Indiana Office of the Public Access Counselor

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Recent Public Access Counselor Advisory Opinions

The public access counselor is charged with issuing advisory opinions in response to formal complaints and informal inquiries. Ind. Code §5-14-4-10. Several advisory opinions affecting school boards and school corporations have been issued since July 1, 2007 (the appointment date for the current counselor, Heather Willis Neal). A selection of those opinions is highlighted here. To view all public access counselor opinions since 1999, please visit www.in.gov/pac.

Opinion of the Public Access Counselor 07-FC-161

This complaint, filed against Fort Wayne Community Schools, alleged the Corporation violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying the requester a copy of a weekly "newsletter" the superintendent prepared for the Board members. The Corporation argued that because the "newsletter" contained expressions of opinion, it could be withheld from disclosure under the deliberative materials exception, found in I.C. §5-14-3-4(b)(6). FWCS indicated the document addresses matters which the Board may see in the next week and expresses the Superintendent's opinion. It does not contain source documents or other factual information.

An agency may withhold, at its discretion, records that are intra-agency or interagency deliberative material, including material developed by a private contractor, that are expressions of opinion or speculative in nature and communicated for the purposes of decision making. I.C. §5-14-3-4(b)(6). The Corporation demonstrated the newsletter was deliberative material.

Opinion of the Public Access Counselor 07-FC-170

This complaint, filed against Fort Wayne Community Schools, alleged the Corporation violated the APRA by denying the requester access to records. The request was for a copy of records of disciplinary actions taken against all certified teachers for the last ten years. The requester provided the Corporation with the names of all 5,200 certified teachers employed by the Corporation within the last ten years.

The APRA provides that personnel files are generally nondisclosable at the discretion of the agency. I.C. §5-14-3-4(b)(8). Certain information, however, must be provided upon request:

> (A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
> (B) information relating to the status of any formal charges against the employee; and
> (C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.
> . . . This subdivision does not apply to the disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name. I.C. §5-14-3-4(b)(8).

The public access counselor opined that this prohibition against generalized requests prohibits a requester from submitting such a request, for any disciplinary actions resulting in suspension, demotion, or discharge, taken against any employee in a generalized group. The length of time it would take the Corporation to perform the research just to determine whether there were responsive records combined with the prohibition in I.C. §5-14-3-4(b)(8) against generalized requests made the request not reasonably particular as required by I.C. §5-14-3-3(a). The Corporation offered to allow the requester to listen to minutes of Board meetings, which would help the requester find the names of any employees against whom such disciplinary action was taken, but the requester declined to do so.

This opinion raised two additional issues regarding personnel records. First is the issue of what constitutes formal charges as contemplated by I.C. §5-14-3-4(b)(8)(B). Following is the opinion related to this issue:

> "[I]t is my opinion "formal charges" would include a statement or assertion of illegality or other complaint rising to the level of being made or asserted using established form, custom or rule. While this does not necessarily limit "formal charges" to solely assertions of illegality, it is my opinion "formal charges" implies records relating to misconduct rising to the level of being alleged through an established formal complaint process." *Opinion of the Public Access Counselor 07-FC-170.*

Second is the issue of what constitutes "final action" as contemplated by I.C. §5-14-3-4(b)(8)(C). Following is the opinion related to this issue:

> "I subscribe to Counselor O'Connor's definition expressed in [*Opinion of the Public Access Counselor 99-5*], that 'final action' is not limited to action by the governing body but includes the final action of discipline or discharge taken against an employee." *Id.*

Similar issues were raised and addressed by the same requester who submitted requests to the other school corporations in Fort Wayne. Two additional formal complaints were filed and answered with the following opinion numbers: *07-FC-183* and *07-FC-189*.

Opinion of the Public Access Counselor 07-FC-201

This complaint, filed against South Bend Community School Corporation Board of Trustees, alleged the Corporation violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5) by holding a meeting in the Superintendent's office, attended by five of the seven members of the Board. The sixth member refused to attend because she believed it to be an illegal meeting. The purpose of the meeting was to discuss concerns arising from the "volatile behavior" of the seventh member during executive sessions. That seventh member was not invited to the meeting. The members hoped the Superintendent might offer some guidance on the issue of the volatile Board member.

The public access counselor opined that the meeting violated the ODL. The gathering was not a chance or social gathering, as it is clear the meeting was planned and had a purpose. The question was whether the meeting was intended to take official action on public business.

