
OPINION OF THE PUBLIC ACCESS COUNSELOR

JASON J. JOHNSON,
Complainant,

v.

BROWNSBURG CMTY. SCH. CORP.,
Respondent.

Formal Complaint No.
17-FC-245

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Brownsburg Community School Corporation (“BCSC”) violated the Access to Public Records Act¹ (“APRA”). BCSC responded to the complaint through attorney Alexander P. Pinegar. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 13, 2017.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

Jason J. Johnson (“Complainant”) filed a formal complaint alleging BCSC violated APRA by improperly denying him access to public records.

On September 5, 2017, Johnson submitted two written public records request to BCSC via email. In the first request, Johnson sought to inspect game film for four varsity football games and four freshman football games from the year 2016. In the second request, Johnson sought the following:

Kelli Waggoner emails sent and received involving Robert Faulkner, 10/20/16 [to] 11/20/16 and 06/01/17[to] 09/01/17; Kelli Waggoner emails sent and received involving Bobby Cox, 10/20/16 [to] 11/20/16 and 06/01/17 [to] 09/01/17;

The record of quarters played by individual players for the 2016 Varsity, JV and Freshman football teams required by IHSAA rule 54-3.2.

On September 12, 2017, BCSC issued a response partially granting and partially denying Johnson’s requests. Specifically, BCSC provided links to the game film of the four varsity football games he requested to inspect. The school corporation stated that game film of freshman football games is not archived because there is no requirement to do so and space restrictions. BCSC also denied disclosure of the emails Johnson requested on the basis that the emails are protected from disclosure under the Family Educational Rights and

Privacy Act² (“FERPA”); and thus, not disclosable under APRA.³

On September 13, 2017, Johnson filed another public record request with BCSC seeking the following:

2015-2017 HUDL Billing and Invoice[;] HUDL Manage Storage for Varsity, JV and Freshman football teams (Will show 90 days of deleted categories and playlist, amount of storage available and all seasons stored film)

Johnson also sent an email to BCSC challenging the district’s denial of his request for certain emails. He noted that any nondisclosable information contained in the emails must be separated or redacted from the disclosable information prior to disclosure.

On September 14, 2017, Johnson sent an email to BCSC suggesting that the game film for freshman games is indeed permanently archived and accessible within HUDL. HUDL is a web-based game film management system used by the school corporation. In the same email, Johnson also suggested two ways to regain access to the game film he requested.

On September 15, 2017, BCSC responded to Johnson via email reiterating that game film for freshman football games is not archived in HUDL. BCSC also provided Johnson with the 2015-2017 HUDL billing and invoices as he requested on September 13. The district also addressed Johnson's follow-up inquiry regarding the emails he requested. BCSC declared that no amount of redaction will make the remainder

² 20 U.S.C. § 1232g.

³ Ind. Code § 5-14-3-4(a)(3).

of particular record disclosable if the record contains includes student information; and thus, non-disclosable information cannot be separated from the disclosable information. The district acknowledged that it had responded to Johnson's records requests from September 5 and September 13, and declared correspondence with regard to the requests concluded.

On September 21, 2017, Johnson submitted the following public records request:

HUDL Manage Storage for Varsity, JV and Freshman football teams (Will show 90 days of deleted categories and playlist, amount of storage available and all seasons stored film)[.] This can be found by logging into HUDL as a website administrator -> selecting the appropriate team in upper left corner ->Video->Manage Storage

BCSC acknowledged the request on September 25, 2017. Johnson claims that no other communication had occurred regarding his request. As a result, he filed a formal complaint October 17, 2017.

BCSC denies that an APRA violation has occurred based on two principle arguments: (1) APRA's definition of *public records*; and (2) The provision in the Act that states a public agency is not required to create a public record to satisfy a public records request.

ANALYSIS

Johnson contends that BCSC violated APRA by improperly denying him the right to inspect four freshman football games from 2016, and his request to inspect the HUDL manage storage report. He also argues that his request from September 22, 2017, has not been denied; and thus, has exceeded the *reasonable time* requirement under APRA.

1. The Access to Public Records Act

The public policy underlying 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.” Ind. Code § 5-14-3-1. Unless an exception applies under section 4, any person has the right to inspect and copy a public agency's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Brownsburg Community School Corporation is a public agency for the purposes of the APRA; and thus, subject to the Act's requirements. Ind. Code § 5-14-3-2(n). Therefore, unless an exception applies, Johnson has the right to inspect and copy BCSC's public records.

