STATE OF INDIANA

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July 16, 2012

Richard J. Coble
3906 S. Summerlin Avenue
Orlando, Florida 32806

Re: Formal Complaint 12-FC-155; Alleged Violation of the Access to Public Records Act by Indiana State University

Dear Mr. Coble:

This advisory opinion is in response to your formal complaint alleging Indiana State University ("University") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Melony A. Sacopulos, General Counsel, responded to your formal complaint on behalf of the University. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide a series of documentation regarding public records requests that you have made to the University dating back to December of 2011 that you allege that the School has either failed to respond to or not provided any records. Your request includes, but is not limited to, e-mail correspondence, meeting minutes, certain personnel information, personal notebooks, investigative reports, legal records, phone calls and/or messages, certain correspondence, and memorandums.

In response to your formal complaint, Ms. Sacopulos advised that the University has received various records requests from you over the last several months. The University has responded to each request asserting that the request lacks sufficient specificity or the record that is sought is exempt from disclosure. Due to the volume of requests the University has received from you, it is possible the University failed to respond to each request.

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." *See* I.C. § 5-14-3-1. The University is a public agency for the purposes of the APRA. *See*

I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the University's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. To the extent that the University failed to respond to your written requests within seven (7) days of its receipt, it is my opinion that it acted contrary to the requirements of section 9 of the APRA.

The APRA requires that a records request "identify with reasonable particularity the record being requested." I.C. § 5-14-3-3(a)(1). However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinions of the Public Access Counselor 02-FC-13; 05-FC-87; 11-FC-88.* In the University's response to your requests for e-mail correspondence, it requested from you further specific information in order so that it could begin compiling the records that would be responsive. Regarding a request for e-mail correspondence, in 11-FC-257, the following was provided as it related to the requirement of reasonable particularity:

> As to your request in Item 2 for all e-mails sent or received by five (5) School employees from May 1, 2011 through August 5, 2011, prior public access counselors had opined on this issue. APRA requires that a request for inspection or copying identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). Counselor Neal provided the following under in a 2009 opinion:
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> > With your request, you seek "all emails sent and received by you in the last 100 days." The County argues this request does not identify with reasonable particularity the record(s) being requested. The APRA requires that a request for access to records identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). "Reasonable particularity" is not defined in the APRA. "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). Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part. *Deaton v. City of Greenwood*, 582 N.E.2d 882 (Ind. Ct. App. 1991). "Particularity" as used in the APRA is defined as "the quality or state of being particular as distinguished from universal." *Merriam-Webster Online, www.m-w.com*, accessed July 18, 2007.

In my opinion, your request is universal rather than particular. You have requested not just an entire category of records, but all records sent or received using a certain form of communication. It is important to remember that electronic mail is a method of communication and not a type of record. Electronic mail is one way an agency might receive correspondence. As Mr. Murrell indicates, and as I often advise people, electronic mail messages are similar to postal mail or facsimile transmissions. And certainly few individuals would disagree that a request for any piece of mail sent or received by an agency or official within the last one hundred days would be considered an overly broad request which does not identify with reasonable particularity the record being requested. The same is true for electronic mail messages. That the correspondence is communicated using a different medium does not change the scenario; in my opinion a request which identifies the records only by the particular method of communication utilized is exactly the type of request that I.C. § 5-14-3-3(a) prohibits.

I have previously issued an advisory opinion in a similar matter regarding a request for access to electronic mail messages. In *Informal Opinion 08-INF-23*, I wrote the following:

If, on the other hand, the request identified the records with particularity enough that the School could determine which records are sought (e.g. all emails from a person to another for a particular date or date range), the School would be obligated to retrieve those records and provide access to them, subject to any exceptions to disclosure. *Informal Opinion 08-INF-23*, available at www.in.gov/pac.

