

August 24, 2006

Jodi Upton
USA Today
7950 Jones Branch Drive
McLean, VA 22314

Re: Formal Complaint 06-FC-127; Alleged Violation of the Access to Public Records Act by Purdue University

Dear Ms. Upton:

This is in response to your formal complaint alleging that Purdue University (“Purdue”) violated the Access to Public Records Act by refusing to disclose certain information relating to coaches’ shoe or apparel contracts and media, advertising, or other deals.

BACKGROUND

You sent a letter to President Martin Jischke requesting, pursuant to the Access to Public Records Act and the federal Freedom of Information laws, records which describe the total compensation package for the head football coach, head men’s basketball coach and head women’s basketball coach. This request was to include, but not be limited to, the current base salary contract, any university-provided perks or bonuses, other listed items not relevant to this complaint, and 1) media, advertising or other deals and 2) any shoe or apparel contracts.

Purdue responded to your request with a letter granting your request for base salary information and university-provided perks or bonuses. Other items were not provided because no responsive documents existed. Purdue also denied your request for media, advertising or other deals, and shoe or apparel contracts, on the basis that this information was exempt as “confidential financial information obtained upon request from a person,” and citing Indiana Code 5-14-3-4(a)(5).

This formal complaint followed. You state in your complaint that while the university does not pay the income directly, it does have possession of a document required by the National

Collegiate Athletic Association (“NCAA”) which requires coaches to annually report such income. You contend that the requirement to file the annual statement is included in the coaches’ contract. The coaches would not have the income except for their position with the university, and taxpayer funded facilities such as practice facilities are used in order to generate such income. Such outside income is an integral part of the coaches’ compensation, and should not be treated any differently than base salary or any other perks such as golf course fees and cars.

I sent a copy of your complaint to Purdue. Ms. Deborah Trice, counsel for Purdue responded. A copy of her letter is attached for your reference. Ms. Trice brought to my attention *Opinion of the Public Access Counselor 03-FC-56*. Ms. Trice argues that the facts are identical to those in *03-FC-56*, in which the Public Access Counselor found that Purdue had not violated the Access to Public Records Act when it refused to provide access to confidential financial information that Purdue had obtained from Purdue basketball and football coaches pursuant to the same NCAA provision.

Further, Ms. Trice explained that Purdue requests all coaches and administrative staff to report athletically related income for fiscal years pursuant to Article 11.2.2 of the NCAA Bylaws. The University specifically solicits this information on a form that Purdue provides for this purpose. The form specifically states that the person is providing the information “in accordance with the request of Intercollegiate Athletics and as required by Article 11.2.2 of the NCAA Bylaws, I am providing the following confidential financial information.” Ms. Trice indicated to me on the telephone that Purdue denied the records to *USA Today* in reliance on the previous opinion of the Public Access Counselor. Purdue disclosed the coaches’ university-provided compensation packages to you.

ANALYSIS

It is the public policy of the state of Indiana 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. The Access to Public Records Act requires liberal construction to implement the policy of openness and transparency. Hence, the burden of sustaining a denial of a record is placed on the public agency. IC 5-14-1-1. Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act (“APRA”). Ind. Code 5-14-3-3(a).

A person who has been denied the right to inspect or copy a public record by a public agency may file an action in circuit or superior court to compel the agency to produce the record. IC 5-14-3-9(e). When the issue before an Indiana court is whether a public agency properly denied access to a public record based upon Indiana Code 5-14-3-4(a), the public agency meets its burden of proof by establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. IC 5-14-3-9(f).

A public agency may deny a written request for a record if the denial states the exemption or exemptions authorizing the public agency to withhold the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c).

A public agency may not disclose a record that is “confidential financial information obtained, upon request, from a person. However, this does not include information that is filed with or received by a public agency pursuant to state statute.” IC 5-14-3-4(a)(5). You have not suggested that the information filed by the coaches with Purdue is filed with or received by Purdue pursuant to state statute, and Purdue denies that any state statute requires the information to be filed with Purdue. Rather, the information is solicited by Purdue in accordance with NCAA Bylaw 11.2.2. Bylaw 11.2.2 states:

“Contractual agreements, including letters of appointment, between a full-time and part-time athletics department staff member (excluding secretarial or clerical personnel) and an institution shall include the stipulation that the staff member is required to provide a written detailed account annually to the chief executive officer for all athletically related income and benefits from sources outside the institution. In addition, the approval of all athletically related income and benefits shall be consistent with the institution’s policy related to outside income and benefits applicable to all full-time or part-time employees.”

The Bylaw states that sources of such income include, but are not limited to, endorsement or consultation contracts with athletics shoe, apparel or equipment manufacturers. It is this “athletically related income” that you sought in addition to university provided compensation, benefits, and perks or bonuses.

In construing IC 5-14-3-4(a)(5) under the same facts as those presented in your complaint, the Public Access Counselor stated in *Opinion of the Public Access Counselor 03-FC-56* that the plain meaning of “confidential financial information,” is “information that is secret relating to finance.” In drawing from federal cases construing a similar provision of the federal Freedom of Information Act, it was the opinion of the Public Access Counselor that “athletically related income” is financial information. Moreover, if the coaches do not customarily release the information and the information is not readily accessible from other sources, Purdue may not release the information requested. Any information that does not meet these elements of the exemption must be separated and released.

It is my opinion that the “athletically related income” that you seek is financial in nature, and to the extent that it is not customarily released to the public or available from other sources, it is “confidential” in the sense that the term “confidential” is used in the exemption. It is also my opinion that the exemption applies only if the confidential financial information was obtained, *upon request*, from a person. The exemption explicitly does not apply where the information is filed with or received by a public agency pursuant to state statute. No state statute requires the athletic staff or coaches to file the report of “athletically related income” with a university. Purdue has stated that it has requested this information from the coaches in conformance with the NCAA Bylaw. Moreover, you have stated that the contracts of the coaches includes the requirement to file the information with Purdue.

The exemption clearly applies in this case if the *only* condition that negates the exemption is when the information is filed with or received pursuant to state statute, since the information was not filed with Purdue pursuant to state statute. Otherwise, if the information obtained pursuant to the NCAA Bylaw is not obtained “upon request, from a person,” the exemption would not apply.

Whenever an action is filed under IC 5-14-3-9(e), a public agency must notify each person who supplied any part of the public record at issue: 1) that a request for release of the public record has been denied; and 2) whether the denial was in compliance with an informal inquiry response or advisory opinion of the Public Access Counselor. Such persons are entitled to intervene in any litigation that results from the denial. IC 5-14-3-9(e). I find that the denial was in compliance with an advisory opinion of the Public Access Counselor, as explained above.

CONCLUSION

For the foregoing reasons, I find that Purdue has the burden of proving that the information you seek regarding “athletically related income” of the Purdue coaches is “confidential financial information obtained, upon request, from a person” and therefore exempt under Indiana Code 5-14-3-4(a)(5).

Sincerely,

Karen Davis
Public Access Counselor

cc: Deborah Trice