

November 10, 2005

Via Facsimile

David P. Studinski
Daily News
AJ 278
Ball State University
Muncie, IN 47306

Re: Formal Complaint 05-FC-206; Alleged Violation of the Access to Public Records Act by Ball State University

Dear Mr. Studinski:

This is in response to your formal complaint alleging that Ball State University (“University”) violated the Access to Public Records Act by denying the *Daily News* [hereinafter, “the *News*”] evaluation forms submitted to the University.

BACKGROUND

The *Daily News*, the student-run newspaper of the University, is seeking unconditional access to evaluations completed by Ball State University faculty, staff members, administrators, and students. These evaluations concerned the three final candidates for Provost and Vice President for Academic Affairs [hereinafter, “Provost”]. You filed your formal complaint with the public access counselor after the University Communications Office informed you that the *News* was required to agree to sign a document containing the following statement: “I agree to review the Provost evaluations for my personal information only. I understand that permission from personnel completing the forms was not obtained for public distribution, and I agree not to distribute this information publicly.”

After submitting a formal written request for the completed evaluation forms to the University on September 29, 2005, the University denied your request the next day, citing Indiana Code 5-14-3-4(b)(6), excepting intra-agency advisory or deliberative material that are

expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decisionmaking. The *News* contends that the University cannot deny the records as deliberative materials because to the extent that the materials were submitted by students, they are not wholly “intraagency.” You argue that, by making the evaluations available to students who are not members of the public agency, the University now must disclose the evaluations to the general public. You further contend that the University may not impose restrictions on the use of the records once they are open to the public.

I sent a copy of your formal complaint to the University. Legal counsel for Ball State University, Mr. Jon Moll, responded by letter. I have enclosed a copy of his letter for your reference. The University supplied some background information that is helpful to this analysis. The University’s Board of Trustees has delegated to the President of the University the responsibility for selecting the Provost and Vice President for Academic Affairs. The President appointed a search committee to review the many applications and select three final candidates to recommend to the President. Each of the candidates was invited to the campus to meet with the President, other senior administrators, and other interested persons. Each candidate also took part in a public forum, at which the candidates gave a presentation and answered questions from faculty, staff members, administrators, and students. Following the public forum, and to aid the President in her selection, the President encouraged University faculty and staff members, administrators, and students to submit evaluation forms to her office. The University sent me a copy of the evaluation form. The candidate’s name appears at the top. There is a single question on which a person submitting the form rates the candidate on credentials/experience/qualifications, with “1” being Superior to “5” Below Average (“6” denoted “not enough information.”). Other areas of the one-page form invited comment on the candidates’ strengths, weaknesses, and a space for additional comments. The form solicited information about where the submitter met the candidate, and whether the submitter was a faculty member, administrator, staff member, or a student.

Persons submitting the form could supply a signature, but the form stated that the signature was optional. The deadline for submitting the form to the Office of the President was “immediately after Open Forum.”

The University further explains, “At the request of some faculty members, and to promote discussion within the University community of the merits of each of the candidates, the President made these evaluation forms available for review in her office by members of the groups who had been invited to submit the forms to her – that is, University faculty and staff members, administrators, and students.” However, those forms were made available only on the condition that the information “not be distributed to the public.” At no time were the forms made available to the public, and the University did not permit members of the public, including reporters from any news media, the opportunity to review them.

The University is taking the stance that the evaluations were utilized between and among the persons involved in the University’s deliberations on the decision to hire the Provost. In allowing the evaluations to be reviewed by members of the “University community,” the President sought to promote a “robust discussion of the strengths and weaknesses of each candidate.” The deliberative materials exception to disclosure was meant to promote these very

discussions so that the exchange of viewpoints is free and uninhibited, according to the University. Specifically, the University stated that only those groups who had been invited to submit evaluations were permitted to view them, so long as each person agreed to not “distribute the information publicly.” Further, the University asserts that by arguing that disclosure to students is not “intraagency” communication, the *News* was taking the position that students are not members of the University community and that students should not have input into the hiring of the Provost.

ANALYSIS

It 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. Ind. Code 5-14-3-1. Providing persons with the 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. The Access to Public Records Act is to be liberally construed to implement this policy, and place the burden of proof for the nondisclosure of the 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. *Id.* Exceptions to disclosure are to be narrowly construed to effectuate the purposes of the statute. *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].

