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August 1, 2012

Eric M. Cox
The Banner
24 N. Washington Street
P.O. Box 116
Knightstown, Indiana 46148

Re: Formal Complaint 12-FC-175, 12-INF-33; Alleged Violations of the Access to Public Records Act and Open Door Law by the Charles A. Beard Memorial School Corporation

Dear Mr. Cox:

This advisory opinion is in response to your formal complaint and informal inquiry alleging the Charles A. Beard Memorial School Corporation ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. and the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et. seq.* Seamus P. Boyce, Attorney, responded on behalf of the School. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that the School Board held an executive session on January 18, 2012. One of the three statutory reasons provided by the School in the notice for the executive session was I.C. 5-14-1.5-6.1(b)(2)(B) which states that an executive session may be held for discussion of strategy with respect to the initiation of litigation or litigation that is either pending or has been specifically threatened in writing. After confirming that the executive session did not pertain to any pending litigation or the initiation of litigation, *The Banner* submitted a records request to the School on February 6, 2012. Among other things, the request sought a full and complete, unredacted copy of any and all written correspondence, including e-mails, that have been sent to the School communicating the specific threat(s) of litigation that was/were the subject of the January 18, 2012 executive session.

In response, the School provided a six-page record on April 30, 2011 which consisted of a heavily redacted letter received by the School from Karen Tamburro, supervising attorney with the U.S. Department of Education's Office of Civil Rights ("OCR"). On the first page of the document is a handwritten notation indicating that the redactions were made pursuant to I.C. § 5-14-3-4 and the redacted material was required

to be kept confidential under the Federal Education Rights and Privacy Act ("FERPA"). While the cover letter that accompanied the record did not specifically identify the person responsible for making redactions, interim Superintendent Don Scheumann informed *The Banner* in a follow-up conversation that the School's legal counsel made the redactions.

On May 2, 2012, *The Banner* filed a records request with the OCR seeking a copy of attorney Tamburro's correspondence to the School, which *The Banner* had previously received from the School. In response, the OCR provided a copy of the correspondence; however the letter provided by the OCR contained fewer redactions. The goal of FERPA is to protect student privacy with respect to educational records. The law applies to the School, as it receives federal funds under an applicable program of the United States Department of Education ("USDOE"). *The Banner* alleges that the School improperly redacted more from the OCR correspondence than what was allowed under FERPA. Specifically as to the following portions of the material, the School redaction is italicized in parentheses:

1. Page 1, first paragraph, lines 3 and 4: ". . .alleging (*discrimination on the basis of disability on behalf of three children*) and also alleging (*retaliation*).
2. Page 1, second paragraph, lines 1-3: "(*Student A . . .Knightstown High School and is diagnosed with a . . .Student B is a . . . attending Kennard Elementary School diagnosed with . . .*)."
3. Pages 1-2, number paragraphs 1-5 in their entirety: CAB redacted these paragraphs completely, whereas the OCR only redacted six small portions in numbered paragraphs 3-5.
4. Pages 4, numbered paragraph 1: "A copy of any District policies that prohibit (*discrimination based on disability, including any anti-retaliation provisions.*). . ."
5. Page 4, numbered paragraph 2: "A copy of any District grievance policies and procedures governing (*claims based on disability*), and for general complaints."
6. Page 4, numbered paragraph 3: "A copy of the District's (*special education policy and procedures, specifically including all procedural safeguards afforded parents, and a description of how such safeguards are communicated to parents.*)."
7. Page 4, numbered paragraph 4, "A copy of the District's policy and procedures for developing and implementing (*a student's health care plan*.")."
8. Page 4, numbered paragraph 5, "A copy of all District's policy and procedures or practice governing (*the school nurse's proper response to a student in need of medical assistance."*)."
9. Page 4, numbered paragraph 6: "(*A copy of Student A's and Student B's special education files, including all IEPs and health care plans in place during the 2010-2011 and 2011-12 school years."*)."
10. Page 4, numbered paragraph 7: "With respect to (*the April 26, 2011 incident*) indicate whether the (*parent of Student A reported the incident, and if so, when: to whom she reported it; whether she filed a formal or informal grievance* (written or oral) and *which of the above-referenced District policies and procedures applied*) if any; and summarize any actions taken by the District to investigate and resolve the claim. Please include relevant documentation to support the District's

actions. (*Please indicate whether the parent presented the complaint as a complaint based on disability, harassment, bullying or some other basis)*. Please identify all District administrators and staff who were made aware of the parent's complaint."