Under APRA, *public record* means:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic

or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Further, APRA requires a public agency that “maintains or contracts for the maintenance of public records in an electronic data storage system to make *reasonable efforts* to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency's data storage system...” *See* Ind. Code § 5-14-3-3(d) (emphasis added). Here, the parties disagree about whether the game film of four freshman football games requested by Johnson are public records under APRA.

1.1 Game Film of Four Freshman Games

As set forth *supra*, BCSC denied Johnson’s original request to view the game film of four freshman football games from 2016 because the games are “not archived due to space restrictions and there being no requirement to do so.” Johnson disputes this claim as false—at least with regard to the storage space restrictions—because the HUDL program that BCSC uses includes unlimited game video in all packages the company offers. Johnson also provided the district with instructions on how to retrieve the game film he wants to inspect.

Notably, BCSC does not dispute Johnson’s argument that the corporation is not limited by storage space restrictions. Instead, BCSC contends that it does not have any record for freshman football game film from 2016 in its own files, electronic or otherwise, and the school is not archiving freshman football games through its HUDL account.

Further, BCSC dismisses—but does not deny—Johnson’s claim that it can easily regain access to games that were once stored on HUDL through a simple procedure because all videos deleted from a user account are permanently archived in the system.

Regardless if that is true, BCSC argues that APRA does not require it to attempt to access a deleted record that only exists on or in a third-party’s filing system; and further, whatever record may exist on HUDL is not a *public record* because HUDL is not a *public agency*.

The overarching question of whether the game films at issue in this complaint are disclosable public records under APRA—even if stored by a third-party-vendor—does not present an issue of first impression to this Office.

Plainly enough, if BCSC—through its athletic department or otherwise—*created* game film of freshman football games in 2016, those game films are public records as defined by APRA. *See* Ind. Code § 5-14-3-2(r). Therefore, unless an exception applies, those videos should not be withheld from disclosure.

For its part, BCSC does not argue that game film was not created for the games in question in 2016 or that a disclosure exception applies. Rather, the district argues that it does not retain or maintain copies in its *own files* and it is not archiving freshman football games through its HUDL account.

The key inquiry is whether BCSC archived the freshman games on HUDL in 2016. The district does not make that argument. So, it is a reasonable presumption that BCSC archived the games in 2016 on HUDL.

Critically, as it pertains to disclosability, it matters not that BCSC does not retain or maintain copies of the game film in its own files, electronic, or otherwise, if the records are maintained by a third-party-vendor. In fact, APRA specifically prohibits a public agency from frustrating its intent by contracting for storage and copying services that impair access to the public. *See* Ind. Code § 5-14-3-3(g).

The Indiana Court of Appeals summarily rejected the argument that APRA's definition of public record does not include records created, maintained, or retained by private entity on behalf of a public agency. *See Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127, 1133 (Ind. Ct. App. 2005). The court concluded to accept such an argument "would amount to a tortured interpretation of APRA." 838 N.E.2d at 1133. Therefore, based on the plain language of APRA and the controlling case law, BCSC's argument that whatever record may exist within HUDL is not a public record because HUDL is not a public agency, must fail.

Alternatively, BCSC argues that APRA does not require it to attempt to access a deleted record that only exists on or in HUDL.

Critically, APRA provides the following:

[A] public agency that maintains or contracts for the maintenance of public records in an electronic data storage system *shall make reasonable efforts* to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency's data storage system.

Ind. Code § 5-14-3-3(d) (emphasis added). Here, BCSC argues that it is under no obligation to even attempt to retrieve the game film at issue. That would only be true if the legislature intended the term *reasonable effort* to encompass—within its meaning—*zero effort*.

To be sure, APRA does not require a public agency to create or provide copies of a list to satisfy a records request. Ind. Code § 5-14-3-3(f). Here, Johnson has not requested the creation of a list.

What is more, BCSC argues that the act of logging into HUDL in an attempt to obtain or restore a requested record exceeds its obligations under APRA. This Office cannot agree. APRA requires *reasonable effort*. What that means exactly will vary case-by-case, but it certainly requires more than what seemingly happened here.

BCSC should be mindful that public records requests fall within the routine duties of business operations for a public agency.

In sum, if the game film of the 2016 freshman football games is maintained—or otherwise accessible—in the HUDL system that BCSC contracts for, then APRA requires BCSC to exert *reasonable effort* to provide those responsive records to Johnson. Implicit in that reasonable effort is an element of practicality, but a categorical refusal to even try to provide access to responsive public records does not comply with the spirit or letter of APRA.

CONCLUSION

Based on the foregoing it is the opinion of the Public Access Counselor that Brownsburg Community School Corporation violated the Access to Public Records Act; and should put forth reasonable effort to fulfill the request.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor