



STATE OF INDIANA

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January 23, 2013

Brian Vukadinovich
1129 E. 1300 N.
Wheatfield, Indiana 46392

Re: Formal Complaint 12-FC-369; Alleged Violation of the Access to Public Records Act by the Hanover Community School Corporation

Dear Mr. Vukadinovich:

This advisory opinion is in response to your formal complaint alleging the Hanover Community School Corporation ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Joanne Rogers, Attorney, responded on behalf of the School to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on December 13, 2012, you submitted a written request for records to the School pursuant to the APRA. On December 20, 2012, the School disclosed records that were responsive to your request, provided that it did not maintain certain records that you had requested, and denied the remaining portion of your request. Specific to your formal complaint, you requested the following:

“3. Records as to the status of any formal charges, the factual basis for any disciplinary action in which final action has been taken and that has resulted in Carol A. Kaiser being disciplined in any way, including being placed on administrative leave to include all letter, notes, writings, memorandums, emails, facsimiles, information on hard drives and other electronic devices and accessories such as flash drive, discs, etc. that in any way pertain to Carol A. Kaiser being disciplined and placed on administrative leave.

5. Records pertaining to the recent 2012 audit conducted by the State Board of Accounts to include but not limited to all correspondence in any form to include letters, notes, writings, memos, emails, facsimiles, etc. to include records of all findings, determinations, conclusions, and records of

exit interview(s) to include all information stored on hard drives and any other electronic devices and accessories such as flash drives, disks, etc.

6. Records as to the status of any formal charges, the factual basis for any disciplinary action in which final action has been taken and that has resulted in Jennifer Grcich being disciplined in any way which led to the termination of Jennifer Grcich as bookkeeper to include all letters, notes, writings, memorandums, emails, facsimiles, information on hard drives, and any other electronic devices and accessories such as flash drives, disks, etc., that in any way pertain to the termination of employment by Jennifer Grcich.

11. Any and all complaints submitted against Carol Kaiser during the course of her employment with the School.

13. Copies of advertisements that were authorized by Justin Biggs for Jason Yurenchko to publish within the Hanover Middle/High School during the 2011-2012 school year to recruit students to sign up for Jason Yurenchko's classes to include all information stored on hard drives and any other electronic devices and accessories such as flash drives, disks, etc., involving the advertisements approved by Justin Biggs for Jason Yurenchko to produce advertisements for his classes for the purposes of student enrollment for Jason Yurenchko's classes."

The School responded in the following manner on December 20, 2012 to your requests:

"3. There are no "formal charges" concerning Ms. Kaiser contained in her personnel file. Moreover, no "final action" has been taken with regard to Ms. Kaiser's employment.

5. The audit being conducted by the State Board of Accounts remains ongoing. There is currently an audit exit date of January 9, 2013, at which time the State Board of Accounts will take its findings to the Attorney General for certification. The official findings should be available approximately six (6) weeks thereafter. The official findings and references to supporting documentation will be posted online along with any rebuttal. All records related to the audit are currently in possession of the auditors.

6. There are no "formal charges" concerning Jennifer Grcich contained in her personnel file. It is anticipated that any "factual basis", including supporting documentation, will be made part of the report/findings of the State Board of Accounts. Those findings will be posted online as indicated in response to request #5 above. The only marginally responsive documents from Ms. Grcich's personnel file are produced herewith.

11. None

13. The flyers/advertisements were not retained. After the Master Schedule was developed, the flyers were no longer relevant and discarded.”

In response to the denials issued by the School, you challenge the School’s statement in response to Request 3 that no formal charges are contained in Ms. Kaiser’s personnel file and no final action has yet to be taken. Local newspapers have reported that Ms. Kaiser has been placed on administrative leave pending further School Board action and a special meeting has been set for December 28, 2012. You believe it is clear that action has been taken in light of the investigation by the State Board of Accounts (“SBOA”). You further note you requested all records, regardless of whether they were maintained in Ms. Kaiser’s personnel file. You provide the School’s response is without merit.