Similarly, it is my opinion here that your request is overly broad. If your request identified particular records in such a way that the agency could identify which records you seek, the agency could better address your request. For instance,

> you might narrow your request to messages between a county official and certain other individual(s) for certain dates. In some cases, an agency may also be able to sort messages on the basis of the subject of the email. But this type of search is only as good as the information which appears in the "Subject" line of each electronic mail and is only feasible where an agency has the technology to conduct a search other than a manual search. *Opinions of the Public Access Counselor 09-FC-124 and 11-FC-12.*
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> I agree with Counselor Neal's and Kossack's analysis in regards to this issue. As such, it is my opinion that your request was not reasonably particular and did not meet the requirements of I.C. § 5-14-3-3(a). If you would narrow your request by providing the sender, recipient, and a particular range of dates, the School should comply with the request unless an exception to the APRA permits or requires withholding all or part of any records responsive to your request. Therefore, it is my opinion that the School did not violate the APRA in responding to Item 2 of your request. *See Opinion of the Public Access Counselor 11-FC-257.*

The guidance provided by the Public Access Counselor's on e-mail correspondence and APRA's requirement of reasonable particularity dates back to 2008. The following informal and formal opinions have addressed this issue: 08-INF-23, 09-FC-24, 09-FC-104, 09-FC-124, 10-FC-57, 10-FC-71, 10-FC-272, 10-FC-311, 11-FC-12, 11-FC-80, and 12-FC-44. The formal and informal opinions provide that e-mail is a method of communication and not a type of record; requests for records that only identify the records by method of communication only are not reasonably particular. I am not aware of any case law from the Indiana Supreme Court or Appellate Court that has held the guidance provided by the Public Access Counselor was contrary to the APRA. Further, the Indiana General Assembly has not responded to the guidance provided the Public Access Counselor on this issue by amending the APRA.

As such, a request for all e-mail correspondence to and from Jane Doe for a range of dates is not reasonably particular. *See Opinion of the Public Access Counselor 09-FC-124, 11-FC-12, and 11-FC-257.* However, a request for all e-mail correspondence from Jane Doe to Jim Smith for a range of dates would be reasonably particular, *regardless* of how many records that are responsive to the request (emphasis added). *See Opinion of the Public Access Counselor* 09-FC-24. Using the above example, if Jane Doe had sent or received 20,000 emails from Jim Smith from January 1, 2011 – January 1, 2012, the agency would be required to produce the records or cite to the specific statutory exemption authorizing their withholding. As applicable here, your request for e-mail correspondence was not made with reasonable particularity as you have not provided the sender/recipient information or in certain cases a date range. Upon providing the necessary information to the University, it would be required to compile and produce all records that are responsive, regardless of the breadth of the request, minus any applicable statutory exemption authorizing all or part of their withholding. It is my opinion that the

University complied with the requirements of I.C. § 5-14-3-3 in responding to your request for e-mail correspondence.

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, 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. I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at their discretion. To the extent you had requested personnel information from University employees that is not required to be disclosed under (b)(8)(A)-(C), it is my opinion that the University did not violate the APRA by exercising the discretion provided to it under the statute and denying your request. I would note that should you seek a copy of your own personnel file, the University must make all personnel file information available to the affected employee.

The APRA excepts from disclosure, among others, the following:

> 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.
> I.C. § 5-14-3-4(b)(6).

When a record contains both disclosable and nondisclosable information and an agency receives a request for access to the record, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1.

The Indiana Court of Appeals provided the following guidance on a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate dislcosable from non-dislcosable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-dislcosable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
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> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id*. at 913-14.

To the extent that records you sought that were denied pursuant to I.C. § 5-14-3-4(b)(6), contain information that is not an expression of opinion or speculative in nature, and is not inextricably linked to non-disclosable information, APRA provides that the information shall be disclosed. If the University complied with these requirements as part of its denial citing to (b)(6), it is my opinion that it did not violate the APRA.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy…."). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC*-56. As applicable here, the University did not violate the APRA by failing to provide records that it was not obligated to maintain or create a record in response to your request.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56*; 11-FC-172. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

As applicable here, it is my opinion that the University has failed to meet its burden to demonstrate that it provided all records responsive to your request, or alternatively issued a proper denial, in a reasonable period of time. The University submitted documentation showing that it acknowledged receipt of your request dating back to February 2012; however the University's final denial was not issued until July 11, 2012. The University failed to provide any detail in its response to your formal complaint as to why it took over four months to issue a denial. As such, it is my opinion that the University failed to respond to your request in a reasonable period of time.

CONCLUSION

For the foregoing reasons, it is my opinion that the University failed to meet its burden to demonstrate that it responded to your request for records in a reasonable period of time. To the extent the University failed to respond to your written requests within seven (7) days of its receipt, it is my opinion that it violated section 9 of the APRA. As to all other issues, it is my opinion that the University complied with the requirements of the APRA.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Melony A. Sacopulos