

April 26, 2002

Mr. Michael Mullen
KittyShark Productions
P.O. Box 321
Frazeysburg, OH 43822-0321

Re: *Advisory Opinion 02-FC-13*;

Alleged Denials of Access to Public Records by the Ball State University Office of Dean of Students.

Dear Mr. Mullen:

This is in response to your formal complaint, which was received on April 8, 2002. You have alleged that Ball State University's Office of Dean of Students ("BSU,") violated the Indiana Access to Public Records Act, ("APRA,") Indiana Code chapter 5-14-3. Specifically, you claim that BSU improperly denied you access to various public records by citing to exemptions for personnel file information, investigatory records of a law enforcement agency and deliberative material. Mr. Randy E. Hyman, Associate Vice President for Student Services and Dean of Students, responded in writing to your complaint and a copy of his response is enclosed for your reference.

For the reasons set forth below, it is my opinion that that if BSU did not understand your request or was unclear as to what public records you were seeking, then BSU should have contacted you for more information. BSU was not obligated to provide information or public records under a generalized request from personnel files and BSU did comply with the requirements of the APRA by making available final disciplinary action information to you. It is also my opinion that BSU may only lawfully rely upon the deliberative material exception for information contained in their administrative investigation files that meets all of the requirements of the exception, including that the public records are intraagency or interagency in nature. Finally, it is my opinion that BSU may only withhold public records under the investigatory records exception if that information related to an investigation of a crime.

BACKGROUND

In your complaint, you allege that you sent a public records request to BSU on February 19, 2002. You requested copies of all letters in the possession of BSU dated January 1, 1998 through February 19, 2002 "in which the author is expressing their opinion of the university or its officers." Additionally, you asked for copies of the following documents:

- a. Copies of letters written by former BSU police officer Eric Moore;
- b. complaints against BSU Officer Michael Milbourn alleging he displayed a firearm at Moore's criminal trial;

- c. complaints received alleging misconduct by Officer Milbourn for his use of tear gas or pepper spray; and
- d. letters alleging misconduct by BSU Officer Joe Pauley during a rape investigation.

On March 11, 2002 you received a response from BSU informing you that you were being denied access to some of the information you requested. The BSU did not cite the statutes in question, but the response did refer to the personnel file exception, law enforcement investigatory record exception and the exception for intra/inter-agency deliberative material. BSU did, however, provide you with information from personnel files for three different officers outlining final disciplinary actions taken against them. After receiving BSU's response, you filed your formal complaint with this Office.

In response to your complaint¹, Mr. Hyman stated that your request for public records "in which the author is expressing their opinion of the university police or its officers" was too vague and non-specific that identifying such items, to the extent they exist, would be impossible. Other than personnel files and internal administrative investigations, BSU does not maintain files of letters or correspondence expressing opinions about the university police or its officers. Mr. Hyman further stated that criminal complaints against BSU officers are included in the police department's daily log as required under Indiana Code section 5-14-3-5(c) and this log is available for inspection and copying.

If BSU receives a letter or complaint about an officer that warrants an investigation, a copy of the letter may be inserted into the personnel file, especially if disciplinary action results, or placed in the administrative office investigation file. BSU asserts that such a letter in a personnel file is nondisclosable under Indiana Code section 5-14-3-4(b)(8) and in the administrative investigation file is nondisclosable under Indiana Code section 5-14-3-4(b)(6). Mr. Hyman further stated that if a letter became part of a criminal investigation, it is excepted from disclosure under Indiana Code section 5-14-3-4(b)(1). According to his response, BSU did provide you with the only information that you were entitled to receive under Indiana Code sections 5-14-3-4(b)(8)(B) and (C).

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and 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. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." Ind. Code § 5-14-3-1.

BSU is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of BSU during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a). Since it is the public policy of the APRA that it is to be construed liberally in favor of disclosure, exceptions to that general rule of disclosure are to be narrowly construed. Ind. Code §5-14-3-1.

Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . .

"[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. App. 1995) [Citations omitted] quoting *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E. 2d 726, 729 (Ind. App. 1982) [Citations omitted]. While it only takes one valid exception to support the nondisclosure of a public record, BSU has cited to three (3) different exceptions in support of its denial. In your complaint, you claim that BSU violated the APRA by failing to produce public records in reliance upon the personnel file exception, the deliberative material exception and the exception for investigatory records of a law enforcement agency. BSU has also claimed in its response that your first request, for letters in which persons have "expressed an opinion about" BSU officers, is not specific enough and as such, they could not produce any records in response to it. In the following paragraphs I have analyzed first BSU's claim concerning the specificity of your request, and then the three exceptions cited for BSU's denial of access to public records.

Specificity of a Public Records Request

When a public records request is made, the requestor must make his or her request with reasonable particularity. Ind. Code § 5-14-3-3(a)(1). There is no Indiana case law defining "reasonable particularity," so were it necessary to interpret the APRA to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary, dictionary meanings of the word used. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. App. 1992). "Particularity" is defined as "the state of being particular rather than general." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981), 956. Rules of statutory interpretation also require that one construe the phrase "reasonable particularity" in light of the entire APRA. *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. App. 1991).

Since 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, then the agency should contact the requestor for more information if it is necessary to respond to the request. See generally, Ind. Code § 5-14-3-1. It is my opinion, therefore, that if BSU did not understand your request or was unclear as to what public records you were seeking, then BSU should have contacted you for more information. While I do not believe that failing to do so in this case constituted a violation of the APRA, I suggest that in the future BSU make efforts to seek clarification from the requestor when faced with similar circumstances.

The Personnel File Exception, Indiana Code §5-14-3-4(b)(8)

Under Indiana Code section 5-14-3-4(b)(8), a public agency generally has discretion over the disclosure of the information maintained in their employees' personnel files. However, the General Assembly provided exceptions to this provision that permit any person to obtain the following information from these files:

- (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) information concerning disciplinary actions in which final action has been taken and that resulted in the employee being disciplined or discharged.

However, all personnel file information shall be made available to the affected employee or his representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

Indiana Code §5-14-3-4(b)(8).

Under this provision, BSU was not obligated to disclose information from personnel files on a generalized group of employees nor to disclose any items not listed under (A)-(C), above. While the APRA requires a public agency to provide certain information from personnel files, there is no requirement that even if a public record expressing an opinion of a particular officer was maintained in an officer's personnel file that BSU would have to disclose it to you.

It is my opinion that, to the extent that BSU had public records "in which the author is expressing their opinion of the university police or its officers" within various personnel files, BSU was not obligated to provide such information or public records under a generalized request. With respect to information you sought concerning named BSU police officers, BSU did provide you with information required to be made available to you under Indiana Code section 5-14-3-4(b)(8) and this was in compliance with the APRA.

The Deliberative Material Exception

BSU also cited to Indiana Code 5-14-3-4(b)(6) as the basis for denying access to information contained in administrative investigation files. This exception under the APRA allows a public agency discretion as to whether to disclose the following information:

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 purposes of decision making.

There is very little case law interpreting this statutory provision, in particular, what is deliberative material. "Generally, when construing a statute, the interpreting body attempts to give words their plain and ordinary meanings." *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99,103 (Ind. 1998), citations omitted. Non-technical, undefined words are to be defined by their ordinary and accepted dictionary meaning. *Bulkomatic Transport v. Department of Revenue*, 629 N.E.2d 955, 957 (Ind. Tax 1994), citations omitted. 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 Act, deliberative material includes information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decisionmaking process. Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. In order to withhold them from disclosure under Indiana Code 5-14-3-4(b)(6), however, the documents must also be interagency or intraagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature.

