



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

July 22, 2008

Sandra Lewis
Greater Clark County Schools
slewis@gcs.k12.in.us

Via electronic mail transmission

Re: Informal Inquiry 08-INF-26 regarding Greater Clark County Schools

Dear Ms. Lewis:

This is in response to your informal inquiry dated July 14, 2008. You write on behalf of Greater Clark County Schools ("School") to inquire about a request for access to public records the School received pursuant to the Access to Public Records Act ("APRA")(Ind. Code 5-14-3). Pursuant to I.C. § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

BACKGROUND

The School has adopted a policy that requires verification of criminal history background checks performed on all employees hired by contractors. Further, contractors must comply with random drug testing and must ensure all employees have submitted I-9 forms. The School does not receive the related records. Instead, the general contractor provides the information to the project manager (also a contractor to the School). The project manager certifies to the School that all employees are in compliance with the policy.

The School has received a request for the following:

1. Copies of all security badges issued to workers
2. Copies of all criminal background checks done for workers
3. Copies of all certified payroll records for all contractors
4. Copies of all drug tests performed for workers onsite
5. Copies of all I-9 forms for workers onsite

You inquire whether the School is required to provide access to the requested records.

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. The School is clearly 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 the public records of the School during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. § 5-14-3-2. The Indiana Court of Appeals has added to that definition records created for or on behalf of a public agency. *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005). Noting that the legislature crafted a broad definition of "public record," the court held that a settlement agreement drafted by the Town attorney on behalf of the Town was a public record, even though the settlement agreement was not in the Town's possession, but was retained by the Town's attorney. *Id.* Following this decision, a public agency cannot deny access to a record simply on the basis that it is retained by an outside contractor or other entity.

This matter can be distinguished from the *Knightstown Banner* case, though, in that it is my opinion the records at issue here were not created for or on behalf of the School. In the *Knightstown Banner* case, the record at issue was created by an attorney working on behalf of the Town, and the record at issue ended a controversy involving the Town. Here, while the School has set contractual conditions for the contractor as it relates to employees, the School has not required the creation of the records and the records created by the contractor may not be related directly to the contractor's work for the school. Certainly records related to drug testing as well as tax forms are records the contractor would create and maintain regardless of the client.

In my opinion the records requested in items 1, 2, 4, and 5 are records created and maintained by the contractor in the course of employing workers, as many records created by the contractor could be categorized. Similarly, for example, it would be my opinion staff memos or training materials which address the current project with the School but were developed and maintained by the contractor for the purpose of educating its employees are not public records. The records are not related to the workers' employment by the School or through School's public funding. While it may be likely the workers' wages are paid by the contractor utilizing the funds the contractor is receiving from the School pursuant to the contract, the workers are not paid directly by public funds, nor are they managed by the School.

With respect to request number 3, certified payroll records, I have previously issued an opinion on this matter. I am attaching a copy of the opinion for your reference. To the extent the certified payroll records contain information excepted from disclosure

under the APRA, the School may be allowed to withhold from disclosure part or all of those records. See the enclosed opinion for a more detailed analysis. Ultimately, the School will bear the burden of proof to sustain the denial if the School chooses to deny access. See I.C. § 5-14-3-1 and I.C. § 5-14-3-9.

CONCLUSION

For the foregoing reasons, it is my opinion the records at issue in items 1, 2, 4 and 5 are not public records and therefore not subject to disclosure. Further, it is my opinion the records in item 3 are public records but may be excepted from disclosure under one of the exceptions listed in the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor