
OPINION OF THE PUBLIC ACCESS COUNSELOR

KAITLIN L. LANGE,
Complainant,

v.

PURDUE UNIVERSITY,
Respondent.

Formal Complaint No.
17-FC-233

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging Purdue University ("Purdue") violated the Access to Public Records Act¹ ("APRA"). Purdue responded to the complaint through assistant legal counsel Trenten D. Klingerman. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 9, 2017.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

Kaitlin L. Lange (“Complainant”), statehouse reporter for the *Indianapolis Star*, filed a formal complaint alleging Purdue violated the Access to Public Records Act by wrongfully denying her access to public records.

On September 19, 2017, Lange submitted a public records request to Purdue seeking the following:

[C]opies of all applications submitted to the state seed commissioner for a license to grow or handle industrial hemp, and a list of those applicants that were approved for a license since the creation of the industrial hemp license in 2014.

Ten days later, Purdue partially granted and partially denied Lange's request. Specifically, the university's office of legal counsel released 36 pages of applications for licenses to grow or handle industrial hemp in Indiana, and a list of licensed industrial hemp growers. At the same time, Purdue withheld the disclosure of seven applications.

Purdue based the partial denial on Indiana Code section 5-14-3-4(a)(1), which prohibits disclosure of records *declared confidential by statute*. Specifically, Purdue noted Indiana Code section 15-15-13-17, which provides in relevant part the following:

- (a) The seed commissioner may keep the:
 - (1) names of growers and handlers who are licensed under this chapter; and
 - (2) locations of licensed industrial hemp crops;

confidential for purposes of IC 5-14-3.

Lange and the *Indy Star* argue that the statute pertains only to those growers or handlers who are licensed, not those who applied. What is more, Lange contends that the statute does not reference the applications themselves, rather only the name and locations of licensed industrial hemp crops.

On October 2, 2017, Lange challenged the denial in an email to Purdue. Lange stated that the *Indy Star* should still be able to obtain the applications in their entirety both from those applicants who were not granted licenses and from those applicants who were granted licenses, but with the names of growers and handlers and the location of the crops redacted. Unpersuaded, the university stated in an email response four days later that the prior denial stands.

Lange then filed a formal complaint with this Office alleging an APRA violation.

Purdue denies that an APRA violation has occurred in this case. Specifically, Purdue argues the *Indy Star* seeks records that are: (1) Confidential by Indiana statute; (2) Contain the confidential business information of private entities and individuals whom have specifically asked the university to protect their information; and (3) Because some of the information contained in the applications comprise confidential education records as defined by the Family Education Rights and Privacy Act of 1974 ("FERPA").

ANALYSIS

The issue in this case is whether Purdue acted in accordance with the Access to Public Records Act ("APRA") when it denied the *Indianapolis Star* access to the seven license applications at issue in this complaint.

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

Under APRA, *public record* means:

[A]ny writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). The parties do not dispute that the license applications at issue are public records under APRA. I agree the applications submitted to the state seed commissioner for a license to grow or handle industrial and agricultural hemp seed, and any list created that lists the applicants

who were granted licenses are public records as defined by APRA.

The parties' disagree about whether Purdue wrongfully denied access to disclosable public records under APRA.

1. APRA Disclosure Exclusions and Exceptions

This case, like so many before it, turns on whether a particular public record is disclosable or exempt from disclosure under one—or more—of APRA's mandatory or discretionary exceptions to disclosure.

Under APRA, certain records are excluded from the Act's general disclosure requirements and may not be disclosed by a public agency unless specifically required by state or federal statute or otherwise ordered by a court. *See* Ind. Code § 5-14-3-4(a).

Additionally, APRA lists several types of records that *may* be excluded from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

Purdue contends that three of APRA's disclosure exceptions authorize it to withhold the license applications at issue here. Specifically Purdue cites the following APRA exceptions: Section 4(a)(1); Section 4(a)(4); and Section 4(a)(6).

