

October 12, 2004

Ms. Frankie Rae Niedhammer
2931 E. Boonville – New Harmony Road
Evansville, IN 47725

Re: Formal Complaint 04-FC-161; Alleged Violation of the Access to Public Records Act by the Evansville-Vanderburgh School Corporation

Dear Ms. Neidhammer:

This is in response to your formal complaint alleging that the Evansville-Vanderburgh School Corporation (“School”) violated the Access to Public Records Act by failing to respond to your requests to inspect and copy an audiotape in a timely manner and failing to provide access to the records requested in a timely manner. For the following reasons, I find that the Evansville-Vanderburgh School Corporation violated the Access to Public Records Act.

BACKGROUND

On August 30, you submitted to Dr. W.H. McCandless, Superintendent of the Evansville-Vanderburgh School Corporation, a request for a copy of a public record. You submitted your request at 8:45 p.m., shortly after the adjournment of the School Board’s meeting and public hearing on the 2005 budget. Your request, which was handwritten and submitted in person, sought a copy of the audiotape of the meeting that had just adjourned. On September 1, at 11:11 a.m., Mr. Robert Yeager, Assistant Superintendent of the School, left a message on your answering machine indicating that you should call him on September 8th or 9th to learn when you could pick up the tape.

On September 2, you called Mr. Yeager’s office to ask if the copy of the tape could be provided to you by September 3rd. You spoke to Mr. Yeager's secretary at that time, and you explained that you needed the tape for purposes of putting together a petition that was required to be filed by September 7th. Later that day, Mr. Yeager contacted you and advised you that you could not have the tape on September 3rd as he did not have staff and material available to provide the copy of the tape. You then asked to come in to listen to the tape and make a copy of

it on the agency's own equipment, or on your equipment. Mr. Yeager refused to allow you to make a copy of the tape or listen to it because he was afraid something would happen to the original. He then advised you that the tape would be available on September 7th at 4:00 p.m., which happened to be the date your petition was due. You allege that Mr. Yeager intended to keep you from receiving a copy of the tape as long as possible to deprive you of the use of the information contained on the tape in your petition.

You filed your formal complaint, which was received by this office on September 10, 2004. Your complaint requested priority status pursuant to 62 IAC 1-1-3; however, you later rescinded that request. I forwarded a copy of your complaint to the School, and Mr. Patrick Shoulders, attorney, responded on its behalf. Mr. Shoulders forwarded a copy of his response to you for your reference.

In his response, Mr. Shoulders stated that your request was not made during the regular business hours of the School and that it was not delivered to the designated records keeper. He also states that you were not physically present in the office of the agency when you made your request. Mr. Shoulders further alleges that your written request failed to precisely identify what record you sought, and your oral request could not be complied with because of the potential danger to the original public record. Finally, Mr. Shoulders states that the time taken to provide you with a copy of the tape was reasonable.

ANALYSIS

Requests

There are two requests at issue: your August 30 written request for a copy of the tape of the meeting held that evening, and your September 2 oral request to inspect that tape. Mr. Shoulders raises several issues with respect to your requests. First, he states that your August 30 request should have been made during the normal business hours of the School, and that it should have been delivered to the designated record keeper. The APRA states that a person may inspect and copy the public records of any public agency during the regular business hours of the agency. However, nothing in the APRA requires that requests for inspection or copies of public records be *made* during business hours. Therefore, it is my opinion that a request for access to public records need not be made during an agency's regular business hours.

Mr. Shoulders also states that your August 30 request should have been submitted to the designated records keeper. According to Mr. Shoulders, the designated records keepers are Mr. Robert Yeager and Mr. James Trader. You submitted your request to Dr. McCandless, Superintendent of the School. This office has held that an agency may designate a particular office or person to *respond* to requests for access to public records. In *Opinion of the Public Access Counselor 99-FC-2*, a record requestor asked if the president of the Commission could direct a member of the public to file requests for public records to the clerk-treasurer's office instead of to the commission members directly, as had been the practice in the past. This office stated that while there is no requirement that public records requests be filed with a particular person, the designated office may be the logical place to submit your requests for records. This

