



STATE OF INDIANA

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October 27, 2026

Re: Complaint 26-FC-217
Tom Ley (Complainant) v.
Indiana University (Respondent)

This advisory opinion is issued in response to the above-referenced complaint filed on April 20, 2026.

A Notice of Complaint, along with a copy of the complaint, was sent to the Respondent on August 28, 2026, requesting a formal response by September 28, 2026. A formal response, submitted by Emily Stultz, Assistant General Counsel, on behalf of Respondent, was received in this office on September 28, 2026.

The complaint alleges that the Respondent violated the Access to Public Records Act (APRA) when it improperly denied the request.

ANALYSIS

The public policy of 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." IC 5-14-3-1.

Respondent is a public agency for purposes of APRA; and therefore, subject to the requirements. IC 5-14-3-2(s). As a result, unless an exception applies, any person has the right to inspect and copy Respondent's public records during regular business hours. IC 5-14-3-3(a).

In November 2025, the Complainant filed an APRA request with Respondent requesting:

1. "chat histories of all ChatGPT or Microsoft CoPilot sessions conducted by Indiana Football Coach, Curt Cignetti, on university-owned devices from 11/30/2023 to the date of the request."¹

Respondent provided Complainant with a response on March 31, 2026, stating the records were "being withheld as an advisory and deliberative material pursuant to Ind. Code 5-14-3-4(b)(6)."

In its formal response, Respondent indicates that it further "does not maintain (and has not at any time had in its possession) any public records responsive to this request." The formal response states Respondent notified Complainant of this basis for withholding the records on September 28, 2026, and therefore it was not required to create a record to meet the request.

Deliberative Records

Complainant alleges in its complaint that Respondent was withholding records as "advising and deliberative material pursuant to Ind. Code 5-14-3-4(b)(6).

Indiana Code 5-14-3-4(b)(6) provides an exemption for records that are,

"[r]ecords that 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 purpose of decision making."

This allows for an exception to disclosure for deliberative records. APRA requires that if a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under APRA, separate the material that may be disclosed and make it available for inspection or copying. IC 5-14-3-6(a).

It is reasonable to think that not all sessions from 11/30/2023 to November 2025 would be considered deliberative.

Our Supreme Court has held for a public agency to invoke the deliberative material exception; it must demonstrate the following three requirements:

- 1) *"That the records are intra-agency or interagency deliberative or advisory material, including material developed by a private contractor under a contract with a public agency;*

¹ There is no information as to the date of the request.

2) *The records contained expressions of opinion or of a speculative nature; and*

3) *The records were communicated for the purpose of decision making.”*

Fam. & Soc. Servs. Admin. v. Saint, 258 N.E.3d 972, 983 (Ind. 2025). The Respondent simply states the material is “being withheld as an advisory and deliberative material pursuant to IC 5-14-3-4(b)(6).” Respondent did not demonstrate the three requirements.

Respondent does nothing to meet its statutory burden of separating disclosable and nondisclosable material. Furthermore, it has failed to meet its burden to establish that no part of the requested and responsive records could be separated and disclosed pursuant to statute. *See Opinion of the Public Access Counselor 04-FC-053*.

Respondent, nor Complainant, filed a copy of the response by Respondent claiming the deliberative records exception. This office does not take a position as to the proper use of the exception but does set forth the above criteria. Respondent may have violated APRA by not properly invoking the deliberative material exception to disclosing these records.

Withholding Due to Not Maintaining the Records

APRA defines “public records” as,

“any writing, paper, report, study, map, photograph, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency.”

I.C. 5-14-3-2.

Complainant feels that Respondent must have these documents, though he does not state the basis for his opinion.² If Respondent maintains the requested documents, then it has the duty to provide the documents; it cannot require a Complainant to obtain the documents from another agency merely because it is more convenient. *Opinion of the Public Access Counselor 05-FC-144*.

However, the Respondent has stated that it does not maintain the documents requested. In its formal response of September 28, 2026, Respondent asserts that it “does not maintain (and has not at any time had in its possession) any

² If Complainant continues to believe that Respondent has the requested records and it not providing them, his only recourse is to bring an action under IC 5-14-3-9(e).

public records responsive to their request.” It is not a violation of the APRA for the Respondent to inform Complainant that it does not have the documents requested. *Id.* While Respondent has no duty to provide documents that it does not maintain, it does have a duty to inform Complainant of whether it maintains the records sought.

“[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....”).

Thus, Respondent did not violate the APRA by failing to release records that it does not have.

CONCLUSION

Based upon the foregoing, it is the opinion of this office that by claiming the deliberative records exception Respondent must meet its burden regarding invoking the exception and regarding identifying and separating disclosable and nondisclosable information. This office does not have ample information to determine whether Respondent violated APRA with regards to this exception.

However, Respondent also claimed that it did not maintain any responsive records to the request. In doing so, Respondent did not violate APRA when it did not produce records that it does not have.

A handwritten signature in black ink, appearing to read 'Brittney A. Long', is written over a circular stamp or seal.

Brittney A. Long
Public Access Counselor