



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

February 17, 2012

David L. Ferguson and Sung (Fidelia) Park
403 East Sixth Street
Bloomington, Indiana 47408

Re: Formal Complaint 12-FC-27; Alleged Violation of the Access to Public Records Act by Indiana University

Dear Mr. Ferguson and Ms. Park:

This advisory opinion is in response to your formal complaint alleging Indiana University ("University") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Thomas Gannon, Associate General Counsel, responded on behalf of the University. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request to the University on October 12, 2011 for the following records:

1. Records, investigations, and reports of all Indiana University School of Dentistry ("IUSD") students, identified by number or code with race, national origin, and gender specified, who has been
 - a. charged with,
 - b. subjected to formal disciplinary consideration for,
 - c. disciplined for, or
 - d. expelled for,interacting with a faculty member in an unprofessional manner.
2. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who has been
 - a. charged with,
 - b. subjected to formal disciplinary consideration for,
 - c. disciplined for, or
 - d. expelled for,failing to comply with the "swipe system" for attendance.



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3. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who has been
 - a. charged with,
 - b. subjected to formal disciplinary consideration for,
 - c. disciplined for, or
 - d. expelled for,failing to attend a scheduled remediation appointment or failing to reschedule a remediation appointment.
4. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who has been
 - a. charged with,
 - b. subjected to formal disciplinary consideration for,
 - c. disciplined for, or
 - d. expelled for,arriving late for or leaving a remediation examination without permission from the faculty.
5. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who has been
 - a. charged with,
 - b. subjected to formal disciplinary consideration for,
 - c. disciplined for, or
 - d. expelled for,for failing to respond to electronic communications from faculty members.
6. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who has been
 - a. charged with,
 - b. subjected to formal disciplinary consideration for,
 - c. disciplined for, or
 - d. expelled for,failing to attend a meeting scheduled by a faculty member.
7. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who has been
 - a. charged with,
 - b. subjected to formal disciplinary consideration for,
 - c. disciplined for, or



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- d. expelled for,
breaching the Code of Professional Conduct confidentiality policy.
8. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who has been
 - a. charged with,
 - b. subjected to formal disciplinary consideration for,
 - c. disciplined for, or
 - d. expelled for,
failing to remain in contact with the Student Professional Conduct Committee ("SPCC").
9. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who has been
 - a. charged with,
 - b. subjected to formal disciplinary consideration for,
 - c. disciplined for, or
 - d. expelled for,
failing to correctly use the absence notification system.
10. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who has been
 - a. charged with,
 - b. subjected to formal disciplinary consideration for,
 - c. disciplined for, or
 - d. expelled for,
failing to attend the first day of a mandatory extended orientation/preceptorship without notifying faculty or staff.
11. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who has been
 - a. charged with,
 - b. subjected to formal disciplinary consideration for,
 - c. disciplined for, or
 - d. expelled for,
failing to attend the first day of mandatory meetings without notifying faculty or staff.



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12. Attendance records of all IUSD students in the aggregate, not individually, identified by number or code with race, national origin, and gender specified.
13. Discipline records for all IUSD students in the aggregate, not individually, identified by number or code with race, national origin, and gender specified.
14. Records of all IUSD remediation exam results.
15. Correspondence of all kind, including electronic correspondence directed to ten or more IUSD faculty or IUSD students regarding remediation exams.
16. All reports, investigations, and complaints arising from controversies, complaints, or charges from students against Dean Kasberg.
17. All reports, investigations, and complaints arising from controversies, complaints, or charges from students against Professor Haug.
18. All reports, investigations, and complaints arising from controversies, complaints, or charges from students against Professor Cayetano.
19. All reports, investigations, and complaints arising from controversies, complaints, or charges from students against Professor Holt.
20. All reports, investigations, and complaints arising from controversies, complaints, or charges from students against Professor Post.
21. All reports, investigations, and complaints arising from controversies, complaints, or charges from students against Professor Carlson.
22. All reports, investigations, and complaints arising from controversies, complaints, or charges from students against Professor John.
23. Records of all communications by the students who missed Dr. John's July 2, 2010 deadline for syllabus exam, between those students and Dr. John from June 1, 2010 through August 21, 2010.
24. Records of all disciplinary investigations, reports, or proceedings against the students who missed Dr. John's July 2, 2010 deadline for his syllabus exam, including any rationale for not disciplining these students.



