



February 25, 2021

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Contemporaneously submitted through: <https://law.georgia.gov/key-issues/open-government/open-government-complaint>

RE: Complaint regarding Violations of the Georgia Open Records Act

Dear Ms. Colangelo:

The Georgia First Amendment Foundation (“the Foundation”) hereby submits the following complaint to the Attorney General’s Open Government Program on behalf of and in conjunction with Ms. Carrie Bishop.

Ms. Bishop is a resident of Athens-Clarke County and the mother of a child in the Clarke County School District (“CCSD”). She, like many parents, is justifiably concerned about the risk that Covid-19 poses to her child and to other children attending schools operated by CCSD. This concern is particularly acute because CCSD is in the process of implementing an optional phased return to in-person learning at its schools. Although Ms. Bishop has chosen to continue with a virtual learning option for her child for the time being, she is keenly interested in evaluating the level of safety achieved by CCSD in connection with the in-person learning option.

On February 23, 2021, Ms. Bishop submitted an Open Records Act request to CCSD seeking the following records and data:

Pursuant to the open records law, I would like to obtain copies of:
For 2020-2021

- The total number of CCSD COVID cases (all reported cases, including those that occurred on campus and those off campus).
- The total number of CCSD COVID isolations and quarantines.
- The total number of CCSD COVID related hospitalizations.
- The total number of CCSD COVID related deaths

I would like this data separated by school.

See Exhibit A (Open Records Act request) (emphasis original).

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“Because public men and women are amenable ‘at all times’ to the people, they must conduct the public’s business out in the open.”
— The late Charles L. Weltner Sr., Chief Justice, Georgia Supreme Court

Ms. Bishop's request was perfectly appropriate. The CCSD operates at 21 schools. In order to have any meaningful understanding of the threat a child faces in a particular school, it is necessary to have a breakdown of the Covid-19 cases present in each school environment.

Unfortunately, the CCSD's response violated the Open Records Act at both a procedural and substantive level.

I. CCSD intentionally delayed Ms. Bishop's access to public records.

As a procedural matter, CCSD initially provided a prompt response to Ms. Bishop's request. On the same day as her request, CCSD informed Ms. Bishop that she could find Covid-19 cases "involving CCSD students and staff" on the CCSD website and provided a link. However, the website information did *not* provide Ms. Bishop with a school-by-school breakdown of the data. In a follow up email, Ms. Bishop appropriately informed CCSD that she was aware of the website, but had requested "the data separated by school." In response to this, CCSD responded as follows:

Good morning,

While I understand that you would like that information, it is not something that we can release. The personal health information of employees is exempt from disclosure under the Open Records Act, pursuant to OCGA 50-18-72 (a)(21). Similarly, personally identifiable information related to students is exempt under OCGA 50-18-72 (a)(1) and (a)(37) of the Open Records Act. The individual cell sizes for each school are fortunately smaller than we could release and still meet the requirements for properly de-identifying the data.

See Exhibit B (copy of email correspondence).

Ms. Bishop immediately clarified that she was looking for the "total numbers of cases per school," not personally identifying information. CCSD then explained its position as follows:

Happy to clarify. When making aggregate, deidentified data available to the public, the Clarke County School District follows Georgia Department of Education guidance regarding data reporting and student privacy by suppressing cell sizes that are less than ten but more than zero.

While CCSD's response above was legally flawed as a substantive matter (as discussed separately below), it was CCSD's subsequent response that showed CCSD's procedural contempt for the Open Records Act. Given CCSD's position as stated above, Ms. Bishop made a perfectly reasonable follow-up request. She asked:

Thank you. Can you please provide a link to that Georgia Department of Education guidance? Also, can you provide the data for schools where the cells are more than 10?

In response to this inquiry, CCSD's outside counsel sent an email to all parties, including Ms. Bishop:

Let's send her the guidance in three days and move on. I'd recommend not responding to this email right now.

See Exhibit B (emphasis added). Neither of CCSD's outside counsel attempted to withdraw or amend the email and appeared content to have it shared with Ms. Bishop.

At that point, CCSD discontinued contact with Ms. Bishop. CCSD has provided no further information to Ms. Bishop as of the writing of this complaint. CCSD's response shows contempt for the Open Records Act process. CCSD's counsel explicitly advised CCSD to stop being responsive and delay any further response. Additionally, the instruction to "move on" appears to be an instruction to provide no further information other than the referenced link and to delay even the transmission of that link for "three days" so that Ms. Bishop received no further information "right now."