11. Page 5, numbered paragraph 9: "Provide a copy of all (*procedural safeguard notices provided to the Student B's parent related to Student B for meetings held in June and September 2011. If the parent waived the 10-day notice,*) provide documentation.
12. Page 5, numbered paragraph 10: "Provide documentation indicating whether notice was provided (*to Student A's . . .and . . .for the 2011-12 school year of accommodations required by her IEP.*) Additionally, provide any documentation indicating that (*any required accommodations were provided to Student A during the 2011-12 school year in her . . .classes.*)."
13. Page 5, numbered paragraph 11: "Provide a narrative summary or response relating to (*the Principal's comments referenced in Allegation 5(a),*) including the content of the discussion (*why the comment was made, and the rationale for making the comment.*)"
14. Page 5, numbered paragraph 12: "(*Provide a copy of the mediation agreement referenced in Allegation 5(a). Please state whether the agreement is being implement and any supporting documentation.*)."
15. Page 5, numbered paragraph 13: Report how the District determined the schedule for providing ("*Student B compensatory services subsequent to the Indiana Department of Education's requirement that compensatory service be provided.*) Additionally, explain why the District (*provided compensatory education on three days to Student B during recess, why such services were rescheduled to a time other than recess stopped, and how the District completed the required implementation of the compensatory services*) relating to Allegation 5(b)."
16. Page 5, numbered paragraph 14: "(*Provide a copy of any and all correspondence between District staff, including school psychologist, and Student B's . . .If no written correspondence exists, provide a description of any and all oral communications, specifying whether and (sic) District staff, including the school psychologist, provided any input to Student B's neuropsychology office relating to Student B*.)"
17. Page 5, last paragraph, and last sentence: "We would like to speak with this person as soon as possible to discuss the processing of this complaint, (*including discussing the identities of Students A and B*.).

The information redacted by the School is not information that personally identifies either of the two students referenced in the complied filed with the OCR. In fact, the OCR correspondence ensured, for the most part, the privacy of the student when the letter referenced the students as Students A and B.

As to the executive session held on January 18, 2012, to discuss in part strategy with respect to the initiation of litigation or litigation that was either pending or has been threatened specifically in writing, the only letter produced by the School that demonstrates a threat that has been specifically made in writing was the OCR

correspondence. Due to the substantial redactions, *The Banner* was unable to readily discern whether the document truly communicated a specific threat of litigation as claimed by the School. However, upon receipt of the correspondence received by OCR, it is clear that the letter contained no threat of litigation. The OCR provided that it was simply investigating the civil rights complaint and had not yet made a determination on its merits. As the correspondence contained no specific threat, the executive session held on January 18, 2012 pursuant I.C. § 5-14-1.5-6.1(b)(2)(B) was improper.

The next issue raised by *The Banner* regards the alleged improper redactions to proposed employment contracts and School Board memorandum. The School Board members receive a pack of documents ("board packet") from the Superintendent prior to the regularly monthly meetings. The board packets are generally made available the Friday before each meeting. The board packets generally include the superintendent's Agenda Notes, minutes from previous board meetings, a summary of claims presented for approval, personnel recommendations, monthly financial reports, and other documents.

On May 11, 2012, *The Banner* hand-delivered a records request to the School for a copy of the board packet for the May 16, 2012 regularly scheduled meeting, which had been prepared and made available to board members. While the request was made for the packet to be e-mailed prior to the meeting, contrary to School's past practice, the board packet was not provided until the day after the meeting. The board packet contained redacted documents, after which *The Banner* received un-redacted copies from another source. It is *The Banner's* contention that the School improperly redacted the agenda notes and the proposed employment contracts. The Board cited to I.C. § 5-14-3-4(b)(6), the deliberative materials exception, and I.C. § 5-14-3-4(b)(8), the personnel file exception, in redacting certain parts of the agenda notes. *The Banner* believes that the information was not an expression of opinion or speculative in nature, and was not communicated for the purposes of a decision making. The information provided in the agenda notes was informational, to inform the Board members that their board packets including a recommendation to extend the contracts of two current employees. Similarly, it is not a matter of opinion or speculation that "a motion and vote will be required" to approve the contract extensions. Further (b)(8) is misplaced as the agenda notes is not a record taken from the personnel files of either two employees. Even if the subsection were applicable, the redaction went beyond what is required under the APRA, including the names and titles of the two employees and their positions was not proper, as such information is required to be disclosed under 4(b)(8)(A).

