STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

August 24, 2011

Ms. Idelle B. Kerzner
406 Hickory Lane
Munster, Indiana 46321

Re: Formal Complaint 11-FC-187; Alleged Violation of the Access to Public Records Act by the Hammond School Corporation

Dear Mr. Kerzner:

This advisory opinion is in response to your formal complaint alleging the Hammond School Corporation ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Eliza Gonzalez, Chief Administrator for Human Resources, responded on behalf of the School. Her response is enclosed for your review.

BACKGROUND

In your complaint, you allege that you submitted a written request to the School for an e-mail that was sent regarding an incident that occurred while you were employed by the School. You were able to identify for the School the sender and recipient of the e-mail. You provide that the School denied you access to the e-mail and since the email is a public record, you therefore believe you are entitled to inspect and/or have a copy of it made.

In response to your formal complaint, Mr. Gonzalez advised that the e-mail was part of an investigation conducted by the School's attorney and herself. The School maintains that the email is an intra-agency communication that was an expression of opinion or of a speculative nature that was communicated for the purpose of decision making. The e-mail was part of an investigative file of the School's labor relations attorney, as such it would constitute attorney-work product. Finally, the nature of the e-mail is required to be kept confidential pursuant to federal law.

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." *See* I.C. § 5-14-3-1. The School is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the School's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the School responded to your request within the seven-day time period required by the APRA.

The APRA excepts from disclosure, among others, the following:

> Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.
> I.C. § 5-14-3-4(b)(6).

When a record contains both disclosable and nondisclosable information and an agency receives a request for access to the record, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1.

The Indiana Court of Appeals addressed a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.,* 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate discloseable from non-discloseable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a

> public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-discloseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
>
> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id*. at 913-14.

To the extent that the email you requested contains information that is not an expression of opinion or speculative in nature, and is not inextricably linked to non-disclosable information, APRA provides that the information shall be disclosed.

The School also provides that the e-mail was part of an investigative file of the labor relations attorney and would constitute attorney-work product. One category of nondisclosable public records consists of records declared confidential by a state statute. *See* I.C. § 5-14-3-4(a)(1). I.C. § 34-46-3-1 provides a statutory privilege regarding attorney and client communications. Indiana courts have also recognized the confidentiality of such communications:

> The privilege provides that when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as confidential. The privilege applies to all communications to an attorney for the purpose of obtaining professional legal advice or aid regarding the client's rights and liabilities.

Hueck v. State, 590 N.E.2d 581, 584 (Ind. Ct. App. 1992) (citations omitted). "Information subject to the attorney client privilege retains its privileged character until the client has consented to its disclosure." *Mayberry v. State*, 670 N.E.2d 1262, 1267 (Ind. 1996), *citing Key v. State*, 132 N.E.2d 143, 145 (Ind. 1956). Moreover, the Indiana Court of Appeals has held that government agencies may rely on the attorney-client privilege when they communicate with their attorneys on business within the scope of the attorney's profession. *Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley*, 580 N.E.2d 371 (Ind. Ct. App. 1991).

Pursuant to I.C. §5-14-3-4(b)(2) a public agency has the discretion to withhold a record that is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

> "Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation and includes the attorney's:
> (1) notes and statements taken during interviews of prospective witnesses; and
> (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions.
> I.C. § 5-14-3-2(p).

If the records you sought constitute the work product of an attorney, the School acted within its discretion when it denied your request for access to them. However, as required with the deliberative materials exception, if a record contains disclosable and non-disclosable information, the APRA requires an agency to separate the material that may be disclosed and make it available. *See* I.C. §5-14-3-6. The School would not be required to disclose information that contains the attorney's opinions, theories, or conclusions or if the disclosable information is inextricably linked to the non-disclosable information. To the extent the email contains information beyond this scope; the School would be required to disclose it.

Lastly, the School provided that because of the nature of the e-mail, it is required to be kept confidential pursuant to federal law. When the request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Under the APRA, a public agency that withholds a public record bears the burden of showing that the record is exempt. *See* I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. *See* I.C. § 5-14-3-1. While the APRA does provide that a public agency may not disclose records declared confidential by federal law, the School does not meet the burden of showing that the record is exempt by providing that "the record is confidential pursuant to federal law." *See* I.C. § 5-14-3-4(a)(3). The School would be required to provide a specific citation to the federal statute that makes the e-mail confidential.

CONCLUSION

For the foregoing reasons, to the extent that the e-mail contains information that is not expression of opinion or speculative in nature pursuant to the deliberative materials exception and is not inextricably linked to non-disclosable information, that information is required by the APRA to be provided. The same would apply in regards to the attorney work product exception, in that information that is not the expression of an attorney's opinions, theories, or conclusions and is not inextricably linked to non-disclosable

information, that information would be required to be disclosed. Finally, the School did not meet its burden of showing that the record is exempt by simply providing that "the record is confidential pursuant to federal law."

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Eliza Gonzalez