STATE OF INDIANA

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November 7, 2011

The Banner
c/o Jeff Eakins
24 N. Washington St.
P.O. Box 116
Knightstown, Indiana 46148

Re: Informal Inquiry 11-INF-63

Dear Mr. Eakins:

This is in response to your informal inquiry regarding the Charles A. Beard Memorial School Corporation ("School") and Formal Opinion 11-FC-257. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.*

BACKGROUND

On September 30, 2011, *The Banner* filed a formal complaint with the Public Access Counselor's Office against the School regarding alleged violations of the APRA. On October 24, 2011, the School provided a response to the formal complaint, which I provided to *The Banner* on the same day. On October 26, 2011, Formal Opinion 11-FC-257 was issued, of which a copy was emailed to *The Banner* and the School on October 27, 2011. On October 27, 2011, Eric Cox, Owner and Publisher of *The Banner,* submitted a reply to the School's response of Formal Complaint 11-FC-257. On October 27, 2011, you submitted your informal inquiry. Copies of all documents are enclosed and I will summarize the reply submitted by Mr. Cox and your informal inquiry.

Mr. Cox advised that the School relied heavily in its response to the formal complaint on Formal Opinions 09-FC-124 and 10-FC-57, which addressed public record requests for e-mail correspondence and the requirements of I.C. § 5-14-3-3(a). Unlike 09-FC-124 where the general request for e-mail correspondence was found not to be reasonably particular, Mr. Cox maintained that the request made of the School is more specific and reasonably particular under the APRA. The request here was not universal, as it did not apply to all employees. Mr. Cox disagreed with the Counselor Neal's holding in 09-FC-124 to the extent that e-mails are "a method of communication and not

a type of record. E-mails are a public record and contain distinct electronic characteristics that differentiate them from other correspondence.

Mr. Cox further advised that in Formal Opinion 10-FC-57, Counselor Kossack misread Counselor Neal's opinion in 09-FC-24 and was in error. Specifically, Counselor Kossack stated in 10-FC-57 that "In an opinion last year, Counselor Neal also noted that e-mail 'is a method of communication and *not a record*.'" Counselor Kossack omitted the term "type of" from Counselor Neal's opinion which provided an entirely different meaning to the holding. As such, Mr. Cox urged that 10-FC-57 not be taken into consideration in determining the issues at hand.

Further, Mr. Cox has interpreted the School's position to be that since the records are e-mails, the request inherently lacks reasonable particularity. The School simply cannot maintain that they are not aware of what records are being sought as the APRA provides that all persons are entitled to full and complete information regarding the affairs of government. Mr. Cox further provided that the ability to narrow the records request is not always possible, especially in situations whether both the sender and requestor are unknown.

As to the issue whether the screen shots that were requested would be considered public records, Mr. Cox stated that the School maintains an e-mail archiving system that allows it to enter dates into a search query, that would allow it to pull up all e-mails that have been sent or received. In addition, the APRA already requires in certain situations that information, and not just records be provided in response to a records request.

In your informal inquiry, you raised the issue regarding Formal Opinion 10-FC-57 and whether the alleged misstatement by Counselor Kossack substantively changed the law that had been addressed prior by Counselor Neal in Formal Opinion 09-FC-24. In addition, you asked for clarification whether a request for e-mail correspondence that does not at a minimum included the parties, dates, and possibly other subject matter lack reasonable particularity under the APRA.

ANALYSIS

The first issue to be addressed will be Formal Opinion 10-FC-57, opined by Counselor Kossack, and whether it substantively changed the law that had previously been addressed by Counselor Neal in 09-FC-124. As an initial matter, I would note that I did not cite Formal Opinion 10-FC-57 in the analysis provided in Formal Opinion 11-FC-257, although the School did refer to it in its response.

Counselor Neal provided in 09-FC-124 the following, quoting 08-INF-23:

> In my opinion, your request is universal rather than particular. You have requested not just an entire category of records, but all records sent or received using a certain form of communication. It is important to remember that

> electronic mail is a method of communication and not a type of record.