As to the proposed employment contracts, the records were blacked out in their entirety. The unredacted records received by *The Banner* show that the documents in question were the proposed contract extension for two employees mentioned in the redacted portions of the agenda notes. Again, the School's reliance on the deliberative materials and personnel file exception is misplaced. The records do not contain an expression of opinion or speculation (e.g. "Athletic Director Employment Contract"). While it is possible that specific terms of the contract are speculative, the exception would not allow for the redaction of the entire document. As to the personnel file

exception, again the requirements under 4(b)(8)(A) would require the School to provide the name, compensation, and job title.

The last issue presented is in regards to whether the School violated the requirement to provide all records in a reasonable period of time when it failed to provide the board packet until five days had passed and the School Board meeting had already occurred. Prior to the May 16, 2012 meeting, the School's normal practice was to provide a copy of the board packet in advance, via emailing a copy in .pdf format. In April 2012, the School had informed *The Banner* that the board packet would no longer be provided until the business day following the board meeting (if possible). The School relied on a previous advisory opinion issued by the Public Access Counselor's Office that provided that records need not be provided in advance of a board meeting "when doing so would be impractical or would constitute a material interference with the regular discharge of duties." As the board packets had already been scanned and e-mailed to the respective Board members, *The Banner* challenges the assertion that simply emailing a copy of the records would constitute a material interference with the discharge of the School's duties. The School's past practice of providing the information prior to the meeting further demonstrates this point. Certain issues have arisen in regards to the personnel recommendations being included in the board packet, but to date the School has failed to provide a citation to a specific statutory exemption that would authorize the withholding of the personal recommendations.

In response to your formal complaint, Mr. Boyce advised that pursuant to I.C. § 5-14-5-7(a), the complainant generally has thirty (30) days to file a complaint with the Public Access Counselor. All issues alleged by *The Banner* occurred well over the thirty day period in relation to the date the complaint was filed with the Public Access Counselor. As such, the Public Access Counselor should respond to all issues as an informal response.

As to whether the School complied with the APRA by redacting personally identifiable information from the education record, the School would argue that it complied with the requirements of APRA and FERPA in responding to *The Banner's* request. Pursuant to I.C. § 5-14-3-4(a)(3), an agency is prohibited from disclosing records that are declared confidential by federal law. Indiana's Court of Appeals has stated that "FERPA is a federal law which required education records to be kept confidential." *Unincorporated Operating Division of Ind. Newspaper, Inc. v. Trs. Of Ind. Univ.*, 787 N.E.2d 893, 904 (Ind. Ct. App. 2003). As required by APRA, the School provided the specific exception to disclosure on the redacted OCR correspondence.

In support of the argument that the School over-redacted the OCR correspondence, *The Banner* primarily cites to the less redacted letter received from the OCR. *The Banner* assumes that the standards of redaction that apply to the School under FERPA are the same standards to be used by the OCR under the Freedom of Information Act ("FOIA"). In preparing a response to the formal complaint, the School contacted a representative from the USDOE regarding the standards that were used for redaction of the OCR correspondence. Ann Cook-Graver, Senior Attorney, advised that the OCR

applied the provisions of the FOIA and the Privacy Act to *The Banner's* request. Under both statutes, OCR withheld all personally identifying information, the release of which would constitute a clearly unwarranted invasion of privacy. Ms. Cook-Graver provided that OCR is not bound by the provisions of FERPA. Thus, it is irrelevant as to compare the levels of redaction between the School and the USDOE. The appropriate analysis would be whether the School made redactions that were reasonable under FERPA's confidentiality standards.

