
OPINION OF THE PUBLIC ACCESS COUNSELOR

NICHOLAS T. OTIS,
Complainant,

v.

SOUTH BEND COMMUNITY SCHOOL CORP.,
Respondent.

Formal Complaint No.
20-FC-32

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the South Bend Community School Corporation violated the Access to Public Records Act.¹ Attorney Amy Steketee Fox responded to the complaint. 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 March 5, 2020.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over the access to certain documents maintained by South Bend Community School Corporation (SBCSC).

On December 20, 2019, Nicholas Otis (Complainant) submitted a public records request to SBCSC for payments and contracts by and with a named individual. SBCSC did not acknowledge the request until January 7, 2020. In the acknowledgement, SBCSC sought clarification, which Otis provided six days later. On February 13, 2020, Otis asked for a status update because the district had not produced any of the requested documents.

Otis filed a formal complaint with this office on March 5, 2020.

For its part, SBCSC acknowledges that the delay in confirming receipt of the request was due to the holiday break. The school corporation also outlines its procedures for submitting a public records request, which involves the use of prescribed form. SBCSC also cites circumstances involving its lone legal counsel, Brian Kubicki, who had competing priorities in the scope of his duties.

SBCSC also notes the pending litigation between the school corporation and Otis's client in the United States District Court of Northern Indiana. SBCSC contends discovery in that case may be more appropriate under the circumstances. By the time of its response on April 22, the school corporation's counsel had located 199 pages of responsive records and produced them. There may be some remaining documents as well that are temporarily inaccessible due to the

COVID-19 event. As such, SBCSC argues that it never denied Otis' request.

ANALYSIS

1. The Access to Public Records Act

The Access to Public Records Act (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.” Ind. Code § 5-14-3-1. The South Bend School Corporation (SBCSC) is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the school corporation's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

2. Otis' request

The crux of Otis' complaint is that SBCSC improperly denied the request by failing to provide the requested records within a reasonable time in accordance with APRA. In re-

sponse, the school corporation argues it did not deny the request and notes that pending litigation and operational constraints of the school's public access processing system justifies the delay.

2.1 Reasonable time

Otis argues that SBCSC's failure to produce any responsive records within 70 days of receiving the request is not reasonable for purposes of APRA.

Under APRA, a public agency may not deny or interfere with the exercise of the right for any person to inspect and copy a public agency's disclosable public records. Ind. Code § 5-14-3-3(a). Toward that end, the law requires an agency within a reasonable time after the request is received to either:

- (1) provide the requested copies to the person making the request; or
- (2) allow the person to make copies:
 - (A) on the agency's equipment; or
 - (B) on the person's own equipment.

Ind. Code § 5-14-3-3(b)(1)-(2). The term "reasonable time" is not defined by APRA; and thus, it falls to this office to make a determination on a case by case basis when a complaint is filed challenging timeliness. In doing so, this office considers the following factors: (1) the size of the public agency; (2) the size of the request; (3) the number of pending requests; (4) the complexity of the request; and (5) any other operational considerations or factor that may reasonably af-

fect the public records process. At the same time, if specificity has been established as a predicate, reasonable timeliness is simply defined by this office as practical efficiency.

Here, Otis's request is not overwhelmingly voluminous or complex. An informal benchmark this office observes as a typical reasonable timeframe is approximately 30 days from receipt of a request.

In *Opinion of the Public Access Counselor 20-FC-19*, this office took exception to Purdue University's meager resources dedicated to the public records process – essentially one person for the entire university system. While not nearly as large, the South Bend Community School Corporation is an entity of substantial size. One person – especially one with such diverse duties as a general counsel – likely cannot be expected to handle requests and still realistically remain in compliance. Therefore this office remains skeptical of excuses from any sizable public agency that creates a bottleneck of its own doing by devoting scant resources and attention to the public records process. While it may not be *the* priority, it is nonetheless an important priority.

That written, I am confident the SBCSC recognizes this shortcoming and is making efforts to shore up any systemic deficiencies. In the course of my investigation, I was contacted by the School's general counsel, Brian Kubicki, who admitted his relative inexperience with the public records process but vowed to dedicate thoughtfulness as to how to improve the school corporation's processes.

While I hesitate to completely ratify the SBCSC's response to the complaint, I take Mr. Kubicki at his word. This office

is always available to assist in those efforts with guidance and counsel.

3. Remaining issues

Two considerations remain that are worth mentioning: (1) the prescribed form the SBCSC uses; and (2) the pending litigation between the parties.

It is well taken that the SBCSC can insist that a requester use a prescribed form for a public records request because it is well within the agency's discretion to do so under APRA. *See* Ind. Code § 5-14-3-3(a)(2). Toward that end, coupled with the School shutdown over holiday break, I will not consider the delay in acknowledging the request to be a violation of APRA.

Once SBCSC acknowledged the request, however, the corporation was on the clock for responding within a reasonable time. As noted above, the 70 day delay was not a reasonable time for producing at least some of the requested documents.

It is worth mentioning that this office takes a strong stance on deferring to the judiciary when discovery is available in Indiana state trial courts. This does not, however, hold true at the federal level. In *Kentner v. Indiana Public Employers' Plan, Inc.*,² the Indiana Court of Appeals recognized that a litigant in federal court can still rely on APRA and not be in conflict with Federal Rules of Civil Procedure.³ Even so, I

² 852 N.E.2d 565 (Ind. App. 2006).

³ For further reading on this subject, see *Opinion of the Public Access Counselor*, 14-FC-158 (2014).

advise litigants to use discovery at any level. It is more controlled and indeed broader than APRA.

RECOMMENDATIONS

Based on the foregoing, it is the opinion of this office that South Bend School Corporation continue to explore ways to make the public access process quicker and more efficient. Any further specific guidance or recommendations is just a phone call or email away.

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

Luke H. Britt
Public Access Counselor