



STATE OF INDIANA

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April 2, 2014

Mr. Cory Havens and Ms. Kim Kilbride
C/o South Bend Tribune

*Re: Informal Inquiry 14-INF-08; South Bend School Corporation
Counsel*

Dear Mr. Havens and Ms. Kilbride:

This is in response to your informal inquiry regarding the South Bend School Corporation ("School") and its response to your public records request. The School has responded via Mr. Ed Sullivan III, Esq., Counsel for the School Corporation. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1.

BACKGROUND

On March 12, 2014, I issued an Advisory Opinion in response to your formal complaint alleging the City of South Bend unlawfully withheld records relating to citations given to school-aged children by law enforcement officers (also referred to as school resource officers). I opined in 14-FC-17 the City would be required to release the citation for a number of reasons. Citations for infractions are not "crimes" as contemplated by the Indiana Criminal Code and therefore would not fall under the exception of the investigatory records materials in Ind. Code § 5-14-3-4(b)(1). Additionally, infractions do not fall under the exclusive jurisdiction of a juvenile court and would not be considered a juvenile court record. Nonetheless, I did not find the City had violated the APRA because I had not had an opportunity to inspect all of the records *in camera* to determine their specific nature.

Based upon my recommendations, the City subsequently produced all of citations to you in a timely manner. In doing so, however, they withheld the names of the students under the age of majority. Their reasoning was so they could consult with their Counsel to determine if the release of the names would be a potential violation of the Family Educational Rights and Privacy Act ("FERPA"). While eventually conceding the

citations are not FERPA covered, I found this to be a worthwhile good faith argument while they explored their options with their Counsel. Accordingly, I suggested to you that you submit a request for an informal opinion as an academic exercise and not one of an adversarial nature.

In the interim, the City of South Bend contacted the School's Counsel in order to determine the FERPA ramifications of the disclosure. The School determined the records are not FERPA covered and would be releasing all of the un-redacted citations with student names to you immediately. It is my Opinion the City and School exercised due diligence and appropriate discretion thoroughly analyzing the legal arguments and do not find them to be violative of the APRA. I agree the records are not FERPA covered and I am pleased they came to the same conclusion.

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* Ind. Code § 5-14-3-1. School Corporations in Indiana are public agencies for the purposes of the APRA. *See* Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the School Corporation's non-confidential public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise non-disclosable under the APRA. *See* Ind. Code § 5-14-3-3(a).

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education. The Indiana Access to Public Records Act does not specifically address FERPA or educational records. Rather, the Act prohibits disclosure of any information required to be kept confidential by Federal law. *See* Ind. Code § 5-14-3-4(a)(3). Under federal law, the federal government may withhold funding for a program “...for any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information...) of students without the written consent of the parents to any individuals, agency, or organization...” *See* 20 U.S.C. §1232g(b)(1).

In the current instance, the School concedes the records are not educational records as intended by FERPA. The term "education records" is defined as those records that contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 20 U.S.C. §1232g.

While the school resource officers are invited by the School to issue citations on school grounds for unruly student behavior, they are not acting for the School Corporation. The

resource officers are law enforcement officers employed and assigned by the South Bend Police Department. The School has confirmed there is no nexus between the citations and student discipline. The exclusivity of the citations to the custody of the South Bend Police Department exempt them from FERPA considerations. It is my sincere hope this matter has been resolved to your satisfaction and I consider the subsequent production of un-redacted documents to be reasonable stewardship of access by the City of South Bend and the School Corporation.

Please do not hesitate to contact me with any further questions.

Best regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a large, sweeping flourish underneath.

Luke H. Britt
Public Access Counselor

cc: Mr. Ed Sullivan III, Esq.