Congress enacted FERPA in 1974 "under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student education records." *Gonzaga Univ. v. Doe*, 536 N.E.2d 273, 278 (2002). FERPA provides in part that no funds shall be made available under any program to any education agency or institution which has a policy or practice of permitted the release of educations records (or personally identifiable information contained therein) of students without the written consent of their parents to any individual, agency, or organization . . ." 20 U.S.C. § 1232g(b)(1). Further, no funds shall be made available to any education agency which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records unless there is written consent form the student's parents. 20 U.S.C. § 1232g(b)(2). *The Banner* alleges that the School could comply with FERPA merely my removing the name of the student and referring to the student anonymously. The law does not support *The Banner's* allegation.

34 C.F.R. § 99.3(f) prohibits the disclosure of "information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstance, to identify the student with reasonable certainty." 34 C.F.R. § 99.3(g) further prohibits disclosure of "information requested by a person who the education agency or institution reasonably believes knows the identity of the student to whom the education record relates. A request under FERPA where the requestor knows the identity of the student is a "targeted request" and requires even more care in redaction. As such, the School must assess whether the school community or the specific requestor might have knowledge about the student(s) related to the education record in question.

Under FERPA, the School had to assess whether the information it disclosed could be linked or linkable to the students by a reasonable person in the school community and had to determine if the Complainant knew the identity of the students for which it was requesting information. The School is located in a small, close knit community, that is particularly knowledgeable about local events, what issues are being discussed within organizations, and even what families are involved in disputes with the School. Further, the School had reason to believe that *The Banner* knew the identity of the students to whom the OCR correspondence related to. *The Banner* has inquired several times regarding the dispute between the School and the family that prompted the OCR correspondence and has mentioned the family by name.

FERPA addresses what is referred to as the "de-identification" of records and information in 34 C.F.R. § 99.31(b)(1). Education records may be released without

consent only if all personally identifiable information can be removed. The School has to make a reasonable determination that a student's identify is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information. The Family Policy Compliance Office, the division of the USDOE charged with implementation of FERPA, has provided the following guidance:

> The definition of PII provides objective standards for districts, institutions, SEAs, State higher education authorities, and other parties that release information, either at will or in response to an open records request, to use in determining whether they may release information, including in special cases such as those involving well-known students or records that concern highly publicized incidents. In response to public comments, we clarify in the preamble to the final regulations that the disclosing party must look to local news, events, and media coverage in the "school community" in determining whether "other information" (i.e., information other than direct and indirect identifiers listed in the definition of PII), would make a particular record personally identifiable even after all direct identifiers have been removed. In regard to so-called targeted requests, the final regulations clarify that a party may not release information from education records if the requestors ask for the record of a particular student, or if the party has reason to believe that the requestors knows the identity of the student to whom the requested records relate. These standards for determining whether records contain PII also apply to the release of statistical information from education records, in particular small data cells that may identify students.
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> Under the final regulations, a party that releases either redacted records or statistical information should also consider other information that is linked or linkable to a student, such as law enforcement records, published directories, and other publically available records that could be used to identify a student, and the cumulative effect of disclosure of student data. In all cases, the disclosing party must determine whether the other information that is linked or linkable to an education record would allow a "reasonable person in the school community" to identify the student "with reasonably certainty." The regulations recognize that the risk of avoiding the disclosure of PII cannot be completely eliminated and is always a matter of analyzing and balancing risk so that the risk of disclosure is very low. The reasonable certainty standard in the new definition of PII requires such a balancing test."

Comments received regarding the proposed regulation received from journalism and writers' associations concerned that a school "may not be able to release redacted education records that concern students or incidents that are well-known in the school community, including when the parent or student who is subject of the record contacts the media and causes the publicity that prevents release of the record." The proposed definition of PII does not acknowledge the public interest in school accountability. 73

FR 74830. In response to said comments, the agency provided that FERPA is not an open records statute, and only parties who have a right to obtain access to education records are parents and eligible students. Journalists, researches, and other members of the public have no right under FERPA to gain access to education records for school accountability or other matters of public interest. . ." 73 CFR 74831. Further, parents and/or student do not waive their protections afforded by FERPA by sharing information with the media.

