



STATE OF INDIANA

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July 22, 2014

Mr. Steven M. Badger, Esq.
12730 Meeting House Road, Ste. 200
Carmel, IN 46032

Re: Formal Complaint 14-FC-135; Alleged Violation of the Access to Public Records Act by Purdue University

Dear Mr. Badger,

This advisory opinion is in response to your formal complaint alleging Purdue University ("University") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* Ms. Abby K. Daniels, Esq., has responded to your complaint; it is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on June 27, 2014.

BACKGROUND

Your complaint dated June 27, 2014 alleges Purdue University ("Purdue") violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On March 4, 2014, your client, the Purdue Student Publishing Foundation, Inc., d/b/a the Purdue Exponent ("Exponent") made a request to Purdue University for copies of complaints against Purdue University Police Department Employees which were referred to in annual summaries of internal investigations which were earlier provided to the Exponent. The Exponent's request was timely acknowledged on March 5, 2014. On June 10, 2014, the request was denied in full, with Purdue asserting the investigatory record exemption provided under Ind. Code I.C. 5-14-3-4(b)(1).

You allege in your complaint Purdue errs in relying on the investigatory record exemption and violated the Access to Public Records act by failing to respond to the request in a timely manner. With regards to the investigatory records exception, you present a number of arguments. First, you argue, relying on *Evansville Courier v. Prosecutor of Vanderburgh County*, 499 N.E. 2d 286, 288 (Ind. App. 1986) that a

complaint alleging police misconduct does not fall automatically under the investigatory record exception; rather, the agency asserting the exception has the burden of proving the records were compiled in the course of an investigation. Additionally, not all complaints of police misconduct implicate criminal conduct. You argue Purdue must show a complaint which is withheld from disclosure was actually compiled in the course of an investigation.

Purdue, however, alleges that Exponent's request was only for complaints which were investigated, and thus automatically falls under the investigatory record exception. Furthermore, you argue information contained in citizen complaints must be included in the daily log required under Ind. Code § 5-14-3-5(c). In their July 11, 2014 response, Purdue states the daily log was not requested by Exponent.

Regarding Purdue's failure to provide a timely response, Purdue did acknowledge the request in a timely manner on March 5, 2014. However, Purdue did not respond to the request until the denial on June 10, 2014. You argue the delay is unreasonable given the fact Purdue denied the request in full and did not have to compile any records. In their response, Purdue appears to argue that because there was no follow-up by Exponent between March 5, 2014 and June 10, 2014, Purdue did not violate the timeliness requirement of Ind. Code § 5-14-3-3(b).

Purdue responded to your complaint on July 11, 2014 by Mr. William Kealey, Esq., outside counsel, and on July 14, 2014, by Ms. Abby Daniels, Esq., in-house counsel. In their July 11, 2014 response, Purdue also argues the requested records are exempt from disclosure requirements as part of employee personnel files.

DISCUSSION

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 Ind. Code § 5-14-3-1. Purdue University is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the University's public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

Ind. Code § 5-14-3-4(b)(1) gives law enforcement agencies the discretion to withhold or disclose investigatory records. An investigatory record is "information compiled in the course of the investigation of a crime." See I.C. § 5-14-3-2(h). This is not to say all records maintained by the Department are considered investigatory – it must be in the course of an investigation of a crime.

The investigatory records exception is indeed one of the broader, and most liberally applied, exceptions in the APRA. I have continuously cautioned law enforcement agencies to use the exception in a light most favorable to transparency and access – all

the more so when release of information would not compromise the integrity of an investigation. Indeed, there will be many instances where the disclosure of a record may jeopardize an investigation or public safety. Even investigations by law enforcement internal affairs units may ultimately result in criminal charges and therefore would fall under the exception.

The University has not clearly stated the internal investigations of external complaints were crimes as defined by Indiana Statute. Ind. Code § 35-31.5-2-75 defines “crime” as a felony or misdemeanor. If the employee conduct implicates an officer in a crime, then the University may withhold the records at their discretion. If the misconduct was merely a violation of policy, then the exception may not be applied. The distinction can likely be determined on the face of the complaint.

Although not addressed at length in the University’s response to your formal complaint, they have implied the “personnel file exception” may also apply in the current instance. Other than basic human resource data, personnel files of public employees may also, in the agency’s discretion, be withheld. Ind. Code § 5-14-3-4(b)(8). Caveats to non-disclosure are three exceptions, or categories of records which must be disclosed, including information related to formal charges against an employee as well as the factual basis for disciplinary action resulting in termination, demotion or suspension. Ind. Code § 5-14-3-4(b)(8)(B) and (C).

It is unclear if the grievances against the personnel were intended to be included in the employee’s personnel file. To assert this exception, Purdue would need to demonstrate that complaints against employees are regularly and consistently placed in an employee’s personnel file. If the complaints are held in any other administrative file (and are not criminal in nature), they are public record subject to disclosure.

As to the timeliness controversy of your complaint, it appears the University has acted contrary to the APRA in taking over three months to deny the records after their initial acknowledgement. Public records, upon request, must be either produced or denied in writing within a reasonable time. See Ind. Code § 5-14-3-3(b) and Ind. Code § 5-14-3-9(d). It does not appear your request is so complex and voluminous so as to take three months to research. A requester of public documents is under no obligation to “follow-up” with a public agency. In fact, quite the opposite is true. A public agency should be in semi-regular communication with a requester updating them on the status of a search if it determines a request will take a significant amount of time to fulfill.

RECOMMENDATION

I cannot conclusively determine if the exceptions asserted by the University are meritorious. It is a factual matter. I encourage the University to re-evaluate their decision based on the foregoing commentary.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Ms. Abby K. Daniels, Esq.