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September 19, 2022 (Revised)

Dennis A. Walter, Esq.
County Attorney
County of Hanover
7516 County Complex Road
P.O. Box 470
Hanover, Virginia 23069-0470

Re: August 31, 2022, Request for information and documents

Dear Mr. Walter:

The Hanover County School Board has received and reviewed your August 31, 2022, request for information and documents. As you know, Chris Whitley, Assistant Superintendent for Community Engagement and Legislative Affairs for the Hanover County Public Schools, initially responded by e-mail to your request on September 1, 2022. In that response, based on the volume and breadth of your request, Mr. Whitley asserted the School Board's right to request an additional seven days to respond substantively. You replied by e-mail promptly that same day, confirming that the School Board's response would be due on September 19, 2022. Mr. Whitley then e-mailed you again on September 9, 2022, forwarding substantive responses to requests 1, 3, 9 and 10 from your August 31 letter. The School Board has asked that I reply formally on its behalf to your August 31 letter.

Initially, thank you for your cooperation with Mr. Whitley as he, on behalf of the School Board, requested the additional seven days' response time and provided to you in advance of that date substantive responses to four of your ten requests. To the extent that you have any questions about his response to those items, please feel free to contact me; otherwise, the School Board and I will presume that you are satisfied with that response to those items. Below, I will respond individually to the remaining six inquiries.

Item #2: Attached please find documents responsive to your request regarding guidance provided to School Board members about use of personal e-mail or personal devices in the transaction of public business, including safeguarding student records. These documents include "on-boarding" training for newly appointed school board members conducted by the Hanover County Attorney's Office as well as a copy of the Virginia School Board Association's Statement of Ethics, which includes specific mention of confidential obligations. Each School

Board member has been asked to review his or her personal records for any other additional training each may have received on these topics. As of the date of this letter, no School Board member has reported that any additional documents responsive to your request Item #2 exist.

Item #4: The Hanover County Public Schools administration has conducted a search of its electronic files, including the School Board members' School Board-provided e-mail accounts. Despite the administration's efforts to narrow the search terms, in order to comprehensively survey any potentially responsive e-mails, ALL e-mails to and from School Board members must be reviewed. An initial search within the date restrictions requested revealed 4,900 e-mails.¹ Each of those will need to be independently reviewed to determine if they are responsive to your Item #4 (and Item #8, below) and what, if any, exemptions to disclosure apply. The administration has estimated it will take **approximately** 250 person hours at a blended rate of \$50.99/hour to complete the search and review. As authorized by Virginia Code Section 2.2-3704(F) the School Board will require your office to pay a deposit in the amount of \$12,747.50, an estimated amount which does not exceed its actual cost incurred in accessing, duplicating, supplying, or searching for requested records, before proceeding with the review. The School Board invites you, however, to narrow your request in a manner that might assist the School Board in avoiding these costs. Mr. Whitley and I are available to discuss these options with you further at your convenience.

Item #5: Each School Board member has been asked to review his or her personal emails and personal devices for documents responsive to this request. As of the date of this letter, no School Board member has reported that any documents – other than the document attached to your August 31, 2022, letter - responsive to your request Item #5 exist. The School Board further asserts that, if any such documents did exist, any such disclosure to you as County Attorney, or to the Board of Supervisors would be a violation of the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, *et seq.*, as an unlawful disclosure of a student record without the required consent of the student, if an adult, or his/her parent. This assertion is not a representation that any previous e-mail, itself, constitutes a FERPA violation, which would depend on the circumstances of any such communication. To reiterate, however, to date no School Board member has produced any document responsive to this request.

Item #6: Your Item #6 requests copies of documents sent to students or parents/guardians notifying them of the disclosure of non-directory information regarding the student or student education records. Without divulging that any such documents do or do not exist, the School Board asserts that any such disclosure by the School Board now to you, as County Attorney, or to the Board of Supervisors would be a violation of the Family Educational Rights and Privacy Act, 20 U.S.C §1232g, *et seq.*, as an unlawful disclosure of a student record without the required consent of the student, if an adult, or his/her parent. As is detailed above at in the School Board's response to Item #4, the Hanover County Public Schools administration has not completed a review of the 4,900 e-mails generated as *potentially* responsive to your requests. Nonetheless, the School Board again asserts that, if any such documents did exist, any

¹ The e-mails fall within the following categories in the following numbers: (a) School Board Member to School Board Member – 119 (9 with attachments); (b) School Board Member to Board of Supervisors Member – 46; (c) School Board Member to members of the public – 4,540 (including duplicates); and (d) School Board Member to Hanover County Public Schools staff members – 195.

such disclosure to you as County Attorney, or to the Board of Supervisors would be a violation of the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, *et seq.*, as an unlawful disclosure of a student record without the required consent of the student, if an adult, or his/her parent.

Item #7: Your August 31, 2022, letter includes a redacted copy of the subject e-mail chain referenced in Item #7.