1.1 Records Declared Confidential by State Statute

Under APRA, a public agency may not disclose—unless specifically required by statute or a court order— records that are "declared confidential by state statute." Ind. Code § 5-14-3-4(a)(1). Here, Purdue argues that the "declared confi-

dential by state statute" exception applies because the license applications at issue are made confidential by Indiana Code section 15-15-13-17.

Indiana Code section 15-15-13-17, in relevant part, provides:

- (a) The seed commissioner may keep the:
 - (1) names of growers and handlers who are licensed under this chapter; and
 - (2) locations of licensed industrial hemp crops confidential for purposes of IC 5-14-3.

Lange and the *Indy Star* maintain that this statute does not provide the state seed commissioner with the authority to keep license applications confidential for purposes of APRA, but rather only the names of growers and handlers who are licensed as well as the location of licensed industrial hemp crops.

Before weighing in on the applicability of the APRA exception, it makes sense to first consider the disputed language in Indiana Code section 15-15-13-17. In my view, the word "licensed" is clear and unambiguous. I believe the plain language includes only those who have been granted, and issued a license by the seed commissioner in accordance with Indiana Code section 15-15-13-8.

To be sure, the word "licensed" is not defined in the relevant statutory section, but it seems the plain and ordinary meaning would exclude the unlicensed.

Black's Law Dictionary defines license as "[a] permission, usually revocable, to commit some act that would otherwise

be unlawful..." Black's Law Dictionary 455 (10th ed. 2014). "Licensing," in relevant part, is defined as "[a] governmental body's process of issuing a license." *Id.* at 456. What is more, Black's Law Dictionary defines applicant as "[o]ne who requests something; a petitioner..." *Id.* at 42. "Apply" is defined, in relevant part, as "[t]o make a formal request or motion..." *Id.*

In addition to the plain language, Indiana Code section 15-15-13-8 governs the industrial hemp license application processing procedure. After an application is received, a series of procedural steps—including criminal history checks by the state police—*must* occur to convert an applicant into a licensed industrial hemp grower or handler. Indeed, the existence of statutorily-created licensing procedure is itself persuasive that a distinction exists between applicants and those who have been granted and issued a license.

Certainly, I recognize that the legislature could have empowered the seed commissioner with the discretion to keep the names of applicants confidential for purposes of APRA. Even so, I do not believe that the legislature intended to include the names of applicants and their license applications in the records the seed commissioner may keep confidential under APRA.

The use of the word "licensed" limits who and what information the seed commissioner can rightfully withhold as confidential. Notably, the word licensed is not a legal term of art and its plain meaning seems easily understood. In other words, being licensed is a necessary condition to trigger the seed commissioner's discretion to keep the names of

growers and handlers as well as the locations of crops confidential. Licensure is not an automatic foregone conclusion pursuant to an application.

Because applicants are not licensed at the time of submitting a license application to the seed commissioner, the applications are not records the seed commissioner has discretion to deem confidential under Indiana Code section 15-15-13-17. Accordingly, these records should not be denied disclosure under APRA section 4(a)(1) because the records have not been declared confidential by state statute.

1.2 APRA's Trade Secrets Exception

Purdue also contends that the license applications were properly withheld under APRA's trade secret exception.

APRA prohibits the disclosure of trade secrets by a public agency unless compelled to do so by a court. Ind. Code § 5-14-3-4(a)(4). Under Indiana Code section 5-14-3-2(t), APRA adopts the definition of trade secret set forth in the Uniform Trade Secrets Act²:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who

² Ind. Code § 24-2-3-2(c).

can obtain economic value from its disclosure or use; and

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Indiana Courts have declared trade secrets to be "one of the most elusive and difficult concepts in law to define." *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (1993). Moreover, the Courts have determined information is not a trade secret if it "is not secret in the first place--if it is 'readily ascertainable' by other proper means." *Id.* The Court in *Amoco* goes on to hold: "The threshold factors to be considered are the extent to which the information is known by others and the ease by which the information could be duplicated by legitimate means." *Id.*

Here, the license applications do not appear to contain trade secrets. In general, the information sought about the applicant includes basic background information, which license the person is applying for, the proposed research plot address, source of hemp, and various disclaimers and attestations. Notably, Purdue did not state what information in the license applications would—or even could—be considered a trade secret.

