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March 15, 2010

Mr. Jeff Eakins
The Banner
24 North Washington Street
Knightstown, Indiana 46148

Re: Informal Inquiry 10-INF-5; Records of the Charles A. Beard Memorial School Corporation

Dear Mr. Eakins:

This is in response to your informal inquiry regarding the Charles A. Beard Memorial School Corporation ("School"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Indiana Public Access Records Act ("APRA"), I.C. § 5-14-1 *et seq*.

BACKGROUND

I. Your Inquiry.

Your inquiry relates to the School's response to your request for access to public records, which you filed in February of this year. Specifically, you requested access to communications between the School's superintendent, Gary Storie, and members of the school board ("Board") between January 9, 2010, and the date of your request. The School produced, among other records, two redacted emails. You question whether the School had the authority under the APRA to redact those emails.

The first email, which is dated February 2, 2010, is from the Board president, Kevin Knott, to Mr. Storie and five of the six other Board members. Upon information and belief, you claim that the email concerns a Board member's absence from several recent school board meetings due to a medical issue. In redacting portions of the email, the School initially cited to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), P.L 104-191. After you objected to the School's reliance upon HIPAA, the School took the position that the email is not a public record. You disagree with that position because the email was received by the superintendent through his School email account and because it concerns a "school board-related issue." You also

argue that the email became a public record once Mr. Storie printed a copy of it, redacted it, and forwarded it to your paper in response to your request.

The second email was sent by Board member Lisa Kopp to Mr. Storie on January 27, 2010. The School also redacted portions of Ms. Kopp's email, but this time relied upon subsection 4(b)(6) of the APRA, which is commonly known as the "deliberative materials" exception to the APRA. You argue that the School's redaction of this email was inappropriate because the word "why" immediately precedes the first two redactions. You believe the "whys" precede two questions that Ms. Kopp asked Mr. Storie. You concede that Mr. Storie's responses to Ms. Kopp's questions might satisfy subsection 4(b)(6), but you do not believe that the questions themselves qualify as statements that are "expressions of opinion or are of a speculative nature . . . communicated for the purpose of decision making" under that exception to the APRA.

Moreover, you question whether the second email's redactions qualify as deliberative materials due to the fact that it was a "top down" communication; that is, it originated from the top of the School's organizational chart at the Board level and was directed to a lower level of the organization in the person of the superintendent. In support of your position, you cite to a statement by Steve Key of the Hoosier State Press Association:

> Given the background of the APRA, I'd start the thought process with the fact that the school board is at the top of the organizational chart, so a query from school board member to superintendent is one that flows downward…. The [subsection 4](b)(6) exception was to prevent a chilling effect on staff to offer various opinions to better help the decision makers above better understand all the permutations and possible impacts of options to resolve an issue. So the parties involved tend to knock out the [4](b)(6) exception. I think it would be hard for [4](b)(6) to apply when the communication is from the top down, whether it's one school board member or the board as a whole.

Thus, you ask two questions related to this second email: First, is subsection 4(b)(6) applicable to a school board member's email to the superintendent, or is it not covered due to its top-down nature? Second, if the exception applies notwithstanding its top-down nature, does it apply given that the redacted portions appear to be questions?

II. The School's Response.

With regard to the February 2nd email from Mr. Knott, the School notes that it was sent from a private email account to four board members on their private email accounts and to the superintendent at his School email address. The School claims that the redacted portion of the email contains sensitive and detailed information about a Board

member's medical condition. The School did not redact that entire email because "the unredacted portions could be construed as concerning a government official's intention to return to active involvement in his elected position." *See School's Response* at 1.

The School frames the issue concerning Mr. Knott's email as a question of "whether portions of a personal email entirely unrelated to any governmental purpose becomes a public record merely because it is captured in a public agency's email system's digital memory." The School maintains that the redacted portions of the email are of a purely personal nature, do not concern government affairs, and should not be considered a public record even though the message was sent to the superintendent's School-provided email address. In support of this position, the School cites to *Office of the Public Access Counselor Informal Inquiry Response of February 1, 2006*, available at http://www.in.gov/pac/informal/files/Roberta_Recker_inquiry_re_public_record_definition.pdf (last accessed Mar. 12, 2010):

