



STATE OF INDIANA

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October 5, 2009

Mr. Michael D. Harmeyer
200 East Main St., Suite 630
Fort Wayne, IN 46064

Re: Formal Complaint 09-FC-201; Alleged Violation of the Access to Public Records Act by Northwest Allen County Schools

Dear Mr. Harmeyer:

This advisory opinion is in response to your formal complaint alleging Northwest Allen County Schools ("Northwest") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to a videotape depicting students riding one of Northwest's buses. For the following reasons, my opinion is that Northwest did not violate the APRA by denying you access to the videotape because doing so would have violated federal law.

BACKGROUND

According to your complaint, on August 24, 2009, you filed a written request for access to videotape recordings of students riding on one of Northwest's school buses. You allege that the request was received by Northwest on August 25, 2009, but you had not received a response as of September 3, 2009.

My office forwarded a copy of your complaint to Northwest. Attorney Linda A. Polley responded on behalf of Northwest by saying that the video recording depicts students and, therefore, cannot be released without violating the Family Education Rights and Privacy Act, 20 U.S.C. §1232(g) *et seq.* ("FERPA").

ANALYSIS

The public policy of the APRA states, "[p]roviding persons with 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." I.C. § 5-14-3-1. Northwest does not dispute that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy Northwest's public records during regular business hours unless the public records are

exempt from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

One of the exceptions to the right to inspect and copy a public record applies when federal law requires a record to be kept confidential. I.C. §5-14-3-4(a)(3). Northwest cited this section of the APRA with respect to the videotape, which Northwest argues is nondisclosable under FERPA. In a previous opinion from this office, Counselor Davis opined that FERPA precluded a school from releasing a videotape depicting students. *See Opinion of the Public Access Counselor 06-FC-191*, <http://www.in.gov/pac/advisory/files/06-FC-191.pdf>. Because the facts are analogous and I concur with Counselor Davis' reasoning, I have incorporated relevant portions of her opinion here.

FERPA operates to classify all "education record[s]" as confidential: "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records or personally identifiable information contained therein..." 20 U.S.C. §1232g(b)(1). "Education record" is defined as those records that are directly related to a student; and maintained by an educational agency or institution or by a person acting for such agency or institution. 34 C.F.R. §99.3. "Record" means any information recorded in any way, including but not limited to video tape. *Id.* "Personally identifiable information" includes, but is not limited to, a list of personal characteristics that would make the student's identity easily traceable, or other information that would make the student's identity easily traceable. *Id.* "[A] videotape, to the extent that it contains depictions showing students, is an 'education record.'" *PAC Opinion 06-FC-191* at 3. Consequently, Northwest's videotape depicting students is a confidential "education record" under FERPA and nondisclosable pursuant to section 4(a)(3) of the APRA.

Northwest also acted properly by not releasing a redacted version of the videotape. Generally, the APRA requires public agencies to separate and/or redact the nondisclosable information in public records in order to make the disclosable information available for inspection and copying. I.C. §5-14-3-6(a). The videotape contains the images of several students. According to Northwest, it lacks the technological means to remove the confidential information from the videotape. In *Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003), the Indiana Court of Appeals held that I.C. §5-14-3-6(a) required the agency to separate disclosable information from the nondisclosable information where the two were not "inextricably linked." *Id.* At 914. Northwest's inability to redact the videotape means that the disclosable and nondisclosable information are inextricably linked. Thus, it is my opinion that Northwest did not violate the APRA by failing to produce a redacted version of the videotape.

CONCLUSION

For the foregoing reasons, my opinion is that Northwest did not violate the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping "A" and a long, horizontal stroke at the end.

Andrew J. Kossack
Public Access Counselor

Cc: Linda A. Polley, Hunt Suedhoff Kalamaros LLP