

December 13, 2006

*Sent Via Facsimile*

Justin Hesser  
*Daily News*  
Ball State University  
AJ 278  
Muncie, IN 47306

*Re: Formal Complaint 06-FC-197; Alleged Violation of the Access to Public Records Act by Ball State University*

Dear Mr. Hesser:

This is in response to your formal complaint alleging that Ball State University (“BSU”) violated the Access to Public Records Act by refusing to disclose electronic mail and written communications of BSU. I find that BSU may not deny a request because it is not reasonably particular.

#### BACKGROUND

You filed a formal complaint with the Office of the Public Access Counselor after receiving a denial letter from Sali Falling, BSU Executive Director of University Compliance to each of your three requests for electronic mail and other written communications. Specifically you requested 1) any written or e-mail communication Tom Taylor has received or sent within the last six months that mentions Larry Waters; 2) all written or e-mail communication between Jo Ann Gora and Tom Taylor the past six months; and 3) all written or e-mail communication between Larry Waters and Tom Taylor the past six months. Each of these requests was submitted in turn after you received a denial for lack of specificity from BSU.

For each request, Ms. Falling sent a written denial that stated “IC 5-14-3-3(a)(1) requires that a request for inspection or copying of a public record must identify with reasonable particularity the record being requested. Your request does not fulfill that requirement, in that it

doesn't identify what you are requesting. If you can identify the record you are seeking with more particularity, I will be happy to review that request and determine whether the record exists and whether it is subject to release."

Your objection to BSU's response is that it seeks so much specificity that it virtually requires you to name the particular record or records you are seeking with "exact precision," and the APRA does not require that much specificity.

You note that until just prior to the first of your requests, BSU changed the process for handling public records requests; previously, BSU's Office of University Communications processed requests. Since October 16, that responsibility has shifted to the Office of University Compliance. You point out that a colleague had been able to request and receive communications between Dave Land and Tom Collins from January through August 2. This request had been fulfilled by the Office of University Communications. You did not receive a satisfactory answer when you pointed out the disparate treatment to Ms. Falling.

Anticipating that most of the documentation you request will be electronic mail, you also wondered whether BSU is required to have an e-mail retention policy. I will address other issues you raise in your complaint below.

I sent a copy of your complaint to BSU. In response, Mr. Jon H. Moll provided a letter, a copy of which is attached for your reference. Mr. Moll represents BSU. In response to the first of your three requests, Mr. Moll noted that Ms. Falling was aware of hundreds or perhaps thousands of responsive documents. This was the reason that she asked that you identify the record with more particularity. Rather than accept Ms. Falling's invitation, you broadened your two subsequent requests. BSU maintains that the production of e-mails to your colleague involved far fewer e-mails because the e-mail communication between Mr. Land and Mr. Collins was infrequent. BSU takes the position that it is not required to spend long hours going through hundreds or thousands of e-mails and other written communications to determine whether they are disclosable. Mr. Moll also proposed a more specific request to be "copies of e-mails or written communications between Mr. Taylor and Dr. Waters concerning any disciplinary action taken by Mr. Taylor against Dr. Waters."

With respect to your question about retention policies for e-mail, Mr. Moll stated that no issue regarding retention is raised in your complaint. However, the law regarding preservation of records does not apply to state universities. Universities are free to set their own policies concerning retention of records.

## ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). A request for inspection and copying must identify with reasonable particularity the record being requested. IC 5-14-3-3(a)(1). There is no Indiana case law defining "reasonable particularity," so were it necessary to interpret the APRA to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary, dictionary meanings of

the word used. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. Ct. App. 1992) “Particularity” is defined as “the state of being particular rather than general.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981), 956. Rules of statutory interpretation also require that one construe the phrase “reasonable particularity” in light of the entire APRA. *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. Ct. App. 1991). In legal terms, what is “reasonable” is measured with respect to the particular facts and circumstances.