> In the 2006 informal inquiry response, . . . the PAC recognized that email poses special problems for the APRA. Initially, the PAC stated that as a "general rule, it is apparent to me that the mere fact that the email is personal or unrelated to a governmental purpose is not dispositive." However, the PAC also stated: "Nevertheless, the mere fact that a document is kept or held in the office of a governmental official or employee does not mean that it is a 'public record.'" The PAC stated that if an attorney general brought personal bills and kept them temporarily in his office drawers, the personal bills would not become public records. Similarly, if a secretary brought her grandchild's artwork to her state office and tacked it on the wall, the artwork would not become a public record. We believe that a personal email which is unrelated to government but caught by and stored on an agency's server is akin to the utility bill left in the drawer or the artwork tacked on the wall.
>
> The PAC's only conclusion in the 2006 informal inquiry response was that a personal or private email, even if not a public record upon its creation, becomes a public record if some type of official action is taken in response to it, or if the email forms a basis for the agency taking an official action….
>
> Here a portion of the Email could be seen as relevant to a board member's ability to serve and therefore might be seen as a matter "regarding the affairs of government." The School has provided that portion of the record. But the School took no official action in response to the redaction

> portion of the Knott Email. Nor did it form a basis for official School action. The redacted portions of the Knott email . . . simply do not concern the "affairs of government and the official acts of those who represent [the public] as public officials and employees." I.C. § 5-14-3-1. Just as a public record may contain both disclosable and nondisclosable information, we believe that a document may contain both language that is of a public nature and language that is of a purely personal nature.

School's Response at 2-3 (citations omitted).

On March 11, 2010, the School's attorney submitted a supplementary response detailing the School's position on Board member Kopp's January 27th email to Mr. Storie. In it, the School maintains that redacted portions of that email are nondisclosable under the deliberative materials exception to the APRA. I.C. § 5-14-3-4(b)(6). The School disagrees with your argument that questions cannot be used to express opinions:

> For example, if I ask, "Why would President Obama be advocating his health care program if he was not a socialist?", I think I am both speculating and expressing an opinion. Likewise, a rhetorical question, which could very well start with the word "why" is by its very essence an expression of opinion with no answer expected. In short, we do not believe the language used is dispositive of whether the redaction is appropriate. And since [the public access counselor] is not able to review the email and not a fact-finder, I am not sure what more can be said.

School's Supplementary Response at 1. The School also disagrees with your argument that "a school board member is not a part of the public agency that constitutes the Charles A. Beard School Corporation" and cites to the APRA's definition of "public agency" in I.C. § 5-14-3-2(m)(2) in support of its belief to the contrary.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." I.C. § 5-14-3-1. The School does not dispute that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the School's public records during regular business hours unless the records are excepted from disclosure as confidential or nondisclosable under the APRA. I.C. § 5-14-3-3(a).

I. The February 2, 2010, Email From Board President Knott to Superintendent Storie and Board Members.

The parties dispute whether Mr. Knott's February 2nd email is a public record. Under the APRA, a "public record" is defined as:

> any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

IC 5-14-3-2(m). In a literal sense, the School "received" Mr. Knott's email via Superintendent Storie's School-issued email account. Generally, if a public official sends an email from his or her personal email account to another official's personal email account, that message is not a public record under the APRA. However, the fact that all but one recipient of the email received the message in their personal email accounts does not negate the fact that Mr. Knott also sent the email to a School-owned email account. *See Opinion of the Public Access Counselor 09-FC-205* (personal email message was not a public record until it was received by public agency for public purpose).

At the same time, I agree with Counselor Davis' opinion that "the mere fact that a document is kept or held in the office of a governmental official or employee does not mean that it is a 'public record.'" *Office of the Public Access Counselor Informal Inquiry Response of February 1, 2006* at 4. However, Mr. Knott's email is distinguishable from "the attorney general's bills" or "the secretary's artwork" cited by Counselor Davis as examples of materials that are not public records "because those records are not "created, received, retained, maintained, *or* filed by or with a public agency." *Id.* (emphasis in original). Personal bills and artwork brought to work by a public employee are strictly personal in nature, and they are not distributed to other employees or officials of the agency for any purpose; they are brought to the agency *by* the employee/official and *for* the employee/official's personal use. On the other hand, Mr. Knott's email was distributed to Board members and the superintendent of the School, and the School concedes that "a portion of the Email could be seen as relevant to a board member's ability to serve and therefore might be seen as a matter 'regarding the affairs of government.'" *School's Response* at 3. Thus, Mr. Knott's email related to matters of public concern to a much greater extent than an individual's personal bills or artwork. As such, it is my opinion that Mr. Knott's email is indeed a "public record" under subsection 2(m) of the APRA.