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25. Records of sanctions and recommendations made by Assistant Dean Kasberg against all students, identified by number or code with race, national origin, and gender specified.
26. All documents relating to the University's consideration, creation, rules, procedures, and activities of the Racial Incidents Team, including a breakdown of those that has related directly or indirectly to the IUSD.
27. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who reported or complained that a grading scale was changed from the course syllabus, that they were given lower grades than justified by syllabus standards, or that grades were reported incorrectly or in a manner inconsistent with the syllabus.
28. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who reported or complained that they attended a remediation exam and were held responsible for the professor's failure to prepare the exam.
29. Records, investigations, and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who reported or complained that they were not told about a meeting with a professor, but held responsible for not attending.
30. Records, investigations, and reports of all IUSD students, identified by number or code, who have been
 - a. charged with,
 - b. subjected to formal disciplinary charges for,
 - c. disciplined for, or
 - d. expelled forinteracting with a faculty member in an unprofessional manner.
31. Records, investigations, and reports of all IUSD students, identified by number or code, who have been
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failing to comply with the "swipe system" for attendance.

32. Records, investigations, and reports of all IUSD students, identified by number or code, who have been
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 - c. disciplined for, or
 - d. expelled forfailing to attend a scheduled remediation appointment or failing to reschedule a remediation appointment.
33. Records, investigations, and reports of all IUSD students, identified by number or code, who have been
 - a. charged with,
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 - c. disciplined for, or
 - d. expelled forarriving late for and leaving a remediation examination without permission from faculty.
34. Records, investigations, and reports of all IUSD students, identified by number or code, who have been
 - a. charged with,
 - b. subjected to formal disciplinary charges for,
 - c. disciplined for, or
 - d. expelled forfailing to respond to electronic communications from faculty members.
35. Records, investigations, and reports of all IUSD students, identified by number or code, who have been
 - a. charged with,
 - b. subjected to formal disciplinary charges for,
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36. Records, investigations, and reports of all IUSD students, identified by number or code, who have been
 - a. charged with,



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- b. subjected to formal disciplinary charges for,
 - c. disciplined for, or
 - d. expelled for
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37. Records, investigations, and reports of all IUSD students, identified by number or code, who have been
- a. charged with,
 - b. subjected to formal disciplinary charges for,
 - c. disciplined for, or
 - d. expelled for
failing to remain in contact with the SPCC.
38. Records, investigations, and reports of all IUSD students, identified by number or code, who have been
- a. charged with,
 - b. subjected to formal disciplinary charges for,
 - c. disciplined for, or
 - d. expelled for
failing to correctly use the absence notification system.
39. Records, investigations, and reports of all IUSD students, identified by number or code, who have been
- a. charged with,
 - b. subjected to formal disciplinary charges for,
 - c. disciplined for, or
 - d. expelled for
failing to attend the first day of the mandatory extended orientation/preceptorship without notifying faculty or staff.
40. Records, investigations, and reports of all IUSD students, identified by number or code, who have been
- a. charged with,
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41. Attendance records of all IUSD students, identified by number or code.
42. Discipline records for all IUSD students, identified by number or code.
43. Record of sanctions and recommendations made by IUSD Assistant Dean Kasberg against all students, identified by number or code.
44. Records, investigations, and reports of all IUSD students, identified by number or code, who reported or complained that a grading scale was changed from the course syllabus, that they were given lower grades than justified by syllabus standards, or that grades were reported incorrectly or in a manner inconsistent with the syllabus.
45. Records, investigations, and reports of all IUSD student, identified by number or code, who reported or complained that they attended a remediation exam and were held responsible for the professor's failure to prepare the exam.
46. Records, investigations, and reports of all IUSD students, identified by number of code, who reported or complained that they were not told about a meeting with a professor, but held responsible for not attending.
47. Records and reports of all IUSD students, identified by number or code with race, national origin, and gender specified, who were offered clinic suspension and the terms of the clinical suspension.
48. Records and reports of all IUSD students, identified by number or code who were offered clinic suspension.
49. Correspondence of all kind, including electronic correspondence directed to ten or more IUSD faculty or students regarding student attendance at classes or clinics.
50. Correspondence of all kind, including electronic correspondence, from Assistant Dean Kasberg directed to ten or more IUSD faculty or IUSD students.
51. Correspondence of all kind, including electronic correspondence, directed to ten or more IUSD faculty or IUSD students regarding student use of swipe cards or failure to use swipe cards.