To take "official action" means to receive information, deliberate, make recommendations, establish policy, make decisions or take final action. I.C. §5-14-1.5-2 (d). "Public business" means any function upon which the public agency is empowered or authorized to take official action. I.C. §5-14-1.5-2(e).

Official action is not limited to decision-making. Here, the members of the Board who met were doing so to discuss the actions of another Board member at executive sessions. They were certainly deliberating, if not also receiving information and making recommendations and perhaps even making decisions. As such, the counselor's opinion was that the Board violated the ODL.

Opinion of the Public Access Counselor 07-FC-283

This complaint, filed against Union North School Corporation, alleged the Corporation violated the APRA by denying the requester access to the resignation letters of two former employees. The Corporation claimed the letters were part of the personnel files of the employees and as such could be withheld from disclosure at the discretion of the agency, pursuant to I.C. §5-14-3-4(b)(8).

Section 4(b)(8) provides an exception within the exception to disclosure, requiring the disclosure of certain records contained in the personnel files of an employee but providing a general exception for the remainder of the personnel file. The records at issue here are not records which fall into any of the exceptions within the exception listed in I.C. §5-14-3-4(b)(8). The public access counselor said the following: "While it is not my opinion that *any record* placed into an employee personnel file can be withheld from

disclosure using this exception, it is my opinion that records *related to an individual's employment* which are maintained as part of the employee's personnel file, including a resignation letter, may be withheld from disclosure at the discretion of the agency under this exception."

Opinion of the Public Access Counselor 07-FC-317

This complaint, filed against Fort Wayne Community Schools, alleged the Corporation violated the APRA for a number of reasons. The noteworthy issue for Board members to consider is the issue of the request for copies of handwritten notes from two different meetings.

This issue was previously addressed by Counselor Karen Davis in *Opinion of the Public Access Counselor 06-FC-72*. A "public record" is any material that is created, received, retained, maintained, or filed by or with a public agency. See I.C. §5-14-3-2(m). Mere creation of handwritten notes during a public meeting by a public official, without more, does not demonstrate that a record is a "public record." Only "public records" are required to be available for inspection and copying. *Id*.

If the handwritten notes created by Board members in attendance at a meeting are not filed with or are not maintained by the Corporation office, they are not public records. If the notes were filed with or are maintained by Corporation, they may constitute personal notes serving as the equivalent of a diary or journal, which are excepted from disclosure at the discretion of the public agency under I.C. §5-14-3-4(b)(7). Since the handwritten notes were used as reference by each individual for his own purposes, the exception applied here. As such, FWCS did not violate the APRA by denying access to the notes.

Opinion of the Public Access Counselor 07-FC-318

This complaint, filed against South Bend Community School Corporation and Corporation Board of Trustees, alleged the Corporation and Board violated the ODL. First, the complainant alleged the Corporation violated the ODL when all the members of the Board attended an organizational meeting held to discuss the petition and remonstrance process under way regarding proposed financing of remodeling of schools maintained by the Corporation. The meeting was not organized by any members of the Board, but the Board President did send an invitational flyer by electronic mail to 45 respondents, and each of the Board members was a recipient of the email message.

The public access counselor relied on the facts that the Board had not previously discussed the meeting or decided to attend the meeting as a group, the President sent the message to the Board members as individuals whom she knows to be interested in and supportive of the issue, and the Board members each made an individual decision whether to attend the gathering. Further, requiring the members of a governing body to provide notice every time they receive an invitation and might attend the same event frustrates the purpose and intent of the ODL. As such, the gathering was a "social or

chance gathering not intended to avoid this chapter" and did not violate the ODL. I.C. §5-14-1.5-2(c).

As a caveat to Board members, though, the opinion is not intended to indicate that any time Board members individually decide to attend a function they escape the requirements of the ODL. Note the following excerpt from the opinion:

> "I am not prepared to say that because the Board is not empowered or authorized to take action relating to the remonstrance process that any gathering of the Board to discuss the remonstrance would not be defined as a meeting. It is conceivable that a gathering intended to be a discussion of the remonstrance could lead to official action on business on which the Board is empowered or authorized to take action. If, for instance, the Board gathered to discuss their actions as a Board, like whether they would attend the organizational meeting or the October 8 Council meeting together as a Board and address the financing issue, I believe that would cross the line and constitute a meeting." *Opinion of the Public Access Counselor 07-FC-318.*

The complainant also alleged the Board violated the ODL when a majority of the members attended a South Bend Common Council meeting regarding the financing issue. For reasons similar to those in the previous scenario, the counselor again found no violation of the ODL. Further, it was clear the Board was not attempting to circumvent the ODL since this issue involves a public meeting of the Council which a majority of Board members attended.

