

January 9, 2003

Mr. J. Nelson Wilkinson
Washington Document Service
1023 15th Street N.W., 15th Floor
Washington, DC 20005

Re: *Advisory Opinion 02-FC-69*; ; ; Alleged Denial of Access to Public Records by Purdue University.

Dear Mr. Wilkinson:

This is in response to your formal complaint, which was received on December 11, 2002. You have alleged that Purdue University ("Purdue") violated the Indiana Access to Public Records Act, ("APRA,") Indiana Code chapter 5-14-3. Specifically, you claim that Purdue improperly denied you access to information maintained in the Pesticide Regulator's Forum by citing to the exemption for deliberative material, Indiana Code section 5-14-3-4(b)(6). Ms. Lucia Anderson, Public Records Officer and Director, Business Managers, responded in writing to your complaint and a copy of her response is enclosed for your reference.

For the reasons set forth below, it is my opinion that Purdue may only lawfully rely upon the deliberative material exception for information contained in the Pesticide Regulator's Forum that meets all of the requirements of the exception. To the extent that information contained in the Forum does not meet these requirements, it is my opinion that Purdue may not rely upon Indiana Code section 5-14-3-4(b)(6) to deny you access.

BACKGROUND

According to your complaint, on November 12, 2002¹ you requested the following from Purdue:

All entries, from its inception to the date of the receipt of this request, to the electronic data storage system entitled "Pesticide Regulator's Forum" and operated by the National Pesticide Information Retrieval System ("NPIRS.")

In a letter dated November 19th, Ms. Anderson responded to your request stating that Purdue considers the information you requested exempt from disclosure under Indiana Code section 5-14-3-4(b)(6). Although not expressly stated in her letter, Ms. Anderson denied you access to the information you requested. You then filed your formal complaint with this Office.

In response to your complaint, Ms. Anderson stated that Purdue hosts the Pesticide Regulator's Forum as an electronic bulletin board to facilitate communications exclusively among state and tribal pesticide regulators and the U.S. Environmental Protection Agency concerning the enforcement of pesticide laws. The first messages were posted in July 2001. Access to the Forum is limited by a user id and password and apparently, the Forum includes a "privacy statement" effectively stating that the information is considered exempt from disclosure under the APRA, specifically Indiana Code section 5-14-3-4(b)(6), the deliberative material exception. Ms. Anderson further states that since the APRA does not define "intra-agency" or "interagency" a fair interpretation of Indiana Code section 5-14-3-4(b)(6) is that the terms include communications between states, tribes and federal agencies on the Pesticide Regulator's Forum. According to a U.S. EPA official who was contacted by Purdue about this matter, if it were "determined that the Forum data was not exempt from disclosure, the usefulness of the Forum as originally conceived would cease to exist."

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." Ind. Code § 5-14-3-1. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." Ind. Code § 5-14-3-1.

Purdue is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of Purdue during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

There is no dispute between the parties that the information in the Pesticide Regulator's Forum is a public record for the purposes of the APRA. In support of its nondisclosure of this public record to you, Purdue cited to Indiana Code 5-14-3-4(b)(6). This exception under the APRA allows public agencies discretion as to whether to disclose the following information:

(r)ecords that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purposes of decision making.

Indiana Code §5-14-3-4(b)(6). [Emphasis added.] In order to withhold public records from disclosure under Indiana Code 5-14-3-4(b)(6), therefore, the information must meet all of the requirements of this exception.

Since it is the public policy of the APRA that it is to be construed liberally in favor of disclosure, exceptions to that general rule of disclosure are to be narrowly construed. Ind. Code §5-14-3-1. Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws

"[e]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. App. 1995) [Citations omitted] quoting *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E. 2d 726, 729 (Ind. App. 1982) [Citations omitted].

There is very little case law interpreting Indiana Code section 5-14-3-4(b)(6). In 1998, the Indiana Court of Appeals rendered a decision in *The Journal-Gazette v. The Board of Trustees of Purdue University*, 698 N.E.2d 826, that provided an interpretation of Indiana Code section 5-14-3-4(b)(6). One of the issues in that case was whether certain documents related to an internal grievance process concerning an alleged NCAA violation were properly withheld from disclosure under Indiana Code 5-14-3-4(b)(6). The Court of Appeals determined that documents gathered during the course of the internal grievance process were interagency documents, statements of opinion and used for a decision making purpose. As a result, the Court held many of the documents requested concerning the investigation could lawfully be withheld from disclosure under Indiana Code section 5-14-3-4(b)(6).