Since the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, then the agency should contact the requester for more information if it is necessary in order to provide the records. See generally IC 5-14-3-1; *Opinion of the Public Access Counselor 02-FC-13*. It is my opinion that the response of Ms. Falling falls short of the requirements of the APRA. Rather than issuing an outright denial of your request, BSU should have contacted you to explain why your request was not reasonably particular. The denial invited you to “try again” but did nothing to provide information concerning why your request was not reasonably particular. The complaint response provided by BSU appears to be the only documentation of BSU’s concern that the records you had requested were voluminous. Had Ms. Falling contacted you to explain that the records were voluminous and suggested ways that you could narrow the scope to elicit fewer, but more pertinent, records, you may have found it unnecessary to file a complaint.

In reviewing each of your requests, the first request may not be particular because it is somewhat ambiguous. When requesting e-mail, it is helpful to specify that e-mail is “received” when the recipient’s name is in the “To” space, not when the person receives a copy, if this is what you intend. In addition, whether the e-mail or other communication “mentions” Larry Waters could be interpreted two ways; e.g., the e-mail contains his name in any context, or the writer of the message refers to Larry Waters in some fashion. The other two requests are broader, but are not ambiguous. Again, if BSU had concerns along these lines, or believed that the voluminous number of records would have included messages that you were not interested in, it was incumbent on BSU to contact you for clarification.

You raise in your complaint three other issues regarding the question of the scope of your requests. You posed these questions: 1) is e-mail between public officials a public record; 2) can requests that may be voluminous in material be deemed unreasonably particular or denied on another basis; and 3) if there are issues of privacy within a public record, can the public agency not release that e-mail or written communication or must the agency redact the content and submit the rest, no matter how much that may leave? You also ask what a public agency’s responsibility is with respect to maintaining e-mail.

In response, BSU observes that your questions do not raise matters on which you could complain. I agree that you do not allege facts on these issues, but the Office of the Public Access Counselor may issue advice informally, not just in the context of a formal complaint. See IC 5-14-4-10(5). Accordingly, I am issuing the following informal guidance.

“Public record” is any material “created, received, retained, maintained, or filed by or with a public agency... including “electronically stored data or any other material, regardless of form or characteristics.” IC 5-14-3-2(m). BSU concedes that the records you seek, including the

e-mail, is a public record, since BSU is a public agency and the records are maintained by BSU. With respect to voluminous records, a request cannot be denied because responsive records will be voluminous or take many hours to identify or to review for nondisclosable information. As I stated above, if a request would elicit thousands of records, it is appropriate for the public agency to tell the requester that the records would be voluminous and invite the requester to make his request more particular. However, I find nothing in the APRA that would allow a public agency to limit the number of different records provided.<sup>1</sup>

If a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under the APRA, separate the material that may be disclosed and make it available for inspection and copying. IC 5-14-3-6(a). Hence, if the e-mail or other written communication contains nondisclosable material, BSU is required to separate the two and disclose the remainder of the record. This is true even if the redacted record is materially reduced by the redactions.

Finally, you have asked what a public agency's responsibility is with respect to maintaining public records. Public records subject to Indiana Code 5-15 may be destroyed only in accordance with record retention schedules under Indiana Code 5-15; public records not subject to Indiana Code 5-15 may be destroyed in the ordinary course of business. IC 5-14-3-4(e). IC 5-15-5.1 applies to state agencies generally, but does not apply to state-supported colleges and universities. IC 5-15-5.1-2(b). No other chapter in IC 5-15 provides for retention of records of state-supported colleges and universities. Hence, unless another statute provides for retention of university records specifically, BSU is free to develop its own policies regarding retention of records, with services from the Commission on Public Records if BSU chooses. *See* IC 5-15-5.1-2(b). For a catalog of record retention schedules that may be searched by public agency, go to: [http://www.in.gov/apps/icpr/retention/icpr\\_retention](http://www.in.gov/apps/icpr/retention/icpr_retention).

## CONCLUSION

For the foregoing reasons, It is my opinion that BSU could not deny your request for records because it did not comply with IC 5-14-3-3(a). Rather, BSU should have contacted you for clarification and provided to you enough information about the records for you to narrow your request.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Jon H. Moll

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<sup>1</sup> A public agency shall regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* IC 5-14-3-7(a). Nothing in IC 5-14-3-7 operates to deny to any person the rights secured by section 3 of the APRA. *See* IC 5-14-3-7(c).