

February 13, 2008

Jeff Eakins
Knightstown Banner, LLC
24 North Washington Street
PO Box 116
Knightstown, Indiana 46148

Re: Formal Complaint 08-FC-38; Alleged Violation of the Access to Public Records Act by the Charles A. Beard Memorial School Corporation Board of Trustees

Dear Mr. Eakins:

This advisory opinion is in response to your formal complaint alleging the Charles A. Beard Memorial School Corporation (“School”) Board of Trustees (“Board”) violated the Access to Public Records Act (“APRA”)(Ind. Code 5-14-3) by improperly redacting records provided to you upon request. I have enclosed a copy of the Board’s response to your complaint for your reference. It is my opinion the School cannot sustain its denial of access to much of the information redacted from the records.

BACKGROUND

Your complaint follows *Opinion of the Public Access Counselor 07-FC-327*, issued November 26, 2007. In that opinion, I said the School must provide statutory authority for redacting information from records provided to you in response to your request. Subsequently, on November 30 you requested the School provide you with the statutory authority for the redactions. On December 12, the School provided statutory authority for the redactions. You then filed this complaint, alleging the records were improperly redacted. You mailed the complaint on January 11, 2008, and I received it on January 14. For the sake of efficiency, I will describe your complaint related to each set of records in the following section.

The School responded to your complaint by letter dated January 29 from Jena Schmidt, the School’s Public Access Officer. Ms. Schmidt indicates that the School’s attorney disagrees with my opinion that the School must set forth the statutory reason for each redaction (See *Opinion of the Public Access Counselor 07-FC-327*) but advised the School to comply nonetheless. Ms. Schmidt contends the School’s reasons for redaction are justified. I will address her arguments in the following section.

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." I.C. § 5-14-3-1. The School and the Board are clearly public agencies 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 or the Board 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).

When a record contains nondisclosable as well as disclosable information, the agency must separate the disclosable information and make it available for inspection and copying. I.C. § 5-14-3-6(a). An agency will often comply with this statute by redacting nondisclosable portions of a record. I have said that when an agency lists several statutory reasons for redaction, it must indicate which statutory exception applies to which redacted information. *Opinion of the Public Access Counselor 07-FC-327*.

Here, you allege the School has improperly redacted information, based on the statutory authority the School has cited for redaction. In a court action regarding denial of access, the burden of proof is on the agency to sustain its denial. The agency meets its burden by establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. I.C. § 5-14-3-9(f).

You have requested that I review each of the records in unredacted form to determine whether the redactions were appropriate. You further suggest that to avoid the School's fear of the records becoming public records if they are sent to me, the School's attorney should bring the records to my office for review and take the records when he leaves. Because the legislature has placed the burden to sustain denial on the agency and because it is clear the agency meets the burden only when it establishes the content of the record with adequate specificity, my review of the individual records is not necessary. Further, I do not believe it is within my authority to compel an agency to expend its public funds (in the form of attorney fees in this case) to provide me copies of records in question. As such, I now address the records at issue in the order they appear in your complaint.

School Board member email addresses

In 26 of the 49 email records the School provided you, the School redacted the email addresses of individual Board members. The School redacted the information based on the exception found in I.C. § 5-14-3-4(b)(8), which generally excepts from disclosure personnel files of public employees or applicants. Certain information, though, must be released from those files. I.C. § 5-14-3-4(b)(8). You contend that because the statute governing eligibility for Board members prohibits Board members from being employed by the school as a teacher or noncertificated employee (See I.C. § 20-26-4-11), this exception cannot apply to Board member email addresses.

The School in its response indicates that the personnel files exception (See I.C. § 5-14-3-4(b)(8)) requires the release of business telephone number and address but does not require the release of email address. The School does not dispute the claim that Board members are not employees. Even if the Board members were employees, I do not believe this exception applies to the Board member email addresses.

The personnel files exception applies to records contained in the personnel files of public employees or applicants for public employees. I.C. § 5-14-3-4(b)(8). It does not except from disclosure all records related to personnel matters. For instance, a staff memorandum indicating how an agency will be reorganized certainly addresses personnel matters but likely is not contained in the personnel files of employees. Absent any other applicable exceptions, such a memorandum would be a disclosable record. It is my opinion that even if the Board members were employees, which by definition they cannot be, the email address of each would not be personnel file information.

Email addresses of School employees and one non-employee

Similarly, you allege that the School redacted the email addresses of several School employees from copies of email messages it provided to you. For the reasons set forth in the preceding section, I do not believe this is a denial the School can sustain based on the reasons it has provided (namely, the personnel file exception found at I.C. § 5-14-3-4(b)(8)). Regarding the redaction of the email address of a non-School employee, the School has indicated the redaction was in error and has now corrected the issue. I would agree the redaction was inappropriate.

A note about email addresses: If your request had been for a list of the names and email addresses of the School's employees and you intended to use the list of names and email addresses for commercial purposes, the School would be precluded from disclosing that list to you, pursuant to I.C. § 5-14-3-3(f). I often find that public agencies confuse this provision with the release of email addresses generally. This provision does not prohibit an agency from disclosing public employee email addresses contained in records produced in response to a request.

