



STATE OF INDIANA

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July 21, 2008

Sharon McKee
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One Logan Square, 27th Floor
Philadelphia, Pennsylvania 19103-6933

Re: Informal Inquiry 08-INF-20 regarding Wabash City Schools

Dear Ms. McKee:

This is in response to your informal inquiry dated May 30, 2008. You write to inquire about a request for access to records which you sent to Wabash City Schools ("School") dated April 24, 2008; you indicate that in the April 24 letter you requested access to a number of records pursuant to the Access to Public Records Act ("APRA")(Ind. Code 5-14-3). Pursuant to I.C. § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

BACKGROUND

Your inquiry addresses requests for access to records which you made or re-addressed in an April 24, 2008 letter to Thomas Wheeler, attorney for the School. You indicate your inquiry is limited only to certain requests made in the April 24 letter, but you provide further background regarding the issues related to the request. The records at issue are related to Heather Bauduin's tryouts for the School's varsity baseball team. You do not submit specific inquiries related to the records but instead indicate you appreciate any guidance and assistance I can provide. Since I do not know the nature of your inquiry, I will assume you inquire whether the School should disclose the identified records. You have identified the following as records you have requested and not received:

1. Videotape – you have requested a copy of a videotape of the tryout. The School has agreed to provide you access to the portion of the videotape including Miss Bauduin's tryout but not the tryouts of any others. The School cites the Family Educational Right to Privacy Act ("FERPA"), 20 U.S.C. § 1232g *et seq.*, as well as state law as the reason for nondisclosure of the remainder of the tape. You indicate that although the School has indicated you may have access to the tape, it has not yet provided access.

2. Publicly disclosed rosters – The School has provided copies of rosters for the varsity and junior varsity baseball teams for the years 2004/05 through 2006/07, but you indicate the School has not yet produced copies of rosters for the 2002/03 or 2003/04 seasons. Again, you do not submit a specific inquiry regarding these records.
3. Tryout records – You contend these records are not protected from disclosure by FERPA. Even if they are protected, you contend they could be redacted to remove information identifying students other than Miss Bauduin.
4. Policy on junior varsity participation – You allege you have requested a copy of the School’s policy related to junior varsity participation and have not received any copies.
5. Softball records – You requested copies of records upon which the School relied when making the assertion Miss Bauduin’s softball averages were poor. You allege you have received no copies.
6. Records of conversations with Miss Bauduin – You have requested and not received copies of any conversations between Miss Bauduin and any baseball coach. You do not indicate what the records might be (e.g. video or audio recordings; personal notes taken by coaches).

On behalf of the School, Mr. Wheeler responded to the informal inquiry in letters dated June 13 and July 7. In the June 13 letter, Mr. Wheeler addressed concerns regarding your practice of law in Indiana absent an Indiana license to practice law. I have addressed that issue in my July 2 letter, wherein I indicated the issue is outside the purview of this office. I have enclosed a copy of my July 2 letter to Mr. Wheeler for your reference.

Mr. Wheeler responded to the substance of the inquiry by letter dated July 7. Mr. Wheeler provides background regarding the matter, contending that Miss Bauduin is well below the standards for a varsity player at the School. Mr. Wheeler further contends the Access to Public Records Act is not a substitute for trial discovery. This opinion has been confirmed by the former public access counselor in *Opinion of the Public Access Counselor 07-FC-85*.

Mr. Wheeler indicates that when Miss Bauduin did not make the baseball team, the APRA requests began. Mr. Wheeler contends the School has provided the Bauduins with all documents relating to Miss Bauduin’s own personal tryout. In addition, the School provided redacted versions of the tryout sheets for all other individuals trying out for the team. Further, the School created and provided statistical abstracts of the first and second days of tryouts.

Mr. Wheeler provides a response regarding each of the six types of issues at issue in your informal inquiry:

1. Videotape – The School denied access to the videotape on the basis of I.C. § 5-14-3-4(a)(1) and (3) which prohibit disclosure of records declared confidential by state statute or required to be kept confidential by federal law. The School contends the videotape is an educational record required to be kept confidential by FERPA as well as by Indiana statute analogous to FERPA, found at I.C. § 20-33-7-1 *et seq.* The School cites an opinion from the public access counselor indicating a videotape from a school bus was an educational record under FERPA and therefore could not be disclosed absent the consent of each student. The School contends it is practically impossible to redact other student information from the videotape. The school has offered to allow Miss Bauduin to view the tape at the School's office, during which viewing the School would physically block viewing of other student information. The School contends Miss Bauduin has not contacted the School to accept that offer.
2. Publicly disclosed rosters – The School contends it did not maintain rosters for years prior to the 2004/05 school year.
3. Tryout records – The School contends that individual tryout records are educational records protected from disclosure under FERPA. The School further contends that any personal notes are excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(7); the School cites a 2007 opinion from the Public Access Counselor regarding this issue.
4. Policy on junior varsity participation – The School contends no such documents exist.
5. Softball records – The School contends this request is an improper discovery-type request. The School cites a 2007 opinion from the public access counselor, which said the access laws do not require an agency to answer questions or quantify the importance or relevance of various records.
6. Records of conversations with Miss Bauduin – The School contends that to the extent any individual coaches took and maintain personal notes related to conversations with Miss Bauduin, those notes are excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(7), as addressed in *Opinion of the Public Access Counselor 07-FC-317*. The School contends that aside from such coaches' notes, no further records exist responsive to this request.