Counselor Kossack, in Formal Opinion 10-FC-57, provided the following:

> In an opinion last year, Counselor Neal also noted that email "is a method of communication and not a record," and that requests for records that identify the records by method of communication only are not reasonably particular. *Opinion of the Public Access Counselor 09-FC-124*.

It should be noted that Counselor Kossack also did not include the phrase "type of" in 10-FC-311 and 11-FC-80. The inquiry is whether Counselor Kossack elimination of the words "type of" substantively changed the law as provided by Counselor Neal in her 2009 Formal Opinion. If Counselor Kossack intentionally eliminated the phrase "type of" from the holding, then in my opinion it would have substantively changed the interpretation of the APRA in regards to e-mail correspondence. Essentially, Counselor Kossack's holding would stand for the notion that e-mail correspondence is not a public record pursuant to the APRA. However, upon reading the analysis provided by Mr. Kossack in 10-FC-57 and all other opinions issued by him regarding e-mail correspondence, it is my opinion that the elimination of "type of" was a scrivener's error.

Mr. Kossack issued a number of opinions dealing with public records requests for e-mail correspondence, wherein he provided analysis on how agencies are required to respond to such requests pursuant to the APRA. *See Opinion of the Public Access Counselor 11-FC-132, 10-FC-272, 10-FC-71, and 10-FC-319.* Mr. Kossack also issued an informal opinion in response to *The Banner's* records request in 10-INF-5, which specifically dealt with e-mail records that had been disclosed in response to a public records request.[1] If Counselor Kossack believed that e-mail correspondence was not a public record, then it does not logically follow why he simply did not state as such in the formal and informal opinions referenced above, and instead dealt with various issues that were addressed in the opinion as to e-mail correspondence.

In a search of all opinions issued by Counselor Kossack that addressed e-mail correspondence, I have found no support for the holding that e-mail correspondence is not a public record. The only reference I can find where the "type of" language was deleted arose was in 10-FC-57, 10-FC-311, and 11-FC-80. I would note that in 11-FC-12, Counselor Kossack included the phrase "type of" in quoting Counselor Neal's 2009 opinion. In addition, I am not aware of any formal or informal opinion issued by a public access counselor which held that e-mail correspondence is not a public record.

As such, it is my opinion that Mr. Kossack removal of the phrase "type of" in quoting Counselor Neal's 2009 Opinion would have substantively changed the interpretation and guidance provided by this office. However, since I can find no support

[1] 10-INF-5 was issued six (6) days prior to 10-FC-57.

for the holding, aside of three opinions where he quoted Counselor Neal, it is my opinion that the elimination of the phrase "type of" was a scrivener's error.

The second issue raised by Mr. Cox was his belief that the request at issue in 11-FC-257 was clearly reasonably particular, unlike the request in 09-FC-124, and as such the School should have been required to produce all records responsive to the request. As I have addressed many of the issues in 11-FC-257, I will quote directly from that formal opinion as a starting point:

> "As to your request in Item 2 for all e-mails sent or received by five (5) School employees from May 1, 2011 through August 5, 2011, prior public access counselors had opined on this issue. APRA requires that a request for inspection or copying identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). Counselor Neal provided the following under in a 2009 opinion:
>
> > With your request, you seek "all emails sent and received by you in the last 100 days." The County argues this request does not identify with reasonable particularity the record(s) being requested. The APRA requires that a request for access to records identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). "Reasonable particularity" is not defined in the APRA. "When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself." *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998). Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part. *Deaton v. City of Greenwood*, 582 N.E.2d 882 (Ind. Ct. App. 1991). "Particularity" as used in the APRA is defined as "the quality or state of being particular as distinguished from universal." *Merriam-Webster Online, www.m-w.com*, accessed July 18, 2007.
> >
> > In my opinion, your request is universal rather than particular. You have requested not just an entire category of records, but all records sent or received using a certain form of communication. It is important to remember that electronic mail is a method of communication and not a type of record. Electronic mail is one way an agency might receive correspondence. As Mr. Murrell indicates, and as I often advise people, electronic mail messages are similar to snail mail or facsimile transmissions. And certainly few individuals would disagree that a request for any piece of

