February 1, 2006

Sent Via Facsimile

Brooke Baker
Managing Editor
Zionsville Times Sentinel
250 S. Elm Street
Zionsville, IN 46077

Re: Informal Inquiry Response; Alleged Violation of the Access to Public Records Act by the Zionsville Community Schools

Dear Ms. Baker:

You have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

Specifically, you have alleged that the Zionsville Community Schools ("School") denied you copies of e-mail messages sent by the former superintendent of the Zionsville Community Schools, Dr. Howard Hull. You had requested "the e-mails originating from Dr. Howard Hull's school-issued computer that were the cause of the investigation, as referenced in the board's statement released on January 26, 2006."

In the denial letter that you supplied me, Attorney Alan McLaughlin stated that the e-mails that are responsive to your request were personal correspondence authored or received by Dr. Hull, "which do not in any way include, refer, or relate to the business or governmental function of [Zionsville Community Schools] or of Dr. Hull as Superintendent, and which were not prepared or utilized for, or circulated or communicated in the course of, transacting school business." He further stated, "[e]ven assuming the identified personal e-mails could be considered documents otherwise subject to disclosure, [School] further denies the request based on the protections of IC 5-14-3-4(b)(7)."

I take the denial letter of the School to be based on two grounds. First, the School believes that the e-mails of Dr. Hull are not "public records" within the ambit of the Access to

Public Records Act. Second, the School argues that even if the e-mails are a "public record," they are subject to the APRA exemption for "diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal." Ind. Code 5-14-3-4(b)(7).

> "Public record" means "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).

The School is a public agency for the purposes of the APRA. IC 5-14-3-2(l). Therefore, if a record, including electronically stored data, is "created, received, retained, maintained, or filed by or with" a public agency, it is a public record. No Indiana court has considered whether an e-mail of a purely private or personal nature, sent or received, and stored on the computer or server of a public agency, is a public record. Other jurisdictions have squarely dealt with this question, but those states have definitions of "public record" that are explicitly limited to those records made or received pursuant to law or ordinance or in connection with the transaction of official business of any agency. *See Denver Publishing Co. v. Board of County Commissioners, 121 P.3d. 190 (Colo. 2005); Brennan v. Giles County Board of Education, 2005 Tenn. App. LEXIS 503 (Tenn. Ct. App. 2005); State v. City of Clearwater, 863 So.2d 149 (Fla. 2003.).*

A New York court has held that records stored or held by the City of Albany that were the former mayor's correspondence of a purely personal nature are nevertheless a "record" under the New York Freedom of Information Law ("FOIL"), because the definition of "record" did not contain any language suggesting a limitation regarding governmental purpose. The FOIL definition, similar to Indiana's, considers a "record" as "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever..." *Matter of Capital Newspapers v. Whalen, 69 N.Y.2d 246, 505 N.E.2d 932 (1987).*

Hence, the central question is whether an e-mail message of a personal or private nature, not connected with any governmental purpose when it was created, is "created, received, retained, maintained, or filed by or with" a public agency. I enclose with this letter an informal inquiry response that I issued today, in response to a more general inquiry. As you can see, I determined that Indiana's definition of "public record" is so broad that a personal or private e-mail, stored on the public agency's computers, may be "retained" or "maintained" by the public agency.

However, the issue presented by your informal inquiry is more narrow. Under the facts you present, the School Board reviewed these otherwise personal e-mails in furtherance of its investigation of the Superintendent. The e-mails formed the basis, at least to some extent, for the underlying investigation and for the resignation agreement of the Superintendent. In my opinion, the e-mails that were the subject of the investigation were received, retained, or filed with the

School, irrespective of their status when Dr. Hull created or received them. Therefore, the e-mails that you requested are "public records."

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. IC 5-14-3-3(a). The School maintains that the e-mails, if public records, are diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal. As such, they are excepted at the discretion of the public agency under IC 5-14-3-4(b)(7), the School contends.

The Access to Public Records Act is to be liberally construed to implement the policy that providing persons with information is an essential function of a representative government. IC 5-14-3-1. The APRA places the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record. IC 5-14-3-1; IC 5-14-3-9(g). If a court were reviewing the denial of the e-mails, the court would determine the matter do novo. In court, the public agency meets its burden of proof when denying a discretionary record by proving that the record falls within any one (1) of the categories of exempted records under section 4(b), and by establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. IC 5-14-3-9(g).

Therefore, the School would have to establish the content of the records with adequate specificity, and would have to prove that the e-mails fall within the exemption for diaries and journals. In an opinion of the previous public access counselor, an IDEM employee's professional calendar met the diary or journal exemption. *Opinion of the Public Access Counselor 01-FC-42*. The professional calendar contained personal notes, was shared with a select few and the employee had exclusive control of it. This was judged to be comparable to the facts in *Journal Gazette* v. *The Board of Trustees of Purdue University,698 N.E.2d 826 (Ind. Ct. App. 1998)*, where a compliance log was deemed to be a diary or journal. The log contained notes made concerning information provided to the person on activities related to NCAA or Big Ten rules and regulations, ongoing entries on various matters, and personal notes. The Purdue University employee who created the compliance log testified that no one else made any entries into the compliance log, he shared information from it with very few people and that he referred to it as a notebook or diary.

From the denial letter, I can determine very little about the nature of the messages and how they may be considered a diary or journal. From my experience, I do not believe that persons who send e-mail messages typically consider or refer to those messages, individually or in the aggregate, as one's diary or journal. The more difficult matter is that the e-mails were sent to another person. In that regard, the messages are not in the exclusive control of the sender once the "send" key is pressed. The recipient could forward those messages to anyone, and the person who sent those messages usually is aware of that capability.

To summarize, it is my opinion that the e-mail messages that are responsive to your January 27 request are "public records." Those records are disclosable unless exempt under any one of the exemptions in section 4 of the APRA. The School has the burden of proof for

nondisclosure of the records under IC 5-14-3-9(g), if the School continues to resist disclosure of the e-mails.

Please feel free to contact me if you have any questions.

Sincerely,

Karen Davis
Public Access Counselor

cc: Alan L. McLaughlin