
OPINION OF THE PUBLIC ACCESS COUNSELOR

MICHAEL WILSON,
Complainant,

v.

HAMILTON SOUTHEASTERN SCHOOLS,
Respondent.

Formal Complaint No.
21-FC-35

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging that Hamilton Southeastern Schools and its Board of Trustees violated the Access to Public Records Act.¹ Attorney Alexander P. Pinegar filed an answer on behalf of the School. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by

¹ Ind. Code § 5-14-3-1-10.

the Office of the Public Access Counselor on March 31, 2021.

BACKGROUND

This case involves a dispute over access to records of Hamilton Southeastern Schools (HSE) regarding three separate public records requests.

On December 3, 2020, Michael Wilson (Complainant) filed a public records request with HSE Superintendent Dr. Allen Bourff and the Board of Trustees seeking the following:

- a. Copies of public records that detail by category the absences by Hamilton Southeastern School teachers...beginning November 1 through December 3, 2020 segmented by grade level and category of absence.
- b. Copies of public records that detail the list of demands, requirements and suggestions provided by or on behalf of the Hamilton Southeastern Education Association (HSEA) to Hamilton Southeastern Schools (HSE) administration and/or Board of School Trustees in response to the HSE administration and Board of School Trustees Operations Plan for the 2020-2021 academic year; and
- c. Copies of public records from meetings between [HSEA] and [HSE] administration and/or Board of School Trustees in response to the HSE administration and the Board of School Trustees Operations Plan for the 2020-2021 academic year.

On March 9, 2021, HSE replied to Wilson acknowledging his request. HSE included a document fulfilling the first portion of the request regarding teacher absences. HSE indicated it did not have records responsive to the second portion of the request, and it denied the third portion of the request based upon the deliberative materials exception to disclosure under the Access to Public Records Act (APRA).

Wilson filed a formal complaint on March 31, 2021, alleging HSE violated APRA. Specifically, Wilson takes exception to the length of time HSE took to disclose the first portion of the request. Wilson also contends that HSE improperly withheld the records responsive to final portion of his request.

HSE filed a response to Wilson's complaint arguing it had to create a record to fulfill the portion of the request concerning teacher absences; thus explaining the length of time to produce the document. Moreover, HSE justifies its application of APRA's deliberative materials exception based on prior public access counselor opinions and prior jurisprudence.

ANALYSIS

1. The Access to Public Records Act

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1.

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. Hamilton Southeastern Schools 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 HSE’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. *See* Ind. Code § 5-14-3-4(a)—(b).

2. Wilson’s first two requests and timeliness

This complaint, in part, questions whether HSE fulfilled Wilson’s requests in a timely manner as required by APRA.

It is true that APRA requires a public agency to fulfill (or deny) a public records request within a reasonable time. *See* Ind. Code § 5-14-3-3(a). While factors beyond the control of an agency may affect what is reasonable, this office generally suggests a 30-day timeframe for most routine records requests.

In this case, however, the records requested were not routine. In fact, they did not exist at all at the time of the request. This office continues to adhere to the maxim that records do not have to be created in order to fulfill a request. This is true in an overwhelming majority of cases.

And so it is here. The document tabulating teacher absences was one that had to be created after the information was aggregated. While it is commendable that HSE undertook this task, it was not required by APRA. Based on that alone, it is not a records request that would be subject to the Access to Public Records Act and is more of a research project or service provided to Wilson based upon his bespoke request.

Additionally, while Wilson's second request – a list of demands from the teacher's association – may have been able to be denied sooner, the response time is not as concerning because the records did not exist at all.

3. Deliberative materials exception

Under APRA, a public agency has discretion to withhold deliberative material, which includes records that are:

intra-agency or interagency advisory...including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). Deliberative materials include information that reflects, for example, one's ideas, consideration, and recommendations on a subject or issue for use in a decision making process. The Indiana Court of Appeals observed that the purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002).

As an initial matter, it is important to note who the players are in this case. As noted above, HSE is a public agency. The deliberative materials exception only applies to inter – or

intra – agency communication (i.e., within a public agency or between public agencies).

The Hamilton Southeastern Education Association (HSEA) is a different animal. While they are comprised of a group of agency employees,² it remains to be seen if they would be considered inter- or intra- agency for the purposes of the deliberative materials exception. They can be bargaining adversaries, to be sure, but also an internal group employed by HSE itself.

In the prior opinion cited by HSE – *Opinion of the Public Access Counselor 20-FC-149* – the governing body in question was internal and did not interact with outside entities. It deliberated in a vacuum. Thus, the determination of this office was that it could invoke the deliberative material exception to disclosure. Its minutes and notes from meetings were not subject to disclosure.

This case is distinguishable because the minutes generated involve an outside entity.

Even so, the public access laws can be a bit confusing to navigate when it comes to collective bargaining adversaries. At some points, it calls discussions with them exempt from the Open Door Law;³ or allows executive sessions for strategic discussions⁴ about them, or sets schedules for negotiations.⁵

Nowhere, however, do the access or education laws mandate documentation to be created pursuant to meetings between

² www.hseateachers.org/hsea-leadership

³ Ind. Code § 5-14-1.5-2(c)(8)

⁴ Ind. Code § 5-14-1.5-6.1(b)(2)(A)

⁵ Ind. Code §§ 20-29-6-1 & 19

a school's administration and a collective bargaining unit. Notably, the Open Door Law does reference accessibility if it does:

Whenever a governing body, or any person authorized to act for a governing body, meets with an employee organization, or any person authorized to act for an employee organization, for the purpose of collective bargaining or discussion, the following apply:

- (1) Any party may inform the public of the status of collective bargaining or discussion as it progresses by release of factual information and expression of opinion based upon factual information.

Ind. Code § 5-14-1.5-6.5(a). In this context, the word “may” suggests permissive, but not mandatory disclosure. Therefore, the legislature seemingly gives a public agency the discretion to release these materials or keep them in house. Presumably, the documentation referenced in this section would include memoranda and minutes from meetings with HSEA.

This office is not convinced that the HSEA entity is a public agency even though its membership is comprised of public employees. It does not meet the definition of public agency or governing body pursuant to Indiana Code section 5-14-3-2(q) nor does it perform the functional equivalent of a public agency. That stated, the deliberative materials exception does not apply.

Section 6.5 of the Open Door Law is not one that is often invoked in responses to complaints to this office. And while this office does not habitually argue on behalf of public agencies, it is obscure enough that an oversight on behalf of HSE

is understandable. It appears as if the Indiana General Assembly intended to grant school administrations the discretion to withhold material generated from these types of meetings.

CONCLUSION

Based on the foregoing, it is the opinion of this office that Hamilton Southeastern Schools did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LHB', is positioned above the name of the signatory.

Luke H. Britt
Public Access Counselor