



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 29, 2010

Ms. Heather Gillers
The Indianapolis Star
307 N. Pennsylvania St.
Indianapolis, IN 46204

Re: *Formal Complaint 10-FC-231; Alleged Violation of the Open Door Law by Indiana University - Purdue University Indianapolis*

Dear Ms. Gillers:

This advisory opinion is in response to the your formal complaint on behalf of *The Indianapolis Star* ("*The Star*"), which alleges Indiana University – Purdue University Indianapolis ("IUPUI") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* IUPUI's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that on September 15, 2010, *The Star* contacted IUPUI and requested access to a copy of a report produced by an investigative committee concerning IUPUI women's basketball coach Shann Hart and the women's basketball program (the "Report"). IUPUI published a press release on September 23rd in which IUPUI indicated that it would not release the Report. The release read, "A report from the Chancellor's Ad Hoc Advisory Committee on the IUPUI Women's Basketball Program is not being released because it is deliberative and personnel information." *The Star* believes IUPUI's refusal to release the Report is a violation of the APRA.

On behalf of IUPUI, Indiana University Associate General Counsel Joseph Scodro responded to *The Star's* complaint. Mr. Scodro offers some background information regarding Ms. Hart and her position as head coach of the women's basketball team. Ms. Hart served in the position of head coach pursuant to a written employment agreement, which Mr. Scodro attached to his response. In late July of this year, IUPUI Chancellor Charles Bantz appointed and charged a three-person committee with investigating certain allegations made in *The Indianapolis Star* relating to Ms. Hart and her program. Chancellor Bantz asked the committee to forward to him a written report of its investigation with recommendations. The report was later created by the committee and provided directly to the Chancellor. Subsequently, it was filed in Ms. Hart's

personnel file. Ms. Hart's employment with IUPUI ended on September 23rd pursuant to Section VI, Paragraph D of the employment agreement. That provision reads,

D. Termination by University Without Cause. The University shall have the right to terminate this Employment Agreement prior to its normal expiration on May 31, 2009, without cause. Termination "without cause" shall mean termination of this Employment Agreement on any basis other than those set forth in paragraphs A and B of Section VI. Termination without cause shall be effectuated by delivering to Coach written notice of the University's intent to terminate this Agreement without cause, which notice shall be effective upon the earlier of the date set for termination in such notice or five (5) days after receipt of such notice by Coach. If the University exercises its right under this paragraph D of Section VI to terminate this Employment Agreement without cause, Coach shall be entitled to damages only as provided for in paragraph E of Section VI below, and the provisions contained in paragraph D of Section V hereof concerning restrictions on Coach's ability to accept competitive employment shall have no further effect. The University agrees that if the Coach is terminated as provided in this paragraph D of Section VI at any time during a season, Coach shall nonetheless be permitted to maintain her position and complete the remainder of the season before her removal.

Mr. Scodro cites to two provisions of the APRA for IUPUI's position that the Report is excepted from the APRA's general disclosure requirement. First, he cites to subsection 4(b)(8)'s exception for personnel file information. He notes that no formal charges were pending against Ms. Hart and no final discipline was taken against her. Rather, the employment agreement was terminated "without cause" pursuant to the language above. Second, Mr. Scodro argues that the Report is exempt from disclosure under subsection 4(b)(6), which permits public agencies to withhold interagency or intra-agency deliberative material.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with 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." I.C. § 5-14-3-1. IUPUI does not contest that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy IUPUI's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Personnel files of public employees are generally excepted from disclosure at the discretion of the agency, except for the items specifically required by the APRA to be disclosed. I.C. § 5-14-3-4(b)(8). The material that must be disclosed upon request includes

- (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.

I.C. § 5-14-3-4(b)(8). Mr. Scodro claims that no formal charges were pending against Ms. Hart and no final disciplinary action was taken against Ms. Hart that resulted in her suspension, demotion, or discharge. That said, the committee conducted an investigation into Ms. Hart in response to allegations regarding her conduct as coach. It is unclear what constitutes a “formal charge” against an IUPUI employee, but it is undisputed here that allegations were made against Ms. Hart that were serious enough to warrant Chancellor Bantz to form a committee to investigate them and provide him with a written report. Moreover, the timing of IUPUI’s termination of Ms. Hart’s contract seems to suggest that IUPUI’s decision occurred – at least in part – as a result of the content in the Report.

On the other hand, it is not clear that the committee’s investigation discovered anything that would have subjected Ms. Hart to disciplinary action. Notwithstanding the Report and the allegations that led to its creation, IUPUI could have terminated Ms. Hart’s contract without cause for any reason or no reason at all (other than an illegal reason, such as discrimination or retaliation). Moreover, it is possible that the committee discovered something that was not serious enough to subject Ms. Hart to discipline or termination for cause, but that nevertheless led IUPUI to the conclusion that it was in the best interests of the university to terminate her contract.

