



STATE OF INDIANA

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July 29, 2014

Kim Kilbride
C/o The South Bend Tribune
225 W. Colfax Ave.
South Bend, IN 46601

Re: Formal Complaint 14-FC-132; Alleged Violation of the Access to Public Records Act by the Joint Educational Services in Special Education

Dear Ms. Kilbride,

This advisory opinion is in response to your formal complaint alleging the Joint Educational Services in Special Education ("JESSE") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* JESSE has responded via Counsel Monica J. Conrad, Esq. Her response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on June 26, 2014.

BACKGROUND

Your complaint dated June 19, 2014, alleges the Joint Educational Services in Special Education (JESSE) violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On June 9, 2014, you requested copies of all tort claims or notices filed against the Joint Educational Services in Special Education (JESSE) between January 1, 2009 and June 9, 2014, as well as copies of all settlement agreements entered into by JESSE for the same period. JESSE denied your request on June 16, 2014 stating your request lacked reasonable particularity, was significantly cumbersome, and contained Family Education Rights and Privacy Act ("FERPA") or personnel records which would need to be redacted.

JESSE responded to your formal complaint on July 14, 2014. It reiterates its arguments that the request lacks reasonable particularity and the records would contain educational records.

DISCUSSION

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 Ind. Code § 5-14-3-1. The Joint Educational Services in Special Education (JESSE) is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1).

Accordingly, any person has the right to inspect and copy JESSE’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

Similar to your complaint in 14-FC-131, JESSE asserts your request is not reasonably particular; however, you are fairly specific in the records you seek. The request asks for requested copies of all tort claims or notices filed against JESSE between January 1, 2009 and June 9, 2014, as well as copies of all settlement agreements entered into by JESSE for the same period. Although a particular document is not identified, the kind of records you seek is obvious. A request does not have to identify with pinpoint accuracy the specific record in mind.

As noted in its response, the Public Access Counselor’s Office has interpreted this provision to mean that the public agency must be able to ascertain the records the requestor is seeking in order for the request to be made with reasonable particularity. See *Opinions of the Public Access Counselor 10-FC-57 and 08-FC-176*. If an agency needs clarification regarding a request, the agency should contact the requestor for more specific information. See *Opinion of the Public Access Counselor 02-FC-13*.

See also *Jent v. Fort Wayne Police Dep’t*, 973 N.E.2d 30 (2012). The Court in *Jent* wrote:

In response to a request under APRA, a public agency is required to search for, locate, and retrieve records. Depending upon the storage medium, the details provided by the person making the request may or may not enable the agency to locate the records sought.

While I acknowledge the element of practicality and have cited to *Smith v. State*, 873 N.E.2d 197 (Ind. Ct. App. 2007) in prior opinions, it stands to reason an organization would be able to identify documents related to its participation in litigation during a five year period with relative ease. Your request appears to be sufficiently narrow.

Finally, JESSE argues the records may contain educational records protected by FERPA. I do not have information which suggests JESSE is a FERPA covered entity. Assuming it is, under the APRA, JESSE does not have to disclose confidential documents which includes those “records declared confidential by state statute.” See Ind. Code § 5-14-3-4(a)(1). Specifically, the records could be declared confidential under the Family Educational Right to Privacy Act (“FERPA”) (20 U.S.C. § 1232g et seq.) and its state

law counterpart, Ind. Code § 20-33-7-1, et seq. Ind. Code § 20-33-7-1 defines “Education records” as follows: “As used in this chapter, ‘education records’ means information that: (1) is recorded by a nonpublic or public school; and (2) concerns a student who is or was enrolled in the school.” Under Ind. Code § 20-33-7-3, “[a] school corporation . . . may [not] disclose or report on the education records of a child, including personally identifiable information contained in the education records, without the consent of the child’s parent” except under very limited circumstances.

The same result occurs under FERPA. “The Act states that federal funds are to be withheld from covered entities which have ‘a policy or practice of permitting the release of education records (or personally identifiable information contained therein. . .) of students without the written consent of their parents.’” 20 U.S.C. § 1232g(b)(1); *Owasso Independent School District v. Falvo*, 534 U.S. 429, 429 (2002). “The phrase ‘education records’ is defined, under the Act, as ‘records, files, documents or other materials’ containing information directly related to a student, which are contained by an educational agency or institution or by a person acting for such agency or institution.’” 20 U.S.C. § 1232g(a)(4)(A); *Owasso*, 534 U.S. at 429.

In any case, a public agency must separate the disclosable materials from the non-disclosable information, whether it is FERPA or personnel records. See Ind. Code § 5-14-3-6 and *Opinion of the Public Access Counselor 14-FC-129*. JESSE must parse out the information which is deemed confidential or discretionary and release the remainder to you upon request. JESSE argues the small community would make it difficult to determine which records may personally identify a student. The burden is on the public agency to make this determination and act accordingly. A record request is not inherently unreasonable merely because release may involve heavy redaction.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access Counselor the Joint Educational Services in Special Education (JESSE) has violated the Access to Public Records Act.

Regards,



Luke H. Britt
Public Access Counselor