

February 21, 2007

Sent Via Facsimile

Diane VanWagnen
Labor Relations Representative
Michigan Department of Education
608 W. Allegan Street
Lansing, Michigan 48933

Re: Formal Complaint 07-FC-38; Alleged Violation of the Access to Public Records Act by Purdue University

Dear Ms. VanWagnen:

This is in response to your formal complaint alleging that Purdue University (“Purdue”) violated the Access to Public Records Act. I find that Purdue University did not violate the Access to Public Records Act.

BACKGROUND

Your formal complaint to the Public Access Counselor set forth the following background. You represent the employer in an arbitration proceeding in Michigan relating to Donald Haring’s employment with the Michigan Department of Education. He was terminated on March 30, 2006 stemming from charges of sexual harassment. The final arbitration hearing is set for February 23, 2007.

You learned that Mr. Haring had a similar incident when he was a faculty member at Purdue. On January 26, 2007, you sent Lucia Anderson, Public Records Officer at Purdue an e-mail requesting “information related to the findings and subsequent resignation of Mr. Haring, i.e., resignation letter, summary of your investigation, emails or complaints received by students, or anything else that would be helpful to demonstrate his previous history.”

Ms. Anderson sent you a letter dated February 1 denying your request pursuant to I.C. 5-14-3-4(b)(8), for information in the personnel file of a public employee. After receiving the letter, you began efforts to compel Purdue to provide witnesses and documents pursuant to a subpoena *duces tecum*. The subpoena demanded “any documents related to the investigation and resignation of former employee Donald Haring from Purdue University.” Purdue has successfully resisted the subpoena because it is not valid in Indiana.

Your formal complaint states that you are appealing denial of witness testimony, documents and final disposition related to Mr. Haring by Purdue University. You requested priority status for your complaint, because you intend to present the records at the arbitration proceeding on February 23, 2007. Because your complaint set forth the circumstances for which priority status may be granted, this Opinion is being issued within seven days of the date that I received your complaint setting forth those circumstances. *See* 62 IAC 1-1-3.

I sent a copy of your complaint to Purdue. Purdue’s response to your formal complaint was filed by Deborah Trice, counsel to Purdue. Ms. Trice noted that your formal complaint raises only the denial of records relating to the subpoena, not an issue regarding Ms. Anderson’s denial of your e-mailed records request. The Access to Public Records Act (“APRA”) contains no requirement that compels testimony by employees of a public agency or requires attendance at an arbitration proceeding out of state.

Ms. Trice stated that Purdue did not consider the subpoena to be a request pursuant to the APRA. Nevertheless, Purdue responded timely to the e-mailed request for records, denying your request under the personnel file exception. To the extent that the documents you requested in the subpoena could be construed as an APRA request, Purdue is prohibited from disclosing student education records under federal law, and in Purdue’s discretion would withhold other responsive records as deliberative material, diaries or journals, and privileged attorney client communication.

You submitted a second public records request during the pendency of this complaint. Your request was for any employment contract or agreement with Mr. Haring, as well as any termination or severance agreement. Purdue has disclosed the employment contract and a Report of Termination of Employment. There was no severance agreement. Purdue contends that it has not violated the Access to Public Records Act.

ANALYSIS

As a preliminary matter, I note that your complaint purports to be an appeal of the denial of witness testimony, documents and final disposition related to Mr. Haring by Purdue University. The Office of the Public Access Counselor is not an appellate tribunal, and cannot entertain appeals of denial of a subpoena. *See* IC 5-14-4. You included with your complaint a copy of the denial letter dated February 1 from Lucia Anderson. Therefore, I am regarding your complaint as one brought under IC 5-14-5, alleging a denial of the right to inspect and copy records under IC 5-14-3, the Access to Public Records Act. IC 5-14-5-7(6)(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). If a public agency receives a request for a record in person or by telephone, the public agency is required to respond within 24 hours or the record is deemed denied. IC 5-14-3-9(a). If the public agency receives a request for a record via U.S. Mail or facsimile, the public agency is required to respond within seven calendar days, or the request is deemed denied. IC 5-14-3-9(b). We have said that e-mailed requests must be responded to within seven days.

If a request initially is made in writing, by facsimile, or through enhanced access, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny the request if the denial is in writing or by facsimile, and the denial includes:

(A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and

(B) the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

Personnel files of public employees and files of applicants for public employment may be excepted, except for:

(A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

(B) Information relating to the status of any formal charges against the employee; and

(C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

IC 5-14-3-4(b)(8).

Purdue has stated that Mr. Haring was not suspended, demoted, or discharged. Also, no formal charges were brought against him during his tenure at Purdue. Accordingly, Purdue has withheld the remainder of the personnel file, including any letters of resignation or other information about the employment.

It is my opinion that Purdue has properly withheld the letter of resignation and any other materials relating to any investigation, e-mails, or complaints of students, to the extent that those materials are contained in Mr. Haring’s personnel file. In addition, Purdue has fulfilled the requirements of the APRA for denying the record, because Purdue issued a written denial that cited the exemption and gave the name and title of the person responsible for the denial.

Purdue has also set forth additional exemptions that would apply to other records that would fall within the ambit of the subpoena. The subpoena requested documents related to the investigation and resignation of Mr. Haring. This is a broader request than the APRA-related request of January 26. However, it appears to me that the additional bases for denial could apply even to those records requested on January 26. This is insignificant because I find no basis for waiver of exemptions that are not initially claimed by the public agency, and you do not raise any issue of waiver in your complaint.

In addition to records that must be withheld because they are classified as confidential, the APRA also permits a public agency to withhold certain categories of records in the agency's discretion. These include:

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. IC 5-14-3-4(b)(6); and

Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal. IC 5-14-3-4(b)(7).

Purdue states that complaints of students and other investigative materials would fall within the deliberative materials exception, citing *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 830 (Ind. Ct. App. 1998). Notes of Purdue's Diana Prieto are exempted by Purdue as a diary or journal.

Records classified as confidential must be withheld from disclosure under IC 5-14-3-4(a). According to Purdue, communications between Purdue officials and their attorneys that are privileged fall within IC 5-14-3-4(a)(8) because they are declared confidential under a rule of the Indiana Supreme Court. *See* Rule 1.6 of the Rules of Professional Conduct, "Confidentiality of Information." Finally, student education records are exempt under the Family Educational Rights and Privacy Act, 20 U.S.C.A. 1232g *et seq*, and are therefore confidential under the APRA because the records are required to be kept confidential by federal law. IC 5-14-3-4(a)(3). This would include student complaints and other identifying information concerning students.

A public agency bears the burden of sustaining any denial of records. IC 5-14-3-1; IC 5-14-3-9(f) and (g). Purdue's response supplementing the bases for denial for the records appears to be sufficient in both form and substance. Ultimately, if you challenged Purdue's denial of some or all of the records, an Indiana court could review the records *in camera* to determine whether any part of the records could be withheld. *See* IC 5-14-3-9(h). However, it is my opinion that Purdue's bases for withholding the investigative records are supported by the APRA.

CONCLUSION

For the foregoing reasons, I find that Purdue University did not violate the Access to Public Records Act in withholding the records you sought either under the subpoena or through the e-mailed request you made under the Access to Public Records Act. I expressly make no determination concerning the validity of the subpoena, since that is beyond the scope of my authority.

Sincerely,

Karen Davis
Public Access Counselor

cc: Deborah Trice