Recognizing all of these factors, the School considered the following points in analyzing *The Banner's* request:

- The School must balance the risk so that the risk of disclosure is low;
- The School must take into account the level of knowledge of the school community;
- The School must consider local news and media coverage;
- The School must account for other information that is liked or linkable to the student, such as law enforcement records or other publically available records;
- The School must consider whether it has a reasonable belief that the requestor knows the identity of the student to whom the record relates;
- The decision of one or more families involved in the situation to publicize their positions and share information, which does not excuse the School from its obligations to protect student records

Taking all of these factors into consideration, the School believes that it was required to redact a substantial portion of the OCR letter as it contained information regarding the identity of the students education program, placement, and even medical-related information. While schools have had to apply the community and requestor knowledge standard for some time, until recently there has been very little case law on the issue. In a case from the Iowa Supreme Court, the Court held that heavy redaction of student records requested by the press was permitted to comply with FERPA, and in some cases the complete nondisclosure of the record could be required by FERPA when applying the community and requestor knowledge standard. *Press-Citizen Co. v. Univ. of Iowa*, 2012 Iowa Sup. LEXIS 80 (Iowa July 13, 2012. "Education records maybe withheld in their entirety when there requestor would otherwise know the identity of the referenced student or students even with redactions. *Id*. The School intent in redacting the OCR correspondence was to protect against student confidentiality, where it had reason to believe that the community, and in particular *The Banner*, could identify the students with less redactions. Any other conclusion would lead to the wholesale disclosure of private student information that would jeopardize the family's privacy and put Indiana school at risk at choosing between the potential loss of federal funding or violating the APRA.

As to the allegation that the School Board improperly conducted a executive session on January 18, 2012 in discussing the USDOE letter, the School disagrees with the assessment provided in a previous advisory opinion issued by the Public Access Counselor's office which opined that the litigation exception for executive sessions

would not include administrative proceedings. *See Opinion of the Public Access Counselor 01-FC-16.* The School argues that administrative proceedings involve many of the same aspects as a court case, can be quite adversarial, and require a public agency to devise a strategy in response. Regardless, the School would have been allowed to meet in executive session, amongst other reasons, to discuss records classified as confidential under state or federal statute. I.C. § 5-14-1.5-6.1(b)(7). As such, the School had a legitimate basis for the January 18, 2012 executive session, even if it did not list the proper reason in the notice that was provided.

As to the redaction of information from a memorandum containing personnel information and prospective employment contracts, the record were properly redacted pursuant to I.C. § 5-14-3-4(b)(6) and I.C. § 5-14-3-4(b)(8). As to the memorandum, the information redacted pursuant to I.C. § 5-14-3-4(b)(8), the personnel exception protects personnel information even if the record is not in a physical file labeled "personnel file". The employer reasonably determines what information and records go into the personnel file as a concept and category. Here, the redacted information about two current employees possibly having their contracts extended is personnel file information that the School chose not to disclose. The remaining information in the memorandum that was redacted was opinion and speculation by administrative staff about what may happen at the school board meeting and used by the board for purposes of a decision making.

As to the contracts, the redactions were made pursuant to I.C. § 5-14-3-4(b)(6) and (8). The School emphasizes that it is important for school board to be able to have the option not to disclose draft speculative employment contracts before they are up for consideration. The contracts were deliberative, speculative, and communicated for the purpose of decision making. Thus, the School complied with the requirements of the APRA in denying the request.

Finally, as to the allegation that the board packets were not provided in a reasonable period of time, nothing in the APRA provides that a requestor is to be provided with "instant access" to the record that have been sought and the counselor has historically inquired as to whether the records must be reviewed and edited to delete nondisclosable material. Thus, it was reasonable for the School to wait less than a week to disclose records that it needed to review and decide what to redact. In previous opinions, the Public Access Counselor has addressed the issue of "board packets" and the School actions in response to the *The Banner's* request comply with those opinions. *See Opinions of the Public Access Counselor 09-FC-22 and 07-FC-330.*

While the School has previously provided board packets to *The Banner* prior to its board meetings, it did so without including the personnel report. This allowed the School to avoid the time needed to go through the packet and make redaction to a personnel report that is often not finalized and indeed subject to change up to the last minute before a board meeting. By objecting to the deletion of the personnel report, *The Banner* has changed the method my which the School could, as a matter of courtesy, provide the board packet in advance. Now *The Banner* not only wants to change the understanding between the parties but wants to insist on having access as a time and manner as it

determines. Nothing in the APRA requires the public agency to submit to such time and manner requirements and those requirements should not be engrafted on to the statute.

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 School 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 School'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).

As an initial matter, I.C. § 5-14-5-6 provides that a person or a public agency denied the right to inspect or copy records under I.C. 5-14-3 or any other right conferred by I.C. 5-14-3 may file a formal complaint with the counselor under the procedures prescribed by this chapter or may make an informal inquiry under I.C. § 5-14-4-10(5). I.C. § 5-14-5-7 provides that a person or public agency filing a formal complaint must file the complaint not later than thirty days after the denial or the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. As such, all issued raised by *The Banner* will be addressed by this Office as an informal inquiry. If *The Banner* is contemplating legal action pursuant to I.C. § 5-14-3-9, under subsection (i) a plaintiff is eligible to receive attorney fees if the action was filed after first seeking an " . . .informal inquiry response or advisory opinion from the public access counselor. . ." Thus, *The Banner's* eligibility to receive attorney fees would not be jeopardized by the issuance of an informal opinion, as opposed to an advisory opinion. However, note that an informal inquiry or other request for assistance under the public access laws does not delay the running of a statute of limitations that applies to a lawsuit under IC 5-14-1.5 or IC 5-14-3 concerning the subject matter of the inquiry or other request. *See* I.C. 5-14-4-13. Lastly, the analysis provided in an informal opinion is identical to that which would have been provided in an advisory opinion.

As to the four issues that you have raised, I will address each separately.

Did the School comply with the APRA be redacting personally identifiable information from an education record?

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. *Opinion of the Public Access Counselor 01-FC-47.*

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. The Indiana Court of Appeals provided the following guidance on a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.,* 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate dislcosable from non-dislcosable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-disclosable simply by proving that some of the documents in a group of similarly requested items are non-disclosable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
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> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual

> matters which are not inextricably linked with other non-disclosable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-disclosable matters must be made available for public access. *Id*. at 913-14.

In response to your request, the School provided a redacted copy of the OCR correspondence. The School provided that certain information was redacted pursuant to IC 5-14-3-4 as records required to be kept confidential under federal law may not be disclosed; the School cited FERPA as the federal law that prohibited disclosure of certain parts of the correspondence. An agency is prohibited from granting access to inspect and copy a public record that is declared confidential pursuant to federal law. *See* I.C. § 5-14-3-4(a)(3). FERPA is administered by the Family Policy Compliance Office, a division of the USDOE. FERPA applies to educational agencies and institutions that receive funding under any program administered by the USDOE. *See* 34 CFR 99.1. FERPA operates to classify all "education record[s]" as confidential: "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records or personally identifiable information contained therein…." 20 U.S.C. § 1232g(b)(1).

The Banner received copies of the correspondence from the School and the OCR. The School was bound by the provisions of FERPA in redacting certain information from the record, while the OCR has provided that it was only bound by the FOIA and Privacy Act. Ms. Cook-Graver provided that the OCR is not bound by the provisions of FERPA and in my research, I have found nothing to contradict this assessment. Applying this factor to the OCR correspondence, an agency required to comply with the requirements of FERPA is highly likely to produce a record which is more heavily redacted as compared to an agency that is only bound to the requirements of the FOIA and the Federal Privacy Act.

"Education record" is defined as those records that are directly related to a student and maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 34 C.F.R. § 99.3. "PII" includes, but is not limited to, a list of personal characteristics that would make the student's identity easily traceable, or other information that would make the student's identity easily traceable. FERPA further provides that PII prohibits the disclosure of information that, alone or in combination, that can be linked or linkable to a specific student that would allow a reasonable person in the school community, who does have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the record relates. *See* 34 CFR 99(f), (g).

The School has provided that it is located in a close-knit community and it had to determine that if the information was disclosed, if a reasonable person in the school community would be able to identify the student. Further, the School had a reasonable

belief that *The Banner* was aware of the identity of the students in question that were referred to in the OCR correspondence. Mr. Boyce advised that *The Banner* has inquired several times since the beginning of the year regarding this issue and has mentioned the specific family by name.

