



STATE OF INDIANA

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March 3, 2014

Mr. Douglas Wissing
PO Box 1683
Bloomington, IN 47402

Re: Formal Complaint 14-FC-12; Alleged Violation of the Access to Public Records Act by Indiana University

Dear Mr. Wissing,

This advisory opinion is in response to your formal complaint alleging Indiana University ("University") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The University has provided a response to your complaint via Mr. Stephen Harper, Esq. His response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on January 30, 2014.¹

BACKGROUND

Your complaint dated January 30, 2014 alleges Indiana University violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On November 19, 2013, you filed a public records request with the University seeking the following documents:

The current IU Student Legal Services (SLS) Charter, the original IU Student Legal Services Charter, and all iterations/revisions from the original SLS Charter to the current SLS Charter.

¹ Please note your original public records request was dated November 19, 2013 and the agency denial occurred on December 16, 2013. As such, your formal complaint is outside the 30-day statutory guideline pursuant to Ind. Code § 5-14-5-7. Therefore, this Opinion is for educational purposes only and is not to be considered persuasive authority in any other legal context.

After acknowledging your request on November 21, 2013, the University responded on December 9, 2013 with a link to minutes of a September 18, 1970 IU Board of Trustees' meeting but did not provide any other materials responsive to your request. The University explained that a "Charter" as contemplated by your request does not exist, but rather these minutes serve as documentation of the creation of the University's Student Legal Services ("SLS").

You specifically used the identifier "Charter" due to a conversation you had in July 2013 with the director of the SLS. That particular conversation yielded your investigation into the Charter to which he allegedly referred. The University has responded to your complaint arguing no Charter actually exists. The University contends the Charter referred to by the director was likely a memo created in 1996 by a former SLS director to a former University General Counsel. Therefore, the University estimates even though the memo was mischaracterized as a Charter by the current director, the document is actually an intra-agency memo used in the decision-making process. The University claims this memo is deliberative in nature and is not subject to disclosure.

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 Ind. Code § 5-14-3-1. Indiana University is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the University's public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

The deliberative materials exception found at Ind. Code § 5-14-3-4(b)(6) is one of the more elusive exceptions to APRA when evaluating the nature of a document. Contemplated at length by prior Public Access Counselors, public agencies have often used the exception *ad nauseum* to justify withholding records. As with many of the APRA exceptions, the determination if a record is deliberative is made on a case-by-case basis.

Consider former Counselor Davis' analysis found at Opinion of the Public Access Counselor on March 31, 2005:²

² http://www.in.gov/pac/informal/files/IEDC_deliberative_materials_letter.pdf

The deliberative material exception requires that information must be "interagency or intra-agency," which implies documents created and shared within a public agency or between public agencies. IC 5-14-3-4(b)(6) also requires that the communication subject to this exception from disclosure be part of a decision making process. In addition, the content of the information must be advisory or deliberative material and constitute opinion or be speculative in nature. The plain meaning of "deliberative" is "assembled or organized for [or] . . . characterized by or for use in deliberation or debate." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 349 (1981). "Deliberation" means "thoughtful and lengthy consideration . . . [t]houghtfulness in decision or action." *Id.* In the context of the APRA, therefore, deliberative material includes information that reflects, for example, one's ideas, opinions, advice, consideration and recommendations on a subject or issue for use in a decision-making process.

Former Counselor Hoage also opined more recently in *Advisory Opinion 13-INF-32*:

Deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1*. Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64*. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must also be interagency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17*. The exception does not provide a pre and post-decision distinction, so that the records may be withheld even after a decision has been made. *See Opinion of the Public Access Counselor 09-INF-25; 13-INF-29*. The deliberative materials exception does not provide that the requested materials are confidential; rather the records may be released at the agency's discretion. *See I.C. § 5-14-3-4(b)*.

It appears as if the mischaracterization of the document in question has led to significant confusion and unintentionally led you to believe the memo was an actual Charter or official policy. The University's response makes it clear the contents of the memo were never formalized as a codification of operating procedures or by-laws. It is unclear what the University means by using the document as an "internal reference point", however, it

is foreseeable the University considers its contents to be contemplative of best practices, if not memorialized standard procedures.

Despite this, I do not find the deliberative materials exception to be conclusively compelling in the present instance. It is, in essence, a draft policy. Draft policies are not, in and of themselves, deliberative by nature. They are not necessarily speculative opinion; rather they set forth a proposed version of a final set of guidelines. Decisions do not spring from these types of communication other than whether or not to ratify or amend the policy. The University has not established demonstratively that disclosure of drafts themselves would prohibitively prejudice or chill frank discussion of preliminary policy matters. “Even a draft public record is a public record subject to the disclosure requirements of the APRA.” See *Opinions of the Public Access Counselor 04-FC-49; 05-FC-195; and 08-FC-54*. The APRA does not require a record to be in its final or complete form before it can be produced pursuant to a request. See *Opinion of the Public Access Counselor 08-FC-54*.

What sets the current instance apart is the notion the draft policy was communicated in a memo to the University’s formal general counsel as attorney-client communication. As the University correctly asserts, the APRA prohibits the disclosure of information which would otherwise be declared confidential by Federal or State rule or statute. See Ind. Code § 5-14-3-4(a)(1-3). Ind. Code § 34-46-3-1 provides a statutory privilege regarding attorney and client communications. Additionally, Indiana courts have also recognized the confidentiality of such communications:

The privilege provides 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).

“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 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).

As the University has affirmatively stated the communication was between the former director of the SLS and the former General Counsel, such communication is privileged and not subject to disclosure. Finding alternatively would hinder the ability of a client to deliberate freely to counsel and to suggest strategies and courses of action. If your formal complaint was timely, I would not have found a violation on the part of the University for withholding the record.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

cc: Mr. Stephen Harper, Esq.