

BUTZEL LONG

ATTORNEYS AND COUNSELORS

a professional corporation

Robin Luce Herrmann
248.593.3044
Luce-Herrmann@butzel.com

Stoneridge West
41000 Woodward Ave
Bloomfield Hills, Michigan 48304
T: (248) 258-1616 F: (248) 258-1439
www.butzel.com

December 3, 2019

VIA U.S. MAIL

Ms. Sue Kelly
Traverse City Area Public Schools
412 Webster Street
Traverse City, MI 49686

Re: FOIA Appeal Record Eagle No. 1 (Re FOIA Request No. 8)

This Firm represents the *Traverse City Record-Eagle*. The *Record-Eagle* submitted a FOIA request on October 10, 2019 seeking “A copy of the letter distributed to Traverse City Area Public Schools Board of Education members on Oct. 7, 2019, regarding a complaint against TCAPS Superintendent Ann Cardon.”

In its initial response on October 29, TCAPS refused to provide the requested letter stating that: “your request identifies documentation that was specifically and exclusively prepared for use in a closed session of the Board. Such notes/documentation are exempt from disclosure under Section 13(1)(d) of the FOIA and Section 7(2) of the Open Meetings Act. Accordingly, your request must be denied.” TCAPS’ response does not identify which closed session of the Board it is referring to. Below, I will refer to this as the “Documentation Refusal”.

The *Record-Eagle* appealed this decision on November 6, which you state was received on November 11 - the next TCAPS Board of Education Meeting. TCAPS responded on November 25. TCAPS again denied the request, but changed position and asserted that the requested letter “are part of the minutes of the closed session. *Titus v Shelby Carter Township*, 226 Mich App 611 (1997).” Here again, TCAPS’ response does not identify which closed session of the Board it is referring to. Below, I will refer to this as the “Closed Minutes Refusal”.

We respectfully disagree with TCAPS’ proffered exemptions from disclosure and ask that TCAPS reconsider its decision in an effort to avoid litigation. In this regard, and as a general proposition, we note that the vast majority of the exemptions under FOIA are discretionary – meaning that while a public body *may* exempt material, it is **not required** to do so. It is also impermissible for a public body to contract away its FOIA obligations; meaning that a public body cannot enter into an agreement that would prevent public records from being obtained under FOIA.

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The law is also clear that exemptions are narrowly construed. And the general rule for good public transparency is “when in doubt – provide the requested information”. It is certainly of benefit to TCAPS’ parents, students, and the public generally to be open and transparent about its workings, particularly with respect to the immensely important position of school Superintendent. In addition to this general framework, we have significant concerns about the particular exemptions invoked here.

First, as to TCAPS “Documentation Refusal”, there is no exemption in FOIA or OMA for documents prepared for a closed session. Indeed, such an idea is counter both to the frameworks of FOIA and OMA, as well as the law construing those statutes. As an example, we are sure that TCAPS on occasion receives FOIA requests for personnel records for its employees. We are also sure that TCAPS would provide such materials if requested (subject to any appropriate redactions) – this occurs all the time under FOIA. Let’s suppose that Employee Doe is scheduled to have her periodic personnel evaluation conducted by the TCAPS Board of Education during a closed session at Ms. Doe’s request; and the Board of Education asked that a copy of certain specified materials from the personnel file be provided in preparation for that evaluation. Surely, the TCAPS Board of Education would not take the position that the personnel file was thereafter exempt from disclosure under FOIA because some of those documents were specifically gathered for use at a closed session? We are confident that no court would countenance a public body shielding from public disclosure any and all public records simply because they were used in a closed session.