As to Request 5, you find it inconceivable that the School does not maintain any records responsive to your request and all have been provided to the SBOA. You insist that there must be records of communication between the School and SBOA and if the records are still maintained electronically by the School, the records should be provided under the APRA. The School is obligated to timely produce the information that is requested, regardless of its later posting of said information online. You provide that the School should issue a certification to verify that “All records related to the audit are currently in possession of the auditors.” Regarding Request 6, you provide that the School Board’s Agenda for December 11, 2012 noted that the bookkeeper at Hanover Central High School was terminated for cause, effective December 11, 2012. You allege that at a minimum, the School would have issued a letter of termination to the employee in question.

As to Request 11, you dispute that the School does not maintain any records of complaints filed against Ms. Kaiser, especially in light of a lawsuit filed by Julie Mueller against the School in 2009. You provide that a lawsuit filed against the School, specifically naming Ms. Kaiser as a party, would be responsive to your request. As to Request 13, you note that although the records may have been physically discarded, if they are still maintained electronically by the School, they would be required to be disclosed under the APRA.

In response to your formal complaint, Ms. Rogers advised that as to Request 3, the only marginally responsive documents to your request did not exist at the time of your request. In response to a separate request that you have since filed, a copy of Ms. Kaiser’s Notice of Resignation and Employment Resignation and Severance Pay Agreement has been provided to you.

As to Request 5, the records that were sought were exempt from disclosure pursuant to I.C. § 5-14-3-4(a)(1). Specifically, I.C. § 5-11-5-1 provides that the SBOA’s report is not open to public inspection until the report is filed. Further, the School would

be statutorily provided with an opportunity to file a written response to the SBOA's report. Lastly, the exit documents were stamped by the SBOA as being "Not for Public Record" and "Not for Public Release." As such, none of the information requested concerning findings, determinations, conclusions are able to be disclosed until such a time as the report has been certified. As to your request for communications, such records are privileged pursuant to accountant-client privilege found under I.C. 25-2.1-14-2.

As to Request 6, there are no records responsive to your request outside of what was previously produced. A police report was made, however the School was never provided with a copy. For Request 11, the request sought complaints that had been submitted against Ms. Kaiser was interpreted to mean informal complaints, not a pleading which was filed in a court of law. Regardless, a copy of the Complaint for Preliminary and Permanent Injunction filed on July 1, 2009 have been provided in response to your December 23, 2012 records request. As to Request 13, Mr. Rogers advised that Mr. Yurechko is no longer employed with the School. In light of the scarcity of school resources, the computer used by Mr. Yurechko was wiped, reimaged, and assigned to another employee prior to your request. Mr. Biggs had approved a hard copy of the advertisement; an electronic image was not available.

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. The School is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the School's public records during regular business hours unless the 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 twenty-four 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 days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). 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. 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).

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, 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. I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees' personnel file at their discretion. Subsection (b)(8)(C) specifically requires for a disciplinary action to have occurred. If a suspension, demotion, or discharge did not occur, again the requirements of the subsection would not apply. Lastly, an agency would not be required to create a factual basis under (b)(8)(C) if no such record was maintained by the agency upon receipt of the request. *See Opinion of the Public Access Counselor 08-FC-184 and 12-FC-110.*

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* As to Request 3, the School has provided that the only records that were responsive to your request were produced in response to a separate records request that you submitted after the filing of your formal complaint (e.g. Ms. Kaiser's Notice of Resignation and Employment and Severance Pay Agreement). The School provided in response to your original request that there were no "formal charges" concerning Ms. Kaiser contained in her personnel file and that "final action" had not been taken with regard to Ms. Kaiser's employment. As provided *supra*, if no formal charges were filed against Ms. Kaiser and the School Board did not take final action that resulted in Ms. Kaiser's suspension, demotion, or discharge, the requirements of I.C. § 5-14-3-4(b)(8)(A)-(C) would not apply. The requirements of I.C. § 5-14-3-4(b)(A)-(C) would not apply if the employee resigned from their position. You allege that the School's response lacks merit in light of the investigation by the SBOA. I would note that the School has not denied your request in any fashion; it has provided all records that it believes are responsive to your request. Accordingly, *if* the School provided all records that it maintained that were responsive to your request, it complied with the requirements of the APRA (emphasis added).