office also stated that ultimately, members of the governing body of the public agency are responsible for ensuring that requests are responded to in a timely manner. Furthermore, even if the School may require requests be submitted to Mr. Yeager or Mr. Trader, you state you were not aware that your request should be submitted to them. You allege that you have submitted five or six requests for access to public records within the past eighteen months directly to Dr. McCandless. You state that Dr. McCandless accepted all of your requests, that all record requests submitted to Dr. McCandless have resulted in timely production, and that he has never advised you that he is not the proper person to receive record requests. If Dr. McCandless is not the appropriate person to receive record requests, he should have advised you of that fact when you submitted your request to him.

Mr. Shoulders states that your August 30 request was not reasonably particular. He states that you requested the "raw audiotape recordings of the minutes of the School Board" meeting, and that reading the "particularity" requirement literally, the School could have informed you that no documents exist "since there are no tape recordings of written minutes." When a public record request is made, the requestor must state his or her request with reasonable particularity. I.C. §5-14-3-3(a)(1). There is no Indiana case law defining "reasonable particularity," but where a public agency believes that the request is not reasonably particular, it has the affirmative duty to notify the requestor if more information is needed in order to respond to the request. *Opinion of the Public Access Counselor* 00-FC-2. On September 1, Mr. Yeager contacted you and left a message for you indicating that you should contact his office on September 8 or 9 to determine when you could come and pick up the tape you requested on August 30. As Mr. Yeager's message did not ask you for more particular information to clarify your request, it appears as if Mr. Yeager had no doubt what record you sought. Therefore, it is my opinion that your August 30 request was reasonably particular.

Mr. Shoulders further states that I.C. §5-14-3-9(a) does not apply to your August 30 request because you were not "physically present" in the School's office when you submitted your request. Indiana Code §5-14-3-9(a) states that a denial of disclosure by a public agency occurs when the person making the request is physically present in the office of the agency and either the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying or twenty-four (24) hours have elapsed after any employee of the public agency refuses to permit inspection and copying when such a request has been made. In *Opinions of the Public Access Counselor* 03-FC-94 and 03-FC-103, this office addressed the issue of what constitutes being physically present in an agency's office. In both of those opinions, this office found that a request for access to public records that was left in the agency's mailbox did not trigger a twenty-four (24) hour deadline for response because dropping the request in the agency's mailbox did constitute being physically present in the office of the agency. In 03-FC-103, this office elaborated, stating that "the statute provides that the twenty-four (24) hour time period applies 'when the person making the request is *physically present in the office of the agency* . . .'. The spirit, if not the express language of this provision contemplates a direct and contemporaneous communication between the requestor and the agency representative before the twenty-four hour rule is triggered. Delivering your request to a mail slot outside the agency's office does not satisfy this requirement, let alone guarantee that your request would even be received by a representative from that office within twenty-four (24) hours." *See* 03-FC-103.

Mr. Shoulders alleges that you were not physically present in the School's office when you submitted your request. However, he does not state where the School's office is located, but rather only states that you were in the School's board room, where the School Board meeting had just occurred and that the board room is not the School's office. Although there is some uncertainty with respect to where exactly the School's office is located, you were in the School building when you handed your August 30 request directly to Dr. McCandless. In fact, you were just outside the room where the School Board had just finished conducting its official business. Submitting your request directly to Dr. McCandless is the type of contemporaneous communication contemplated in 03-FC-103. Therefore, it is my opinion that the twenty-four (24) hour response time was triggered pursuant to I.C. 5-14-3-9(a).

Response

A public agency is required to make a response to an oral request or a written request made in person within twenty-four (24) hours after it is received. Failure to respond within these time periods constitutes a denial under the APRA. *Opinion of the Public Access Counselor 00-FC-30*. When a request is submitted in writing, the agency's response must also be in writing. I.C. §5-14-3-9(c). As previously stated, I.C. §5-14-3-9(a) governs your request; therefore, if the School failed to respond to your request within twenty-four (24) hours, a denial has occurred. According to your complaint, you submitted your August 30 request at 8:45 p.m. You received a response from Mr. Yeager on September 1, more than twenty-four hours after your request. Furthermore, the School's response was not made in writing, which is required pursuant to the APRA. Therefore, the School's failure to respond in writing to your request within the twenty-four hour time frame is a violation of the APRA.

