
OPINION OF THE PUBLIC ACCESS COUNSELOR

ELAINE J. MITTLEMAN,
Complainant,

v.

BALL STATE UNIVERSITY,
Respondent.

Formal Complaint No.
17-FC-243

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging Ball State University (“Ball State”) violated the Access to Public Records Act¹ (“APRA”). Attorney Séamus P. Boyce responded on behalf of the university. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaints received by the Office of the Public Access Counselor on October 9, 2017.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

Elaine J. Mittleman (“Complainant”) filed a formal complaint alleging Ball State violated APRA by wrongfully denying her access to public records.

Mittleman has requested records related to a fraud investigation at the university since 2014. The Complainant provided copies of denied records requests that were denied on September 30, 2016, April 6, 2017, June 13, 2017, and most recently August 30, 2017. All of the denials prior to the August 30 denial fall outside of the thirty (30) day requirement for filing a formal complaint with my Office under Indiana Code section 5-14-5-7, so this opinion will focus on the August 30 denial. However, the prior denials may be referenced for contextual purposes.

On August 25, 2017, Mittleman submitted a public records request to the University seeking “records and emails about communications between law enforcement authorities and Ball State officials, including Randy Howard, in September 2011 and October 2011 about the Betts and Montolio fraud cases and investigations.” Ball State denied the request in a communication dated August 30, 2017. In the denial, the university stated that “as we have previously indicated, in order for us to review your request for emails, we will need for you to provide a specific sender, a specific recipient, a time frame and one or more key words.” The University further notes that Dr. Howard no longer worked for the University for more than three years, and therefore no email account for him existed. Finally, the University also stated that the university employees involved in the investigation

at the time were generally briefed verbally, and any communications between the University and legal counsel is protected by attorney-client privilege.

My Office received the complaint on October 9, 2017, and notified Ball State of the complaint on October 20, 2017. My Office received the response of the university on November 13, 2017.

In its response, Ball State asserts that the request did not meet the standard of reasonable particularity as contemplated by the APRA and case law on email records requests. Ball State also notes that it would have been sufficient to deny the request due to a lack of reasonable particularity, but it made an additional effort to prevent a “further fishing expedition for records that do not exist or would be protected from disclosure.”

ANALYSIS

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. Ball State University is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2(p)(1).

Therefore, unless an exception applies, any person has the right to inspect and copy Ball State’s public records during regular business hours. Ind. Code § 5-14-3-3(a). Under APRA, a public records request must identify the records sought with reasonably particularity so that the public

agency has enough information to locate and produce records responsive to the request. Ind. Code § 5-14-3-3(a); *Anderson v. Huntington Cty. Bd. of Comm'rs*, 983 N.E.2d 613, 618 (Ind. Ct. App. 2013). A denial made in writing must include the specific exemption(s) authorizing the withholding of the record. Ind. Code § 5-14-3-9(d)(2)(A).

Ball State argues that the Mittleman's request lacked reasonable particularity. I agree. Toward that end, I have consistently recommended that requests for emails—in order to be reasonably particular—must identify the following four items:

1. Named sender;
2. Named recipient;
3. Time frame of six months or less; and
4. Particularized subject matter or set of search terms.

See Opinion of the Public Access Counselor, 17-FC-52 (2017). Ball State notified Mittleman of these factors in a prior denial on June 13, 2017. The university provided these factors again in the August 30 denial.

Here, Mittleman appears to have provided sufficient key words to establish a search parameter and a sufficiently narrow time frame; however, she only named one employee as a sender/recipient and provided generic senders/recipients like “Ball State officials” and “law enforcement authorities,” which does not meet the well-established standard for a reasonably particular request for emails.

Mittleman also appears to take issue with the discussion of attorney-client privilege in the denial. While I think that stating “as a general matter, any communications between

the university and outside counsel would be protected by attorney-client privilege and not subject to release” is an overbroad statement, this was not the basis for denying Mittleman’s request. Were the Complainant to submit a reasonably particular request for communication between an employee and outside counsel, and such written communication existed, the University would not only need to review the communication to redact or withhold anything covered by attorney-client privilege, but also to review the communication for anything not covered by attorney-client privilege or another exemption that would render portions of the record releasable. *See Opinion of the Public Access Counselor*, 17-FC-199 (2017).

As a side note, it is worth reminding Ball State that emails are public record under Indiana Code section 5-14-3-2(q) and must be preserved according to retention schedules set by the State or by the university. When an employee leaves a public agency, there should be steps taken to preserve the employee’s emails that are subject to the relevant records retention schedule.

CONCLUSION

Based on the foregoing it is the opinion of the Public Access Counselor that Ball State University did not violate the Access to Public Records Act.

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

Luke H. Britt
Public Access Counselor