

July 18, 2007

Kelly Soderlund  
The Journal Gazette  
600 West Main Street  
Fort Wayne, Indiana 46802

*Re: Formal Complaint 07-FC-170; Alleged Violation of the Access to Public Records Act by Fort Wayne Community Schools*

Dear Ms. Soderlund:

This is in response to your formal complaint alleging Fort Wayne Community Schools (“FWCS”) violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3) by denying your request for records. A copy of FWCS’s response to your complaint is enclosed for your reference. I find that your request was not made with reasonable particularity but that if you work with Fort Wayne Community Schools to narrow your request, the records you seek are required to be disclosed under the Access to Public Records Act.

#### BACKGROUND

In your complaint you allege you submitted a request to FWCS on April 9, 2007 for “a copy of discipline actions taken against all certified teachers for the last 10 years . . .” You offered in your original request to “work with FWCS to narrow this request to speed it along.” On May 16 you sent a letter to Mr. William Sweet, attorney for FWCS, requesting in writing a status report regarding your request.

On May 18 Mr. Sweet sent you a response in which he indicated FWCS did not have a list of discipline actions taken against certified teachers. Mr. Sweet acknowledged FWCS is required by the APRA “to release personnel file information concerning disciplinary action in which final action has been taken.” He then cited a definition of “final action” found in *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. App. 2001) (*finding that final action is a vote by the governing body*). Mr. Sweet further indicated the records responsive to your request would be minutes of the meetings of the School Board, specifically the personnel report. He indicated the records were not available electronically but would be available for inspection upon appointment with the acting public information officer.

On June 7, you sent another letter to Mr. Sweet. You indicated you spoke to the previous Public Access Counselor, Karen Davis, who told you the case cited by Mr. Sweet pertains to the Open Door Law (Ind. Code 5-14-1.5) and not the APRA. You indicated that in your conversation with Ms. Davis she said she believed FWCS was required to provide information on demotions, suspensions and firings regardless of whether the board voted on them. You say then “So, if there are any disciplinary actions in which an employee was suspended, demoted or discharged, regardless of whether the FWCS board voted on them, I ask that the factual basis of those disciplinary actions be released.” You further indicated Ms. Davis instructed you to supply FWCS with a list of employees for whom you were requesting information. You attached a list of all FWCS teachers from the past nine years.

On June 8, Mr. Sweet responded to your letter indicating the list you provided contained approximately 5,200 names for which you requested discipline records. Mr. Sweet further indicated FWCS was not obligated to provide personnel file information except what is required under IC 5-14-3-4(b)(8)(C). He again indicated FWCS does not maintain a list or summary which contains the information you request but does indicate it would be contained in the School Board minutes as part of the personnel report. He further indicates no employee in the district is suspended, demoted or discharged without Board action and such action is reflected in the minutes of the Board. He invited you again to inspect those minutes. Mr. Sweet again asserts that in FWCS final action is a vote by the Board and no other action.

You filed your complaint on June 18, 2007, alleging FWCS has denied you “access to disciplinary actions taken against all teachers in the past 10 years.” In your complaint you indicate you will view FWCS’s Board meeting minutes. You further claim Mr. Sweet has answered only your request for records under 5-14-3-4(b)(8)(C) and not your request under 5-14-3-4(b)(8)(A) and (B). You indicate you provided Mr. Sweet with the names of FWCS employees from the last nine years but that Mr. Sweet has declined to give you information for those employees. You further seek my opinion regarding the meaning of “final action” as used in IC 5-14-3-4(b)(8)(C).

In an addendum to your complaint submitted by you and Ron Shawgo of The Journal Gazette via email to this office on June 25, you provide further information. Relating to IC 5-14-3-4(b)(8)(C) excepted records, you refer to *Opinion of the Public Access Counselor 99-5*, finding “final action” is not solely action by the governing body. You again indicate FWCS has denied access to information under IC 5-14-3-4(b)(8)(A) and (B), the latter of which you explore further by addressing the definition of “formal charges.” I do not believe this addendum to your complaint was provided by this office to FWCS for response.

Mr. Sweet responded to your original complaint on June 25. Mr. Sweet affirms there is no list of disciplinary actions against teachers employed by the district but again asserts all discipline which has been completed is contained in the minutes of the School Board. He again offers those minutes are available for your inspection. He further indicates that in FWCS, no suspension, demotion or discharge is ever made without School Board action, and that action is reflected in the minutes. He further clarifies there were no pending discipline matters involving formal charges during the pendency of your request and any such matters had been finalized prior

to your request. Other than the Board minutes, there are no documents responsive to your request. Mr. Sweet further asserts FWCS is not required to review over 5,200 employee personnel files to create the list you seek.