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52. Correspondence of all kind, including electronic correspondence, directed to ten or more IUSD faculty or IUSD students regarding documentation of personal days.
53. All documents showing actions taken by the University Board of Trustees in dismissing IUSD students.
54. All documents showing the University's compliance with I.C. 21-39-2 in dismissing IUSD students.
55. All documents granting authority to Dean Queener to dismiss students or showing that Dean Queener has authority to dismiss students.
56. All IUSD student reviews conducted by Dean Queener.

On October 19, 2012, Mr. Gannon responded to your request in writing and advised that the University was in the process of determining whether records existed that would be responsive to your request and whether they would be disclosed. On January 13, 2012, the University responded to your request and either provided documents that were responsive to your request or issued a statement denying your request. You believe that the University failed to respond to your request in a reasonable period of time as required by the APRA, especially in light of its almost complete denial of your request.

In addition to failing to respond to your request in a reasonable period of time, you further allege that University improperly denied parts of your request in the following manner:

- As to the records cited by the University that were considered to be confidential pursuant to the Family Education Rights and Privacy Act ("FERPA"), you allege that the University was still required to redact the information deemed confidential pursuant to FERPA and provide access to the remaining parts of the record.
- As to the parts of the request which the University denied due to the belief that the request was not made with reasonable particularity, you allege that the proper response was to seek clarification, not deny the request.
- As to the records that were denied pursuant to I.C. 5-14-3-4(b)(4), the exception only applies to preclude disclosure of the identity of the person by name. The University should have provided test scores after redacting the names of the



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- persons in such records in order to comply with FERPA and the APRA, and then release the remaining information. Because your request only sought data involving examination results of multiple persons, the exception for academic examination data does not apply.
- The University acted improperly when it asserted in its denial that the requested records *may* include documents excepted from disclosure (emphasis added).
 - As to the records that were denied pursuant to I.C. 5-14-3-4(b)(8), the University was required to provide information regarding the status of any formal charges and the factual basis for a disciplinary action in which final action has been taken that resulted in the employee being suspended, demoted, or discharged. The University failed to follow the guidelines of (b)(8) in citing to this exception.
 - The records that were denied on the basis of the Health Insurance Portability and Accountability Act (“HIPPA”), the University was required to redact the HIPPA information and provide access to the remaining parts of the records. The University failed to redact information and instead issued a blanket denial.
 - If any of the records simply do not exist, the University should make a clear statement as to their existence, or lack thereof.

In response to your formal complaint, Mr. Gannon confirmed that you made a request of the University pursuant to the APRA on October 12, 2011. On October 19, 2011, Mr. Gannon responded on behalf of the University, acknowledged the receipt of your request, and provided that the University was in the process of determining whether the requested records existed and whether the records would be deemed disclosable. On December 23, 2011, Mr. Gannon sent a follow-up response, indicating that the search was taking longer than anticipated and the response would be forthcoming in early January 2012. On January 13, 2012, the University provided, via e-mail, all records that were responsive to your request or denied your request pursuant to various provisions of the APRA and Indiana Code.

As to the length of time taken by the University to respond to your request, Mr. Gannon advised that the APRA does not specify a time for the actual production of records. The Public Access Counselor’s Office has often stated that public agencies must respond within a reasonable period of time. Here, you requested approximately fifty-seven detailed, lengthy requests of the University that covered a span of multiple years. At the time of your request made pursuant to the APRA, in addition to all of its normal duties, the University was required to respond to your separate and detailed request made pursuant to the Family Educational Rights and Privacy Act (“FERPA”). The records that were sought were potentially stored in several administrative units. Not only was the University required to retrieve all records that were responsive; pursuant to the APRA



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each record was required to be reviewed prior to disclosure. After the University responded to Ms. Park's FERPA request on December 2, 2011, it was able to devote more attention to her APRA request. It should be noted that thereafter, Ms. Park submitted a supplementary FERPA request which further competed for the attention of the pending APRA request. The University estimated that the time involved for all personnel who assisted in the retrieval, review, and response issued as to your request totaled approximately fifty to sixty hours.

As to the substance of the request, many of the University's responses provided that it did not maintain such records in the format request and is not required to create a record that does not exist. The University also cited other alternative bases in the event such records were later discovered or if the request was misunderstood. As to the denials that were made pursuant to FERPA, the University's responses to numbers 14-24, 26, 32-54, and 56-57 provide that no such records were maintained by the University in the format requested. The University response detailed that even if such records existed in the format request, the record would be exempt pursuant to a specific exemption provided in FERPA, which was detailed in the University's correspondence denying parts of your request. The University does acknowledge that non-confidential information must be redacted, however the University maintains that the records sought were not kept in the format that was requested and it was not required to create a record in response to a request.

