

July 23, 2004

Ms. Pamela Frazee
1671 West State Street
West Lafayette, IN 47906

Re: Advisory Opinion 04-FC-104; Alleged Denial of Access to Public Records by Purdue University

Dear Ms. Frazee:

This is in response to your formal complaint, which was received on June 23, 2004. You have alleged that Purdue University ("Purdue") has violated the Indiana Access to Public Records Act ("APRA"), Ind. Code 5-14-3. Specifically, you allege that the denial of access to public records in response to your May 28, 2004 request violated the APRA. Mr. James Almond, Vice President for Business Services and Assistant Treasurer and Ms. Lucia Anderson, Public Records Officer, responded on behalf of Purdue. A copy of Purdue's response is enclosed for your reference.

BACKGROUND

On May 10, 2004, you submitted to Purdue a written request for records that outlined thirteen different documents. The documents can be broken down into three categories: requests for documents relating to your employment at Purdue; documents relating to Purdue's Diversity, Work Life and Campus Survey; and documents relating to information regarding employees who voluntarily terminated their employment at Purdue and who, as a result, became ineligible for future employment with the University. On May 28, 2004, you received a response from Purdue in which some records were provided, some were denied, and you were advised that some records did not exist.

On June 10, 2004, you filed with our office a complaint alleging that some of the records given to you were incomplete and that other records were inappropriately denied you. We forwarded a copy of that complaint to Purdue. In a letter from Mr. James Almond and a telephone call with Ms. Lucia Anderson, Purdue stated that your request did not specify all of the records you wanted, that some records were appropriately denied pursuant to I.C. 5-14-3-4(b)(6), and that some records you requested do not exist.

ANALYSIS

Disclosed Documents

Your request for information asked for all documents in your personnel file, “both at the Human Resources level and the departmental level – both formal and informal,” and for all documents which communicate your ineligibility to be employed at Purdue. Ms. Anderson forward to you documents that purported to be all the information in your personnel file to satisfy the first portion of your request and two letters regarding your ineligibility meant to satisfy the second portion of your request. Upon your review of those documents, you noted that documents were missing from your personnel file, such as your yearly employee evaluations, a letter of recognition, a letter in response to the termination warning of July 29, 2003, and informal notes regarding your employment during 2002-2003. Additionally, you noted that not all documents communicating your ineligibility had been included.

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). Indiana Code §5-14-3-4(b)(8) provides generally that a public agency has discretion in releasing personnel files of public employees and files of applicants for public employment; however, "all personnel file information shall be made available to the affected employee or his representative."

With regard to the information in your personnel file, Mr. Almond’s letter and Ms. Anderson’s telephone call indicate that although disclosable, Purdue believed your request for “all documents in your personnel file” was not particular enough to indicate that you also meant to obtain your annual evaluation reports. A request for inspection and copying must identify with reasonable particularity the record being requested. I.C. 5-14-3-3(a). “That (an agency) can identify and has many records that are responsive does not make the request so vague or broad that it relieves the agency of its obligation to provide access to those records.” *Opinions of the Public Access Counselor 04-FC-73, 04-FC-75, and 04-FC-80*. “(I)f an agency needs clarification of a request, then the agency should contact the requestor for more information if it is necessary to respond to the request.” *Opinion of the Public Access Counselor 02-FC-13*. Clearly, Purdue was aware of the existence of the annual evaluations. If they were unsure as to whether or not you were requesting those evaluations, (Purdue) had an obligation to obtain the additional information necessary for the request to be fulfilled. *See Opinion of the Public Access Counselor 03-FC-51*.

Mr. Almond’s letter does not address the issue of the missing letter of recommendation, letter in response to the termination warning of July 29, 2003, or informal notes regarding your employment during 2002-2003, all which you assert are part of your personnel file, except to generally say “see factual summary.” We can not guess what is meant by this reference; however, Purdue should have either made those records available, or advised you that your request was denied, and under what exception those records are excluded.

With respect to the partial production of documents communicating your ineligibility for employment at Purdue, Mr. Almond's response to your complaint states only that "the denial was appropriate." This is only a belated response to our office, and in fact, you received no response to your request for those records.

Under the APRA, the burden of proof for the nondisclosure of a public record is on the public agency, not the person seeking to inspect or copy the record. The APRA, however, also places some responsibility on the requestor to inform the public agency in a manner that will permit the public agency to respond to the request. *Opinion of the Public Access Counselor 01-FC-47*.

If there are additional letters that communicate the decision to remove you from eligibility from employment at Purdue, those letters should have either been provided to you or you should have received a response from Purdue. If Purdue meant to deny all or part of those records, they should have forwarded a denial to you.

Denied documents

Your request also asks for all documents surrounding the decision to remove you from eligibility for further employment at Purdue. Your request was denied pursuant to I.C. 5-14-3-4(b)(6), the "deliberative material exemption." This exemption applies to protect the deliberative material of both staff of the public agency and deliberative material prepared by a private contractor under contract with the public agency. The purpose of this exemption is to "prevent injury to the quality of agency decisions" by encouraging "frank discussion of legal or policy matters in writing." *Opinion of the Public Access Counselor 04-FC-24, citing Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002).

Purdue's response to your request generally states that your request is denied pursuant to I.C. 5-14-3-4(b)(6). The APRA outlines the standard for communicating the denial of access to a public record. Under the APRA, a public agency denying the access in response to a written public records request must put that denial in writing and include the following information:

1. a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and
2. the name and title or position of the person responsible for the denial. I.C. 5-14-3-9(c).

Purdue's response to your complaint says that the "bulk of the documents which are contained in the Employee Relations file" are excepted from disclosure under I.C. 5-14-3-4(b)(6). Purdue must establish "the contents of the record with adequate specificity and not by relying on a conclusory statement or affidavit." *Newman v. Bernstein*, 766 N.E.2d 8 (Ind. App. 2002).

Furthermore, because "the public policy of APRA requires a liberal construction in favor of disclosure, exemptions to disclosure must be construed narrowly." *Opinion of the Public Access Counselor 04-FC-24*. Because the denial does not provide information with sufficient

specificity, Purdue has not made an adequate showing that the record falls within the deliberative material exemption.

No Responsive Records

Finally, you requested “documentation regarding any further study or recommendations for further study which will be pursued as a result of the Diversity, Work Life and Campus Survey.” In response to your request, Purdue advised you that there were no such records. “A public agency is not required to create a record in response to a request, and it is not required to produce a record it does not have. If an agency does not have a responsive record, it should say so, but its failure to produce a record it does not have and is not required to have is not a denial under the APRA.” *Opinion of the Public Access Counselor 04-FC-79.*

In response to your complaint, Purdue advised our office that “although not technically a recommendation for study as a result of the Survey, the Vice President for Human Relations has recommended that the Survey be repeated.” They continue, saying,

“(s)pecifically, in April 2004, a Governance Report on Diversity at Purdue University was presented at a meeting of the Board of Trustees. Ms. Rollock reported on the Survey. Her materials included a one-page statement regarding ‘Next Steps.’ If Mr. Frazee would like a copy of this page, it would be made available to her upon her request.”

It appears that Purdue is belatedly making this document available to you for inspection and copying.

CONCLUSION

For the reasons set forth above, I find that Purdue has violated the Access to Public Records Act, and continues to violate it to the extent that they continue to withhold documents claiming that the deliberative materials exemption applies without adequate demonstration of its applicability.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. James Almond w/out enclosures