Opinion of the Public Access Counselor 07-FC-327

This complaint, filed against the Charles A. Beard Memorial School Corporation, alleged, among other things, the Corporation violated the APRA by claiming a tort claim notice was an education record and as such subject to redaction of personally identifiable information, pursuant to I.C. §5-14-3-4(a) and the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C.A. §1232 *et seq*.

The public access counselor opined that the tort claim notice is an education record and as such personally identifiable information must be redacted before the record may be disclosed. Here, though, the Corporation redacted too much information, including items like the name of the school, the amount the claimant sought in damages, and arguably the list of teachers involved. The Corporation bears the burden of proof in sustaining the denial of access. I.C. §5-14-3-1. If the Corporation can show that a list of the involved teachers would make it easy to trace the student involved, that proof could sustain the denial.

Opinion of the Public Access Counselor 07-FC-330

This complaint, filed against the Clark-Pleasant Community School Corporation, alleged, among other things, the Corporation violated the APRA by refusing to make available a copy of the "Board packet" to the public prior to each Board meeting. The issue of a blanket request for a copy of the packet for each meeting had been addressed in a previous opinion:

> "Regarding your blanket request on January 1 for all council packets for the year, I do not believe this to be a request made with reasonable particularity under the APRA. The definition of public records required to be disclosed under the APRA includes 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. I.C. §5-14-3-2. The definition does not include records yet to be created, and as such the Town is under no obligation to produce records that have not been created. If you wish to receive each council packet for the year, you should request each packet after it has been created." *Opinion of the Public Access Counselor 07-FC-259*.

Regarding the request that the Board packet be made available for inspection and copying at the time of each Board meeting, the APRA does not provide a time by which records must be provided in response to a request. The public access counselor's office has long said that records must be produced within a reasonable amount of time based on the facts and circumstances. It is not always reasonable to expect the packet to be provided in advance of the meeting. If, for instance, the packet were finalized close to the meeting time and the packet had not yet been reviewed for disclosable and nondisclosable information, it would be reasonable for the Corporation to provide the packet at some point after the meeting.

Opinion of the Public Access Counselor 07-FC-354

This complaint, filed against Hanover Community School Corporation, alleged the Corporation violated the ODL for failing to provide a time in the meeting notice, failing to identify agenda items by substance, and indicating to the complainant he would not be allowed to speak at future meetings.

The Board provided notice for its November 13 meeting but in the notice indicated the meeting would begin "immediately following the public hearing on the proposed lease for the new middle school." The counselor opined that "time" as contemplated by the notice requirement of I.C. §5-14-1.5-5(a) is the hour at which the meeting will begin. "'Time' has a number of definitions, but in my opinion the applicable definition here is 'an appointed, fixed, or customary moment or hour for something to happen, begin, or end.' *Merriam-Webster's Online Dictionary*, http://www.merriam-webster.com/dictionary/time, accessed December 3, 2007." *Opinion of the Public Access Counselor 07-FC-354*. A notice indicating a meeting will begin

before or after another meeting or event, absent an indication of the time of day, does not satisfy the ODL notice requirement. As such, the Board violated the ODL by failing to indicate the time at which the meeting was to begin.

Regarding the complaint that the Board failed to refer to agenda items by substance rather than agenda number, the Board did not violate the ODL. A governing body utilizing an agenda shall post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. A rule, regulation, ordinance, or other final action adopted by reference to agenda number or item alone is void. I.C. §5-14-1.5-4(a). If the Board took final action (i.e. voted) on the proposed policy changes and referred to the item only by agenda number or item, the final action may be void. Here, though, the Board did not take final action, so it did not violate the ODL.

Regarding the complaint that the Board indicated it would no longer allow the complainant to speak at its meetings, the Board did not violate the ODL. Indiana law only requires that public meetings be open; it does not require that the public be given the opportunity to speak. *Brademas v. South Bend Cmty. Sch. Corp*., 783 N.E.2d 745 (Ind. Ct. App. 2003), *trans. denied*, 2003.