



# STATE OF INDIANA

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May 10, 2012

Michael A. Wartell  
8107 Tranquilla Place  
Fort Wayne, Indiana 46815

*Re: Formal Complaint 12-FC-94; Alleged Violation of the Access to Public Records Act by Purdue University*

Dear Mr. Wartell:

This advisory opinion is in response to your formal complaint alleging Purdue University ("University") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Lucia Anderson, Public Records Officer, responded on behalf of the University. Her response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that as an employee of the University, you filed a formal complaint alleging harassment and discrimination pursuant to the University's internal complaint process. University policy requires such complaints to be investigated by a neutral investigator. As a result, you agreed to the appointment of John Trimble as the independent investigator.

During the course of the investigation, you and other witnesses were informed by the University that information contained in the investigator's report would be subject to disclosure under federal and state public record laws. After the investigation was completed on March 22, 2012, you submitted a written request to the University for a copy of the investigator's report and other documents prepared by Mr. Trimble. On April 5, 2012, the University denied your request citing attorney-client communication and the attorney-work product exception found under I.C. § 5-14-3-4(b)(2). You allege that Mr. Trimble was only acting as an independent investigator, not as the University's attorney, during the investigation into your complaint. Accordingly, the University could not cite to the attorney-client privilege or attorney-work product exception in denying your request made pursuant to the APRA.

In response to your formal complaint, Ms. Anderson advised that you have provided a copy of the September 20, 2011 correspondence in which Vice-President Rollock outlined the procedure by which your complaint would be administered.

Nowhere in the materials does it call for the investigative report or supporting materials to be provided to anyone other than the Trustees who were selected to decide the matter. The procedure for resolving the complaint has been followed and the three Trustees assigned to determine the matter are the only persons who received the investigative report and materials. The report has not been shared with any other employee or representative of the University.

The University disagrees with your statement that you were informed that the report would be subject to disclosure pursuant to federal and state public record laws. The University does acknowledge that Mr. Trimble may have told witnesses that he could not “guarantee” that their statements would be strictly confidential. Mr. Trimble was aware during his investigation that you were threatening litigation against certain individuals and that the investigative report might later be the object of a subpoena. Mr. Trimble denies that the report would be subject to public disclosure. The University stands by the assertion that it may deny your request pursuant to I.C. § 5-14-3-4(b)(2) as it represents the work-product of an attorney and the requirements of confidentiality pursuant to the attorney-client privilege.

#### 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). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

The University has provided that certain records were deemed to be confidential pursuant to state law regarding attorney-client communication or were the work product of an attorney pursuant to I.C. § 5-14-3-4(b)(2). One category of nondisclosable public records consists of records declared confidential by a state statute. *See* I.C. § 5-14-3-4(a)(1). I.C. § 34-46-3-1 provides a statutory privilege regarding attorney and client

communications. Indiana courts have also recognized the confidentiality of such communications:

The privilege provides that when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as confidential. The privilege applies to all communications to an attorney for the purpose of obtaining professional legal advice or aid regarding the client's rights and liabilities.

*Hueck v. State*, 590 N.E.2d 581, 584 (Ind. Ct. App. 1992) (citations omitted). “Information subject to the attorney client privilege retains its privileged character until the client has consented to its disclosure.” *Mayberry v. State*, 670 N.E.2d 1262, 1267 (Ind. 1996), *citing Key v. State*, 132 N.E.2d 143, 145 (Ind. 1956). Moreover, the Indiana Court of Appeals has held that government agencies may rely on the attorney-client privilege when they communicate with their attorneys on business within the scope of the attorney’s profession. *Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley*, 580 N.E.2d 371 (Ind. Ct. App. 1991).

Pursuant to I.C. §5-14-3-4(b)(2) a public agency has the discretion to withhold a record that is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

“Work product of an attorney” means information compiled by an attorney in reasonable anticipation of litigation and includes the attorney’s:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney’s opinions, theories, or conclusions.

I.C. § 5-14-3-2(p).

There is no dispute that the University is subject to the APRA. Once the investigative report and materials were created and/or received by the University they became a public record. *See* I.C. § 5-14-3-2(n). It is immaterial what was alleged to have been communicated between the parties during the pendency of the investigation regarding whether the records would be subject to disclosure. Once the University received your request for records pursuant to the APRA, it would have been required to either provide the record or cite to an applicable specific exception found in state or federal law that either prohibited disclosure or granted discretion to the University to produce the record.

The key inquiry whether the University may cite to I.C. § 5-14-3-4(b)(2) or the attorney client privilege to deny your request is whether Mr. Trimble was acting as the

University's attorney during the investigation. You allege that Mr. Trimble was acting as an independent investigator, relying on University correspondence provided to you and after being informed by the University that the report and supporting materials would be available for inspection. The University and Mr. Trimble deny that you were informed that the records would be subject to disclosure and that Mr. Trimble was acting in his capacity as an attorney in creating the report and the supporting materials on behalf of the University.

The University in its September 20, 2011 correspondence provided that "an *independent investigator* (preferably an Indiana attorney with a practice in the area of higher investigation) acceptable to each of you will be appointed by me to conduct a thorough investigation of the Complaint . . ." (emphasis added). Further, Ms. Anderson provided in her response to your formal complaint that ". . . the work performed by Mr. Trimble was done in his capacity as *an attorney* and that his investigative report and materials are privileged." (emphasis added). In order for the University to cite to the above referenced attorney exceptions, Mr. Trimble would be required to acting as an attorney on behalf of the University, not just acting as "an attorney".

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. A court would be empowered to make factual determinations regarding Mr. Trimble status and the University's denial pursuant to I.C. § 5-14-3-9(e)-(i). As applicable here, if in investigating the complaint, Mr. Trimble was acting solely as an independent investigator, the University may not cite to I.C. § 5-14-3-4(b)(2) or the attorney-client privilege in denying your request. However, if Mr. Trimble was acting as the University's attorney during the investigation, the University may cite to I.C. § 5-14-3-4(b)(2) and the attorney-client privilege to deny the request.

## CONCLUSION

For the foregoing reasons, it is my opinion that the University did not violate the APRA and would be allowed to cite to the attorney-client privilege or I.C. § 5-14-3-4(b)(2) in denying your request for records if Mr. Trimble was acting as the University's attorney in conducting the investigation into your complaint.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "H".

Joseph B. Hoage  
Public Access Counselor

cc: Lucia Anderson