November 21, 2003

*Re: Formal Complaint 03-FC-108*
*Alleged Denial of Access to Public Records by the TaylorUniversity Office of Campus Safety*

Dear Mr. McLaughlin:

I am writing in response to your formal complaint wherein you allege that the Taylor University Office of Campus Safety (Office of Campus Safety) violated the Access to Public Records Act (APRA) when it denied your request for records for the reason that it was not subject to the provisions of the APRA. The Office of Campus Safety, by counsel, responded to your complaint, and a copy of that response is attached for your reference.

For the reasons set forth below, it is my opinion that the Office of Campus Safety is not a "public agency" for purposes of the APRA, and thus did not violate the APRA when it denied your request for records.

## BACKGROUND

On September 23, 2003, you sent a letter to the Office of Campus Safety requesting access to records maintained by that office. The Office of Campus Safety is the department of Taylor University that is responsible for law enforcement, security, and emergency response on the campus of Taylor University. Your record request sought records in four categories including a general category seeking "all investigatory records," as well as more specific requests seeking records relating to particular kinds of investigations and/or for investigations that were initiated by a particular individual. On October 2, 2003, the Office of Campus Safety denied your request for the reason that the office was not subject to the APRA. In your complaint, you assert that the Office of Campus Safety is a "public agency" for purposes of the APRA and as defined by Indiana Code 5-14-3-2 both because it is a "law enforcement agency" and because it is an office or entity that exercises the executive or administrative power of the state.

In response, the Office of Campus Safety acknowledges that it denied your request based on its belief that it is not a public agency subject to the provisions of the APRA. The Office of Campus Safety notes that Taylor University, of which it is a part, is a private institution, and "not a part of 'government' under the ordinary meaning of that term." In response to your allegation that the Office of Campus Safety is a public agency subject to the provisions of the APRA because it exercises the executive or administrative powers of the state of Indiana -- specifically, because it exercises police powers conferred on public and/or accredited universities by state statute -- the Office of Campus Safety asserts that the more specific provision regarding law enforcement agencies controls and excludes by definition the police departments of private universities. In particular, the Office of Campus Safety asserts that "law enforcement agency," as defined by the APRA, is limited to "an agency or department of any level of government," and in that regard does not include and apply to the police department of a non-governmental entity, such as Taylor University. Alternatively, the Office of Campus Safety argues that, even assuming it is subject to the provisions of the APRA, it may properly deny you access to the requested records under the investigatory records exception set forth in Indiana Code 5-14-3-4(b)(1).

## ANALYSIS

The APRA applies only to public agencies, and at first glance appears not to be applicable to a private university or any division or department of a private university. However, the APRA sets forth varied and fairly broad definitions of the kind of entities that would constitute a "public agency" for purposes of that statute. These definitions include, for example, advisory committees created by executive order or state or local law, quasi-private entities created by statute, and fully private entities that because of their receipt of and reliance on public funds become subject to a budget review by a state or a local governing body, or an audit by the state board of accounts. IC 5-14-3-2. Any number of entities that would fit within these broad categories might be characterized as "not a part of 'government' under the ordinary meaning of that term." Therefore, that Taylor University and its Office of Campus Safety are a private institution and department of a private institution does not end the inquiry.

You rely on two definitions of "public agency" to capture the Office of Campus Safety in the APRA. You assert that the Office of Campus Safety is a public agency both because it is a "law enforcement agency" and more generally because it is an office that exercises a part of the executive powers of the state, pursuant to IC 20-12-3.5-1, which authorizes Taylor University as an accredited college or university to appoint police officers with the general police powers of the state of Indiana. Taylor University has, in fact, taken full advantage of the authority to appoint police officers with general police powers. However, in my opinion the university's exercise of this statutory authority does not transform the university or the Office of Campus Safety into a "public agency" under either definition cited.

The Office of Campus Safety is not a "law enforcement agency" as that term is defined in the APRA. A "law enforcement agency" for purposes of the APRA means "an agency or department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders." IC 5-14-3-2 [Public Agency, ¶6]. Under the plain

language of the statute, a "law enforcement agency" must both exist as an agency or office of government and engage in the functions identified. Indeed, although I do not read the list of agencies identified as law enforcement agencies under this definition to be exhaustive, each of the agencies identified does share the common characteristic of being an agency or office of state or local government. IC 5-14-3-2 [Public Agency, ¶6] (citing as examples of law enforcement agencies the state police, the police or sheriff's department of a political subdivision, a county prosecuting attorney, members of the safety and security divisions of various state agencies). While the Office of Campus Safety engages in or at least has the authority to engage in the investigation, apprehension and arrest of alleged criminal offenders under the authority of state law, it cannot be said to be "an agency or department of any level of government." Rather, it is a subdivision or office of a private institution. Because the Office of Campus Safety is not an agency or department of any level of government, it is not a "law enforcement agency" for purposes of the APRA.[1]

More compelling is your assertion that the Office of Campus Safety is a public agency because it exercises a part of the executive power of the state. Indiana Code 5-14-3-2 broadly defines a "public agency" as any "board, commission, department, division, bureau, committee, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state."[2] IC 5-14-3-2 [Public Agency, ¶1]. Police power is an executive power of the state, and pursuant to Indiana Code 20-12-3.5-2, the university has seemingly without any reservation accepted and embraced that power through its Office of Campus Safety.

