

October 12, 2004

Mr. Martin Hensley
15 Wood Street
Greenfield, IN 46140

Re: Formal Complaint 04-FC-159; Alleged Violation of the Access to Public Records Act by the Metropolitan School District of Wayne Township

Dear Mr. Hensley:

This is in response to your formal complaint alleging that the Metropolitan School District of Wayne Township (“School”) violated the Access to Public Records Act (“APRA”) by denying you access to certain records. I find that the Metropolitan School District of Wayne Township violated the Access to Public Records Act to the extent that it denied you a mailed copy of the public inspection file that it maintains.

BACKGROUND

By a series of electronic mail messages originating on August 25, 2004, you requested four categories of documents. You sent this request to Jon Easter, Director of WBDG radio, a radio station operated by students of Ben Davis High School. The School is the current licensee of the broadcast license for WBDG issued by the Federal Communications Commission.

Although not entirely clear from the copy of the request that you supplied this office, it appears that all records that you requested relate in some fashion to WBDG. You received an e-mail response from Mr. Easter that appears to have been sent to you on September 3, 2004. In that response, Mr. Easter states that you are allowed to view the public inspection file during the normal business hours of the School. It further states that any documents that you requested that are not included in the “public inspection file” may be obtained by contacting the Ben Davis High School principal. The principal’s contact information is included in this message.

Your next correspondence with Mr. Easter, dated September 3, claims that Mr. Easter’s response denied your request. You then state that since you have visited the school twice and been denied access, you are actually requesting that the file be copied and mailed to you. On September 9, you sent another message to Jon Easter reiterating your desire to receive a copy of the entire file since you attempted to view the file in 1999 and it was not available. You also

make an additional request for copies of four new categories of documents. In both communications, you state that the law requires the School to respond within three days. On September 9, 2004, Rex Haviland of the School sent you an e-mail stating that Mr. Easter has already responded to your request. Also included in the material that you sent me was a letter from attorneys at the law firm of ShawPittman in Washington D.C. denying your request that a copy of the entire public inspection file be mailed to you because "Greenfield, Indiana is outside the station's service area."

The present complaint followed this communication from ShawPittman. That complaint and another complaint that you sent me by fax several hours later, were dated September 10, 2004. Those complaints are consolidated under 04-FC-159. In the second complaint, you append a letter dated September 10, 2004 from ShawPittman, FCC attorneys of the School, denying your records request under "FCC rules." The ShawPittman September 10 letter appears to be in response to a different records request (undated) that you have included in your second complaint. This request lists six categories of documents, and seems to subsume your earlier requests for documents.

I forwarded a copy of your complaints to the School, and received a complaint response from Jon Bailey, an attorney representing the School in this matter. I enclose a copy of his response for your reference. In his response, he states that WBDG staff believed that rules of the FCC preempted the Access to Public Records Act with respect to any request for documents from a party to a matter pending before the FCC. Nevertheless, he states that he advised the School to address your request under APRA, and on September 10, 2004, a response was e-mailed to you from Jon Easter (the "September 10 School response"). Mr. Bailey enclosed a copy of the School's response with his complaint response. I also enclose School's response.

For purposes of this advisory opinion, I will opine on the School's response to your earlier requests, since at the time you filed your complaint you did not have the benefit of the September 10 School response. This is also because any dispute that you have after reviewing the September 10 School response may be raised by you in another complaint or via informal inquiry to this Office. In the event that you would contact this office for advice, I would then allow the School to address any specific issues that remain. Therefore, I do not deem it appropriate to reach the September 10 School response at this time.

ANALYSIS

Any person may inspect and copy the public records of a public agency during the regular business hours of the agency, except as provided in IC 5-14-3-4. IC 5-14-3-3(a). An agency's response to a written request (including an e-mailed request) must be in writing, and must be sent within *seven (7)* days of receipt of the request. IC 5-14-3-9(c). Any denial must include a statement of the specific exemption or exemptions authorizing the withholding of the public record and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c). The School responded to your August 25 request on September 3, more than seven days after your request, in violation of the APRA. The response allowed you access to the public inspection file, although this file was not specifically defined. You then requested a copy of the entire file be mailed to you, and you also request additional documents. The response of the

School, sent September 9, the same day as your renewed request for mailed copies and additional documents, states only that Mr. Easter had already responded. This response apparently denied your request that copies of the entire file be mailed to you, but does not explicitly so state. IC 5-14-3-3(b) states:

A public agency may not deny or interfere with the exercise of the right stated in subsection (a). The public agency shall either: (1) provide the requested copies to the person making the request; or (2) allow the person to make copies: (A) on the agency's equipment; or (B) on his own equipment.

Because you stated in your September 3 message that you cannot drive, I am concerned that the School did not attempt to contact you further to determine whether you were prepared to pay the cost of copying the entire file prior to the School making the copies, informing you of the cost of copying and mailing the records in advance. Also, the response of ShawPittman of September 8 was not consistent with APRA where denial of a mailed copy of the file was based on your not residing in the radio station's service area. In any event, to the extent that the School was refusing under any circumstances to mail any copies of its records to you, I find that it violated the Access to Public Records Act.

I also write to opine regarding the WBDG staff's belief that FCC rules preempt the APRA with respect to records in the so-called "public inspection file." Although the FCC may have regulations respecting what it deems to be material appropriate for a "public inspection file," under APRA, any public record "filed, maintained, created, or received" by an Indiana public agency is subject to inspection and copying by any person. This includes a person who is a party to an FCC action. Therefore, I endorse Mr. Bailey's advice that a response under APRA is appropriate.

CONCLUSION

For the foregoing reasons, I find that the Metropolitan School District of Wayne Township violated the Access to Public Records Act where it failed to timely respond to your August 25 request. It also violated the Access to Public Records Act to the extent that it denied you a mailed copy of the public inspection file that it maintains. If you still are seeking the entire public inspection file, you should request that the School contact you about the cost of copying and mailing the file. Any other issues with respect to your request for specific documents and the September 10 School response are expressly excluded from this advisory opinion.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. Jon Bailey