As to issue regarding that the request must be submitted with reasonable particularity, the University did not deny you access to any records based on the failure to identify the records with reasonable particularity, but rather the request was denied based on the fact that no such records existed in the format requested. Further, the University has not received any follow up from you seeking clarification for any of the thirty-seven responses that are claimed to be improper.

The University's response to request's 14-15 regarding remediation examinations was misunderstood. In each instance, the primary response was that the University does not maintain records in the format requested and has no duty to create a responsive record. To the extent that your request could be interpreted as a request for actual examination results, the University cited I.C. § 5-14-3-4(b)(3) in denying your request.

As to the allegation that the University improperly asserted a blanket exception pertaining to "deliberative materials" and the "request may also encompass materials that serve as personal notes or the equivalent of a diary or journal"; the University's denial stated that no such records are maintained in the format request and the University is not



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required to create a record in response to a request. The request goes on to say that if in fact a record did exist, the deliberative materials or diary exception would grant the University discretion as to whether to disclose the record.

As to records sought pursuant to I.C. § 5-14-3-4(b)(8), the University provided that no such records existed that were responsive to your request. The University was not required to produce records that it did not maintain. The University agrees with the assertion that it must produce records that contain information about the status of formal charges about the employees that were sought, and that it must provide a factual basis regarding disciplinary action involving suspension, demotion or discharge. However again, the University did not have any records that were responsive to your request.

As to the University's denial pursuant to HIPPA, presumably found in item 12, again the University provided that it did not have any records that were responsive to your request. However, even if it did, the University would have denied your request pursuant to state and federal laws protecting confidential health information.

Finally, as to those instances where you have alleged that the University should clearly state when no such records exist that are responsive to a request, it is abundantly clear that your requests were lengthy and complicated. In other instances, your requests were in the nature of information or requests that might require the University to consider every appropriate form of response pursuant to the APRA. The University, recognizing that it is obligated to provide public information, independent of ongoing litigation, attempted to answer each and every request with seriousness and care.

ANALYSIS

The public policy of the 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." *See* I.C. § 5-14-3-1. The University is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the University's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by



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mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the University responded to your request within the timeframes provided by section 9 of the APRA.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45.*

Here, you made fifty-seven broad, detailed requests of the University. Regardless of how many records were disclosed, the University was required to search and locate any and all records that were responsive to your request. After retrieving the records, it was required to review the records for any confidential information or information that it would have discretion whether to disclose. During the same time period, while the University was maintaining the normal duties of the agency, it was also responding to a similarity broad nature request that you submitted pursuant to the FERPA and a supplementary FERPA request that was submitted after the University's original response. The University estimated that it took approximately 50-60 hours in receiving, reviewing, and responding to the APRA request that was submitted. In addition, I would note that the University provided a status update in a December 23, 2011 e-mail, which indicated that it was mindful as to the time taken to respond to your request and apprised



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you of its efforts. As such, under the circumstances provided it is my opinion that the University responded to your records request within a reasonable period of time.

As to the substance of your request, I would note at the outset that if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy...”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*. Here the University has indicated that as to a significant portion of your request, either it did not maintain the records in the format that was requested and it was not required to create a record in response to a request. Accordingly, it is my opinion that the University did not violate the APRA by failing to maintain a record or develop a record in the format requested in response to your request.

Many of the remaining issues that you have alleged concern the language used by the University’s in its denial of your request 1. The University stated in the denial:

“IUSD does not maintain such records in the format request and is not required to create a record that does not exist. See e.g., *Op. of the Public Access Counselor 10-FC-120*. Even if such a record existed, however, the APRA prohibits IUSD from disclosing records that are required to be kept confidential by federal law. The Family Education Rights and Privacy Act (FERPA) prohibits IUSD from releasing “education record.” 20 U.S.C. 1232g. “Education records” are defined broadly to include “records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. 34 C.F.R. 99.3 In addition, your request does not identify with reasonable particularity the specific records you are requesting. I.C. 5-14-3-3(a)(1). Your request may also encompass materials that serve as personal notes or the equivalent of a diary or journal. I.C. 5-14-3-4(b)(7). Finally, you request is denied to the extent it calls for deliberative materials. I.C. 5-14-3-4(b)(6).