The Office of Campus Safety attempts to defeat application of this definition by noting that there exists statutory authority for a private person's limited right to use force to effect an arrest or prevent an escape, and a shopkeeper's right to detain shoplifters, and advances those statutes as examples of situations where a statute confers police power on private persons or entities but would not seriously be contended to make those private persons or entities "public agencies" under the APRA. *See* IC 35-41-3-3(a); IC 35-33-6-2. I think the statutes cited by the Office of Campus Safety are markedly different from the statute conferring to a university the general police powers of the state. Indeed, unlike the statute at issue here, neither statute cited by the Office of Campus Safety purports to confer any of the state's police powers on private persons or entities. *See* IC 35-41-3-3(a) (codifying a substantive defense to a charge that might be made against a private citizen for use of force); IC 35-33-6-2 (authorizing a shopkeeper to detain a person suspected of shoplifting, but limiting that authority to brief detention and requiring the shopkeeper to contact law enforcement officers). No such limitations are present with the statute at issue here, where state law is literally authorizing a private entity to create and

[1] This conclusion, also aggressively advanced by the Office of Campus Safety, would seemingly make short work of any analysis of the "investigatory records exemption" should the APRA otherwise be held to be applicable to the Office of Campus Safety. That exemption applies only to the investigatory records of law enforcement agencies. *See* IC 5-14-3-4(b)(1).

[2] "Public agency" is similarly, but separately and additionally defined as any "other entity, or any office thereof, by whatever name designated, exercising in a limited geographical area the executive, administrative, judicial or legislative power of the state or a delegated local governmental power." IC 5-14-3-2.

appoint a police force that has all of the police powers of the state, and all of the common law and statutory powers, privileges, and immunities applicable to peace officers appointed and employed by governmental units. *See* IC 20-12-3.5-2.

Neither does it matter that that officers employed by the Office of Campus Safety have limited geographical jurisdiction. Limited geographical jurisdiction does not defeat the public or even "governmental" character of any entity, and in fact is contemplated by most of the definitions of "public agency" under the APRA. Then too, the statute at issue here confers authority on the Office of Campus Safety to expand its geographical jurisdiction beyond the borders of the campus of Taylor University, both through assisting and cooperating with other law enforcement agencies, and by agreement with the municipal chief of police or the county sheriff. IC 20-12-3.5-2(a), 2(b).

In the end, I think that your claim must fail not for these reasons advanced by the Office of Campus Safety, but because it does not serve the public policy of the APRA when reviewed in the context of the entire statute. The public policy of the APRA states:

> [I]t is the public policy of the state that all persons are entitled to full and complete information *regarding the affairs of government and the official acts of those who represent them as public officials and employees*. Providing 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 (emphasis added). This preamble to the APRA contemplates that all of the provisions that follow will be interpreted in a manner that opens *government and the acts of those who serve as public officials and employees of government* to public scrutiny. When reviewing the definition of "public agency" as any office that exercises the executive powers of the state, one can easily imagine any number of private entities that conduct activities or carry out functions that can be characterized as powers also exercised by the state, but that are not acting as or on behalf of government in doing so. The definitions of "public agency" cannot be read in a vacuum to avoid or expand the policy of the APRA. In context, there must be more than just shared functions, common goals, or a close working relationship; in my opinion to be a public agency under the definition at issue, the entity must be an entity *of government* or that is exercising functions *on behalf of government or under the control of government*. *Cf. Perry County Development Corporation v. Kempf*, 712 N.E.2d 1020, 1026-27 (Ind. Ct App., 1999) (rejecting claim that the Perry County Development Corporation was a public agency where that agency was not acting on behalf of or under the control of any governmental entity; "[w]orking closely with the County is not tantamount to being compelled to do the County's bidding or working subject to its control."). The structure of the APRA and the categories of definitions of public agency further support this view that something more than shared functions must be present; the entity must take on a character that renders it an actor of government.

By accepting the authority to appoint private police officers with general police powers, Taylor University was not thereby mandated or otherwise compelled to exercise the state's

police power on behalf of or in lieu of or under the control of any unit of government. Neither did the statute delegate the police powers of the state to the university. Indeed, the university was and continues to be free to decline or limit the authority the statute conferred, and whether they would do so or not, I can find no authority to suggest that state, county and local law enforcement authorities are without continuing jurisdiction on the Taylor University campus simply because the university employs its own security department. The acts of the Office of Campus Safety are not the acts and affairs of state or local government or public officials, they are the acts and affairs of Taylor University and the private employees of that entity. Because the Office of Campus Safety is an office of a private institution and does not fulfill its authority to carry out police powers as an entity of government or on behalf of or under the control of government, I find it does not meet the definition of public agency for purposes of the APRA. [3]

## CONCLUSION

It is my opinion that the Office of Campus Safety is not a public agency as either a law enforcement agency or as an entity that exercises the executive powers of the state. Because the Office of Campus Safety is not a public agency, the provisions of the APRA do not apply, and I conclude that no violation of the APRA occurred when that entity denied your request for records.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Michael A. Blickman, Attorney for Taylor University's Office of Campus Safety
Fred R. Biesecker, Attorney for Taylor University's Office of Campus Safety

[3] That said, I am not concluding that the Office of Campus Security or the security force of any private entity can never meet the definition of public agency. If the private police officer can be said to be acting at the behest of and or under the control of government, such as might be the case with participation in a joint task investigation, there may be a sufficient nexus to find "public agency" status. No allegation or evidence of such a relationship is presented here.