Making a determination as to whether "a reasonable person in the school community, who does have knowledge of the relevant circumstances" could identify a specific student from the information that was to be disclosed is an incredible difficult determination, even more so for an outside agency (e.g. Public Access Counselor's Office), who is not a member of the school community, nor a finder of fact. From what the School has provided in response to your inquiry, it is my opinion that it has met its burden to demonstrate that the level of redaction of the OCR correspondence was necessary to prevent the identification of the specific students involved by those in the school community and the belief that *The Banner* was aware of the identity of the students in question. It is my opinion that if the School solely removed the names of the students involved that it would have not complied with the requirements of FERPA. Had the School only redacted the names of the students, the reader would have been able to determine aspects of the students' educational program, placement within the school, the actual School attended, and medical-related information. As with many of the issues that arise regarding the APRA, there is little case law in Indiana to assist in the process of making a determination. From what has been provided, it is my opinion that the School has met its burden to demonstrate that it complied with the requirements of the APRA and FERPA in redacting the OCR correspondence.

Did the School comply with the ODL when the Trustees met in executive session on January 18, 2012 pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B)?

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). Notice of an executive session must be given 48 hours in advance of every session, excluding nights and weekend, and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d).

I.C. § 5-14-1.5-6.1(b)(2)(B) provides that:

> (b) Executive sessions may be held only in the following instances:
> (2) For *discussion of strategy* with respect to any of the following:
> (B) Initiation of litigation or litigation that is either pending or has been threatened in writing.
>
> However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries.

From my review of the correspondence submitted by OCR to the School, it is my opinion that the correspondence did not meet the requirements "of litigation that has been threatened in writing" pursuant to (b)(2)(B) and thus the School would not have been allowed to meet in executive session pursuant to this subsection. The School takes exception to Advisory Opinion 01-FC-16, which provided that the litigation exception does not include administrative proceedings. *See Opinion of the Public Access Counselor 01-FC-16*. However, I would note that since the advisory opinion was written in 2001, there has been no case law from Indiana or amendment made to the ODL by the General Assembly that would alter the analysis provided by Counselor O'Connor.

Did the School comply with the APRA in redacting certain parts of the Agenda Notes and Proposed Employment Contracts?

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, except for:

> (A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
> (B) Information relating to the status of any formal charges against the employee; and
> (C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged. I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at their discretion.

The APRA further makes an exception to disclosure for:

> 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 also be interagency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17.* As stated *supra*, 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).

As to the agenda notes, if the School is going to redact information pursuant to the deliberative materials exception, the parts of the record that are redacted may not be factual statements. The deliberative materials exception would require that the information not only be an expression of opinion and also be communicated for the purposes of a decision making. Simply put, if the material is purely informational, then the deliberative materials exception would not apply.

As to the personnel exception, the School cites to an opinion from the Allen County Superior Court that would support the notion that the personnel file exception protects personnel information even if it is not in a physical file labeled "personnel file." However, the facts from the trial court's order show that the employee was specifically informed by the agency that that record (e.g. tape) would be put in the employee's personnel file. The fact that the tape was later moved to an investigative file did not alter the analysis as it related to the personnel exception. I do not consider the case analogous to the situation presented here. I am not aware of any case, nor has one been cited, from the Indiana Supreme Court or Court of Appeals or any prior opinion from the Public Access Counselor's Office that extend the personnel exception as broadly as interpreted by the School.

The plain language of the exception provides that "personnel files of public employees . . ."; it does not provide "personnel file information." I am not aware of any statute, case law, or advisory opinion that definitively provides what type of records can, may, or shall be kept in an employee's personnel file. The Indiana Commission on

Public Records' general retention schedule that is applicable to all state agencies defines a personnel file as:

> [a] state agency's documentation of the employee's working career with the state of Indiana. Typical contents could include the Application for Employment, PERF forms, Request for Leave, Performance Appraisals, memos, correspondence, complaint/grievance records, miscellaneous notes, the Add, Rehire, Transfer, Change form from the Office of the Auditor of State, Record of HRMS Action, and/or public employee union information. Disclosure of these records may be subject to IC 5-14-3-4(b)(2)(3)(4) & (6), and IC 5-14-3-4(b)(8). *See* Records Retention and Disposition Schedule, State Form 5 (R4/ 8-03).

