STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

July 11, 2012

Bob Segall
WTHR-TV
1000 N. Meridian St.
Indianapolis, Indiana 46204

Re: Informal Inquiry 12-INF-29

Dear Mr. Segall:

This informal opinion is in response to the Indiana Department of Education's ("Department") denial of a request for records submitted by WTHR-TV ("WTHR"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Christopher Greisl, Attorney, responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

On April 23, 2012, WTHR submitted the following request for records to the Department for:

> "…reports submitted to or created by the Office of Student Assessment involving Indiana teachers accused of/investigated for cheating or 'teaching outside the guidelines' of a standardized tests [including], when possible, details of the accusation and its resulting investigation, outcome of each incident, the school where the alleged incident took place and the name of the teacher (if the accusation was verified) . . . for the school years 2008-present" and "if there were specific cases involving Indiana teachers who were fired for cheating on standardized tests, please provide those teacher names/school districts and any specifics you can share about their cases."

In response to the request, you alleged that WTHR received an undated, written denial on May 17, 2012. In denying your request, the Department cited to three exemptions found under Indiana law.

Under I.C. § 5-14-3-4(a)(8), the Department claimed that the records were

deemed confidential by rules adopted by the Indiana Supreme Court, specifically citing to Indiana Rules of Professional Conduct 1.6(a), which prohibit a lawyer from revealing information relating to the representation of a client unless the client gives informed consent. The Department did not provide any clarification to explain how or why this proposed exemption applies to the request. The Department fails to provide who the client is in the attorney-client relationship. Further, WTHR did not request records from an attorney; rather the request was submitted to the Department. While the Department does have attorneys on staff to advise the Department in legal matters, citing to a blanket exemption under I.C. § 5-14-3-4(a)(8) appears to be outside the scope of the exemption.

Further, WTHR requested not only records of the Department's Office of Student Assessment related to incidents of teacher cheating, but also related records "submitted to" and received by the Department. Even if an extremely broad interpretation of I.C. § 5-14-3-4(a)(8) can be found, the exemption would not apply to the requested records, which the school district is required to supply to the Department of their own investigation. The Department has denied WTHR's request in whole, making no distinction between records created by the Department and those submitted to the Department for its own investigation and review.

The distinction between records created by the Department, as opposed to those received, would invalidate the Department second claimed exemption, I.C. § 5-14-3-4(b)(2). The Department is improperly arguing and implying that all records requested are attorney-work product, providing no justification or proof of that claim. The reports submitted to the Department by school districts are often the result of investigations performed by school administrators and staff, and the investigations conducted by the Department are often done by the staff in the Department's Office of Student Assessment. Simply because the work is reviewed by an attorney does not exempt it from disclosure.

Further, the Department cited to I.C. § 5-14-3-4(b)(6) in denying the request under the deliberative materials exception. This exception would not apply as the requested records were submitted to the Department by school districts, and said districts are not part of the Department. Thus, said records would not be considered intra-agency or interagency. Those records are also the result of a fact-finding investigation required by the Department and therefore, are not deliberative, or expressions of opinion. Further, the Department would be required to comply with I.C. § 5-14-3-6 to separate the nondisclsoable material, and provide WTHR the remaining disclosable information.

Lastly, the information sought by WTHR has been released to other local media outlets. Within the past month, the Department has repeatedly discussed the specifics of an ongoing teacher cheating investigation at North Central High School with numerous local media. Through interviews and statements, the Department provided media with details related to specific allegations that the Department is investigating, the evidence the Department has received, and the time period the irregularities took place. Despite the Department providing the information to other media outlets, WTHR has been denied access. When WTHR again asked the Department to provide information related to

ongoing incidents, a Department spokesman responded in writing that it would not discuss specifics of ongoing investigations. However, a few days later after WTHR exposed the teacher cheating allegations at North Central High School, the Department released information about the investigation to other local media. When asked why the Department was apparently changing its policy, the Department responded that "there is nothing here that we did not or would not share with you or any reporter given the nature of the incident."

In response to your informal inquiry, Mr. Griesl advised that the Department properly denied WTHR's request pursuant to I.C. § 5-14-3-4(a)(8); I.C. § 5-14-3-4(b)(2); and I.C. § 5-14-3-4(b)(6). The Department received your written request on April 13, 2012, to which it acknowledged its receipt in writing on April 18, 2012. On May 17, 2012, Mr. Greisl denied WTHR's request based on the above referenced exceptions. More specifically, the records sought by WTHR were confidential, privileged, and deliberative.

