

July 1, 2008

Thomas Margolis
308 North High Street
Muncie, Indiana 47305

Re: Informal inquiry 08-INF-21 regarding Ball State University

Dear Mr. Margolis:

This is in response to your informal inquiry received June 11, 2008. You filed a formal complaint alleging the University violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3), but the complaint was untimely under I.C. § 5-14-5-7 and as such was converted into an informal inquiry. Pursuant to I.C. § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

BACKGROUND

You allege that you requested from Ball State University (“University”) a copy of a report from an attorney to the University regarding a former coach at the University. The University denied you access to the record by letter dated May 2, 2008. The University’s basis for denial was I.C. § 5-14-3-4(b), which excepts from disclosure inter or intra-agency deliberative materials. You allege the report was factual in nature and as such not excepted from disclosure.

The University responded to the inquiry by letter dated June 18 from attorney Jon Moll. The University contends it contracted with the attorney, Ms. Selby, to investigate the University’s earlier investigation and report to the National Collegiate Athletic Association of alleged violations involving the University’s head men’s basketball coach and several of his assistants. The University also engaged Ms. Selby to investigate complaints of race discrimination and retaliation filed by the coach and three assistant coaches. The University includes a copy of the engagement letter, indicating Ms. Selby was working solely for the University and her work product was expressly made subject to the attorney-client privilege.

The University contends that by its nature, a report of the type the University engaged Ms. Selby to deliver is one that is excepted from disclosure under I.C. § 5-14-3-4(b)(6). The University contends the report was advisory and deliberative, was comprised of expressions of

opinion and material of a speculative nature and was communicated solely for the purposes of decision making. The University submits this excepts the report from disclosure, pursuant to I.C. § 5-14-3-4(b)(6), *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 829-31 (Ind. Ct. App. 1998), and *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 909-13 (Ind. Ct. App. 2005).

The University further contends that since Ms. Selby conducted the investigation and prepared the report in her capacity as University legal counsel, the report is excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(2) as attorney work product.

The University further indicates that although the report was appropriately withheld from disclosure pursuant to I.C. § 5-14-3-4(b)(6), the University previously made a redacted copy of the report available in response to some media requests. The University contends this was done on a non-precedent setting basis. The University indicates that it recognizes the need to be even-handed in responding to similar requests, so the University provided you with the redacted copy of the report. It is my understanding the University sent you this copy on or about June 18.

ANALYSIS

The public policy of the APRA states, "(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." I.C. § 5-14-3-1. The University is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the University during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The APRA excepts from disclosure, among others, the following:

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 purpose of decision making.
I.C. § 5-14-3-4(b)(6).

Here, the University contends Ms. Selby's report to the University is intra-agency deliberative material because it is advisory and deliberative, is comprised of expressions of opinion and material speculative in nature, and was communicated solely for the purpose of decision making. In my opinion, this is exactly the type of record I.C. § 5-14-3-4(b)(6) excepts from disclosure at the agency's discretion. Ms. Selby was engaged by the University to look into the University's investigation and other matters and to issue a report to the University. It is my opinion the report falls squarely into the deliberative materials exception.

Further, I would agree the report is likely attorney work product and as such excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(2). Work product of an attorney,

for the purposes of the APRA, is information compiled by an attorney in reasonable anticipation of litigation. I.C. § 5-14-3-2(q). Because the University engaged Ms. Selby to issue the report in reasonable anticipation of litigation, this is an appropriate exception to disclosure. If the University sought to deny access to the record on this basis, though, it would have been required by the APRA to indicate the statutory exception to you in writing. See I.C. § 5-14-3-9(c). The University did deny access to the report in writing citing the deliberative materials exception to disclosure, so it is my opinion this omission does not constitute a violation of the APRA.

You contend that the report is based on factual information. The APRA provides that when a record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request, separate the material that may be disclosed and make it available for inspection and copying. I.C. § 5-14-3-6(a). The Indiana Court of Appeals has confirmed that “those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure.” *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 914 (Ind. Ct. App. 2005). Here, though, it is my opinion that factual information contained in the report is inextricably linked with the non-disclosable materials, in that the factual information is contained in a record that is work product of an attorney and consists primarily of speculative material or expression of opinion (thus excepting it from disclosure based on the deliberative materials exception).

CONCLUSION

For the foregoing reasons, it is my opinion the University has not violated the Access to Public Records Act.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Sali Falling, Ball State University
Jon Moll, DeFur Voran LLP