Emails dealing with payments to coaches

Two emails in the records produced by the School contain emails regarding payments to coaches who are not otherwise employed by the School. Each of the records has substantive information redacted, and the school cites I.C. § 5-14-3-4(b)(8) as the authority for redaction. The emails are between employees in the administration of the School, and they concern paying the coaches for their services. You contend these records are not personnel file records and as such should not be redacted based on the personnel file exception.

The School indicates "the redaction for the content fell both within I.C. § 5-14-3-4(b)(8) and I.C. § 5-14-3-4(b)(6). Although both statutes were not cited, the material still falls within the scope of the statute listed on the email." The School provides no description of the content of

the emails and no justification for the use of the two exceptions. As such, it is my opinion the School has not met its burden under I.C. § 5-14-3-9(f).

Emails dealing with unemployment issues

Three emails the School provided to you related to an unemployment hearing for a former employee. The School has claimed the content related to the unemployment issue is excepted from disclosure pursuant to I.C. § 5-14-3-4(a)(8), which prohibits an agency from disclosing records declared confidential by or under rules of the Indiana Supreme Court. In response to your complaint, the School provided a copy of a letter from its attorney, Michael Wallman, providing the statutory authority excepting unemployment related records from disclosure. Mr. Wallman contends I.C. § 22-4-19-6 declares confidential records related to unemployment claims and prohibits disclosure in any manner revealing the individual's or agency's identity. I agree with Mr. Wallman that in addition to records prepared specifically for the unemployment proceeding, interagency records containing information about the proceeding may be required to be withheld as well.

It is my opinion the School has not sustained its denial of access based on the exception found in I.C. § 5-14-3-4(a)(8) since it cites no rule of the Indiana Supreme Court declaring the records confidential but may be able to sustain a denial based on I.C. § 5-14-3-4(a)(1), excepting from disclosure records declared confidential by state statute.

Attorney work product

The School provided you with an email from the School Superintendent to Board members and School employees regarding a hearing requested by a teacher at the School. The School redacted the portion of the email containing the Superintendent's recounting of Mr. Wallman's advice to the Superintendent regarding the hearing. The School cited I.C. § 5-14-3-4(b)(2) in redacting this information. I.C. § 5-14-3-4(b)(2) excepts from disclosure work product of an attorney, which is information compiled by an attorney in reasonable anticipation of litigation. I.C. § 5-14-3-2(p).

You argue that the email from the Superintendent to the Board members and School employees cannot be withheld pursuant to the work product exception because it was not compiled by the attorney. The School contends the email message is work product of an attorney because it falls within the scope of advising the administration regarding procedures. Ms. Schmidt further contends she spoke to me about this issue as well as about the attorney client privilege. While I do not recall the conversation, if I were asked the question about this issue, it would be my opinion this might fall within the privilege for attorney-client confidential communication found at I.C. § 34-46-3-1.

While I do believe the School could sustain its denial here based on I.C. § 5-14-3-4(a)(1) and the privilege found in I.C. § 34-46-3-1, I believe it is clear the record in question was not compiled by an attorney in reasonable anticipation of litigation, as it was an email from the Superintendent to Board members and School employees regarding advice provided by the

attorney. As such, it is my opinion the School cannot sustain its denial based on the exception it provided.

The \$57,000 email

The School provided you with an email from the Superintendent to Board members and the School business manager, indicating the School had “approximately \$57,000 more” than shown on the financial books. The Superintendent’s next sentence begins, “It looks like we need . . .” The School has redacted the remainder of the email, claiming the information is excepted from disclosure based on the personnel file exception found in I.C. § 5-14-3-4(b)(8). You contend that while the information contained in the email may be related to personnel matters, it is not a record contained in the personnel file of an individual employee.

In response to your complaint, the School indicates that “the redaction is appropriate as it deals with personnel issues and falls under the statute cited as well as I.C. § 5-14-3-4(b)(6). The redacted portion deals with a separate issue and is accurate in its citing of code and statute.” The School provides no further justification for the redaction or no further explanation of the content. For the reasons set forth in the first section (*School Board member email addresses*), it is my opinion the School has not shown this is a personnel file record. That the issues addressed are personnel matters does not automatically qualify a record for the personnel file exception.

The record may be appropriately redacted based on the deliberative materials exception found in I.C. § 5-14-3-4(b)(6). To sustain the denial based on that exception, the School would need to show the record was an expression of opinion or speculative in nature *and* was communicated for the purposes of decision making. I.C. § 5-14-3-4(b)(6).

CONCLUSION

For the foregoing reasons, it is my opinion the Charles A. Beard Memorial School Corporation violated the Access to Public Records Act. I caution the School to be mindful of its burden as it relates to sustaining denial of access and to remember that an agency meets its burden by establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. I.C. § 5-14-3-9(f).

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Jena Schmidt, Charles A. Beard Memorial School Corporation