

January 30, 2006

Sent Via Facsimile

Mr. Frank A. Rizzo
2845 45th Street
Highland, IN 46322

Re: Formal Complaint 05-FC-268; Alleged Violation of the Access to Public Records Act by Purdue University Calumet

Dear Mr. Rizzo:

This is in response to your formal complaint alleging that Purdue University Calumet ("Purdue") violated the Access to Public Records Act ("APRA") by failing to give you a record.

BACKGROUND

You sent two requests for records to Purdue. On November 16, 2005 you requested via facsimile records relating to Jodi Attar-Gee; specifically, the dates she attended Purdue and the dates she completed the course requirements under 515 IAC 1-1-8(e). On November 17, 2005, you sent a second request for records via facsimile. In the November 17 letter, you requested a record showing when Ms. Gee passed the "SLLA" exam. These requests were sent to Linda Manes, Purdue's Licensing Advisor.

Purdue initially responded on November 21, asking that you complete and submit Purdue's record request form. You complied on November 21, 2005, faxing the form to Purdue on that date. In your resubmitted request, you penned the following message: "If you are unable to provide copies of the requested records, please provide the information in an acceptable alternative format." You e-mailed Ms. Manes on November 22 to urge her to consider Ind. Code 5-14-3-4(b)(8) that mandates disclosure for the education and training records of public employees. Subsequently, Purdue communicated with you via e-mail that it anticipated having a full response to your request by November 28, and then, November 30. You sent a message to Purdue on December 6 requesting the status of your request. On December 9, Purdue stated that

the staff was waiting for an internal response before responding to your request. You allege that since December 9, you have received no communication from Purdue. You filed your formal complaint with the Office of the Public Access Counselor on December 29, 2005.

I sent a copy of your formal complaint to Purdue. Ms. Deborah Trice, counsel for Purdue, responded by letter, a copy of which is enclosed for your reference. Ms. Trice characterized your complaint as a challenge to the timeliness of the production, or denial, of your specific requests. Ms. Trice contends that Purdue's response was timely, given that the information concerning the dates of attendance was given to you by telephone immediately. With respect to the other portions of your requests, Purdue's denial, which was being processed when your complaint was filed, was not unreasonably delayed, given the two holidays that intervened. Ms. Trice also stated that the information concerning the dates of completion of coursework are contained on Ms. Gee's academic transcript, a record that falls squarely within the prohibition on disclosure contained in the federal educational privacy law, which Ms. Trice cites.

Ms. Trice also disputed your averment that you received no communication from Purdue after December 6. Ms. Trice stated that you had a telephone conversation with a Laura Luna of Purdue-Calumet on December 12. She understood your request to be that Purdue provide the dates that Ms. Gee completed the courses on Purdue letterhead, rather than through the transcript. To that particular request, Ms. Trice indicated that under the APRA, an agency is not obligated to create a record to satisfy a request for a record.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). Although the APRA sets out the time within which an agency is required to respond to a request for records, there are no specific times within which an agency is required to produce the records. A public agency that receives a request for records via facsimile is required to respond to the request within seven (7) days of receiving it. IC 5-14-3-9(b). If the agency intends to deny a written request for records, the denial must be in writing and state the exemption or exemptions that authorize the agency to withhold the record, and the name and title of the person responsible for the denial. IC 5-14-3-9(c).

You do not take issue with the timing of Purdue's initial response. It appears that Purdue responded timely to both your initial requests on November 16 and 17, and to the subsequent, new request that you submitted on the form provided to you by Purdue. The November 23 response of Purdue indicating that it expected to have a fuller response to your requests was timely under IC 5-14-3-9(b). Your complaint centers on whether you have received a *de facto* denial of the records because Purdue had not given you the anticipated production, denial letter, or other communication, for about three weeks after the December 9 message.

Ms. Trice stated that you had spoken with Ms. Luna on December 12 and requested that Purdue create a document on its letterhead showing the dates that Ms. Gee completed the required coursework at Purdue. This seems consistent with your request on November 21 that, if

unable to provide copies of the requested records, Purdue may provide the information in an acceptable alternative format.

With respect to the timeliness of production or denial of the records, it is not clear to me how Purdue can justify its failure to send a denial letter in the mail or via e-mail, during the time it last spoke to you on December 12 and the date that you filed your complaint on December 29, 2005. I understand that the university was closed on two days that intervened between those dates, but nine days remained in which to issue a written denial. As I understand Purdue's complaint response, Purdue would have issued a written denial that cited the Family Educational Rights and Privacy Act ["FERPA"], and would have declined to create a record to satisfy your request. This particular federal law exemption is routine for a university, and Purdue contends that the record that was responsive to your request was the student's academic transcript, which falls easily within the FERPA law. Without more to explain the lapse of time, I find it difficult to not find an unreasonable delay in issuing the written denial. While APRA does not contain strict timeframes on production or denial of records, in my opinion, Purdue's response to what appears to be a routine request for a transcript should have been issued more quickly.

That said, and taking Purdue's complaint response as a detailed written denial of your request, I do not find fault with Purdue's denial of your request. Under IC 5-14-3-4(a)(3), a public agency may not disclose public records that are required to be kept confidential by federal law. Information contained in a student education record is confidential unless the student consents to disclosure. 20 U.S.C. 1232g. As Ms. Trice explains, you were entitled to, and received from Purdue, information concerning the dates of attendance of Ms. Gee. This is deemed by Purdue policy to be "directory information," which may be disclosed under FERPA. Purdue's policy regarding disclosure of "directory information" is consistent with the federal law definition of "directory information." *See* 34 CFR 99.3. Otherwise, FERPA forbids disclosure of "education records," defined very broadly to mean "records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution." 34 CFR 99.3.

Where you requested in lieu of copies of the transcript that Purdue issue a letter stating the dates of course completion, Purdue is not required to do so under the APRA. That would involve creating a record that does not already exist. Such a record also may itself be subject to FERPA, although Purdue does not argue that an abstract from a transcript would be nondisclosable under FERPA. In any event, the APRA does not require a public agency to create a record to satisfy a record request.

One matter that I believe is raised in your complaint but not addressed by Purdue in its complaint response pertains to your request for the date that Ms. Gee completed the SLLA exam. I am not entirely clear whether this is information that Purdue would maintain, but Purdue should issue a response that states whether it maintains that record and whether it will disclose it, if Purdue has not already done so.

I also address your contention that the information that is deemed disclosable under IC 5-14-3-4(b)(8), including education and training background, would require that Purdue disclose the dates that Ms. Gee completed the coursework.

Personnel files of public employees may be withheld in the public agency's discretion. IC 5-14-3-4(b)(8). However, certain information from a personnel file of a public employee must be disclosed; among the information that must be disclosed is education and training background. *See* IC 5-14-3-4(b)(8)(A).

Here, the information regarding Ms. Gee's academic transcript is not contained in a personnel file, nor was Ms. Gee a public employee of Purdue. Therefore, the required disclosures under IC 5-14-3-4(b)(8) simply do not apply to the student academic records maintained by Purdue.

CONCLUSION

For the foregoing reasons, I find that Purdue University Calumet should have issued a denial letter within a reasonable period of time, but otherwise Purdue did not violate the Access to Public Records Act when it denied you information that is contained in an education record of Ms. Gee.

Sincerely,

Karen Davis
Public Access Counselor

cc: Deborah Trice