I note that your oral request to come in and listen to the tape and make your own copy was made on September 2nd, and Mr. Yeager's oral response was forthcoming that same day. Therefore, his response to your September 2nd oral request was timely made.

Production Time

Mr. Shoulders states that the School produced the requested record in a timely manner. The APRA does not set forth a specific time frame for producing public records, only that production time must be reasonable. *Opinion of the Public Access Counselor 01-FC-56*. This office is frequently asked to make a determination as to the reasonableness of the time an agency takes to produce a public document. "What is a 'reasonable' time period under one circumstance may not be reasonable under other conditions. The determination of what is a reasonable time for production, therefore, depends upon the public records requested." *Opinion of the Public Access Counselor 01-FC-56*. In that opinion, the record requestor sought the draft of minutes from a meeting that had occurred two days before. This office stated that

"the Open Door Law, which governs meetings of the School Board, does not require that meeting minutes be prepared or a time period under which they must be made available for inspection and copying. If, however, meeting minutes had been prepared at the time of your request, it is my opinion that these draft minutes are public records that should have been and could have been disclosed upon request."

Numerous factors must be evaluated when determining reasonableness of the timeliness of production, such as "the number of documents in the request, whether the documents are stored offsite, and whether the documents contain partially disclosable and nondisclosable information." *Opinion of the Public Access Counselor* 04-FC-141. The public agency has the burden of showing that the time for production was reasonable. *Id.*

When you submitted your original written request on August 30, you asked that a copy of the tape of those minutes be prepared and provided to you, as is your right under the APRA. You received a copy of the tape on September 7th at 3:50 p.m. It is the burden of the School to prove that the time for production of the record was reasonable, and in support thereof, the School has stated that it was unable to provide a copy of the tape to you sooner because it had insufficient staff and materials to do so. Mr. Shoulders also points out that the office was closed for a legal holiday, leaving four business days in which to copy the tape. On September 2, you advised Mr. Yeager that you needed the tape as soon as possible, as the information contained therein was needed to complete a petition due on September 7th.

On September 2, when you were made aware that the School had insufficient staff and materials to copy the tape, you immediately requested to come into the office, listen to the tape at a minimum, or, supplying your own audiotape, copy the tape yourself either on the School's equipment or on your own equipment. The School refused to allow you to do so, stating that it was afraid that something would happen to the original.

The School correctly stated that pursuant to I.C. §5-14-3-7, it is responsible for protecting the original record from loss, alteration, mutilation, or destruction. However, there is nothing inherently dangerous about allowing you as a member of the public to listen to or copy the tape on either the School's equipment, or your own equipment, to justify denying you the right to inspect the tape and copy it yourself, as is specifically set out pursuant to I.C. §5-14-3-3(a). Indeed, neither Mr. Shoulders nor Mr. Yeager have stated why they believe allowing you to listen to the tape on the School's equipment poses a hazard to that original record. The School has the burden of proving that the production time was reasonable, and neither Mr. Yeager nor Mr. Shoulders have elaborated on the lack of staff or materials and how those factors impacted the School's ability to protect the original record from loss. *See Opinion of the Public Access Counselor* 04-FC-10 (where agency's conclusory statement that copying an original audio recording may compromise the integrity of that original record was not adequate to deny the right to copy). Without further evidence supporting the School's assertion that the time taken to produce the record under the circumstances was reasonable, I find that the failure to allow inspection of the audiotape, at a minimum, prior to September 7 was unreasonable under these particular circumstances.

Therefore, it is my opinion that the School violated the Access to Public Records Act by prohibiting you from coming to its office to listen to and make copies of the August 30 meeting audiotape.

CONCLUSION

For the foregoing reasons, I find that Evansville-Vanderburgh School Corporation violated the Access to Public Records Act by failing to timely respond in writing to your written

request for the audiotape, and by failing to allow you to listen to or copy the audiotape until September 7.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. Patrick Shoulders