> mail sent or received by an agency or official within the last one hundred days would be considered an overly broad request which does not identify with reasonable particularity the record being requested. The same is true for electronic mail messages. That the correspondence is communicated using a different medium does not change the scenario; in my opinion a request which identifies the records only by the particular method of communication utilized is exactly the type of request that I.C. § 5-14-3-3(a) prohibits.
>
> I have previously issued an advisory opinion in a similar matter regarding a request for access to electronic mail messages. In *Informal Opinion 08-INF-23*, I wrote the following:
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> If, on the other hand, the request identified the records with particularity enough that the School could determine which records are sought (e.g. all emails from a person to another for a particular date or date range), the School would be obligated to retrieve those records and provide access to them, subject to any exceptions to disclosure. *Informal Opinion 08-INF-23*, available at www.in.gov/pac.
>
> Similarly, it is my opinion here that your request is overly broad. If your request identified particular records in such a way that the agency could identify which records you seek, the agency could better address your request. For instance, you might narrow your request to messages between a county official and certain other individual(s) for certain dates. In some cases, an agency may also be able to sort messages on the basis of the subject of the email. But this type of search is only as good as the information which appears in the "Subject" line of each electronic mail and is only feasible where an agency has the technology to conduct a search other than a manual search. *Opinions of the Public Access Counselor 09-FC-124 and 11-FC-12.*

I agree with Counselor Neal's and Kossack's analysis in regards to this issue. As such, it is my opinion that your request was not reasonably particular and did not meet the requirements of I.C. § 5-14-3-3(a). If you would narrow your request by providing the sender, recipient, and a particular range of dates, the School should comply with the request unless an exception to the APRA permits or requires withholding all or part of any records responsive to your request. Therefore, it is my opinion that

> the School did not violate the APRA in responding to Item 2 of your request."

In 09-FC-124, a request was made of the Howard County Legal Department for copies of all e-mail correspondence, sent and received, for the previous one hundred day period that involved up to nineteen (19) county officials. Counselor Neal held the request lacked reasonable particularity and provided the following analysis:

> In my opinion, your request is universal rather than particular. You have requested not just an entire category of records, but all records sent or received using a certain form of communication. It is important to remember that electronic mail is a method of communication and not a type of record. Electronic mail is one way an agency might receive correspondence. As Mr. Murrell indicates, and as I often advise people, electronic mail messages are similar to snail mail or facsimile transmissions. And certainly few individuals would disagree that a request for any piece of mail sent or received by an agency or official within the last one hundred days would be considered an overly broad request which does not identify with reasonable particularity the record being requested. The same is true for electronic mail messages. That the correspondence is communicated using a different medium does not change the scenario; in my opinion a request which identifies the records only by the particular method of communication utilized is exactly the type of request that I.C. § 5-14-3-3(a) prohibits.

In 11-FC-257, the request was for all e-mail correspondence, sent and received, for five School officials from May 1, 2011 through August 5, 2011. You assert that since the request here only requested complete e-mail correspondence from five (5) officials, as opposed to nineteen (19) officials in 09-FC-124, the request in 11-FC-257 was reasonably particular. This type of request does not become reasonably particular by simply limiting it to a certain number of employees or officials. Certainly a request cannot always be considered to be made without reasonable particularity solely because it covers a large number of records. *See Opinion of the Public Access Counselor 09-FC-24.* Accordingly, it is my opinion that the specific request made of the School in 11-FC-257 does not meet the requirements of I.C. § 5-14-3-3(a) by limiting the request to a certain number of employees of officials.