Therefore, I conclude that the information required in these license applications does not constitute a trade secret; and thus, does not satisfy the APRA exception for trade secrets.

1.3 APRA's *Concerning Research* Exception

Under APRA, a public agency may not disclose "[i]nformation concerning research, including actual research documents, conducted under the auspices of a state educational institution including information: (A) concerning any negotiations made with respect to the research; and (B) received from another party involved in the research. Ind. Code § 5-14-3-4(a)(6).

To be sure, case law interpreting this particular APRA exception is in scant supply.

Still, in *Robinson v. Indiana University*,³ the Indiana Court of Appeals held that completed "Animal Care and Use Applications" submitted by potential researchers detailing the researchers' proposed use of animals in research projects was information concerning research conducted by or under the auspices of Indiana University; and as such, the applications were not subject to disclosure under APRA. *Id.* at 157.

The court's conclusion turned heavily on the information sought from researchers on the application itself. The court explained that "[t]he application seeks information about the researcher, the nature of the proposed or ongoing research project, and procedures to be employed throughout the project." *Id.* The court observed that the "sole subject matter of the application is a research project and related personnel and procedures." *Id.*

³ 659 N.E.2d 153 (Ind. Ct. App. 1995).

Although the court recognized that APRA requires a liberal construction in favor of disclosure of public records and the exceptions to disclosure should be construed narrowly, it determined that "even in the narrowest sense" the information sought in the "Animal Care and Use" application concerns research. *Id.*

What is more, the court noted that the "inclusion of the concerning research exception, in addition to a trade secret exception, . . . indicates the legislature's intent to extend nondisclosure to a larger number of records." *Id.* at 156. In doing so, the court also recognized that "[s]ome records may not be of a proprietary nature so as to constitute a trade secret, but may be of a *scientific or experimental nature* so as to concern research. The latter category of documents would fall into the concerning research exception." *Id.* at 157 (emphasis added).

Here, in this case, the license applications at issue—despite some similarities—are distinguishable from the "Animal Use and Care" applications at issue in *Robinson*.

Notably, the license application in this case seeks information that appears far less in-depth than the applications at issue in *Robinson*. For instance, in *Robinson* the applications sought specific information regarding methodology and practices – something far more involved and academic than the applications in question.

Additionally, Purdue's argument takes a terminal dip when considering that it released the vast majority of the license applications requested by the *Indy Star* while invoking this exception as the authority for withholding a small number of applications. The concerning research exception under

APRA is not a discretionary exception, it is a *mandatory* exception. Thus, if the license applications truly concern research as Purdue suggests, it would be prohibited from releasing any of the applications. This cuts strongly against the claim that the applications actually concern research.

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Redactions Based on the Family Educational Rights and Privacy Act (FERPA).

As part of its response, Purdue appears to have provided this Office and the *Indianapolis Star* with heavily redacted versions of the license applications at issue in this complaint. Purdue contends that it has redacted from the license applications any individually identifiable information regarding Purdue students involved in the research projects reflected in the applications. If the applicants—or listed associates—are indeed students, then FERPA would apply. In this case, however, the applicants themselves appear to be university professors, not students. Even if a license application would qualify as an educational record, the exception to disclosure would not extend to non-students. Insofar as students are listed on the application as names of other persons who have access to hemp seed growing sites, the redaction is acceptable.

CONCLUSION

Based on the foregoing it is the opinion of the Public Access Counselor that Purdue University should release the names of the applicants of Industrial Hemp and Agricultural Seed licensure.

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

Luke H. Britt
Public Access Counselor