The Court of Appeals in the Purdue case did not, however, provide an easy to apply standard when considering what information is subject to nondisclosure under the deliberative material exception. To the extent that it does not, we must rely upon the rules of statutory construction used by our courts to interpret statutes. "Generally, when construing a statute, the interpreting body attempts to give words their plain and ordinary meanings." *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99,103 (Ind. 1998), citations omitted. Non-technical, undefined words are to be defined by their ordinary and accepted dictionary meaning. *Bulkomatic Transport v. Department of Revenue*, 629 N.E.2d 955, 957 (Ind. Tax 1994), citations omitted.

Intra-agency or Interagency

The deliberative material exception requires that information must be "interagency or intra-agency," which implies documents created and shared within a public agency or between public agencies. Purdue, in response to your formal complaint, has pointed to the fact that the only participants in the Forum are public agencies dedicated to the enforcement of pesticide laws. The plain and ordinary meanings of intra-agency and interagency are clear, the real question is whether this would include the communications hosted on the Forum. The entities that participate are clearly all public agencies, state and federal. It is my opinion that Indiana Code section 5-14-3-4(b)(6) covers communications between these public agencies in the Forum and that this element of Indiana Code section 5-14-3-4(b)(6) has been met.

Communication for the Purpose of Decision Making

Indiana Code section 5-14-3-4(b)(6) also requires that the communication subject to this exception from disclosure be part of a decision making process. Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. While the plain and ordinary meaning of decision making is clear, the question is what decision making the General Assembly intended to provide this exception for when they enacted this language. It is clear that only public agencies that are subject to the APRA, state and local public agencies in Indiana, can rely upon the APRA and its exceptions. Public agencies from other states or the federal government cannot cite to the APRA as authority for not disclosing the information in question. It is logical to interpret the term "decision making" as used by our General Assembly was intended to relate to the decision making processes of state and local public agencies in Indiana. Purdue, then, must show that information withheld under Indiana Code section 5-14-3-4(b)(6) relates to decision making by state and local public agencies subject to the APRA.

Advisory or Deliberative Material that is Opinion or Speculative in Nature

The most important substantive element to the exception provided at Indiana Code section 5-14-3-4(b)(6) is that the content of the information must be advisory or deliberative material and constitute opinion or be speculative in nature. The plain meaning of "deliberative" is "assembled or organized for [or] . . . characterized by or for use in deliberation or debate." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 349 (1981). "Deliberation" means "thoughtful and lengthy consideration . . . [t]houghtfulness in decision or action." *Id.* In the context of the APRA, therefore, deliberative material includes information that reflects, for example, one's ideas, opinions, advice, consideration and recommendations on a subject or issue for use in a decision-making process.

In your complaint, you note that to the extent that information contained in the Pesticide Regulator's Forum is factual, not speculative, advisory, opinion or deliberative, it is not subject to non-disclosure under Indiana Code section 5-14-3-4(b)(6) and I agree with this statement. You submitted with your complaint two sample messages from the Forum, but it is not clear whether these are representative of all the postings on the Forum. Understandably, since Purdue is claiming that the information contained in the Forum is nondisclosable, no additional examples were provided to me.

Purdue points to its privacy statement on the Forum, but that does not automatically render the information posted as deliberative material under the APRA-the content of the messages must qualify under Indiana Code section 5-14-3-4(b)(6) as well. Some messages may contain, in whole or in part, information that would be "deliberative" under Indiana Code section 5-14-3-4(b)(6), but the mere fact that the information appears on the Forum does not render it subject to this exception.

As noted above, it is my opinion that the Pesticide Regulator's Forum constitutes intra-agency or interagency communications because the participants are all public agencies. It is my opinion, however, that the burden lies with Purdue to show that any information posted on the Forum constitutes

deliberative material that is part of a decision making process for public agencies subject to the APRA. To the extent that information on the Forum does not meet these requirements, it is my opinion that that information cannot be withheld under Indiana Code section 5-14-3-4(b)(6).

CONCLUSION

It is my opinion that that Purdue University may only lawfully rely upon the deliberative material exception at Indiana Code section 5-14-3-4(b)(6) for information contained in the Pesticide Regulator's Forum that meets all of the requirements of the exception.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Ms. Lucia Anderson, Purdue University

¹ Your complaint also references identical requests dated September 25, 2002 and November 6, 2002. Under Indiana Code section 5-14-5-7, you must file your formal complaint within thirty (30) days of the alleged denial. For this reason, my Opinion deals only with the November request.