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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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TATYANA SIZYUK,  
*Complainant,*

v.

PURDUE UNIVERSITY,  
*Respondent.*

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Formal Complaint Nos.  
20-FC-49 & 58 (consolidated)

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to formal complaints alleging Purdue University violated the Access to Public Records Act.<sup>1</sup> Legal Services Coordinator Kaitlyn Heide filed a response with this office on behalf of Purdue. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaints received by the Office of the Public Access Counselor on April 13, 15, 23, 2020.

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

## BACKGROUND

This case involves a dispute over access to personnel and tenure records of an assistant professor of nuclear engineering at Purdue University.

On November 12, 2019, Tatyana Sizyuk, through attorney Ryan P. Sink, filed a public records request with Purdue requesting, in part, the following:<sup>2</sup>

- a) The personnel file of, merit file, tenure file, and all employment files of Tatyana Sizyuk, including all employment contracts, performance evaluations, and applications for tenure;
- b) All faculty handbooks and personnel manuals in effect in the last 2 years;
- c) All policies and documents outlining the terms and conditions of obtaining tenure for Ms. Sizyuk, including all documents showing the factors considered of applicants for tenure;
- d) All documents showing the decision and rationale behind denying tenure to Ms. Sizyuk, including all relevant agendas and any minutes wherein a vote was taken;
- e) All documents, emails, and text messages relied upon when making the decision to deny tenure to Ms. Sizyuk;
- f) All documents wherein the decision to deny tenure was communicated to Ms. Sizyuk;

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<sup>2</sup> The remainder of the request can be found in *Opinion of the Public Access Counselor*, 20-FC-19 (2020).

g) From July 1, 2019, through November 1, 2019, produce all emails (from work and personal email accounts) and text messages (from work and personal cell phones) sent and/or received between (including CCs) Dr. Kim and Dr. Ishii wherein any of the following terms were used: Tatyana, Sizyuk, Dr. Sizyuk, Ms. Sizyuk, and/or tenure;

h) From July 1, 2019, through November 1, 2019, produce all emails (from work and personal email accounts) and text messages (from work and personal cell phones) sent and/or received between (including CCs) Dr. Kim and Dr. Revenkar wherein any of the following terms were used: Tatyana, Sizyuk, Dr. Sizyuk, Ms. Sizyuk, and/or tenure;

i) From July 1, 2019, through November 1, 2019, produce all emails (from work and personal email accounts) and text messages (from work and personal cell phones) sent and/or received between (including CCs) Dr. Kim and Dr. Bertodano wherein any of the following terms were used: Tatyana, Sizyuk, Dr. Sizyuk, Ms. Sizyuk, and/or tenure;

j) From July 1, 2019, through November 1, 2019, produce all emails (from work and personal email accounts) and text messages (from work and personal cell phones) sent and/or received between (including CCs) Dr. Kim and Dr. Tsoukalas wherein any of the following terms were used: Tatyana, Sizyuk, Dr. Sizyuk, Ms. Sizyuk, and/or tenure;

k) From July 1, 2019, through November 1, 2019, produce all emails (from work and personal email

accounts) and test messages (from work and personal cell phones) sent and/or received between (including CCs) Dr. Kim and Dr. Hany Abdel-Khalik wherein any of the following terms were used: Tatyana, Sizyuk, Dr. Sizyuk, Ms. Sizyuk, and/or tenure;

l) From July 1, 2019, through November 1, 2019, produce all emails (from work and personal email accounts) and test messages (from work and personal cell phones) sent and/or received between (including CCs) Dr. Kim and Dr. Choi wherein any of the following terms were used: Tatyana, Sizyuk, Dr. Sizyuk, Ms. Sizyuk, and/or tenure; 4

m) From July 1, 2019, through November 1, 2019, produce all emails (from work and personal email accounts) and test messages (from work and personal cell phones) sent and/or received between (including CCs) Dr. Kim and Dr. Teleyarkhan wherein any of the following terms were used: Tatyana, Sizyuk, Dr. Sizyuk, Ms. Sizyuk, and/or tenure;

n) From July 1, 2019, through November 1, 2019, produce all emails (from work and personal email accounts) and test messages (from work and personal cell phones) sent and/or received between (including CCs) Dr. Kim and Dr. Peter Hollenbeck wherein any of the following terms were used: Tatyana, Sizyuk, Dr. Sizyuk, Ms. Sizyuk, and/or tenure;

o) From July 1, 2019, through November 1, 2019, produce all emails (from work and personal email accounts) and test messages (from work and personal cell phones) sent and/or received between

(including CCs) Dr. Kim and Dr. Arvind Raman wherein any of the following terms were used: Tatyana, Sizyuk, Dr. Sizyuk, Ms. Sizyuk, and/or tenure; Indiana's Public Access law should be "liberally construed" and the burden of proof for the non-disclosure of certain documents is on the public agency, not the requesting party.

After a dispute over the production of documents in a reasonable time,<sup>3</sup> Purdue produced a number of documents responsive to the entire request. Dr. Sizyuk takes exception to the denial of several portions of the requests.

First, Purdue withheld items (d) and (e) as being deliberative material subject to the exception to disclosure found at Indiana Code section 5-14-3-4(b)(6). Sizyuk subsequently clarified and argued that Purdue withheld letters of recommendation from outside sources and argues these are not deliberative by definition. Furthermore, she argues that they were denied by a conclusory statement without adequate specificity.

