

April 23, 2008

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

Re: Your informal inquiry

Dear Mr. Eakins:

This is in response to your informal inquiry received April 16, 2008. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

You write to inquire about records withheld from disclosure pursuant to a discretionary exception found in I.C. § 5-14-3-4(b). You inquire whether a school board discussion of those records during a public meeting, held to discuss whether the records should be released in redacted or unredacted form, would waive the school's ability to assert the exception to disclosure. You further inquire what other options the school board has to review or discuss those records to determine whether they should be disclosed.

The Access to Public Records Act ("APRA")(Ind. Code 5-14-3) provides two general categories of records which may or must be withheld from disclosure upon request for access. I.C. § 5-14-3-4(a) contains a list of the mandatory exceptions to disclosure, or the confidential records. I.C. § 5-14-3-4(b) contains a list of records which are public records but may be withheld from disclosure at the discretion of the agency. Your inquiry relates to records you indicate were withheld from disclosure at the discretion of the agency pursuant to section 4(b).

You inquire whether the board's discussion of the records during a public meeting would waive the agency's discretion to withhold the records. In my opinion, it would not. The APRA does not contain any provision indicating any action on the part of the agency would waive any discretionary exceptions. Furthermore, the General Assembly's use of the word "discretion," which means "liberty of action; freedom in the exercise of judgment," (*New Illustrated Webster's Dictionary of the English Language*, Pamco Publishing Company, Inc., 1992, at 280), indicates to me that the board always has the authority to determine when and if a record in the section 4(b) category will be released. In my opinion, discretion cannot be waived.

Certainly any discussion of the records in a public meeting would be a part of the public record, and pursuant to the Open Door Law (“ODL”)(I.C. 5-14-1.5) any person could record the meeting. I.C. § 5-14-1.5-1. But as with any records utilized during a public meeting, the records would be disclosable unless an exception to disclosure applied. For instance, if the board members held a discussion during a public meeting about a particular incident at the school and during the conversation looked at or reviewed records protected from disclosure under the Family Educational Rights and Privacy Act (“FERPA”), 20 USCA § 1232g et. seq., those records would still be exempt from disclosure upon request from a person for a copy of any records considered or utilized during the meeting. Similarly, if the board considered the records during a public meeting and then received a request for a copy of the records, the board could still assert the discretionary exceptions to disclosure.

I would caution the board, though, if it decided to take this approach to reviewing the records. The purpose of the ODL is to allow any person to observe and record the meetings of the governing body of a public agency. I.C. § 5-14-1.5-1. A public meeting held to discuss records in a cryptic manner so as not to divulge any of the information contained therein certainly could appear to violate the spirit of the ODL.

Regarding your question as to what options the board has in considering those records, I would certainly leave it to the board to propose any ideas it might have to consider the records without violating the ODL. Certainly the members of the board could individually review the records without implicating the ODL.

It is my opinion the records may not be considered in executive session. While an executive session instance exists for a discussion of records classified as confidential by state or federal statute (*See* I.C. § 5-14-1.5-6.1(b)(7)), it is my opinion these records do not fall into that category. While the records may be excepted from disclosure at the discretion of the agency, nothing in I.C. § 5-14-3-4(b) provides that records which may be excepted from disclosure are confidential. The confidential label is reserved for those records excepted from disclosure pursuant to I.C. § 5-14-3-4(a). To the extent any of the records at issue are confidential records, those may be discussed in executive session.

Please do not hesitate to contact us if we can provide further assistance.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Ray Pavy, Interim Superintendent, Charles A. Beard Memorial School Corporation