When the Department initially receives information related to allegations of cheating, the allegations have potential to carry significant consequences both for the adults involved and the students affected by the breach or alleged breach. Any allegations of an educator participating in or aiding a student cheating on a standardized test are initially investigated by the local school corporation. The local school corporation, not the Department, is responsible for maintaining records of any personnel actions relating to testing improprieties. Upon completion of its investigation, the school corporation submits an irregularity report to the Department. The Department's Office of Legal Affairs ("OLA") evaluates the report and decides, for purposes of the Department own internal investigation, whether to pursue a license suspension or revocation action against an employee of the school corporation. While the Department's Office of Student Assessment is making a determination about the validity of the test, the licensing determination is a byproduct of the OLA's investigation.

The OLA's investigation is withheld from disclosure for a number of reasons. First, the records sought by WTHR are privileged attorney-client communication and attorney-work product pursuant to I.C. § 5-14-3-4(a)(8), citing to Indiana Rules of Professional Conduct 1.6(a), and I.C. § 5-14-3-4(b)(2). The Superintendent of Public Instruction ("Superintendent") has the authority and responsibility to bring actions for the revocation or suspension of teaching licenses for various reasons. The OLA provides legal advice and representation to the Superintendent. *See* I.C. § 20-28-5-7. When allegations of educators participating in or aiding a student cheating on a standardized test come to the Department, the OLA must seek and obtain information in the course of its internal investigation for purposes of providing legal guidance and advice to the Superintendent. Thus, the records sought and obtained by the OLA pursuant to this investigation to provide legal advice to the Superintendent constitute attorney-work product. *See Opinion of the Public Access Counselor 09-INF-28*.

In conjunction with advising the Superintendent, the OLA engaged in interagency communications with effected school corporations concerning the allegations and

subsequent investigations. *See Opinion of the Public Access Counselor 10-FC-52*. The records, in addition to being attorney-work product, are also deliberative pursuant to I.C. § 5-14-3-4(b)(6). *See Opinion of the Public Access Counselor 09-INF-28*. The records obtained by the OLA are communicated for the purposes of providing legal guidance to the Superintendent regarding his decision making authority related to teacher licensing. Thus, they are exempt from disclosure in response to WTHR's request. WTHR's reliance on I.C. § 5-14-3-6(a) is without merit as records that are deemed privileged, attorney-work product, and/or deliberative under the APRA may not be disclosed.

Finally, the Department denies allegations that it has shared certain information or records with other local media, but not WTHR. The Department will not release information contained within its investigation files pursuant to the exceptions that have been cited. If, after legal evaluation, the OLA determines that a licensure action is merited, the Department will file a complaint and an administrative law judge will be assigned to the matter. Once a complaint is filed, the complaint and any pleading or hearings that follow are disclosable public records, unless otherwise determined by the administrative law judge. To the extent that WTHR seeks information regarding previous licensure actions invoked by the Department, the information is available on the Department's website.

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." *See* I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Department responded to your initial request for records within seven (7) days of its receipt.

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

> Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. (emphasis added). *Opinion of the Public Access Counselor 01-FC-47.*

There is no dispute that the records that have been requested are "public records" pursuant to the APRA. *See* I.C. § 5-14-3-2(n). The Department has cited to three exceptions under state law that would mandate and/or allow the Department discretion to produce the records in response to a public records request. The Department would satisfy its obligation in responding to a formal complaint filed with the Public Access Counselor's Office by complying with section 9(c) of the APRA. At this time, the Department would not be required to distinguish which records that were being denied that were created by the Department as opposed to those that were submitted to the Department by the local school district. If, however, the matter proceeded to litigation before a court, who would be allowed to conduct an in-camera review, the burden of proof would be on the Department to sustain the denial of access to the records that were requested. *See* I.C. § 5-14-3-4(f); *Opinion of the Public Access Counselor 09-FC-285.*

The APRA excepts from disclosure, at the discretion of the agency, the following:

> Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, 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).

Deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making

process. *See Opinion of the Public Access Counselor 98-FC-1.* Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64.* The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must be interagency or interagency, that are advisory or deliberative, are an expression of opinion or speculative in nature, and communicated for the purposes of a decision making. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17.*

The "interagency or intra-agency" requirement of the exception implies that the documents are created and shared within a public agency or between public agencies. *See Opinion of the Public Access Counselor 02-FC-69; 03-FC-17; 11-INF-64.* The exception would not be applicable to records containing communication between a public agency and a non-public agency, as such records are not "interagency or intra-agency." *See Opinions of the Public Access Counselor 02-FC-13; 04-FC-194; 05-FC-206.* The records sought by WTHR were passed from the local school district to the Department. There is no dispute that the Department and local school district are considered public agencies under the APRA. *See* I.C. § 5-14-3-2(a). As such, it is my opinion that the Department has satisfied this requirement of the exception.