- (a) Your inquiry in subsection (a) is more in the nature of a question than a request for documents; however, your overall request is for documents responsive to any inquiry in your letter and you expressly requested responsive documents in subsection (e). The School Board asserts that the February 7 and February 8, 2022, e-mail communications between Mr. Axselle and a representative of the Alliance Defending Freedom (ADF) are exempt from disclosure as an attorney-client privileged communication and authorized by Virginia Code § 2.2-3705.1(2). Your office already has a copy of the e-mail chain, redacted to excise that portion covered by the attorney-client privilege. The School Board further asserts that sharing of any non-directory, personally identifiable information with legal counsel for the School Board is not a violation of FERPA. However, any such disclosure to you as County Attorney, or to the Board of Supervisors would be a violation of the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, *et seq.*, as an unlawful disclosure of a student record without the required consent of the student, if an adult, or his/her parent.
- (b) Your inquiry in subsection (b) is more in the nature of a question than a request for documents; however, your overall request is for documents responsive to any inquiry in your letter and you expressly requested responsive documents in subsection (e). The School Board asserts that the February 7 and February 8, 2022, e-mail communications between Mr. Axselle and a representative of the Alliance Defending Freedom (ADF) are exempt from disclosure as an attorney-client privileged communication and authorized by Virginia Code § 2.2-3705.1(2). Your office already has a copy of the e-mail chain, redacted to excise that portion covered by the attorney-client privilege. The School Board further asserts that sharing of any non-directory, personally identifiable information with legal counsel for the School Board is not a violation of FERPA. However, any such disclosure to you as County Attorney, or to the Board of Supervisors would be a violation of the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, *et seq.*, as an unlawful disclosure of a student record without the required consent of the student, if an adult, or his/her parent.
- (c) The School Board asserts that the February 7 and February 8, 2022, e-mail communications between Mr. Axselle and a representative of the Alliance Defending Freedom (ADF) are exempt from disclosure as an attorney-client privileged communication and authorized by Virginia Code § 2.2-3705.1(2). The School Board further asserts that sharing of any non-directory, personally identifiable information with legal counsel for the School Board is not a violation of FERPA. Therefore, the School Board and its members have no documents responsive to the request in subsection (c).

- (d) The School Board asserts that the February 7 and February 8, 2022, e-mail communications between Mr. Axselle and a representative of the Alliance Defending Freedom (ADF) are exempt from disclosure as an attorney-client privileged communication and authorized by Virginia Code § 2.2-3705.1(2). Your office already has a copy of the e-mail chain, redacted to excise that portion covered by the attorney-client privilege. The School Board further asserts that sharing of any non-directory, personally identifiable information with legal counsel for the School Board is not a violation of FERPA. Finally, the School Board asserts that any such disclosure by the School Board now to you, as County Attorney, or to the Board of Supervisors would be a violation of the Family Educational Rights and Privacy Act, 20 U.S.C §1232g, *et seq.*, as an unlawful disclosure of a student record without the required consent of the student, if an adult, or his/her parent. Likewise, allowing one or two members of the Board of Supervisors "to view an unredacted copy of the e-mails and all attachments in a secure setting with the understanding that they will not take a copy of those documents or otherwise disclose documents to unauthorized third parties" would also constitute an unlawful disclosure under FERPA.
- (e) The School Board has no documents responsive to the requests in subsection (e).

Item #8: The Hanover County Public Schools administration has conducted a search of its electronic files, including the School Board members' School Board-provided e-mail accounts. Despite the administration's efforts to narrow the search terms, in order to comprehensively survey any potentially responsive e-mails to Item #8, ALL e-mails to and from School Board members must be reviewed. An initial search within the date restrictions requested revealed 4,900 e-mails. Each of those will need to be independently reviewed to determine if they are responsive to your Item #8 (and Item #4, above) and what, if any, exemptions to disclosure apply. The administration has estimated it will take **approximately** 250 person hours at a blended rate of \$50.99/hour to complete the search and review. As authorized by Virginia Code Section 2.2-3704(F) the School Board will require your office to pay a deposit in the amount of \$12,747.50, an estimated amount which does not exceed its actual cost incurred in accessing, duplicating, supplying, or searching for requested records, before proceeding with the review. The School Board invites you, however, to narrow your request in a manner that might assist the School Board in avoiding these costs. Mr. Whitley and I are available to discuss these options with you further at your convenience.

The School Board believes the above detailed response addresses each of your requests. It has provided, or with this correspondence is providing, to your office documents responsive to the requests; asserted proper exemptions where applicable; and invites you to communicate further with Mr. Whitley and/or my office to address the issues raised in Items #4 and #8.

The School Board is also aware of the broad allegations that were made during last week's Board of Supervisors meeting. In an effort to address the confusion and concern in our community regarding recent allegations that a school board member violated federal law by improperly sharing confidential student information with a third party, the School Board wishes to provide the following information.

Earlier this year, the entire School Board received a demand letter from a legal organization on behalf of a Hanover County Public Schools' student. This letter included certain pieces of information about that student, in furtherance of the legal position advanced in the letter. A School Board member, Mr. Axselle, emailed this letter from a personal email account to prospective outside counsel. The Family Educational Rights and Privacy Act (FERPA) requires that school divisions maintain the confidentiality of personally identifiable student information, although there are several exemptions to that requirement. One of those exemptions permits local school divisions to share that information with those deemed "school officials", as that term is defined by FERPA, to include legal counsel. The School Board does not believe that Mr. Axselle violated FERPA when he transmitted the attorney's letter to another attorney in furtherance of obtaining legal advice. The School Board consistently has asserted that exemption in response to previous, and now your, requests for information.

We look forward to hearing from you regarding this response and next steps. Please do not hesitate to call me if I can be of further assistance.

Sincerely,

Bradford A. King
School Board Counsel

Cc: Members, Hanover County School Board
Dr. Michael Gill, Division Superintendent
Mr. Chris Whitley, Assistant Superintendent