The same is true with respect to TCAPS’ “Closed Minutes Refusal”. The Court of Appeals in *Titus* concluded that the closed meeting minutes there included transcribed testimony of witnesses during a closed session of a public body as well as the dialogue between board members. *Titus v Shelby Charter Twp*, 226 Mich App 611 (1997). The document requested here is not a transcription of testimony or dialogue between board members like that in *Titus*. Here again, we are confident that no court would countenance a public body shielding from public disclosure any and all public records by claiming to make them part of the minutes of a closed session. Put another way, the idea that TCAPS’ Board of Education can simply designate anything it desires to be a part of closed meeting minutes and thus shield those documents from public access flies in the face of the relevant statutes and relevant case law.

For these reasons, we ask that TCAPS do the right thing, comply with FOIA and produce the requested letter immediately.

We are compelled to also point out that, in addition to the assertion of exemptions which we believe to be inapplicable, there has been a very troubling trend with respect to TCAPS’ actions with respect to the issues surrounding Superintendent Cardon.

For example, there have been inexplicable delays in responding to FOIA requests. The *Record-Eagle’s* initial request for the above letter was dated October 10, but TCAPS did not deem

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it “received” until October 22.¹ Then, TCAPS took another 7 days to deny the request in a very simple response, on October 29. Similarly, in response to The *Record-Eagle’s* appeal, TCAPS took a full 10 business days to respond to the appeal – until November 25. TCAPS admits that the appeal was received at its November 11 meeting – why was it not discussed at that meeting? And once again, the response was very simple in nature. There could be no delay need to search for, examine, redact and provide the requested information, because it was withheld. The pattern of delays is troubling.

As another example, TCAPS decided to omit interviews of candidates to fill a vacant trustee seat from the district’s live TV feed.

As another example, it appears that TCAPS asserted attorney client privilege to exempt communications between Ms. Kelly and Ms. Cardon, neither of whom are lawyers. The scope of the privilege is narrow. It attaches only to confidential communications between the client and the client’s attorney that are made for the purpose of obtaining or giving legal advice. *Estate of Nash v City of Grand Haven*, 321 Mich App 587, 593 (2017). It appears that this improper exemption was rectified at the Board’s November 25 meeting, but in the meantime, a substantial delay occurred.

FOIA prohibits a public body from delaying the disclosure of public records, as well as acting arbitrarily or capriciously. MCL 15.240(7). In addition, FOIA provides that if a public body “willfully and intentionally fail[s] to comply with this act or otherwise acted in bad faith, the court shall order the public body to pay, in addition to any other award or sanction, a civil fine of not less than \$2,500.00 or more than \$7,500.00 for each occurrence. MCL 15.240b. I especially want to emphasize this latter provision (MCL 15.240b), because it is not noted in your November 25, FOIA appeal response.

Again, we ask that TCAPS do the right thing, comply with FOIA and produce the requested letter immediately.

¹ It is my understanding that this FOIA request, which was emailed, was found in a spam file on October 21, and TCAPS deemed the request received the next day, Oct. 22. At minimum, it is surprising that TCAPS’ FOIA officer does not check spam files **daily** for FOIA requests and that here it took 7 *business days* to be discovered.

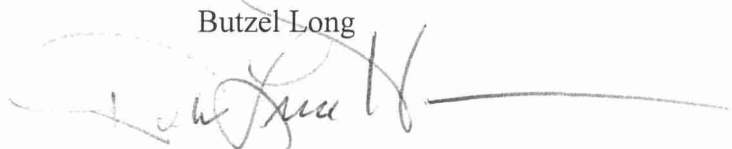
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The *Traverse City Record-Eagle* reserves all of its rights under the Freedom of Information Act if TCAPS declines to produce the requested records or provide a detailed explanation for its claim of privilege. We look forward to your response.

Very truly yours,

Butzel Long

A handwritten signature in dark ink, appearing to read 'Robin Luce Herrmann', with a long horizontal line extending to the right.

Robin Luce Herrmann

RLH:kvg

cc: Jeffrey Leonhardt
Pamela Forton
Matthew Anderson
Jane Klegman
Erica Moon Mohr
Benjamin McGuire
James Pavelka
Stacey Hozak
Nate Payne, Record Eagle

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