

October 29, 1999

Mr. Martin L. Hensley
7205 Mohawk Lane
Indianapolis, IN 46260

Re: *ADVISORY OPINION No. 99-FC-8:*

Denial of Access to Public Records by the Metropolitan School District of Wayne Township, Ben Davis High School.

Dear Mr. Hensley:

This is in response to your formal complaint, which was received on October 4, 1999, against the Metropolitan School District of Wayne Township (hereinafter, "School Corporation,") for denial of access to public records related to the operation of a radio station at Ben Davis High School. A copy of your complaint was faxed to the School Superintendent, Mr. Terry Thompson, on the day it was received. A written response was received on October 8, 1999, via facsimile, from Jon M. Bailey, attorney for the School Corporation. A copy of his response is enclosed for your reference.

For the reasons set forth below, it is my opinion that the School Corporation's failure to respond to your oral requests via telephone and in person constituted denials of access to public records under Indiana Code section 5-14-3-9.

BACKGROUND

According to your complaint, you made several telephone calls to WBDG radio station in August 1999 and early September 1999 requesting access to the public file maintained under Federal Communications Commission (FCC) regulations. You received no response from the School Corporation. You again made your request, in person, on September 8, 1999 and at that time access was denied access to these public records.

According to Mr. Bailey, there were several reasons for the School Corporation's failure to respond to your requests. You requested access to these records during summer break for the School Corporation, there was a newly hired manager and disruption caused by construction, as well as the activities related to the re-opening of the radio station at the beginning of the school year. The School Corporation confesses to an error in not responding in a timely manner to your requests, and has pledged to you that this will not happen again.

ANALYSIS

Under the Access to Public Records Act, Indiana Code chapter 5-14-3, a public agency must respond to requests within certain time periods and the failure to respond in a timely manner constitutes a denial.

- a. A denial of disclosure by a public agency occurs when the person making the request is physically present in the office of the agency, makes the request by telephone, or requests enhanced access to a document and:
 - b (1) the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying of a public record when a request has been made; or
 - (2) twenty-four (24) hours elapse after any employee of the public agency refuses to permit inspection and copying of a public record when a request has been made;whichever occurs first.

Indiana Code section 5-14-3-9. If a request is made orally or in person, the public agency must, therefore, respond to the request within twenty-four (24) hours after the receipt of the request.

There is often confusion of the above-mentioned time periods as being the time periods in which public records must be produced under the Access to Public Records Act. While "(a)ny person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of this chapter," public agencies are not required to produce public records within the time periods stated under Indiana Code section 5-14-3-9. Ind. Code rc 5-14-3-3(a). A public agency's response does not require that the public agency produce the public records within any specified time period, only that the requestor receive communication within twenty-four (24) hours as to whether there are records that will be produced in response to the oral request or the request made in person. The requestor should also be alerted as to when any public records will be made available for copying and inspection and if access will be denied to any public records that are confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4.

It is my opinion that, despite the circumstances surrounding your request, the school construction, summer vacation, etc., the School Corporation's failure to respond to your oral requests and request made in person constituted denials of access to public records. As a result, you were entitled upon those denials to file an action in circuit or superior court in the county of the denial and ask the court to require the School Corporation to produce any disclosable public records. Indiana Code section 5-14-3-9(d). Additionally, after July 1, 1999, if a plaintiff in a civil action for denial under Indiana Code section 5-14-3-9 has first contacted the Office of the Public Access Counselor, and the judge finds in the plaintiff's favor, the judge must award attorneys fees, court costs and litigation to be paid by the public agency.

CONCLUSION

It is my opinion that the failure of the Metropolitan School District of Wayne Township, Ben

Davis High School, to respond to your oral requests and request in person for access to public records constituted a denial of access that is actionable under Indiana Code section 5-14-3-9.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. John Bailey