Even if the email is a public record, however, the question remains whether the School's redactions were appropriate under the APRA. Once a record is categorized as a public record, the record and its entire contents are subject to inspection and copying under section 3 of the APRA. However, the APRA requires public agencies to separate

and/or redact the nondisclosable information in public records in order to make the disclosable information available for inspection and copying. I.C. § 5-14-3-6(a). If a public agency denies a person's request to inspect and copy the agency's public records (in full or by redacting portions of records), it should cite an applicable exemption from section 4 of the APRA to the APRA's presumption of disclosure. I.C. § 5-14-3-3(a). Exceptions to access are to be narrowly construed, so as to effectuate the policy of the APRA. I.C. § 5-14-3-1. In a court action challenging the denial of a record, the court determines the matter *de novo*, with the burden of proof on the public agency to sustain its denial. The public agency meets its burden in the case of records exempt under section 4(a) by establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. I.C. § 5-14-3-9(f). Because there is no exception in section 4 for "personal information," "non-governmental information" or some similar category that the School could cite as the basis for withholding the redacted information, it is my opinion that the School has not met its burden of proof to show that the redacted information in Mr. Knott's February 2nd email is excepted from disclosure under the APRA.

II. The January 27th email from Ms. Kopp to Superintendent Storie.

The parties dispute whether or not the APRA permits the School to redact portions of an email that appear to be in the form of a question. Under the APRA, "[i]f a record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed [from the nondisclosable material] and make it available for inspection and copying." I.C. § 5-14-3-6(a). By stating that agencies are required to separate "information" contained in public records, the General Assembly signaled its intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. *Opinion of the Public Access Counselor 09-FC-53*.

The School claims that it redacted the email pursuant to the APRA's so-called deliberative materials exception, which permits agencies to withhold records that are "intra-agency or interagency advisory or deliberative material . . . that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making." I.C. § 5-14-3-4-(b)(6). Since the Indiana Court of Appeals issued its opinion in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Ind. Univ.,* 787 N.E.2d 893 (Ind. Ct. App. 2005), public access counselors have applied the following reasoning to situations involving redactions of deliberative materials:

> [T]hose factual matters which are not inextricably linked with other nondiscloseable materials, should not be protected from public disclosure…. Consistent with the mandate of APRA section 6, any factual information which can be thus separated from the non-discloseable matters must be made available for public access.

Id. at 914.

As an initial matter, I agree with Mr. Key that -- while not impossible -- it is generally more difficult to demonstrate that a top-down communication is exempt from disclosure under the APRA's deliberative materials exception. This is true by virtue of the fact that the exception requires that the communication was "communicated for the purpose of decision making." I.C. § 5-14-3-4(b)(6). It is axiomatic that in any organization, decisions are generally made at the so-called "top" of an agency. As a result, deliberative materials that are "communicated for the purpose of decision making" would tend to flow from the bottom of the organization to the top. However, at other times managers and directors of agencies might delegate decision making to subordinate employees and officials. In those cases, a "top-down" communications could qualify under the deliberative materials exception to the APRA because the subordinates are actually making the decisions in response to opinions or speculation from higher-level officials.

Mr. Eakins argues that redacted information in the form of questions is neither opinionated nor speculative. That is probably true in most situations because questions typically are typically not *expressions* of opinion or speculation; they are interrogatories which seek information. However, the School claims that is not necessarily true in every case and points to rhetorical questions and other questions containing views or judgments of the writer that could be "expressions of opinion or . . . speculative in nature" within the meaning of subsection 4(b)(6). I agree with the School that questions *can* qualify as deliberative materials under the APRA as a matter of law, even if they typically do not in practice, provided that the questions meet the other elements of subsection 4(b)(6). Here, however, I cannot determine whether or not the information following the "whys"[1] in the January 27th email is factual or opinionated in nature because I cannot review the redacted information. If this matter proceeds to litigation, a court would likely review the records *in camera* to determine whether the redactions were appropriate. I.C. § 5-14-3-9(h). At that stage, the School will continue to bear the burden of proof to show that the redacted information is exempt from disclosure, and any exceptions to disclosure will be narrowly construed against the School. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g).

CONCLUSION

For the foregoing reasons, it is my opinion that the School has not met its burden of proof regarding the School's redactions of the February 2nd email. I do not have sufficient information to determine whether or not the School properly redacted the February 27th email.

If I can be of additional assistance, please do not hesitate to contact me.

[1] Another redaction in the email is preceded by the phrase, "I also understand…." While that also seems to be the type of language that generally would precede factual -- rather than speculative or opinionated -- information, it is likewise unclear whether or not that information qualifies as deliberative under subsection 4(b)(6).

Best regards,

Andrew J. Kossack
Public Access Counselor

Cc: David Day, Church, Church, Hittle & Antrim