
OPINION OF THE PUBLIC ACCESS COUNSELOR

CATE M. CHARRON,
Complainant,

v.

INDIANA UNIVERSITY,
Respondent.

Formal Complaint No.
21-FC-180

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging Indiana University violated the Access to Public Records Act.¹ Assistant General Counsel Amelia Marvel filed an answer on behalf of IU. 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 November 1, 2021.

¹ Ind. Code § 5-14-3-1 to -10.

BACKGROUND

In this case we consider whether the Family Educational Rights and Privacy Act (FERPA), a federal law, requires a university keep certain student disciplinary records confidential; and thus, exempting the records from disclosure under the Access to Public Records Act (APRA).

On September 14, 2021, Cate Charron (Complainant), a reporter with the *Indiana Daily Student*, filed two public records requests with Indiana University. First, Charron requested a copy of a student's disciplinary record dating back to August 2015. Second, Charron requested a copy of an alleged victim's Title IX case file against the first student since 2015. Charron invoked Indiana Code section 5-14-3-4(b)(8) as grounds for the request.

On October 7, 2021, IU denied Charron's requests. IU indicated it denied access to potentially responsive records in accordance with the Access to Public Records Act (APRA) and Family Educational Rights and Privacy Act (FERPA).

On November 1, 2021, Charron filed a formal complaint with this office arguing IU improperly denied her access to the requested records. Specifically, Charron contends that IU misapplied the disclosure exceptions it relied on to justify nondisclosure.

Charron asserts that the requested records are related to the Title IX case filed by an IU student where the university decided the student had been a perpetrator of a sexual assault in 2016 and suspended him twice. She argues FERPA does not prohibit such information to be disclosed.

Additionally, Charron relies on a North Carolina Supreme Court case that concluded, under similar circumstances, the University of North Carolina did not have the discretion to withhold the disciplinary records of students who were deemed to have perpetrated a sexual assault. In that case the court required the university to disclose the name of the student, the violation committed, and any sanction imposed by the university on that student to the requestor.²

On November 22, 2021, IU filed an answer to Charron’s complaint. IU argues that it did not violate APRA by denying Charron’s request because the requested records are required to be kept confidential by FERPA; and thus, the university may not disclose the records under APRA.

IU notes that the North Carolina case is not binding precedent on Indiana agencies. It also asserts, however, that because the university does not classify violations of its student conduct code as crimes of violation or nonforcible sex offenses, it is not required to reclassify in order to mirror the language of FERPA.

ANALYSIS

1. The Access to Public Records Act

The Access to Public Records Act (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. Indiana University (IU) is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind.

² *DTH Media Corp. v. Folt*, 374 N.C. 292 (2020).

Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy IU's public records during regular business hours. Ind. Code § 5-14-3-3(a).

In this case, we consider whether the disciplinary files of a student alleged to have perpetrated a sexual assault are exempt from disclosure under APRA because the records are confidential under federal law.

2. Charron's request

As an initial matter, it should be noted that Charron framed her request through the lens of Indiana Code section 5-14-3-4(b)(8). This section of the APRA concerns personnel files of public employees. Nothing in the information provided suggests the student about whom the request is regarding was or even has been a university employee. By all accounts, the individual is, or was, a student. Therefore, analysis under section 4(b)(8) is not warranted.

Nevertheless, the requests substantively seek information referenced in the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g). FERPA is a federal funding mechanism that protects student privacy. Educational institutions are prohibited from releasing certain kinds of student information or they risk losing certain funding. FERPA does contain certain exceptions, one of which provides the following:

Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of

any crime of violence ... or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense;

20 U.S.C. § 1232g(b)(6)(B). The final results of a disciplinary proceeding are further defined as:

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student”

20 U.S.C. § 1232g(b)(6)(C). It can reasonably be inferred that Charron seeks the information in subsections (i) and (ii).

3. IU's response

For its part, IU argues that FERPA operates as a mandatory exemption to disclosure for these records. It reasons that the Indiana University Code of Student Rights, Responsibilities, and Conduct does not qualify its policies as “crimes of violence” and “nonforcible sex offenses” as contemplated by 20 U.S.C. § 1232g(b)(6)(B). Therefore, the entirety of the disciplinary file is exempt from disclosure because IU cannot equate student code violations to the enumerated criminal activities.

IU states it does not, and is not required to, determine whether a code violation falls into one of the broad definitions in FERPA that warrants disclosure. By that logic, IU would have to classify its student conduct code violations as

a “crime of violence” or “nonforcible sex offense” in order for that portion of FERPA to ever apply to its disciplinary proceedings. This is an absurd result.

No one is suggesting that IU revise any student policy or handbook. Nor is anyone recommending it stand in the shoes of law enforcement to make substantiating judgments regarding criminal code.

FERPA simply operates to protect student populations by preventing schools from sweeping allegations of violence or sex offenses under the rug in order to protect the school’s brand or reputation.

Either an allegation rises to the level to meet the general definition of a “crime of violence” or “nonforcible sex offense” or it doesn’t. These should not be terribly difficult value judgments to make based on a complainant’s report. If the administration does not feel it is qualified to do so, the university police or local law enforcement can help. Surely allegations of this sort are not being exclusively kept in-house in order to avoid transparency.³

This office does not find IU’s arguments to be persuasive in this matter. It does not have statutory authority to withhold the final results of disciplinary proceedings involving a perpetrator of crimes of violence or sex offenses. Moreover, the university cannot simply use semantics to deny their existence. To the extent those files exist, they must be provided upon request.

³ 20 U.S.C. § 1092 (The Clery Act) requires most colleges and universities to disclose campus crime and security information.

4. Required disclosure

IU cites an early opinion⁴ from this office as persuasive authority that FERPA does not mandate disclosure of the disciplinary records. While true, APRA does mandate disclosure of records that exist.

In interpreting APRA specifically, courts apply a presumption in favor of disclosure, given its public purpose of promoting government transparency. *Evansville Courier & Press v. Vanderburgh Cnty. Health Dep't.*, 17 N.E.3d 922, 929 (Ind. 2014).

Simply put, if a record exists, disclosure is mandatory upon request unless an exemption or exception applies. Moreover, exceptions to disclosure are to be construed narrowly in light of the broad presumption of disclosure. *Journal Gazette v. Bd. of Trs. of Purdue Univ.*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998).

Under APRA, the burden is on the agency to justify the denial of records. Here, IU has not carried its burden to justify nondisclosure of these disciplinary records, minus any witness or victim information that should be withheld either by statute or any reasonable policy considerations.

⁴ *Opinion of the Public Access Counselor*, 00-FC-08 (2000).

CONCLUSION

Based on the foregoing, it is the opinion of this office that Indiana University violated the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LHB', is positioned above the name of the Public Access Counselor.

Luke H. Britt
Public Access Counselor