The deliberative materials exception only allows for the redaction of material that is advisory or deliberative and constitutes an opinion or is speculative in nature. When a record contains both disclosable and nondisclosable information and an agency receives a request for access, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1. Any factual information which can be separated from the non-discloseable matters must be made available for public access, unless the material is inextricably linked. *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 913-14 (Ind. Ct. App. 2005). Lastly, the exception requires that the communication be part of a decision making process. *See Opinion of the Public Access Counselor 03-FC-17.* Here the Department has provided that the records were received from the local school district in order for the OLA to make a recommendation to the Superintendent regarding the status of certain teacher licenses. Accordingly it is my opinion that the Department has met the decision making element under the exception.

To the extent that the Department has cited to deliberative materials exception found under I.C. § 5-14-3-4(b)(6) to deny access to certain records requested by WTHR, it is my opinion that the Department has met its burden to demonstrate that is has complied with the requirements of the statute in denying WTHR's request. I would note that the Department is not required to include a statement in its denial that it was aware of

and complied with the requirements of I.C. § 5-14-3-6. If the records contained information that did not meet the requirements of I.C. § 5-14-3-4(b)(6), and were not covered by any other applicable exception, the APRA provides that the remaining portion of the record be provided. If the Department complied with the requirements of I.C. § 5-14-3-6 in issuing its denial of your request, it would not have violated the APRA.

I.C. §5-14-3-4(b)(2) provides that a public agency has the discretion to withhold a record that is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

> "Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation and includes the attorney's:
> (1) notes and statements taken during interviews of prospective witnesses; and
> (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions. I.C. § 5-14-3-2(p).

In a 2009 informal, the counselor analyzed a request that was made of the Department for certain records maintained in connection with the termination of an employee from a local school district. *See Informal Opinion of the Public Access Counselor 09-INF-28*. The Department cited, in part, to I.C. § 5-14-3-4(b)(2), in denying a request for records connected with the investigation. The Department noted that the Superintendent has the authority and responsibility to bring actions for the revocation or suspension of teaching licenses for certain reasons under I.C. § 20-28-5-7. The opinion further noted that the OLA provides advice and representation to the Superintendent and the Department obtained information in the course of its investigation in order to advise the Superintendent. The informal opinion found that the Department complied with the requirements of the APRA and could properly cite to I.C. § 5-14-3-4(b)(2) in denying the request. *Id.* As applicable here, I would concur with the analysis provided by 09-INF-28 as the factual circumstances involved here are almost similar. It is my opinion that that the Department could properly cite to I.C. § 5-14-3-4(b)(2) in denying WTHR's request for records received by the Department in connection with the investigation performed by the OLA, as long as the records met the requirements provided in the subsection.

Finally, the Department cited to I.C. § 5-14-3-4(a)(8) in denying your request, which provides that "records declared confidential by or under rules adopted by the supreme court of Indiana" are prohibited from disclosure. In furtherance of (a)(8), the Department cited to Indiana Professional Rules of Conduct 1.6(a) which provides that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." The Indiana Court of Appeals has held that government agencies may rely on the attorney-client privilege when they communicate with their attorneys on business within the scope of the attorney's profession. *Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley*, 580 N.E.2d 371 (Ind. Ct. App. 1991). *Morely* held that:

> "The communications sought are communications between a client (PERF) and its attorney (the Attorney General) discussing potential legal problems concerning the way in which PERF was carrying out its duties. These fall within exceptions to disclosure under the public records statute because they are protected by the attorney client privilege which makes them confidential under statute and supreme court rule. See IC 34-1-14-5; IC 34-1-60-4; Prof.Cond.R. 1.6(a)."

As applicable here, the Department has provided that the OLA represents the Superintendent in matters pursuant to I.C. § 20-28-5-7. Although you submitted your request to the Department, not an attorney; the Department has provided that the OLA received the records from the local school district in order to make a recommendation to the Superintendent. As to the facts provided, it is my opinion that the Department has met its burden in denying WTHR's request for records under I.C. § 5-14-3-4(a)(8), pursuant to Indiana Professional Rules of Conduct 1.6(a).

I have not reviewed any of the records sought by WTHR, thus I cannot definitively say whether any record contains information which is not excepted from disclosure. Public agencies bear the burden of proof to sustain their denials of public access to records. *See* I.C. §§ 5-14-3-1, 5-14-3-9(f). Based on the information that has been provided, it is my opinion that the Department could sustain its denial of your request under the exceptions cited.

As to the allegation that the Department has provided information to certain media outlets to the exclusion of others, I would initially note that the public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* The APRA deals with records, not information or responding to inquiries related to records. The Indiana Court of Appeals has recognized that a public agency may waive an applicable APRA exception if the agency allowed access to its material to one party and denied access to another based on an APRA exception. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003). If the Department has provided access to records sought by WTHR to any other person or entity that has made a request under the APRA, the Department would have waived the applicable exceptions it has noted in its denial and be required to provide the same records to WTHR.

If I can be of any further assistance to either party, please do not hesitate to contact our office.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Christopher Greisl