



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 2, 2009

Ms. Dare Hawes
719 S. Michigan St.
Plymouth, IN 46563

Re: Informal Inquiry 09-INF-26

Dear Ms. Hawes:

This is in response to your informal¹ inquiry dated July 21, 2009. Pursuant to Ind. Code §5-14-4-10(5), I issue the following opinion in response to your inquiry regarding the Plymouth Community School Corporation ("PCSC"). My opinion is based on applicable provisions of the Indiana Access to Public Records Act ("APRA"), I.C. §5-14-3-1 *et seq.*

Initially, I note that it is difficult to discern how you believe PCSC has violated the APRA because your complaint and attachments contain several allegations regarding PCSC that are outside of the scope of the public access laws. Therefore, my opinion is limited to the following specific allegations in your complaint:

1. Michael Edison has been repeatedly denied his own complete computer record consisting of the complete traffic search history, search query, and host detail report for August 1 - October 4, 2007.
2. PCSC's response to various document requests varied depending on the requester. Specifically, "the media," Judge Martin, Rockwell, and Michael Edison received 94, 85, 304, and 47 documents, respectively.
3. You allege that PCS, through Mr. Wheeler, has improperly withheld documents that PCS claims do not exist.
4. PCSC has improperly refused to produce the "complete, unaltered computer record . . . including the complete traffic search history, the complete search query, and the complete host details report."

My analysis of each of these issues follows.

¹ On July 21, 2009, you submitted a Formal Complaint form with the Public Access Counselor's office. In it, you allege that you were denied access to public records at various times between November 13, 2007 and August 29, 2008. The APRA requires formal complaints to be filed within thirty (30) days after the denial of access to public records. *See* I.C. §5-14--5-7. Because you did not file your formal complaint within the required timeframe, I consider it an informal inquiry under I.C. §5-14-4-10(5).

1. PCSC’s Denial of Michael Edison’s Request for His “Complete Computer Record”

Under the APRA, all personnel file information shall be made available to the affected employee or his representative. I.C. §5-14-3-4(b)(8). Mr. Edison, a former public employee of PCSC, has access to the contents of his own personnel file under the APRA. It is unclear whether or not Mr. Edison’s “complete computer record” was included in his personnel file. If it were not part of his personnel file, Mr. Edison would not necessarily have the right to access it under the APRA.

Mr. Edison’s rights notwithstanding, anyone other than Mr. Edison would not enjoy similar access to his personnel file. With the exception of some limited information, personnel files of public employees may, in the agency’s discretion, not be disclosed in response to a public records request. I.C. §5-14-3-4(b)(8).

2. PCSC’s Varied Responses to Record Requests.

You also allege that PCSC improperly produced different numbers and types of documents in response to public records requests. It is true that public agencies can waive the right to deny a public records request if an identical request was granted previously. *See Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2005). However, I see nothing in the materials that you have produced that would indicate PCSC produced different sets of documents in response to *identical* requests. You allege that different sets of documents were produced by PCSC in response to “the media,” IDOE/Judge Martin, Cynthia Rockwell, and Mr. Edison, but you also acknowledge in your supporting document entitled, “List of Citizens’ Requests for Public Records...” that each of the aforementioned individuals submitted different public access requests. For obvious reasons, different requests will produce different responses depending on the substance and scope of each request. Nothing in the APRA requires a public agency to make identical responses to different records requests.

3. Documents Withheld Based on Nonexistence.

You made a request for access to internet records to PCSC in a letter dated March 26, 2008. PCSC replied in a letter as follows:

In order to respond to your request the School would have to ask its third-party Internet provider, Lightspeed, to create a list of Mr. Edison’s traffic search history and search engine queries. APRA does not require public agencies to create new documents in order to respond to requests made under its provisions: “Moreover, the Department was not required to create a new record, an acknowledgement letter, under the Access to Public Records Act. This part of your

formal complaint is without merit.” *Formal Complaint 06-FC-39; Alleged Violation of the Access to Public Records Act by the Indiana Department of Homeland Security*, <http://www.in.gov/pac/advisory/files/06-FC-39.pdf>.

Because these documents do not currently exist, the School cannot produce nonexistent documents to you.

To the extent that PCSC’s attorney directed the creation of such documents in anticipation of litigation, they are exempt from disclosure as attorney work product. I.C. §5-14-3-4(b)(2). In response to a request from its attorney, PCSC asked Lightspeed to create various documents relating to the searches on Mr. Edison’s computer from September 3, 2007 - October 4, 2007. According to PCSC, those documents were created in response to threatened litigation and at the direct request of PCSC’s attorney. Pursuant to I.C. §5-14-3-4(b)(2) a public agency has the discretion to withhold a record that is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

“Work product of an attorney” means information compiled by an attorney in reasonable anticipation of litigation and includes the attorney’s:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney’s opinions, theories, or conclusions.

I.C. §5-14-3-2(p). Thus, because PCSC has no records responsive to your request other than those exempted by the work product doctrine, my opinion is that PCSC did not violate the APRA by denying your request. The APRA governs access to the existing public records of a public agency; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA. Moreover, nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. Thus, PCSC did not violate the APRA when it failed to produce nonexistent records.

4. PCSC has improperly refused to produce the “complete, unaltered computer record . . . including the complete traffic search history, the complete search query, and the complete host details report.”

Notwithstanding the fact that PCSC claims such a record does not exist, the Public Access Counselor has previously opined that internet history reports do not constitute a “public record” within the meaning of the APRA. Counselor Neal concluded that “as a general rule the internet history from a public employee’s official’s, or agency’s computer is not a public record for purposes of the APRA.” *See Opinion of the*

Public Access Counselor 09-FC-124. Consequently, PCSC's failure to produce the complete computer record would not violate the APRA.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

Cc: Thomas E. Wheeler, II, Frost Brown Todd LLC