

OPINION OF THE PUBLIC ACCESS COUNSELOR

CAROLINE E. ANDERS
Complainant,

v.

INDIANA UNIVERSITY
Respondent.

Formal Complaint No.
20-FC-149

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging Indiana University violated the Access to Public Records Act.¹ Assistant General Counsel Abby K. Daniels filed an answer on behalf of IU. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 13, 2020.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over access to materials developed by the Indiana University Restart Committee.

On September 7, 2020, Caroline Anders (Complainant) submitted a public records request to IU for copies of the following:

all documents – including meeting minutes, reports, recommendations, statements, presentations, or similar documents – created by the Indiana University Restart Committee or any of its members between Feb. 15 and May 15, 2020.

IU made one of the reports public, but Anders suspects that the committee created more reports that are subject to disclosure. IU provided Anders a link to the publicly released report but denied access to any remaining records in accordance the deliberative materials exception in the Access to Public Records Act (APRA).

On October 6, 2020, Anders filed a formal complaint with this office. Anders argues the materials are not exclusively deliberative in nature and she seeks the non-deliberative material as well.

For its part, IU argues its denial was justified and the materials do indeed fall into the deliberative materials category. It contends that the Restart Committee is, by its nature, a deliberative body.²

² The Restart Committee was created by the University President and not the IU Board of Trustees and is therefore likely not an Open Door Law governing body. Information was not provided to establish a

Per its charter:

The Indiana University Restart Committee is charged by President McRobbie with recommending and advising through the university's Executive Policy Group (EPG) on when and under what conditions the university can restart, that is resume, in whole or part, normal face-to-face operations.

It is chaired by Executive Vice President (EVP) and School of Medicine Dean Jay Hess and has 13 members, including the two deans of public health, and other experts in various aspects of public health, epidemiology, virology and other relevant areas of the health sciences. The committee evaluates relevant research, modeling and clinical data to inform deliberations and recommendations.

The group meets regularly to review relevant reports, articles, data and other inputs from major and respected sources that can help inform integrated and aligned recommendations. Through EVP Hess, the committee reports regularly to the EPG.³

As a result, IU contends that any underlying material the committee used to prepare its report, emails and intra-agency communication, was withheld as deliberative. IU disputes there were any other reports developed and it was a proper response to the request.

functional equivalency test or a nexus to the Board of Trustees, which would qualify for public meeting status. It is a subcommittee of the University's Executive Policy Group.

³ <https://covid.iu.edu/restart-report>

ANALYSIS

1. The Access to Public Records Act

The Access to Public Records Act (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.” Ind. Code § 5-14-3-1. Indiana University is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy IU’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a); -(b). This case involves APRA’s deliberative materials exception.

2. Deliberative materials exception

The core issue of this case involves the application of APRA’s deliberative materials exception to disclosure.

Under APRA, a public agency has discretion to withhold deliberative material, which includes records that are:

intra-agency or interagency advisory...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.

Ind. Code § 5-14-3-4(b)(6). 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. The Indiana Court of Appeals observed that 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 court also acknowledged that 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. *Id.*

In order to withhold a public record from disclosure under APRA's deliberative materials exception, the documents must be interagency or intra-agency records of advisory or deliberative material and are also expressions of opinion or speculative in nature.

The deliberative materials exception is indeed broad and can be subject to abuse. Some have called it the exception that swallows the rule. Potential abuse notwithstanding, as the *Newman* court indicates, it has valuable and sound application and can certainly be exercised consistent with good governance and transparency principals.

And so it is here. In this case, based on the evidence submitted to this office, it appears that the Indiana University Restart Committee's sole raison d'être is to develop a recommendation report to the Executive Policy Group. IU posted that work product online. It is the final manifestation of the decision to release the report. The preparation of the report is the deliberative process and is

indeed protected from disclosure by statute at the discretion of the agency.

Any factual data or input is incorporated by reference by five pages of source material citations.

Simply put, it would be difficult to identify any pre-decisional material that would not qualify as deliberative material under APRA. IU appears to be well within its bounds to keep the pre-decisional, deliberative material created in advance of the release of the report in house.

CONCLUSION

Based on the foregoing, it is the opinion of this office that Indiana University did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor