



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

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

October 6, 2009

Ms. Dare Hawes
719 S. Michigan St.
Plymouth, IN 46563

Re: Informal Inquiry 09-INF-28

Dear Ms. Hawes:

This is in response to your informal inquiry dated July 26, 2009. Pursuant to Ind. Code §5-14-4-10(5), I issue the following opinion in response to your inquiry regarding the Indiana Department of Education ("IDOE"). My opinion is based on applicable provisions of the Indiana Access to Public Records Act ("APRA"), I.C. §5-14-3-1 *et seq.*

The circumstances surrounding your inquiry stem from the termination of former Plymouth Community School Corporation ("PCSC") employee Michael Edison. You make several allegations of wrongdoing on the part of PCSC and, by extension, the IDOE with regard to Mr. Edison's termination. As I also noted in response to your previous complaint regarding access to records of PCSC, many of your accusations -- even if they are true -- are outside of the scope of the public access laws. The following analysis, therefore, is focused on your claim that IDOE denied you access to three (3) records and, in doing so, violated the APRA.

You allege that IDOE wrongfully denied you access to the following three records: (1) a copy of IDOE's July 3, 2008, letter to PCSC Superintendent Dan Tyree; (2) PCSC attorney Tom Wheeler's response to IDOE's letter of July 3, 2008; and (3) a copy of the IDOE's determination that the Edison issue was dismissed.

IDOE Legal Counsel Dana L. Long's response to your complaint is enclosed for your reference. In it, IDOE argues that (1) and (2) are confidential and not subject to disclosure pursuant to I.C. §5-14-3-4(b)(2) and (6). With regard to (3), IDOE maintains that such a record does not exist. As to (3), if that record does not exist, IDOE did not violate the APRA by failing to produce it to you. The APRA governs access to the existing, maintained public records of a public agency; the failure to produce public records that do not exist is not a denial of access under the APRA.

With regard to the remaining records, it is my opinion the IDOE can sustain its denial based on the deliberative materials and the work product exceptions to the APRA.

The APRA excepts from disclosure records that are intra-agency or interagency advisory or deliberative material 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). The APRA also excepts from disclosure the “work product of an attorney representing, pursuant to state employment or an appointment by a public agency: (A) a public agency; (B) the state; or (C) an individual.” I.C. § 5-14-3-4(b)(2). “Work product of an attorney” means information compiled by an attorney in reasonable anticipation of litigation. The term 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).

The IDOE notes that the Superintendent of Public Instruction has the authority and responsibility to bring actions for the revocation or suspension of teaching licenses for immorality, misconduct in office, incompetence, or willful neglect of duty. I.C. § 20-28-5-7. The IDOE states that a July 1, 2008, email message from you contained a reference to Mr. Edison and child pornography. In response to your email, the IDOE's Office of Legal Affairs opened an investigation. The Office of Legal Affairs provides legal advice and representation to the Superintendent of Public Instruction. According to the IDOE, the Office of Legal Affairs sought and obtained information in the course of its investigation in order to advise the Superintendent of Public Instruction concerning any possible action to revoke or suspend a teaching license. The IDOE engaged in interagency communications with PCSC concerning the same. The IDOE thus maintains that records (1) and (2) that you requested are part of that investigation file and, consequently, exempt from disclosure pursuant to the APRA's work product and deliberative materials exceptions. I agree.

To the extent the publications contain information not covered by one of the two exceptions listed and not inextricably linked to non-disclosable information, that information must be disclosed.

[T]hose factual matters which are not inextricably linked with other nondiscloseable materials, should not be protected from public disclosure.... Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access.

Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Ind. Univ., 787 N.E.2d 893, 914 (Ind. Ct. App. 2005) (citations omitted).

I have not reviewed all of the documents that you seek, so 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 before me, however, it is my opinion the IDOE could sustain its denial of your request under the deliberative materials and the work product exceptions to the APRA.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

Cc: Dana L. Long, Legal Counsel, Indiana Department of Education