As such, she filed a complaint with this office on April 13, 2020.

Next, Sizyuk filed a complaint on April 15, 2020 contending that Purdue's denial of certain material being redacted and requested an in-camera review. In the same complaint, she argues that Purdue did not make an appropriate effort to secure messages pursuant to subparts (h), (k), (l), (i), and (j) of the requests, particularly those potentially sent on private servers or devices.

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<sup>3</sup> *Id.*

Finally, a complaint was filed against Purdue on April 23, 2020, regarding the university's denial of parts (m), (n), and (o) for largely the same reasons as the prior complaint and again asks for an in-camera review.

For its part, Purdue argues that it heeded the advice in the previous opinion addressing this matter and produced materials in a piecemeal manner as it became available. In regard to the personal email portion of the complaint, Purdue contends it has reached out to individuals named in the request but had not yet received a response from them as to the extent of those materials if any. It indicates it will provide the Complainant's attorney those materials by May 15.<sup>4</sup>

Purdue also doubles down on its position in its denial that the materials redacted and withheld were appropriately handled based upon the deliberative materials exception. As for the letters of recommendation, it claims Dr. Sizyuk provides names of individuals and the university solicits the letters directly from them while assuring the letter-writers of the material's confidentiality.

Finally, Purdue asserts a fact-finding is better suited for a civil action and not an in-camera review by this office.

## ANALYSIS

### 1. The Access to Public Records Act

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the

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<sup>4</sup> As of the writing of this Opinion on July 13, 2020, this office has not received an update from either party and will presume the matter resolved.

affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1.

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.” *Id.* Purdue University is a public agency for the purposes of APRA; and thus, is subject to the act’s requirements. Ind. Code § 5-14-3-2(q). Unless otherwise provided by statute, any person may inspect and copy the university’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Under APRA, “public record” means:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Here, the disputed records are redactions and withholding of deliberative material. The question becomes whether they are disclosable or able to be withheld.

Although public records are presumptively disclosable under APRA, the act contains exemptions and discretionary exceptions to disclosure. *See* Ind. Code § 5-14-3-4(a)–(b).

This case involves the applicability of the deliberative records exception.

## **2. Deliberative records exception**

Purdue maintains that it has discretion to withhold the materials requested by Sizyuk because it qualifies under APRA's disclosure exception for deliberative materials.

Under APRA, deliberative material 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 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. 766 N.E.2d at 12.

In order to withhold a public record from disclosure under Indiana Code section 5-14-3-4(b)(6), the record must be interagency or intra-agency records of advisory or deliberative material and expressions of opinion or speculative in nature.



Granted, APRA's deliberative materials exception is 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, the exception has valuable and sound application and can certainly be exercised consistent with good governance and transparency principals.

This office is often asked to ratify the application of disclosure exemptions without the full picture of the situation. More on that momentarily. Notably, we have not been made privy to the withheld records nor has it been explained why they were created. In order for the deliberative exception to apply, the materials developed reflecting opinion, speculation and the like, must be a predicate to a decision. It is unclear in the current case exactly what that decision might be, however, without more, Purdue may invoke the exception to shield the materials from disclosure if it meets the definition.

### **3. Letters of recommendation**

Now that the definition of deliberative materials has been established, we turn then to the application of the statute.

Undoubtedly letters of recommendation are opinion-based communication: the fitness of a candidate for a given position based on the writer's speculative formations. Even factual material in those letters are framed in a deliberative manner and can be withheld if the remainder of the statute also applies.

Critically, the statute limits the non-disclosure to intra- or inter-agency communication. It does not address, or seek to

shield, extra-agency communication. Therefore in order for the letters to qualify as deliberative, they must come from inside the Purdue system or another public agency (or a contractor thereof). If the letters come from the private sector with no contractual relationship to the producing agency, the exception does not apply.

Even still, this lesson in the semantics of exception is largely moot as letters of recommendation are almost universally placed in a human resource personnel file. Turning to the APRA provision addressing personnel files, we learn that the entirety of the personnel file is available to a requester if the requester is seeking their own file.<sup>5</sup>

Therefore the practice of guaranteeing a letter of recommendation's confidentiality is a legal folly. Letters of recommendation should be released to the requester if that requester is seeking their own material.

#### **4. *In camera* review by the PAC and burden of proof**

This office routinely reviews materials to ensure compliance with the APRA but this is only done by consent of the parties or specific request of a public agency. If a complainant or constituent seeks an *in camera* review, the decision is solely with the agency. No inferences of non-compliance will be made if an agency declines.

Seeing as how this office cannot subpoena, compel testimony, or authenticate evidence, *in camera* review is merely a courtesy extended but not required.

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<sup>5</sup> Ind. Code § 5-14-3-4(b)(8) (“However, all personnel file information shall be made available to the affected employee or the employee's representative”).

As for the burden of proof in a denial, all an agency must do is cite the statutory justification for denial and provide the name of the decision-maker.<sup>6</sup> This office and the courts require more to substantiate a denial<sup>7</sup> - which Purdue mostly has in this case – but it is not a requirement in the initial denial.

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<sup>6</sup> Ind. Code § 5-14-3-9(d).

<sup>7</sup> Ind. Code § 5-14-3-9(f).

## **CONCLUSION**

Based on the foregoing, it is the opinion of this office that Purdue University should release the letters of recommendation to the Complainant, but based on the information provided did not otherwise violate the Access to Public Records Act.



Luke H. Britt  
Public Access Counselor