Counselor Hurst issued an opinion under similar factual circumstances in which he determined that a school corporation did not violate the APRA by refusing to release 4(b)(8)(A) – (C) information regarding a teacher who took early retirement during the course of an investigation into his professional conduct. In *Opinion of the Public Access Counselor 04-FC-32*, the school corporation acknowledged that a teacher was subject to a personnel investigation, but averred that no formal charges were filed against him. The teacher was “suspended with pay pending an investigation by the Superintendent” into allegations that had been made against him. *Id.* The allegations precipitating the investigation were not described, but were communicated to the corporation by the principal of the elementary school where the employee was a teacher. The corporation denied that the allegations ever formed the basis for any formal charges to be lodged against the teacher. The Corporation further noted that “[d]uring the investigation the teacher in question chose to take early retirement,” and that the corporation’s board later voted to accept his request for early retirement. In determining that the corporation did not violate the APRA by refusing to release information related to the investigation, suspension (during the investigation), and early retirement of the teacher, Counselor Hurst reasoned,

“When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself.” *Journal Gazette v. Board*

of *Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998). Certainly, in this context, I cannot find that the allegations made against the teacher and the Superintendent's resulting review of those allegations, without more, constitute "formal charges" under the plain language of the APRA. See MERRIAM-WEBSTER ONLINE (<http://www.m-w.com/>, last accessed March 29, 2004) (defining "formal" as "following or according with established form, custom, or rule," and "charges" as "a formal assertion of illegality."). Moreover, in the same manner it cannot be said that there has been final action for a disciplinary matter that resulted in the employee's discharge. See MERRIAM-WEBSTER ONLINE (<http://www.m-w.com/>, last accessed March 29, 2004) (defining "discharge" as "to dismiss from employment."). While you quite understandably suggest in your record request that "early retirement" may be a euphemism for "discharge" given these facts, the General Assembly has closed off that argument with the plain language it used in the provisions for mandatory disclosure. To the extent that your claims support an argument that the Corporation or any other public employer may avoid the disclosure requirements of Indiana Code 5-14-3-4(b)(8) by settling disciplinary matters before final discipline is taken, your argument is more appropriately directed to the General Assembly. That legislative body is in the appropriate position to balance the public policy considerations at issue here.

Id. Similarly here, it is not clear that the committee's review of the allegations against Ms. Hart were formal charges within the meaning of subsection 4(b)(8)(B). Moreover, although circumstances might suggest that she was subject to a final disciplinary action when her contract was terminated, the evidence before me does not eliminate the possibility that IUPUI terminated her contract for one of any number of other reasons (coach/player chemistry, public relations, effects of the allegations on future recruiting, etc.). Unless a discharge occurs as the result of a "disciplinary action," the APRA permits the agency to withhold information related to the discharge under the personnel file exception. Due to the lack of evidence that any formal charge was filed or that Ms. Hart's contract was terminated as the result of a disciplinary action, it is my opinion that IUPUI did not violate the APRA by withholding the Report because it is exempt from disclosure under the general exception for personnel file information in subsection 4(b)(8).

Because it is my opinion that the Report is exempt from disclosure under the personnel files exception, it is unnecessary to analyze IUPUI's second claim that the Report is also exempt because it is deliberative material. I note, however, that it is unclear whether or not the Report constituted either interagency or intra-agency deliberative material because the members of the three-person investigatory committee have not been identified. If one or more of the members of the committee had no affiliation with IUPUI or any other public agency, it is not clear that the exception would apply. If, however, the committee itself was a public agency (or comprised of agents of IUPUI or other public agencies), the Report would likely also be exempt from disclosure under subsection 4(b)(6) because it contains opinionated materials communicated for the purpose of Chancellor Bantz's decision making.¹

¹ If the Report were exempt from disclosure *only* on the basis of the deliberative materials exception, IUPUI would be obligated to redact the deliberative material from the Report and produce all factual material that is not inextricably linked with the deliberative material. *Unincorporated Operating Div. of*

CONCLUSION

For the foregoing reasons, it is my opinion that if no formal charges were pending against Ms. Hart at the time of her termination, and if her termination was not the result of a final disciplinary action, IUPUI acted within its discretion by refusing to release the Report.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

Cc: Joseph Scodro

Indianapolis Newspapers v. Trustees of Indiana Univ., 787 N.E.2d 893, 914 (Ind. Ct. App. 2005) (holding that “those factual matters which are not inextricably linked with other non-discloseable materials[] should not be protected from public disclosure”). However, because the Report is exempt under the personnel file information exception, it is exempt in its entirety under subsection 4(b)(8) of the APRA.