The guidance provided by the Public Access Counselor's on e-mail correspondence and APRA's requirement of reasonable particularity date back to 2008. The following informal and formal opinions have addressed this issue: 08-INF-23, 09-FC-24, 09-FC-104, 09-FC-124, 10-FC-57, 10-FC-71, 10-FC-272, 10-FC-311, 11-FC-12, and 11-FC-80. The formal and informal opinions provide that e-mail is a method of communication and not a type of record; requests for records that only identify the records by method of communication only are not reasonably particular. I am not aware of any case law provided by the Indiana Appellate or Supreme Court that has addressed this issue and/or held the guidance provided by the Public Access Counselor was contrary

to the APRA. Further, the Indiana General Assembly has not responded to the guidance provided the Public Access Counselor as to this issue by amending the APRA.

You inquire as to whether a request for e-mail correspondence that does not at a minimum included the parties, dates, and possibly other subject matter lack reasonable particularity under the APRA. I would note that a request for all e-mail correspondence to and from Jane Doe for a range of dates is not reasonably particular. *See Opinion of the Public Access Counselor 09-FC-124, 11-FC-12, and 11-FC-257.* However, a request of all e-mail correspondence from Jane Doe to Jim Smith for a range of dates would be reasonably particular. *See Opinion of the Public Access Counselor* 09-FC-24. In response to your inquiry, it is my opinion that generally a request for e-mail correspondence should include the sender, receiver, and a particular date or date range in order to be considered reasonably particular. I would consider this to be a general rule, as I cannot definitively apply such a holding to every conceivable scenario in which e-mail correspondence is the subject of a public records request. The more identifying information provided by the requestor, the more likely the request will be considered reasonably particular.

As to the issue whether the screen shots that were requested by *The Banner* would be considered public records, Mr. Cox stated that the School maintains an e-mail archiving system that allows it to enter dates into a search query, that would allow it to pull up all e-mails that have been sent or received. In addition, the APRA already requires in certain situations that information, and not just records, be provided in response to a records request. I provided in 11-FC-257 the following:

> As provided supra, the APRA requires that a request for inspection or copying must identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). "A request that identifies the records only by the particular method of communication utilized is exactly the type of request that I.C. § 5-14-3-3(a) prohibits." *See Opinion of the Public Access Counselor 09-FC-124.* While the term "reasonable particularity" is not defined in the APRA, it has been addressed a number of times by the public access counselor. *See Opinions of the Public Access Counselor 99-FC-21, 00-FC-15, 09-FC-24, 11-FC-12.* Counselor Hurst addressed this issue in *Opinion of the Public Access Counselor 04-FC-38*:
>
> > A request for public records must "identify with reasonable particularity the record being requested." IC 5-14-3-3(a)(1). While a request for information may in many circumstances meet this requirement, when the public agency does not organize or maintain its records in a manner that permits it to readily identify records that are responsive to the request, it is under no obligation to search all of its records for any reference to the information being requested. Moreover, unless otherwise required by law, a public agency is under no obligation to maintain its records

> in any particular manner, and it is under no obligation to *create* a record that complies with the requesting party's request. *Opinion of the Public Access Counselor 04-FC-38.*
>
> If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. *See Opinions of the Public Access Counselor 01-FC-61 and 08-FC-113.* A public agency is not required to conduct research on your behalf. *See Opinion of the Public Access Counselor 03-FC-146; see also Opinion of the Public Access Counselor 05-FC-25*. That said, your request under Item 3 seeks general information rather than records. Further, even if it was determined that you request sought a record, the request identifies the record only by the particular method of communication utilized. Under either scenario, it is my opinion that your request fails to comply with the reasonable particularity requirements of I.C. § 5-14-3-3(a).

The only thing I would add to this analysis would be that nothing in the APRA prevents the School from voluntarily choosing to conduct such a search, but it is not required to do so under the APRA. *See Opinions of the Public Access Counselor 10-FC-272 and 11-FC-55* (Examples of two agencies that voluntarily conducted a search beyond the requirements of the APRA). Previous public access counselors have opined and I agree that the APRA does not require public agencies to search through records -- electronically or manually -- to determine what records might contain information responsive to a request. *See Opinions of the Public Access Counselor 04-FC-38; 08-FC-124; 10-FC-57.*

Please let me know if I can be of any further assistance.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Eric Cox, Steve Key, David Day, and Alex Pinegar