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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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ANGIE & KEVIN HOPF,  
*Complainant,*

v.

SOUTHEAST DUBOIS COUNTY SCHOOL CORP.,  
*Respondent.*

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Formal Complaint No.  
20-FC-40

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Southeast Dubois County School Corporation violated the Access to Public Records Act.<sup>1</sup> Attorney Jonathan L. Mayes, filed an answer to the formal complaint with this office. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

by the Office of the Public Access Counselor on March 16, 2020.

## **BACKGROUND**

This case involves a dispute over access to emails sent and received by personnel at Southeast Dubois County School Corporation.

On January 23, 2020, attorney Michael Jasaitis filed a public records request with the school corporation on behalf of Angie and Kevin Hopf seeking emails between named personnel with subject matter identification on a specific date – June 27, 2018 - and also expanded the search term to six months. The school corporation acknowledged the request on four days later.

After Jasaitis requested a status update, the school corporation issued a response on February 20, 2020. In its response, the School presupposes the request amounts to pre-litigation discovery. Nevertheless, it conducted a search and released non-deliberative materials, and a substantial amount at that.

In a follow-up email on February 25, Jasaitis pushed back on the School's use of the deliberative material exception as overbroad and sought separation of disclosable from nondisclosable material. It also pointed to the first portion of the original request which pinpointed a specific date – June 27, 2018 – and requested the School confirm if any emails, disclosable or not, existed. Toward that end, the “metadata” as it were, was requested for emails on June 27 between the named individuals regarding the subject matter. The body of the email itself was not requested; only the to and from

and subject matter fields. The school corporation acknowledged the updated request on February 26. The parties were unable to resolve the issue after that point. As a result, the Hopfs filed a formal complaint with this office on March 16, 2020.

On April 7, 2020, the school corporation filed a response to the complaint. It provides some relevant context regarding the situation that led to this office conducting some additional investigatory work.<sup>2</sup> In essence, the case revolves around the transfer of the Hopf's son – a basketball player – from Southeast Dubois to Barr-Reeve Community Schools, also in Dubois County. The Indiana High School Athletic Association (IHSAA) deemed the transfer to be “athletically motivated,” which made the student ineligible to play for Barr-Reeve for 365 days.

At the initial administrative ISHAA evidentiary proceeding, the eligibility determination was upheld. This was challenged in Daviess County Circuit Court and the litigation is still pending as of the writing of this opinion. Notably, however, Southeast Dubois County School Corporation is not a named party in that lawsuit.

The back and forth between the parties' attorneys ran up until the time of the COVID-19 event and shutdown, leaving the school corporation to attend to other pressing matters and the request was left in suspension.

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<sup>2</sup> Counsel for Hopf also provided substantial context via telephone. Despite implications otherwise in the School's response, the Hopfs and their counsel have been forthcoming with information.

The school corporation sets forth several arguments. The first being the pre-litigation discovery mechanism being inappropriate under the circumstances. It argues the Hopfs should have filed a discovery motion in trial court rather than seek the documents via the public records route.

Second, the school corporation considers the question as to whether a document exists to be akin to an interrogatory rather than a document request. Third, the School argues much of the remainder of the documentation reasonably falls under the umbrella of the Access to Public Records Act's deliberative materials exception.

## 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 Southeast Dubois County School Corporation (School) 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'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 fed-

eral 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. The Hopfs' request**

After review of the Hopfs' initial request, it appears for the most part that all of the elements of reasonable particularity exist: a named sender and recipient, a reasonable time frame and a set of key words.

To its credit, the School released 69 pages of material and deemed the remainder to be deliberative material – likely appropriately so.

The point of contention in this case, however, revolves around a singular date. The Hopfs appear to suspect that certain named individuals exchanged emails on June 27, 2018, and merely want to confirm the messages exist, and if they do, how many. All of this with the understanding that the body of the message itself may indeed be deliberative.

### **2.1 Pre-litigation discovery vs. public access**

The School initially balked at the entirety of Hopf's request as there was pending litigation in the matter, arguing the more appropriate mechanism for a document request should be the trial court's discovery process.

It is absolutely true that this office strongly discourages reliance on APRA for records that are otherwise discoverable under the jurisdiction of a trial court when the agency itself and the requesters are parties (or when a lawsuit against an

agency is imminent). The public access counselor has used stern language discouraging the practice and contends that discovery is broader than APRA in almost every way. For example, certain courts have found that agencies cannot use the deliberative materials exception to combat a motion to compel.<sup>3</sup>

In this case, however, it does not appear as if the respondent School was a litigant or potential litigant. While a third party discovery request could have been utilized by the Hopfs in trial court case, it is not strictly required.

The reason this office discourages APRA requests among parties is the practice could circumvent the Indiana Trial Rules over which a judge has exclusive jurisdiction. Should discovery attempts be muddled with APRA requests, the executive branch and judicial branch are left to sort out disputes. This office defers to the judiciary on these matters but only when parties are at odds, not third parties.

There was not an immediate indication Southeast Dubois County School Corporation would become a party to the lawsuit. Therefore this office does take exception to the immediate defensive tone in the School's acknowledgement as unnecessary but recognizes the steps it took in ultimately providing a substantial amount of documents.

In short, the request was valid in spite of the pending litigation.

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<sup>3</sup>*Popovich v. Indiana Dep't of State Revenue*, 7 N.E.3d 406, 416 (Ind. T.C. 2014).

## **2.2 Deliberative materials & the “specific date request”**

The School’s position is well-taken as to the bulk of emails likely being deliberative. It has been said before that a majority of an email request will involve materials that are speculative or opinion-based and used in the process of decision-making. In that regard, the School has likely not erred.

The crux of this argument, however, is whether a follow-up request – details regarding an email – is able to be withheld wholesale or if material must be separated, even within the same document.

The controversy hinges on the existence – or non-existence – of emails from June 27, 2018. Despite the School’s arguments, I cannot wholly agree that the request for information in these emails, regardless of their potential deliberative nature, is akin to an interrogatory or akin to a mere information request.

The request is worded as follows, within the parameters of the initial request:

- (a) providing the following information for any emails withheld from the response
  - (1) Time and date of said email;
  - (2) Name of Sender(s); and
  - (3) Name of recipient(s);

Or

- (b) if no such emails exist from June 27, 2018, acknowledging that no emails exist.

Essentially the request seeks metadata, something this office has found valid for a request.<sup>4</sup> There can be issues of reasonable particularity inherent in requests for metadata, but that is not the case here.

Confirming the existence or nonexistence of emails is often as valuable as the material that is produced pursuant to a request. In essence, most requests for emails are just that: an educated guess something *might* exist and could be helpful to the requester. In this case, for reasons specifically unknown to this office, the Hopfs are concerned about this particular date and communication back and forth between identified individuals.

Again, in short, this is a valid request.

Presuming the emails do not exist, the School has an easy burden to satisfy: simply saying so. If they do exist, and contain deliberative material, Indiana Code section 5-14-3-6 requires an agency to separate the material that must be disclosed and make it available for inspection and copying.

The request as written does not require the School to create a new document, but simply redact everything except the requested information.

Hence my recommendations herein. I do not feel it appropriate in this case to make a declaration of compliance or noncompliance but rather to encourage the School to either state the emails from July 27, 2018, which meet the request parameters do not exist; or if they do and are deliberative,

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<sup>4</sup> *Informal Opinion of the Public Access Counselor*, 17-INF-13 (2017).



redact the body and provide the “metadata” requested by the Hopfs.

A handwritten signature in black ink, appearing to be 'LH Britt', written in a cursive style.

Luke H. Britt  
Public Access Counselor