As you know, the Open Records Act explicitly forbids such intentional delay. Delaying access to records is directly at odds with the stated purpose of the Act. *See, e.g.*, O.C.G.A. § 50-18-70(a) ("The General Assembly further finds and declares that there is a strong presumption that public records should be made available for public inspection without delay."). Indeed, the Act explicitly authorizes criminal and civil penalties for "knowingly and willfully attempting to frustrate the access to records by intentionally making them difficult to obtain or review." *See, e.g.*, O.C.G.A. § 50-18-74(a).

From a procedural perspective alone, CCSD's conduct is a violation of the Act. Unfortunately, CCSD's conduct is emblematic of numerous school districts and other local public agencies that have resisted disclosing Covid-19 information in a timely way. We ask that your Office take action to demonstrate that such delay is unacceptable.

II. CCSD's response to Ms. Bishop's public records request is wrong as a legal matter.

As a substantive matter, CCSD's response is also a violation of the Open Records Act.

At its core, CCSD has taken the position that it is not obligated to provide records or data on the prevalence of Covid-19 cases at a specific school unless the number of cases at that school meets or exceeds 10. There is no legal justification for this position.

The law is well-established that a public agency's disclosure of de-identified numerical data does not violate privacy rights or the Family Educational Rights and Privacy Act. CCSD obviously recognizes this legal principle because it provides data on Covid-19 cases on weekly basis on its website, but compiles that data from its 21 schools into a system-wide cumulative quantum. *See generally*: <https://www.clarke.k12.ga.us/domain/2610>.

Ms. Bishop repeatedly made clear she was not requesting personally identifiable information, but was only requesting "total numbers" of Covid-19 cases on a school-by-school basis. There is no legal support for CCSD's position that it can unilaterally decide its data will not be provided on a school-by-school basis until the number of active cases at a particular school exceeds 10. In fact, the federal agency that enforces FERPA states as follows in its current guidance to schools:

May a school disclose the number of students who have COVID-19 to parents and students in the school community without prior written consent?

Yes, provided that the information the school shares with parents and students does not allow for any individual student to be identified. If a school discloses information about

students in a non-identifiable form, then prior written consent from the parent or student (depending on the age of the student) is not needed under FERPA. When determining what information may be shared without consent, the school must take into account other reasonably available information that could potentially enable non-identifiable information to become identifiable.

For example, a school generally could release the fact that five students are absent due to COVID-19 without disclosing the students' identities. This would be allowed under FERPA as long as there are a sufficient number of other students who attend the school and other students at the school are absent for other reasons. However, we caution schools to ensure that in releasing such facts, they do so in a way that does not reveal information that, alone or in combination with other information, would allow a person in the school community to identify the students who are absent due to COVID-19.

See U.S. Department of Education, Student Privacy Policy Office, HomeRoom website, dated September 24, 2020, found at <https://blog.ed.gov/2020/09/may-schools-disclose-information-cases-covid-19/> (emphasis added).

Given that the U.S. Student Privacy Policy Office explicitly authorizes a disclosure of current absences relating to “five students” under normal circumstances, it is difficult to understand how CCSD could defend a rule that limits disclosure until active cell sizes of Covid-19 infected patients reach ten in size. The composition of CCSD’s schools is not unusual, and CCSD is apparently invoking its “less than 10” rule with respect to all of the schools in its system regardless of the size of each schools’ student population. There is no justification for this position.

The lack of justification for CCSD’s position is further illustrated by the fact that CCSD appropriately informs parents by email when an another student at their child’s school contracts Covid-19. Given that CCSD provides de-identified information on individual cases to parents at schools when the cases arise, there is no justification for refusing to release compiled numbers for each school, so that the data can be assessed from a broader perspective, over a longer time period, with the potential to compare the schools in the CCSD system to one another.

We ask that the Attorney General’s Office instruct CCSD that its cell of size of “less than 10” rule is not legally warranted and that, henceforth, it provide de-identified numerical data on school-by-school basis unless it can make a meaningful showing that such disclosure would allow the identification of individual students given scale of the school population or other particularized facts. Additionally, of course, CCSD should be informed that its effort to “move on” was a patent violation of the Act as there was no basis (even under CCSD’s flawed rule) to fail to identify individual schools with zero cases or schools with “total numbers” of 10 or more cases as Ms. Bishop requested.

We appreciate your consideration of this matter and look forward to working with your office in rectifying these violations of the Open Records Act.

Sincerely,

Thomas M. Clyde

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