



STATE OF INDIANA

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February 1, 2012

Jill C. Vaughan
3344 Breckenridge Drive
Indianapolis, Indiana 46228

Re: Formal Complaint 12-FC-29; Alleged Violations of the Access to Public Records Act and the Open Door Law by the Paramount School of Excellence

Dear Ms. Vaughan:

This advisory opinion is in response to your formal complaint alleging the South Paramount School of Excellent ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, and the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.* Cathleen Nevin, Chairperson, responded on behalf of the School. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request to the School on January 23, 2012 for draft minutes of the December 2011 and January 11, 2012 School Board meetings. On January 24, 2012, Ms. Nevin denied your request in writing as the minutes had yet to be reviewed and approved by the School Board.

As to the ODL, you provide that the School Board recently adopted a new policy ("Policy") on public participation at Board meetings. Section 2 of the Policy provides that "Audio or video recordings are not permitted in the absence of a special exception approved by the Board seven (7) days prior to the meeting." On January 23, 2012, you requested to video the upcoming School Board meeting. On January 24, 2012, Ms. Nevin denied your request to record the meeting for absence of a good cause.

In response to your formal complaint, Ms. Nevin provided copies of the unedited and unapproved draft minutes from the School's Board of Directors meetings that you requested. Copies of the draft minutes are enclosed for your reference. As to the alleged ODL violation, Ms. Nevin provided that the Policy approved by the Board on January 11, 2012 needs to be amended. It currently states that no video or audio recording will be allowed absent a special exception approved by the Board seven days prior to the meeting. The language of the Policy was a misunderstanding, as the School Board failed

to distinguish between public meetings that are subject to the ODL and those which are not subject to the ODL (i.e. school clubs, organizations, presentations, special speakers, etc...). Thus, Section H of the Policy will be amended at the next opportunity and will not be enforced prior to the completion of the amendment process. As such, you may video tape public future School Board meetings if you so choose.

ANALYSIS

The public policy of the APRA states that “(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.” *See* I.C. § 5-14-3-1. Under Indiana law, a charter school is a public school. *See* I.C. § 20-24-4-1(4). Among other requirements, a charter school’s charter must specify that records of the charter school are subject to inspection and copying to the same extent that records of a public school are subject to inspection and copying under the APRA and that meetings of the school’s governing body are subject to the requirements of the ODL. *See* I.C. § 20-24-4-1(13), (15). Consequently, the School constitutes a public agency for the purposes of the APRA and ODL. I.C. § 5-14-3-2.1; I.C. § 5-14-1.5-2(a). Accordingly, any person has the right to inspect and copy the Schools’ public records during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the School responded to your written request within the timelines provided by Section 9 of the APRA.

Regarding minutes and memoranda, the Open Door Law provides the following:

- (b) As the meeting progresses, the following memoranda shall be kept:
 - (1) The date, time, and place of the meeting.
 - (2) The members of the governing body recorded as either present or absent.
 - (3) The general substance of all matters proposed, discussed, or decided.
 - (4) A record of all votes taken, by individual members if there is a roll call.
 - (5) Any additional information required under IC 5-1.5-2-2.5.



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(c) The memoranda are to be available within a reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings. The minutes, if any, are to be open for public inspection and copying.

I.C. § 5-14-1.5-4. Memoranda are to be made available within a "reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings." *See* I.C. § 5-14-1.5-4(c). Meeting minutes are not required under the ODL, but if created, must be available for public inspection and copying. *Id.*

Previous public access counselors have opined that minutes in draft or unapproved form should be made available for inspection and copying upon request. *See Opinion of the Public Access Counselor 98-FC-8* at 1 ("Once created, draft or proposed minutes are public records and nondisclosure must be based upon one of the exceptions outlined in the APRA."); *See also Opinions of the Public Access Counselor 01-FC-65; 05-FC-23; 10-FC-264*. If the minutes are not even recorded yet, the public agency does not violate the APRA by failing to produce the minutes until they are actually created. *Opinion of the Public Access Counselor 10-FC-56* ("Draft minutes that have not yet been approved are different than records that have not yet been created. Where records are not yet created, a public agency does not violate the APRA by refusing to produce them."). If the School is concerned about releasing the minutes in draft form, the School could include a disclaimer on any copies noting that the minutes are not yet approved and subject to revision. *See Opinions of the Public Access Counselor 01-FC-65 and 10-FC-264*. Accordingly, the School violated the APRA when it denied your request for draft minutes for the reason that the minutes had not been reviewed and approved by the School Board. As the School has now provided copies of the draft minutes, I trust that this is in satisfaction of your complaint.

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a).

It is well-settled that a governing body of a public agency may not ban the use of recording devices, including cameras, during a public meeting. *Berry v. Peoples Broadcasting Corp.*, 547 N.E.2d 231 (Ind. 1989). In *Berry*, the Indiana Supreme Court found the trial court's interpretation of the verb "record" was sound: "the reasonable use

of recorders, cameras, and any other recognized means of recording.” *Id.* at 234. Significantly, the trial court had found that the use by the media of one stationary camera and a splitter box were a standard method of pooling video and audio equipment. The Public Access Counselor’s Office has consistently provided that agency may apply reasonable restrictions as to the use of audio and video equipment. *See Opinion of the Public Access Counselor 01-FC-48.* An example of a reasonable restriction would be a request that the cameras remain stationary so as to not distract the governing body from its activity. *See Opinion of the Public Access Counselor 06-FC-176.* Here, the Policy adopted by the School provides that “Audio or video recordings are not permitted in the absence of special exceptions approved by the Board seven (7) days prior to the meeting. The School has provided that the Policy will be amended and will not be enforced prior to the completion of the amendment process. Based on the Indiana Supreme Court’s ruling in *Berry*, I.C. § 5-14-1.5-3(a), and prior opinions of the Public Access Counselor, it is my opinion that the School violated the ODL by denying your request to record the meetings of the Board. Again, the School had provided that you may record the upcoming Board meetings that you previously requested and that it will be amending the current policy, which I trust is in satisfaction of your complaint.

CONCLUSION

For the foregoing reasons, it is my opinion that the School violated the APRA by denying your request for draft minutes. In addition, the School violated the ODL by denying your request to record the School Board meeting.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and "H".

Joseph B. Hoage
Public Access Counselor

cc: Cathleen Nevin