As to Request 5, as to a copy of the final report issued by the SBOA under I.C. § 5-11-5-1(a) is open for inspection after it is filed. *See* I.C. § 5-11-5-1(a). At the time of your request, the SBOA had yet to issue its final report in connection with the School. As provided in the School's response, referencing I.C. § 5-11-5-1(b), before the final examination report is filed, the examined must have an opportunity to review the report

and to file with the state examiner a written response. *See* I.C. § 5-11-5-1(b). If a written response is filed, it becomes a part of the examination report that is signed, verified, and filed as required by subsection (a). *Id.* Thus, the School’s anticipated response to the final report would be open for public inspection after the report is filed by the SBOA. As to any preliminary report as referenced in subsection (d), if during the examination the examiner determines that a substantial amount of public funds have been misappropriated or diverted and has a reasonable belief that the malfeasance or misfeasance that resulted in the misappropriation or diversion of the public funds was committed by the officer or employee of the office, the examiner shall report that determination to the state examiner. *See* I.C. § 5-11-5-1(d). The statute provides that a preliminary report is confidential under subsection (d), *until* the final report under subsection (a) is issued, unless the attorney general institutes an action under subsection (e) on the basis of the preliminary report (emphasis added). *See* I.C. § 5-11-5-1(g). The School had indicated that the SBOA’s official findings, references to supporting documentation, and any rebuttal issued by the School be posted online at the time the final report is filed by the SBOA.

The accountant-client privilege provides, “A certified public accountant, a public accountant, an accounting practitioner, or any employee is not required to divulge information relative to and in connection with any professional service as a certified public accountant, a public accountant, or an accounting practitioner.” *See* I.C. § 25-2.1-14-1. Further, I.C. 25-2.1-14-2 provides that the “information derived from or as the result of professional services is confidential and privileged.” “Professional service” is not defined, but the statute defines “professional” as: “For a certified public accountant, arising out of or related to the specialized knowledge or skills associated with certified public accountants.” *See* I.C. § 25-2.1-1-10.3. As the Indiana Court of Appeals has held:

Indiana Code section 25-2.1-14-2 unambiguously states “the information derived from or as the result of professional services *is confidential* and privileged.” Ind. Code section 25-2.1-14-2 (emphasis added). Because [the accountant in this case] clearly obtained the information . . . as a result of his professional accounting services, the information “is confidential.” *Orban v. Krull*, 805 N.E.2d 450, 453-54 (Ind. Ct. App. 2004).

To the extent that you sought records consisting of the communications that fall within the accountant-client privilege (i.e. between the School and its accountant, or between the School’s accountant and the SBOA), the School could properly deny your request for such records pursuant to I.C. § 5-14-3-4(a)(1) and I.C. § 25-2.1-14-2.

As to Request 6, if a public agency has no records responsive to a public records request, the agency generally does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly

the [agency] could not be required to produce a copy....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. The School provided in response to your request that all records responsive to your request were provided. A police report was made; however Ms. Rogers advised that a copy has never been provided to the School. As such, *if* the School provided all records that it maintained that were responsive to your request, it complied with the requirements of the APRA (emphasis added).

As to request 11, the School interpreted your request to mean any informal complaint filed with the School against involving Ms. Kaiser; not for any pleading filed in court that instituted a lawsuit. Ms. Kaiser was named as a party defendant in a legal action filed in 2009, to which a copy of said complaint was provided to you in response to a separate request for records that you have since filed with the School. As such, *if* the School provided all records that it maintained that were responsive to your request, it complied with the requirements of the APRA (emphasis added).

As to request 13, The APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(e). A public agency shall protect public records from loss, alteration, mutilation, or destruction. *See* I.C. § 5-14-3-7(a). A public agency shall further take precautions that protect the contents of public records from unauthorized access, unauthorized access by electronic device, or alteration. *See* I.C. § 5-14-3-7(b). If the flyers/advertisements, either in electronic or print format, were not kept pursuant to the applicable retention schedule for such records, it is my opinion that the School violated section 7(a) of the APRA.

CONCLUSION

For the foregoing reasons, *if* the School provided all records that it maintained that were responsive to your request, it complied with the requirements of the APRA (emphasis added). Further, if the flyers/advertisements were not kept pursuant to the applicable retention schedule for such records, it is my opinion that the School violated section 7(a) of the APRA. As to all other issues, it is my opinion that the School complied with the requirements of the APRA.

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: Joanne Rogers