ANALYSIS

The public policy of the APRA states, "(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 is clearly a public agency 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 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).

The records about which you write are related to Miss Bauduin's tryouts for the School's varsity baseball team. You do not submit specific inquiries related to the records but instead indicate you appreciate any guidance and assistance I can provide. Since I do not have any further information regarding the nature of your inquiry, I will assume you inquire whether the School should disclose the identified records and/or whether the School's denial of access is appropriate.

Tryout videotape

You have requested a copy of the videotape of the varsity baseball team tryouts. The School has agreed to provide you access to personally inspect the portion of the videotape including Miss Bauduin's tryout but not the tryouts of any others. The School cites FERPA as well as state law as the reason for nondisclosure of the remainder of the tape. You indicate that although the School has indicated you may have access to the tape, it has not yet provided access. You do not argue that the School's denial based on FERPA is inappropriate. On a similar issue, former public access counselor Karen Davis opined that a videotape of students on a school bus was an educational record under FERPA and as such could not be disclosed. See *Opinion of the Public Access Counselor 06-FC-191*, available at <http://www.in.gov/pac/advisory/files/06-FC-191.pdf>. Similarly, it is my opinion here that the tryout videotape is an educational record under FERPA.

The School contends it has offered to allow you and your clients to watch the portion of the videotape containing Miss Bauduin's tryout. The School contends it is practically impossible to redact the information related to other students in order to provide you a copy of the videotape. As such, the School has offered to allow you to inspect the disclosable portions of the videotape at the School offices. The School contends neither you nor your clients have contacted the School to make arrangements to do so.

The APRA provides that if a public record contains disclosable and nondisclosable information, the agency shall separate the material that is disclosable and make it available for inspection and copying. I.C. § 5-14-3-6(a). If a person is entitled to a copy of a public record and the public agency has reasonable access to a machine capable of reproducing the record, the agency must provide at least one copy of the record to that person. If the agency does not have reasonable access to a machine capable of reproducing the record, the person is only entitled to inspect and manually transcribe the record. I.C. § 5-14-3-8(e).

Here, the School cannot copy the entire tape for you because the School contends, and you do not argue, that portions of the tape are nondisclosable pursuant to FERPA and Indiana law. The School contends it does not have access to technology that would allow

it to redact the information regarding other students and make a copy of the videotape for you. The School's solution is to allow you to inspect the videotape while School personnel physically blocks access to information regarding other students. It is my opinion that since the School does not have access to technology which would allow it to redact nondisclosable portions of the videotape, the School is required to allow you to inspect and manually transcribe the disclosable portions of the videotape. See I.C. § 5-14-3-6 and I.C. § 5-14-3-8(e). It is my understanding the School has made this offer; it is my opinion it is now your duty to contact the School to establish a mutually convenient time for you to inspect the disclosable portions of the videotape.

Publicly disclosed rosters

The School has provided copies of rosters for the varsity and junior varsity baseball teams for the years 2004/05 through 2006/07, but you indicate the School has not yet produced copies of rosters for the 2002/03 or 2003/04 seasons. The School contends it maintains no such records for years prior to 2004/05 because of a change in coaching staff. The issue here is not whether the records are disclosable or whether the records should have been retained (the oversight of records retention is a duty of the Indiana Commission on Public Records). The issue is whether the School has violated the APRA by not providing you rosters you have requested for years prior to 2004/05.

Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. It is my opinion the School has not violated the APRA by not providing records which it does not maintain.

Tryout records

You contend you have requested and should be entitled to receive copies of tryout records maintained by the School. While you do not know with certainty what records exist, you believe the following documents exist: charts summarizing and averaging tryout results; player evaluation forms; actual tryout results; and one or more videotapes. I have addressed the issue of the tryout videotape earlier in this opinion. The School has provided you with all documents relating to Miss Bauduin's own personal tryout as well as redacted versions of the tryout sheets for all other individuals trying out for the team. The School also provided you with statistical abstracts from the first and second days of tryouts

You contend the tryout records are not excepted from disclosure by FERPA. Instead, you contend that the records are "directory information," which is defined as "information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed" and includes, but is not limited to, "the student's name, . . . grade level, . . . participation in officially recognized activities and sports, [and] weight and height of members of athletic teams." 34 C.F.R. § 99.3. You contend that an athlete's performance is the type of information that would not generally be considered harmful or an invasion of privacy if disclosed. You contend that

a key point of playing interscholastic sports is to play them before spectators. Further, you contend that games statistics are commonly published and coaches frequently comment on how players are performing in games and at practice.