## 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." Ind. Code 5-14-3-1. FWCS is clearly a public agency for the purposes of the APRA. IC 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of FWCS during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. IC 5-14-3-3(a).

Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of the public agency: . . .

(8) Personnel files of public employees and files of applicants for public employment, 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.

. . . This subdivision does not apply to the disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

IC 5-14-3-4(b).

A request for inspection and copying must:

(1) identify with reasonable particularity the record being requested; and

(2) be, at the discretion of the agency, in writing on or in a form provided by the agency.

No request may be denied because the person making the request refuses to state the purpose of the request, unless such condition is required by other applicable statute.

IC 5-14-3-3(a).

A request for records may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). If the request is delivered by mail or facsimile, the agency must respond to the request within seven days of receipt. IC 5-14-3-9(b).

In this case, you requested a copy of discipline actions taken against all certified teachers for the last ten years. You specifically cited the exceptions within the exception for personnel

records in IC 5-14-3-4(b)(8). And in your original request, you offer to “work with FWCS to narrow the request to speed it along.”

I believe the main issue here is whether this request is reasonably particular under the APRA. I find it is not. I will address that issue in detail at the end of this section after first addressing the issues related to the IC 5-14-3-4(b)(8) exception for personnel records.

Indiana Code 5-14-3-4(b)(8) creates an exception to disclosure, at the discretion of the public agency, for personnel files of public employees and files of applicants for public employment. Within that exception is a list of three groups of records excepted from the exception, or access to inspection and copying of which shall be granted by the public agency. The first of those, listed in subsection (A), is “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.” IC 5-14-3-4(b)(8)(A). I have reviewed the communications between you and FWCS, and it appears to me FWCS did not expressly deny access to records requested under this provision but instead focused on records requested under subsection (C). A written request for access to records is deemed denied when it is not answered within seven days. IC 5-14-3-9(b). Since FWCS did not specifically address your request under subsection (A), it is deemed denied. I agree with you the personnel records specified in subsection (A) are required to be disclosed as a rule, but I find the request must be made with reasonable particularity as described at the end of this section.

Under IC 5-14-3-4(b)(8)(B), FWCS must disclose “information relating to the status of any formal charges against the employee.” Again, after reviewing the communications between you and FWCS, it appears to me FWCS did not expressly deny access to records requested under this provision but instead focused on records requested under subsection (C). In its response to your complaint, FWCS says, “Although she apparently did not understand our response, there were no pending discipline matters involving formal charges during the pendency of her request, and any such matters had been finalized prior to her request. Therefore there are no documents responsive to that request, other than Board minutes, as well.” It is unclear to me whether this is FWCS’s response to your subsection (B) request. If it is in response to your subsection (B) request, I believe FWCS is indicating there are no responsive records regarding “the status of any formal charges” because there are no current pending formal charges. As I read FWCS’s response, any formal charges have been disposed of, and so those records would fall under your subsection (C) request. If this is the case, I believe FWCS appropriately responded to your request. If my assumption is not correct, I agree with you the personnel records specified in subsection (B) are required to be disclosed as a rule, but I find the request must be made with reasonable particularity as described at the end of this section.

You focus much of your June 25 addendum to your complaint addressing the language of subsection (B), specifically as it relates to the definition of “formal charges.” It is unclear to me whether you do so in response to a denial by FWCS based on the definition of “formal charges” or whether you do so as a way of asking me to provide an opinion as to the definition of “formal charges.” “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. App. 1998). Merriam-Webster Online defines this use of “formal” as “following or according with established form, custom, or rule” and “done in due or lawful form.” *Merriam-Webster Online*, [www.m-w.com](http://www.m-w.com), accessed July 18, 2007. Further, Merriam-Webster Online defines this use of “charges” as “a formal assertion of illegality” and “a statement of complaint or hostile criticism.” *Id.* Following these definitions, it is my opinion “formal charges” would include a statement or assertion of illegality or other complaint rising to the level of being made or asserted using established form, custom or rule. While this does not necessarily limit “formal charges” to solely assertions of illegality, it is my opinion “formal charges” implies records relating to misconduct rising to the level of being alleged through an established formal complaint process.

Finally, IC 5-14-3-4(b)(8)(C) requires disclosure of personnel file records containing “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.” At issue here is the term “final action.” Mr. Sweet has asserted the applicable definition of “final action” is that found in *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. App. 2001) (*finding that final action is a vote by the governing body*). You assert *Baker* pertained to the Open Door Law and not the APRA and “final action” is not limited to action by the governing body, as supported by *Opinion of the Public Access Counselor 99-5*. I subscribe to Counselor O’Connor’s definition expressed in 99-5, that “final action” is not limited to action by the governing body but includes the final action of discipline or discharge taken against an employee. *Id.*

In this case, though, Mr. Sweet has indicated on more than one occasion that in FWCS final action is not taken against an employee but by School Board action, which is reflected in the minutes of the Board. I agree with you the personnel records specified in subsection (C) are required to be disclosed as a rule, but I find the request must be made with reasonable particularity as described at the end of this section.

While I find the personnel records you request under IC 5-14-3-4(b)(8)(A-C) are generally required to be disclosed, the request for access to those records must be made with reasonable particularity. IC 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. 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. 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](http://www.m-w.com), accessed July 18, 2007.

Two pertinent provisions of the APRA must be considered in this instance. First, in IC 5-14-3-4(b)(8), “this subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.” Second, “A public agency shall protect public records from loss, alteration, mutilation, or destruction, and regulate any material interference with the regular discharge of

*the functions or duties of the public agency or public employees.” IC 5-14-3-7(a), emphasis added.*

Here you requested “access to disciplinary actions taken against all teachers in the past 10 years.” You later provided a list of over 5200 employees to FWCS, a list I understand to include all teachers employed by FWCS in the past nine years. The problem that arises in responding to this request is that there is not one file or one location for records related to disciplinary actions. As I understand it, those records would be contained in the personnel file of the respective employee. As I further understand it, personnel files of all the listed employees are not housed in one location. Furthermore, those personnel files may contain records to which FWCS has discretion in granting access and even information or records non-disclosable under the APRA. As such, granting a member of the public access to personally inspect all the personnel files is not an option.

It is my understanding you wish FWCS to instead review each personnel file and grant access for inspection or copying to you the disclosable information responsive to your request for disciplinary actions taken against all teachers in the past ten years. If we assume a minimum of ten minutes for an FWCS employee to review each file, and I believe ten minutes to be a low estimate, at 5,200 files, that equates to just over 866 man hours of just reviewing the records. Keeping in mind the admonition of the General Assembly in IC 5-14-3-7(a) for the public agency to regulate material interference with the regular duties of the agency, let us assume FWCS could dedicate ten man hours per week to this request. I do not intend here to indicate ten hours as a standard of reasonableness but merely a tool for demonstration. At ten man hours per week dedicated to just reviewing the files to respond to this one request, it would take 86 weeks to determine which documents are responsive. That does not account for the time for you to inspect the disclosable records or for copying of such records.

I use this demonstration to lead to my opinion that providing a list of 5,200 employees and requesting access to or copies of certain records related to each of them is not making a request with reasonable particularity under the APRA. It is my opinion the General Assembly included the prohibition on generalized requests in IC 5-143-4(b)(8) for this very reason. Keeping in mind the public policy of the APRA, 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. (IC 5-14-3-1), we must also consider the practical implications of such a request. If this dedication of time to answer this general a request were to become commonplace, the regular functions and duties of public agencies would come to grinding halt. While you do list the name of each of the 5,200 employees, it is my opinion this does not remove your request from the generalization prohibited by the statute, as your list includes every teacher employed by FWCS in the past nine years.

It is therefore my recommendation you do as you have offered and work with FWCS to narrow the request, whether by reviewing the minutes of the School Board or by some other mean. Once you have identified the records you request with reasonable particularity, it is my belief based on the communications I have reviewed between you and FWCS that FWCS will then work to provide access to the particular records related to disciplinary action and other information required to be disclosed under IC 5-14-3-4(b)(8).

## CONCLUSION

For the foregoing reasons, I find that your request was not made with reasonable particularity but that if you work with Fort Wayne Community Schools to narrow your request, the records you seek are required to be disclosed under the Access to Public Records Act.

Best regards,

Heather Willis Neal  
Public Access Counselor

cc: William Sweet, Jr., General Counsel, Fort Wayne Community Schools