
OPINION OF THE PUBLIC ACCESS COUNSELOR

LEE V. GAINES
Complainant,

v.

INDIANA DEPARTMENT OF EDUCATION,
Respondent.

Formal Complaint No.
21-FC-148

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Department of Education violated the Access to Public Records Act.¹ General Counsel Chad Ranney filed an answer on behalf of the agency. 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 September 16, 2021.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute about whether the Family Educational Rights and Privacy Act² (FERPA) prohibits the Indiana Department of Education (IDOE) from disclosing student arrest records under the Access to Public Records Act (APRA).

On August 8, 2021, Lee Gaines (Complainant), an investigative education reporter for WFYI Public Media, filed a public records request with the IDOE seeking the following:

Records of arrest of students on school property in Indiana, including the school corporation where the student was arrested, the date and/or school year in which the arrest occurred, the reason for arrest, race/ethnicity of the student, gender of the student, age, and whether the student receives special education for the time period covering the 2016-17 school year through the 2020-21 school year.

On August 25, 2021, IDOE denied Gaines' request. The agency asserted that APRA prohibits it from disclosing public records that are confidential under federal law. Toward that end, IDOE concluded that FERPA makes student education records confidential; and thus, the records Gaines requested are exempt from disclosure under APRA. IDOE reasoned that the records either alone or in combination are linkable to specific students, which would allow a reasonable person in the community—who does not have personal

² 20 U.S.C. § 1232g; 34 CFR Part 99.

knowledge of the relevant circumstances—to identify the student with reasonable certainty.

IDOE invited Gaines to resubmit her request with one of the personal identifiers (e.g., race/ethnicity of the student, gender of the student, age of the student) removed in order to comply with FERPA.

On September 16, 2021, Gaines filed a formal complaint alleging IDOE’s denial was improper under the law. Gaines argues that the data records she requested should not be considered personally identifiable information, which means disclosure of the data would not lead to the identification of students. Also, Gaines asserts that arrest records are not covered by FERPA.

On October 5, 2021, IDOE submitted a response denying Gaines’ allegations that the agency violated the Access to Public Records Act. IDOE maintains that its actions were appropriate since the requested records are considered confidential under FERPA.

First, IDOE argues that the records requested are “education records,” which are protected under FERPA. The agency cites *United States v. Miami University*, 294 F.3d 797, 812 (6th Cir. 2002), where the court acknowledged that student disciplinary records were education records protected under FERPA simply because they directly relate to a student and are kept by the student’s university. Given that IDOE considers itself to be an educational institution the records created and maintained by the department cannot be disclosed.

Second, IDOE argues that Gaines' request also sought "personally identifiable information," which is defined as "a list of personal characteristics that would make the student's identity easily traceable, or other information that would make the student's identity easily traceable." FERPA protects personally identifiable information, which is another reason that the department denied the request.

Finally, IDOE contends that "in a reasonable effort to provide Ms. Gaines with a copy of all disclosable data requested," created an Excel file with the information. However, the department has refused to release the file until Gaines alters the request, removing one of personal identifiers (e.g., race/ethnicity of student, gender of student, age of student). IDOE believes that altering the request will allow it to protect student confidentiality, where it has reason to believe that the community (including Gaines) could identify the students.

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 Indiana Department of Education (IDOE) 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 IDOE's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)—(b).

2. Education records

APRA mandates that a qualified entity must withhold those records which are declared confidential by law. *See* Ind. Code § 5-14-3-4(a)(3). For the purposes of this discussion, we will presume IDOE is an entity covered by FERPA.

There is little argument that FERPA includes confidentiality provisions for education records. This also extends to disciplinary records as well. The state’s privacy analog act does the same.

Here, however, the disconnect is the question of whether aggregate student arrest records are the type of education records covered by FERPA or state law.

The United States Department of Education provides some clarity, but only to the extent that the records were created by an in-house law enforcement unit:

Law enforcement unit records (i.e., records created by a law enforcement unit at the educational agency or institution, created for a law enforcement purpose, and maintained by the law enforcement unit) are not “education records” subject to the privacy protections of FERPA. As such, the law enforcement unit may refuse to provide a parent or eligible student with an opportunity to inspect and review law enforcement unit records, and it may disclose law enforcement

unit records to third parties without the parent's or eligible student's prior written consent.³

This tracks well with commonly accepted analyses of investigatory records. Under APRA, "investigatory record," means "information compiled in the course of the investigation of a crime." Ind. Code § 5-14-3-2(i). Investigatory records can be withheld at the discretion of the law enforcement agency pursuant to Indiana Code section 5-14-3-4(b)(1). The U.S. Department of Education guidance is in lockstep with APRA in this regard.

Here, it is unclear whether the arrest records occurred in-house or were reported by an outside agency. Either way, it matters little. Arrest records, even of juveniles, are records of which disclosure is mandatory.

Therefore, we must divorce student arrest records from FERPA in order to solve this puzzle. It should be viewed through the lens of law enforcement records.

In one of the few instances of mandatory creation of records found in APRA, law enforcement agencies must create a daily log which lists, among other things, the following:

(a) If a person is arrested or summoned for an offense, the following information shall be made available for inspection and copying:

(1) Information that identifies the person including the person's name, age, and address.

³ [https://studentprivacy.ed.gov/faq/are-law-enforcement-records-protected-under-ferpa#:~:text=%E2%80%9CLaw%20enforcement%20unit%20records%E2%80%9D%20\(the%20privacy%20protections%20of%20FERPA.](https://studentprivacy.ed.gov/faq/are-law-enforcement-records-protected-under-ferpa#:~:text=%E2%80%9CLaw%20enforcement%20unit%20records%E2%80%9D%20(the%20privacy%20protections%20of%20FERPA.)

(2) Information concerning any charges on which the arrest or summons is based.

(3) Information relating to the circumstances of the arrest or the issuance of the summons, such as the:

(A) time and location of the arrest or the issuance of the summons;

(B) investigating or arresting officer (other than an undercover officer or agent); and

(C) investigating or arresting law enforcement agency.

Ind. Code section 5-14-3-5. Notably, there is not an exception for juvenile or student arrest records in APRA. What is more, records relating to the detention of any child in a secure facility shall be open to public inspection. *See* Ind. Code § 31-39-3-3. The degree to which Title 31 may intersect with the arrest information itself was not argued by the parties.

Undoubtedly, preliminary proceedings, the investigation itself, and the disposition of any academic disciplinary actions would all be covered by statutes, but not the record of arrest.

While IDOE does not have to create any records pursuant to a request, it did so anyway. And taking the above statutes together, there does not appear to be an argument that student arrestees have any greater expectations of privacy than nonstudents. Therefore, it follows that if the Indiana Department of Education has amalgamated arrest records in a document, it would be subject to disclosure regardless of any identifying information.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Indiana Department of Education should release the documentation of student arrestees

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

Luke H. Britt
Public Access Counselor