Ball State University is a public agency subject to the Access to Public Records Act (“APRA”). IC 5-14-3-2(l). The evaluations are “public records” because they are filed with, retained, received, or maintained by a public agency. IC 5-14-3-2(m). Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. IC 5-14-3-3(a).

The issues presented by the *News*’ complaint are whether the evaluations may be withheld under the deliberative materials exemption, and whether the University waived its right to claim the exemption when it disclosed the evaluations to persons outside the public agency, i.e., the students.

Records 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 purpose of decision making”

are exempt from disclosure in the discretion of the public agency. IC 5-14-3-4(b)(6). This exception to disclosure is commonly called the “deliberative materials” exception.

There is little case law interpreting this statutory provision, in particular, what is deliberative material. In the context of the APRA, deliberative material includes information

that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decisionmaking process. Our office has observed that many, if not most records that a public agency creates or maintains may be part of some decision making process. See *Opinion of the Public Access Counselor 02-FC-13*. In order to withhold them from disclosure under IC 5-14-3-4(b)(6), the records must also be interagency or intraagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature.

To date, the Indiana appellate courts have not provided an easy standard to apply when considering the deliberative materials exception. From my review of the federal caselaw under the federal Freedom of Information Act, as well as various state's access laws on this exception, there is little consensus across the board on what records do and do not constitute deliberative material outside of the paradigmatic "executive privilege" letter or memorandum. However, most authorities agree that the purpose of the deliberative materials exception is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002)(quoting *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 44 L.Ed.2d 29, 95 S.Ct. 1504(1975)). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Id.*

The *News* contends that the evaluations in question could not be withheld as deliberative material, because one element of the exception is lacking—the evaluations are not interagency or intraagency, because students are not part of the public agency. No reported Indiana case has interpreted the "interagency/intraagency" language in the deliberative material exemption. Again, previous guidance of my office has observed that where part of a requested file contained records that were submitted from persons outside of the public agency, the material would not qualify as deliberative material. *Opinion of the Public Access Counselor 02-FC-13*.

Given that exceptions to disclosure are to be narrowly construed, I agree with the *News* that students, while undoubtedly part of the University "community" are nevertheless not a part of the public agency. Generally, members of the workforce of the public agency are deemed to be part of a public agency. In fact, I considered that the legislature specifically included within the rubric of intraagency advisory or deliberative material, material developed by a private contractor under a contract with a public agency. Were it so easy to include persons who are not part of the public agency's workforce within the public agency, the legislature would not have found it necessary to specifically include contractors. Even so, the legislature specified that the material constituting intraagency material must be developed under a contract with a public agency.

Your second assertion, that the University has waived the protection of the deliberative materials exception, also has merit. The Indiana Court of Appeals has recognized that a public agency may waive the applicable APRA exception if the agency allowed access to its material to one party and not another. See *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003). The Court declined to find that Indiana University had waived the deliberative materials exception when it released a summary investigative report but declined to provide the much more detailed full report. Courts in other jurisdictions have held that a public agency may waive the protections of the public access laws, but have followed the

rule that such waiver is to be narrowly construed. *State ex rel. Cincinatti Enquirer v. Sharp*, 785 N.E.2d 822 (Ohio App. 1 Dist. 2003).

In this circumstance, the University admits, without conceding waiver, that the evaluations were disclosed to any member of the four groups who had been invited to submit the forms to the President; i.e., faculty, staff members, administrators, and students, on the condition that those individuals reviewing the forms not disclose them publicly. Apparently, even students and others who did not *actually submit* an evaluation could review the evaluations, since the right to review the evaluations was given to students who merely had been invited to submit an evaluation. For this reason, the disclosure to those students who had not necessarily submitted an evaluation (and may never submit an evaluation) would be a disclosure to persons outside the public agency. In other words, the University's contention that the deliberative materials exception applies is flawed because the decisionmakers whose opinions the exception is designed to protect was too amorphous to be deemed an "intraagency" communication, in my opinion.

In any event, the University, in resisting disclosure of the evaluations to the *News*, bears the burden to show that the evaluations constitute interagency or intraagency materials in addition to the other elements of the deliberative materials exception. If the University cannot sustain its burden, or has waived the right to claim the privilege, the University cannot place conditions on disclosure of the evaluations to you or to any member of the public.

CONCLUSION

It is my opinion that Ball State University may only rely on the deliberative materials exception for the evaluations if the evaluations meet all of the requirements of the exception, including that the public records are intraagency or interagency.

Sincerely,

Karen Davis
Public Access Counselor

cc: Jon Moll