The University clearly communicated in the initial portion of the denial that it did not maintain any such records in the format requested and that it is not required to create a



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record that does not exist. Further, the University provided even if it did have any records that were responsive to the request, FERPA would have prohibited the University from disclosing the records. However, when the denial states in the last three sentences that the request was not made with reasonable particularity, your request *may* encompass materials that fall under (b)(7), and your request is *denied* as to the extent it calls for deliberative materials, it is not as evident whether the University understood your request (i.e. reasonably particular), whether there may be records that were withheld pursuant to I.C. 5-14-3-4(b)(7), and that there were records that were responsive to the request but they were denied because they were deliberative materials. The University has now addressed and clarified the issues and ambiguities contained in its original response by definitively stating that it did not maintain such records in the format request and is not required to create a record that does not exist. As such, it is my opinion that it did not violate the APRA in its denial to request 1. However, I would caution the University that it needs to provide a clear statement in denying a request submitted pursuant to the APRA. Many of the issues that are addressed in the formal complaint could have been resolved had the University provided as such in its denial to request 1.

FERPA operates to classify all “education record[s]” as confidential: “No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records or personally identifiable information contained therein...” 20 U.S.C. § 1232g(b)(1). “Education record” is defined as a record that is directly related to a student and maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 34 C.F.R. § 99.3. “Education record” is defined as those records that are directly related to a student; and maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 34 C.F.R. 99.3. The Court of Appeals of Indiana has stated that “for the purposes of I.C. §5-14-3-4(a)(3), FERPA is a federal law which requires education records to be kept confidential. *An Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003).

The APRA requires public agencies to separate and/or redact the nondisclosable information in public records in order to make the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). The Indiana Court of Appeals held that Ind. Code § 5-14-3-6(a) requires an agency to separate disclosable information from the nondisclosable information where the two types of information are not “inextricably linked.” *Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 914 (Ind. Ct. App. 2003). Thus, if any of the records requested contain information that would not fall under any exception provided in the law and the disclosable information is not



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

inextricably linked to the nondisclosable material, the University would be required to redact the proscribed material and produce the remainder of the record. Here, the University has acknowledged that it is and was aware of its responsibilities under the APRA pursuant to I.C. § 5-14-3-6(a) when it responded to your request. As such, it is my opinion that the University did not violate the APRA in regards to I.C. 5-14-3-6(a).

The APRA requires that a records request “identify with reasonable particularity the record being requested.” I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but the public access counselor has repeatedly opined that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *Ops. of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because 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, the agency should contact the requester for more information rather than simply denying the request. *See generally IC 5-14-3-1; Opinions of the Public Access Counselor 02-FC-13; 05-FC-87; 11-FC-88*. As stated prior, I would agree that the University’s reference in its denial to request 1. However, I cannot read the response to state that your request was denied for lack of reasonable particularity. The University has provided in its response to your formal complaint that no records were denied for lack of particularity of the request. If the University had denied your request solely on the basis that the request was not made with reasonable particularity, without making any effort to clarify the request or seek additional guidance, it would have violated the APRA. However, the University has provided that it did not maintain any records in the format requested that were responsive to your request as the basis for its denial. As such it is my opinion that it did not violate the APRA.

I.C. § 5-14-3-4(b)(3)-(4) provides the following:

(b)Except as provided by subsection (a), the following public records shall be excepted from Section 3 of this chapter at the discretion of the public agency:

(3) Test questions, scoring keys, and other examination data used in administering a licensing examination, examination for employment, or academic examination before the examination is given or if it is to be given again.

(4) Scores of tests if the person is identified by name and has not consented to the release of the person’s scores.



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Indiana Government Center South
402 West Washington Street, Room W470
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The University acknowledged in its response to your formal complaint that its denial as to request's 14 and 15 was misunderstood. In each instance, the primary response was that it did not maintain records in the format requested and has no duty to create a responsive record. To the extent the request might be interpreted as a request for the actual examination response, the denial cited I.C. § 5-14-3-4(b)(3). If the University does not maintain any records responsive to your request's 14 and 15, then it did not violate the APRA. To the extent that your request was denied pursuant to I.C. § 5-14-3-4(b)(3), the exception would only be available prior to the examination or if the examination is to be given again. If the University has records that it denied pursuant to (b)(3), it would need to comply with the requirements of (b)(3) in exercising its discretion under the subsection.

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, except for:

- (A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
 - (B) Information relating to the status of any formal charges against the employee; and
 - (C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.
- I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released to you upon request, but a public agency may withhold any remaining personnel records. Here the University has acknowledged the requirements of (B) and (C) as outlined in the statute, and provided that it has no records that are responsive to your request. Thus, it is my opinion that it did not violate the APRA.



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CONCLUSION

For the foregoing reasons, it is my opinion that the University did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage", written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Thomas Gannon