Finally, you contend that if the records contain information made confidential by FERPA, the names of the students could be redacted. You contend the School should provide access to the remaining information.

The School contends that the records are confidential under Indiana's FERPA analog, found at I.C. § 20-33-7-1, *et seq.*, which defines "education record" as "information that (1) is recorded by a nonpublic or public school; and (2) concerns a student who is or was enrolled in the school."

I agree with the School that these tryout records are confidential under FERPA as well as Indiana's version of FERPA because they are records which concern a student enrolled at the school. While you contend that certain information related to athletic activity is disclosable under FERPA, I would note that the support you offer for the premise relates to activities that happen once a student has been selected for the team. You contend that a key point of playing interscholastic sports is to play them before spectators. Further, you contend that games statistics are commonly published and coaches frequently comment on how players are performing in games and at practice. While these may be compelling reasons to disclose certain records related to athletic activity, they are not persuasive on the issue of disclosing records related to a student trying to make a team. Certainly students who participate in interscholastic activities should reasonably expect those contests will draw spectators as well as media coverage. But it is my opinion the expectation is not the same for tryouts, which are often closed to spectators. It is my opinion your arguments may be valid as it relates to certain records associated with a student's participation in athletics, but I do not believe the argument is successful before a student has become a member of a team.

Further, the School contends that any records of coaches' personal notes made during the tryouts are excepted from disclosure at the discretion of the School pursuant to I.C. § 5-14-3-4(b)(7). I have addressed this exception to disclosure in *Opinion of the Public Access Counselor 07-FC-317*, wherein I said that personal notes taken by school staff members during hearings were excepted from disclosure. In part, the opinion provides the following:

Mere creation of handwritten notes during a public meeting by a public official, without more, does not demonstrate that a record is a "public record." Only "public records" are required to be available for inspection and copying. *Id.* If the handwritten notes created by Mr. White and Mr. Coutts were not filed with or are not maintained by the FWCS office, they are not public records. If the notes were filed with or are maintained by FWCS, the FWCS argues they constitute personal notes serving as the equivalent of a diary or journal, which are excepted from disclosure at the discretion of the public agency under I.C. §5-14-3-4(b)(7). If those handwritten notes were used as

reference by each individual for his own purposes, I would agree with that characterization.

Opinion of the Public Access Counselor 07-FC-317, available at <http://www.in.gov/pac/advisory/files/07-FC-317.pdf>.

In my opinion the excerpt provided above applies to the present issue. If the coaches' notes were not filed or maintained with the School, they are not public records. If they were filed with or maintained by the School and those notes were personal notes each coach took to assist him or her in making a determination, those personal notes likely constitute personal notes serving as the equivalent of a diary or journal and as such are excepted from disclosure at the discretion of the School, pursuant to I.C. § 5-14-3-4(b)(7).

Policy on junior varsity participation

You allege you have requested a copy of the School's policy related to junior varsity participation and have not received a copy of the policy. The School contends it does not maintain any record responsive to your request.

Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. It is my opinion the School has not violated the APRA by failing to provide records which it does not maintain.

Softball records

You requested copies of records upon which the School relied when making the assertion Miss Bauduin's softball averages were poor. You allege you have received no copies of such documents. The School contends your request seeks to force the School to make a determination as to what documents are supportive of the statement and which are important to the statement. The School contends this is an improper discovery type request.

A similar issue was addressed by previous public access counselor Karen Davis in *Opinion of the Public Access Counselor 07-FC-85*. In that opinion, Counselor Davis indicated the following:

The access laws do not contemplate nor authorize a citizen to require a government entity to answer questions or to quantify the importance or relevance of various records.

Id., available at <http://www.in.gov/pac/advisory/files/07-FC-85.pdf>.

I agree with this statement. While the APRA requires an agency to disclose public records when the request identifies with reasonable particularity the record being requested (*See* I.C. § 5-14-3-3(a)), it does not require an agency to determine which records were important in the decision making process for a certain decision or determination. Nor does it require an agency to provide what evidence supports a

specific determination or decision. The requester has the duty to identify with reasonable particularity the records being requested. It is my opinion the request here did not identify the records being requested and instead sought an analysis from the School as to which records were important and relevant to a particular determination.

Records of conversations with Miss Bauduin

You have requested and not received copies of any conversations between Miss Bauduin and any baseball coach. You do not indicate what the records might be (e.g. video or audio recordings; personal notes taken by coaches). The School contends no records exist responsive to this request except any coaches' notes, which are excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(7).

For the reasons outlined in a prior section of this opinion, it is my opinion the diary exception applies to the present issue. If the coaches' notes were not filed or maintained with the School, they are not public records. If they were filed with or maintained by the School, those personal notes likely constitute personal notes serving as the equivalent of a diary or journal and as such are excepted from disclosure at the discretion of the School, pursuant to I.C. § 5-14-3-4(b)(7).

CONCLUSION

For the foregoing reasons, it is my opinion the School has not violated the Access to Public Records Act.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Thomas Wheeler, Locke Reynolds LLP