I note this language is not necessarily binding on the School because it applies to state agencies. I have not reviewed the School's retention schedule as to personnel records nor am I aware if any such schedule exists. However, it is instructive for discerning the types of information and documentation that are typically included in a public employee's personnel file. In a previous informal opinion, I opined that it is possible that an employee of a public agency might have multiple personnel files, kept in various locations. *See Informal Opinion 11-INF-71*. The claimed statements to have been redacted form the Agenda Notes include "Athletic Director/Technology Director Contracts: A recommendation to extend the contracts of Jennifer Jacoby and Brian Woods are included. A motion and vote will be required." It is my opinion that statements such as these contained in the agenda notes could not be properly redacted pursuant to the personnel exception.

As to the proposed employment contracts, as to the specific terms of the contract, it is my opinion that the school could redact the information from disclosure pursuant to deliberative materials exception (i.e. terms of compensation or duration of the contract). However, I would agree with *The Banner* that the deliberative materials exception would not allow the redaction of the entire contract. As to the personnel exception, it is much more likely that a proposed employment contract would be maintained in an employee personnel file, as compared to the Agenda Notes for a monthly school board meeting. Once an employment contract was approved by the School, many of the terms of the contract would be required to be disclosed pursuant to I.C. § 5-14-3-4(b)(8)(A). However, if the proposed contract is maintained in the employee's personnel file (notably not alleged here by the School), it is my opinion that the School could deny access to the contract pursuant to the personnel exception, minus the provisions as required by subsection (b)(8)(A).

Has the School failed to produce the board packets in a reasonable period of time.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56*; 11-FC-172. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121.*

Prior to April 2012, *The Banner* received a copy of the board packet, via e-mail, prior to the upcoming meeting. Starting in March 2012, the Board discontinued this practice and commenced providing the board packets after the meeting had occurred. The School cites to prior opinions issued by the Public Access Counselor regarding the specific issue of providing board packets to a requestor prior to the commencement of the meeting. Counselor Neal advised in 09-FC-22, citing to a prior opinion issued in 2007:

> Regarding the board packet materials, all records of the Corporation are presumed to be public records unless an exception to disclosure is present. I.C. § 5-14-3-1; I.C. § 5-14-3-3. If you submit a request to the Corporation for each board packet after it has been created, the Board has the duty to respond to your request and either allow you to inspect and copy the records or provide you with the statutory provisions excepting disclosure of certain information. I.C. § 5-14-3-3; I.C. § 5-14-3-9. The Corporation has indicated a board packet might contain information deemed confidential by federal law or might contain information excepted from disclosure under the APRA. In each circumstance, the Board would need to respond to your request with the statutory authority excepting disclosure.
>
> Regarding your request that the board packet be made available to you at the time of each Board meeting, the APRA does not provide a time by which records must be provided in response to a request. This office has

> long said that records must be produced within a reasonable amount of time based on the facts and circumstances. I would not assume it would always be reasonable to expect the packet to be provided in advance of the meeting. If, for instance, the packet were finalized close to the meeting time and the packet had not yet been reviewed for disclosable and nondisclosable information, it is my opinion it would be reasonable for the Corporation to provide the packet at some point after the meeting. *See Opinions of the Public Access Counselor 07-FC-330 and 09-FC-22.*

As applicable here, *The Banner* has noted that prior to April 2012, the board packets were *always* provided in advance of the upcoming meetings, minus the personnel report (emphasis added). As such, it is difficult to agree with the School's assertion that it is now a material interference with the discharge of its duties to provide the board packets prior to the meeting. If the personnel report is the only part of the packet that requires redaction, it would be reasonable under the APRA that at a minimum the remaining parts of the board packet be provided prior to the meeting. The materials are already collated and disbursed to the members of the Board prior to the meeting, so this would not be a request that would require the School to commence an entire new search for the records. Again, these are general assumptions that I have made regarding this issue; as provided by Counselor Neal, "I would not assume it would always be reasonable to expect the packet to be provided in advance of the meeting." *See Opinion of the Public Access Counselor 07-FC-330 and 09-FC-22.* As applicable here, as the School has already demonstrated that from past history that the board packets can be provided prior to the meeting without a material interference with the discharge of the School's other duties, to the extent the board packets contain records that do not require redaction, it would be reasonable under the APRA for said information to be provided to *The Banner* prior to the commencement of the meeting. As to records from the Board packet that require redaction, it is my opinion that a time period of greater than six (6) days would not be an unreasonable period of time for said records to be provided.

Please let me know if I can be of any further assistance.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Seamus P. Boyce