

June 30, 2005

*Via Facsimile*

Eric M. Cox  
The Banner  
24 N. Washington Street  
Knightstown, IN 46148

*Re: Formal Complaint 05-FC-109; Alleged Violation of the Access to Public Records Act by the Charles A. Beard Memorial School Corporation*

Dear Mr. Cox:

This is in response to your formal complaint alleging that the Charles A. Beard Memorial School Corporation (the "CAB") violated the Access to Public Records Act ("APRA") by failing to produce copies of two applicant files.

#### BACKGROUND

On May 19, 2005, *The Banner* delivered a record request to the CAB that asked for, among other items, "a copy of all information that is a matter of public record under IC 5-14-3-4(b)(8) with respect to all applicants for the varsity volleyball coaching position." This was item 9 of the request. The CAB sent a letter dated May 23, 2004 (sic) responding to your request. The letter was signed by Dr. Hal J. Jester on CAB letterhead listing Dr. Hal J. Jester as the Superintendent. With respect to item 9, the CAB stated: "There were two applicants for the position, one individual required that a teaching position be included with the coaching position."

You filed a formal complaint on May 31, 2005. In your complaint, you allege that the CAB violated the APRA when it failed to disclose the designated information in Ind Code 5-14-3-4(b)(8)(A)-(C) regarding the two applicants for the varsity volleyball coaching position. You also allege that the CAB failed to 1) separate any nondisclosable information from the records and disclose the remainder; 2) failed to cite to specific statutes that authorize nondisclosure; and

3) failed to provide the name and title of the person responsible for the denial of the request provided.

I sent a copy of your complaint to the CAB. The CAB argued that the case of *South Bend Tribune v. South Bend Community School Corp.* controls. That case held that a public agency is not *required* to disclose applicant information. The CAB forwarded to you the information regarding the successful candidate for the position, without explaining why the information had not been provided initially. The response of the CAB has been forwarded to you.

You sent a reply to the CAB's argument. In your reply, you argue that I am not bound by the Court of Appeals' interpretation of the Access to Public Records Act, and I should decline to follow it.

## ANALYSIS

It is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. IC 5-14-3-1. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information. IC 5-14-3-1.

Accordingly, any person may inspect and copy the public records of any public agency except as provided in section 4 of the APRA. IC 5-14-3-3(a). An agency may deny a written request for a record if the denial is in writing and includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

Under IC 5-14-3-4(b), a public agency may in its discretion except from disclosure certain records. Personnel files of public employees and files of applicants for public employment may be excepted, except for:

(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.

IC 5-14-3-4(b)(8).

It is the information designated above that you sought for the applicants for the coaching position at the CAB. Your request was for "all information that is a matter of public record under IC 5-14-3-4(b)(8)..." Your request implies that you believed you were entitled, under the law, to the designated information in section 4(b)(8) with respect to the applicants, but this entitlement is at issue in this complaint.

No one disputes that the CAB is a public agency under the APRA. Rather, the issue is whether the CAB violated the APRA when it denied you any applicant information. You have invited me to not follow the holding in *The South Bend Tribune v. South Bend Community School Corporation*, 740 N.E.2d 937 (Ind. Ct. App. 2000), because you believe that the legislation prescribing the duties of the public access counselor allow me to interpret only the APRA itself, and “any other statute or rule governing access to public meetings or public records.” IC 5-14-4-3. By these words of limitation, you argue that the legislature gave me authority to disregard court interpretations of the public access laws.

I do not wade into waters of constitutional separation of powers readily, and I do not do so now, because I disagree that the legislature wrote out court interpretations of the public access laws when it gave the counselor the power to “issue advisory opinions to interpret the public access laws upon the request of a person...” IC 5-14-4-10(6). In fact, the *Tribune* court observed that questions of statutory interpretation are questions of law reserved for the courts. 740 N.E.2d 937, 938.

Further, the court of appeals held that the plain meaning of the statute (IC 5-14-3-4(b)(8)) requires a public agency to disclose designated information only with regard to present or former officers or employees of the agency. *Id.* Applicants for public employment are specifically excepted from the disclosure requirements. *Id.* Although you argue forcefully that public policy supports the disclosure of applicant information so that the public may evaluate the wisdom of government hiring decisions, this argument is more appropriately made to the legislature.

The CAB did not violate the APRA when it declined to disclose the identity and any other information about the unsuccessful candidate for the coaching position. It did not specifically state the exemption for applicant information, and it should have done so under IC 5-14-3-9(c). It also should have disclosed the designated information for the successful applicant, who at the time of your request was an employee of the CAB. The CAB has now forwarded that information to you in a memo dated June 6, 2005.

In my opinion, the CAB violated the Access to Public Records Act when it failed to cite to IC 5-14-3-4(b)(8) as authorizing it to withhold information about the unsuccessful applicant. Its failure to send the employee information or refer to it in its response letter was at worst a denial under the APRA; at best, it was a tardy production of the record.

However, the CAB did not violate the Access to Public Records Act in failing to disclose the applicant information.<sup>1</sup> It also did not violate the Access to Public Records Act when it issued the May 23 letter in the name of the Superintendent Hal J. Jester. The name and title or position of the person responsible for the denial was provided as required. In my opinion, the requester should infer that the person signing a denial letter is responsible for the denial without the public agency having to specifically so state, in the absence of an express designation of someone other than the signer of the letter by the public agency.

---

<sup>1</sup> The CAB in its response argued that the court of appeals held that IC 5-14-3-4(b)(8) made applicant information *confidential*. I do not read the court of appeal’s opinion to hold that applicant information is confidential, only that applicant information is nondisclosable at the discretion of the public agency.

Sincerely,

Karen Davis  
Public Access Counselor

cc: E. Edward Dunsmore