



# STATE OF INDIANA

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January 3, 2011

Ms. Stacy W. St. Clair  
c/o Brendan Healey, *Chicago Tribune* Legal Department  
435 N. Michigan Ave.  
Chicago, IL 60091

*Re: Formal Complaint 10-FC-304; Alleged Violation of the Access to  
Public Records Act by the Notre Dame Security Police Department*

Dear Ms. St. Clair and Mr. Healey:

This advisory opinion is in response to your formal complaint alleging the University of Notre Dame Security Security Police ("NDSP") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* A copy of the NDSP's response is enclosed for your reference.

## BACKGROUND

In your complaint, you allege that the NDSP is a "public agency" within the meaning of the APRA. As such, in response to your request on November 16, 2010, the NDSP should have disclosed requested records pertaining to sexual assaults and/or witness tampering on the University of Notre Dame ("University") campus from August 20, 2010, to the time of the request.

You note that the NDSP states on its website that it "is fully authorized as a police agency by the State of Indiana," and its officers "have the same legal authority as any other police officer in Indiana." You argue that the NDSP is a public agency because it exercises "part of the executive, administrative, judicial, or legislative power of the state" under Ind. Code § 5-14-3-2(m)(1). Specifically, you note that private university police departments such as the NDSP are empowered by Ind. Code § 21-17-5-2 to perform traditional government functions such as conducting arrests, carrying firearms, and even using deadly force under appropriate circumstances. You request that this office revisit opinions issued by two previous public access counselors and determine that "where, as here, a private university employs a police force in which the officers have the same legal authority as any other police force in Indiana, that university police force be subject to [the] APRA."

In response to your complaint, University Associate General Counsel Clair Konopa Aigotti maintains the University's position that the NDSP is not a public agency subject to the APRA. She notes that the NDSP is a department within the University consisting of sworn officers, non-sworn security staff, and additional personnel, all of whom are University employees charged with ensuring the safety of the University's campus. The University's board of trustees formed the NDSP in 1977 pursuant to Ind. Code § 21-17-5, which allows NDSP officers to exercise "[g]eneral police powers." I.C. § 21-17-5-4. NDSP is controlled solely by the University, which employs the officers, prescribes their duties, and has the power to limit their exercise of police powers. I.C. § 21-17-5-4(b). No government entity appoints or has the power to remove any NDSP officer. Ms. Aigotti argues that the NDSP is not subject to the APRA because, among other reasons, it is not a government agency and "has no ties whatsoever with any part of the state, county, or local government," the University is not obligated to exercise any powers (e.g., forming the NDSP, appointing its officers, or prescribing their duties) granted to it in Ind. Code § 21-17-5, and the NDSP does not fit the definition of a "law enforcement agency" in Ind. Code § 5-14-3-2(m)(6).

## ANALYSIS

The public policy of the APRA states, "[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." I.C. § 5-14-3-1. Only entities that fall within the definition of a "public agency" are subject to the requirements of the APRA and the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.* The party seeking to inspect and copy records has the burden of proving that the entity in possession of the records is a public agency within the meaning of the APRA. *Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc.* 577 N.E.2d 208, 212 (Ind. 1991) ("*ICVA*"). The question here is whether the NDSP is a public agency under the APRA because it is an "entity . . . exercising in a limited geographical area the executive, administrative, judicial, or legislative power of the state. . . ." I.C. § 5-14-3-2(m)(1).

Initially, I note that two of my predecessors have addressed this issue in the past and have determined that private university police departments are not public agencies subject to the APRA. *See Ops. of the Public Access Counselor 09-FC-9* (Valparaiso University); *03-FC-108* (Taylor University). I agree with the conclusions reaching in those opinions, incorporate their analyses herein, and supplement those decisions with the following analysis.

It is true that Ind. Code § 21-17-5 provides private universities with the authority to appoint police officers, prescribe their duties and uniforms, and designate and operate emergency vehicles:

Governing board; powers and duties

Sec. 2. The governing board of an educational institution may do the following:

- (1) Appoint police officers for the educational institution for which it is responsible.
- (2) Prescribe the duties of police officers of the educational institution and direct their conduct.
- (3) Prescribe distinctive uniforms for the police officers of the educational institution or campus.
- (4) Designate and operate emergency vehicles.

I.C. § 21-17-5-2. However, it is important that the General Assembly granted these powers not to the NDSP, but to “the governing board of an educational institution.” Consequently, NDSP does not exercise State powers on its own; NDSP exercises only those powers granted it by the University’s governing body. Consequently, if the NDSP is a public agency by virtue of the fact that it exercises the executive or other powers of the State, the entire University would be subject to the APRA along with the NDSP. I do not believe the General Assembly granted police powers to private universities with the intent that doing so would subject the entire institution to the APRA. Indeed, Ind. Code § 21-17-5 was intended to apply only to private colleges and universities:

Applicability of chapter

Sec. 1. This chapter applies to a college, university, or junior college that:

- (1) is accredited by the North Central Association; and
- (2) is *not* a state educational institution.

Ind. Code § 21-17-5-1 (emphasis added).

If the General Assembly’s intent were otherwise, it has passed on several opportunities to amend the APRA and clarify it to include private universities police departments. Since 2003, the APRA has been amended in some fashion during nearly every annual legislative session, but the General Assembly has not seen fit to amend the APRA to supersede this office’s advisory opinions by explicitly defining private universities’ police departments as public agencies. Moreover, I agree with the University that the most logical place in the statute to include such entities would be under Ind. Code § 5-14-3-2(m)(6), which defines a “law enforcement agency” as

An agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff’s department of a political subdivision, prosecuting attorneys, members of the excise police division of the alcohol and tobacco commission, conservation officers of the department of natural resources, gaming agents of the Indiana gaming commission, gaming control officers of the Indiana gaming commission, and the security division of the state lottery.

It is also notable that subsection 2(m)(6) lists “the police or sheriff’s department *of a political subdivision....*” *Id.* (emphasis added). If the General Assembly had intended all police departments to be subject to the APRA at all times, there would be no reason to include the prepositional phrase regarding political subdivisions. As the Indiana Supreme Court has repeatedly noted, we must “interpret a statute in order to give effect to every

word and render no part meaningless if it can be reconciled with the rest of the statute.” *Piven v. ITT Corp.*, 2010 Ind. LEXIS 401 at \*14 (Ind. June 28, 2010) (citing *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782 (Ind. 2000)). Because the University is not a political subdivision, in my opinion the NDSP is not a “law enforcement agency” under this provision, and the failure of the General Assembly to include private universities’ police departments in the other enumerated law enforcement agencies evidences an intent to limit application of the APRA to police departments of political subdivisions.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the NDSP is not a public agency subject to the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack  
Public Access Counselor

Cc: Claire Konopa Aigotti