STATE OF INDIANA

ERIC J. HOLCOMB, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
Toll Free:1-800-228-6013
Email: pac@in.gov/opac
Website: www.IN.gov/pac

OPINION OF THE PUBLIC ACCESS COUNSELOR

GAELEN A. SCHUMANN	)	
	)	
Complainant	)	
	)	
v.	)	**17-FC-49**
	)	
NEW ALBANY – FLOYD COUNTY SCHOOL CORPORATION	)	
	)	
	)	
Respondent	)	

ADVISORY OPINION
April 13, 2017

This advisory opinion is in response to the formal complaint alleging the New Albany-Floyd County School Corporation ("School") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-1.5-1 et. seq. The School responded on March 17, 2017 via Mr. John W. Woodard, Esq. His response is enclosed for review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on February 28, 2017.

BACKGROUND

The formal complaint filed on February 28, 2017 alleges the New Albany-Floyd County School Corporation violated the APRA for denial of access to requested information.

On January 25, 2017, the Complainant submitted a public records request to the School for a copy of any incident report related to an allegation against an assistant principal at the School. The School responded by denying the documentation based upon four (4) exemptions to disclosure: work product of an attorney; deliberative materials; diaries, journals and notes; and the personnel file exception. The Complainant takes exception to the invocation of these exemptions for various reasons and deems the statutory justifications for non-disclosure asserted by the School as inapplicable. The School responded by arguing the statutory justification for withholding the documents are valid.

STATE OF INDIANA

ERIC J. HOLCOMB, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
Toll Free:1-800-228-6013
Email: pac@in.gov/opac
Website: www.IN.gov/pac

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 Indiana Code § 5-14-3-1*. The New Albany-Floyd County School Corporation is a public agency for the purposes of the APRA. *See Indiana Code § 5-14-3-2(n).* Accordingly, any person has the right to inspect and copy the School's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14-3-3(a).*

Both parties reference the "liberally construed" language of Indiana Code § 5-14-3-1. To be clear, the statute itself is to be "liberally construed", as opposed to technocratically applied, and not the request. The School appears to "liberally construe" the request itself and strictly construe the statute. That is not the intent of the APRA or the General Assembly who wrote it. An agency should not have to stretch the law to fit a disclosure exemption or strenuously define a document. Frankly, I am suspicious of any public agency who attempts to throw several statutes against the wall to see what sticks. A document either is or it is not exempt from disclosure based upon an applicable section of the APRA. I caution against these 'kitchen sink' defenses.

Turning to the facts at hand, the request was submitted by the Complainant, an attorney, on behalf of a student presumably as a result of an allegation of inappropriate conduct. It can be reasonably inferred some kind of investigation by the School into an incident took place. It is unclear whether that investigation was conducted by the School's attorney – which would be unusual – or by School administration officials who typically perform that task. By whatever name, it is likely some kind of documentation akin to an 'incident report' would have been generated and considered by the decision-makers.

Indiana Code § 5-14-3-4(b)(2) exempts from disclosure the work product of an attorney representing a public agency. The investigation into a personnel matter is not a traditional function of legal representation. A public agency cannot filter a public record through the attorney-client relationship or in order to hide a document from disclosure. See Knightstown *Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005). Therefore, the School cannot use this exception to disclosure.

Likewise, an investigation report is not deliberative material as defined by Indiana Code § 5-14-3-4(b)(6) as it is inherently a fact-finding mission. Only speculative material would qualify. Even if factual material is used for the purpose of decision-making, it must also be opinion-based in order for the deliberative definition to apply.

STATE OF INDIANA

ERIC J. HOLCOMB, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
Toll Free:1-800-228-6013
Email: pac@in.gov/opac
Website: www.IN.gov/pac

Finally, consider this 2010 opinion from prior Public Access Counselor Andrew Kossack as to why investigative reports are not diaries or journals:

> "the exception for "[d]iaries, journals, or other ***personal notes*** serving as the functional equivalent of a diary or journal" does not apply to investigation records. I.C. § 5-14-3-4(b)(7) (emphasis added). Investigation records, by their nature, are not "personal" within the meaning of subsection 4(b)(7). Rather, investigation records are typically communicated to investigators and other interested parties as part of the investigation process. It is unlikely that the General Assembly intended to except investigation records from disclosure via subsection 4(b)(7).

Opinion of the Public Access Counselor 10-FC-52.

That leaves Indiana Code § 5-14-3-4(b)(8) as the only meritorious exemption to disclosure. Public employees enjoy an expectation of privacy up until the point they are subject to discipline and discharged, demoted or suspended pursuant to subsection (c) of that statute. This ensures unsubstantiated allegations do not subject a public employee to unwarranted scrutiny. If discipline is issued, the public agency must produce a factual basis for the suspension, demotion or termination.

Based on the information provided, it does not appears as if the assistant principal in question received discipline rising to that level. Even if he did, the investigative reports would not necessarily be disclosable as they are germane to a personnel file. The factual basis is often a subsequent document created once a decision to discipline has been made:

> [Investigative] materials are not information concerning the final disciplinary action; they are instead the underlying investigatory documents which led to the final disciplinary action. Indeed, the final disciplinary decision was yet to be made when the [investigative] materials were created. Information concerning the final disciplinary action might encompass the nature, extent, and general reason behind the decision to discipline or discharge a public employee, but not the intimate details of the factual investigation which forms the basis of the action.

Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ., 787 N.E.2d 893 (Ind. Ct. App. 2003)

A fine line to be sure, however, factual basis is often much less detailed than the underlying investigative documents. This is often to protect victims or witness from retaliation or embarrassment, especially in a

STATE OF INDIANA

ERIC J. HOLCOMB, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
Toll Free:1-800-228-6013
Email: pac@in.gov/opac
Website: www.IN.gov/pac

School setting. Therefore, the School may withhold any incident or investigative report as being part of a personnel file but not for the other listed reasons.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the New Albany-Floyd County School Corporation did not violate the Access to Public Records Act.

Luke H. Britt

Public Access Counselor

Cc: Mr. John W. Woodard, Jr.