In 1998, the Indiana Court of Appeals rendered a decision in *The Journal-Gazette v. The Board of Trustees of Purdue University*, 698 N.E.2d 826, that provided an interpretation of Indiana Code section 5-14-3-4(b)(6). One of the issues in that case was whether certain documents related to an internal grievance process concerning an alleged NCAA violation were properly withheld from disclosure under Indiana Code 5-14-3-4(b)(6). After considering the various documents in the *Journal-Gazette* case, the Court of Appeals determined that documents gathered during the course of the internal grievance process were interagency documents, statements of opinion and used for a decision making purpose. In any event, the Court held that many of the documents requested concerning the investigation could lawfully be withheld from disclosure under the deliberative material exception.

The Court of Appeals in the *Purdue* case did not provide an easy to apply standard when considering the deliberative material exception. The facts presented by your complaint, however, can be distinguished from the *Purdue* case in that it appears that some, if not all of the documents you were seeking were submitted from persons outside of BSU. The deliberative material exception requires that information, in order to be subject to the exception must be "*interagency or intraagency*," which implies documents created and shared within a public agency or between public agencies.

It is my opinion, therefore, that BSU may only lawfully rely upon the deliberative material exception for information contained in their administrative investigation files that meets all of the requirements of the exception; it must be intraagency or inter-agency, expressions of opinion or of a speculative nature and communicated for the purposes of decisionmaking. If information within the administrative investigation files does not meet this or any other valid statutory exception to disclosure under the APRA, the BSU must disclose it to you.

The Investigatory Records of a Law Enforcement Agency Exception

The final exception to disclosure cited by BSU, Indiana Code section 5-14-3-4(b)(1), provides that a

law enforcement agency has discretion over whether or not to disclose its investigatory records. Investigatory records are defined as "information compiled in the course of the investigation of a crime." Ind. Code §5-14-3-2. A crime is defined as a misdemeanor or a felony. Ind. Code §35-41-1-6. BSU's Police Department, as a law enforcement agency, has discretion over the disclosure of investigatory records-they may either disclose or not disclose these public records in response to a public records request under the APRA.

Not all information compiled by a law enforcement agency, however, is subject to the investigatory records exception. For example, Indiana Code sections 5-14-3-5(a) and (c) of the APRA set forth the information about arrests and suspected crimes, accidents or complaints that must be provided upon request and for which a law enforcement agency may not claim the investigatory records exception. Also, it is clear from the definition of investigatory record that not all investigations are subject to this exception. Law enforcement agencies may conduct investigations, such as internal investigations concerning the violation of a departmental rule, for example, that are not crimes and therefore not subject to the exception under Indiana Code section 5-14-3-4(b)(1).²

With respect to your formal complaint, therefore, it is my opinion that BSU may only withhold public records under the investigatory records exception if that information related to an investigation of a crime.

CONCLUSION

It is my opinion that that if Ball State University's Office of Dean of Students ("BSU") did not understand your request or was unclear as to what public records you were seeking in your February 19, 2002 public records request, then BSU should have contacted you for more information. Under Indiana Code section 5-14-3-4(b)(8), BSU was not obligated to provide information or public records under a generalized request from personnel files and BSU did comply with the requirements of the APRA by making available final disciplinary action information to you. It is also my opinion that BSU may only lawfully rely upon the deliberative material exception at Indiana Code section 5-14-3-4(b)(6) for information contained in their administrative investigation files that meets all of the requirements of the exception, including that the public records are intraagency or interagency. Finally, it is my opinion that BSU may only withhold public records under the investigatory records exception, Indiana Code section 5-14-3-4(b)(1) if that information related to an investigation of a crime.

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: Mr. Randy Hyman, BSU

¹ I did not have access to the public records in questions, nor was there much information provided about the content of any documents that may exist. For this reason, I could not reach more definitive conclusions with respect to the exceptions cited by BSU but have provided guidance on how the exceptions should be applied to any public records in question.

² This does not mean that another valid exception would not apply to all or a portion of records compiled in non-criminal investigations by law enforcement agencies. The burden for showing that nondisclosure under any circumstances lies with the law enforcement agency, not with the requestor. See discussion of the deliberative material exception, above.