



STATE OF INDIANA

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Ms. Abby Daniels
C/o Purdue University
Distributed via Email

Re: Informal Inquiry 14-INF-04; Purdue University¹

Dear Ms. Daniels:

This is in response to your informal inquiry regarding a recent request made by the local media in response to the January 21, 2014 shooting at Purdue University ("Purdue"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-1.5-1 *et seq.* and Ind. Code § 6-1.1-35 *et seq.*

BACKGROUND

As public records officer at Purdue University, you recently received a demand from the local newspaper requesting information regarding a shooting which took place on campus January 21, 2014. Specifically, the request sought "all emails to and from any university email account held by [approximately 14 Purdue.edu account holders] for the time period of January 24, 2013 to present". All of the email accounts had potential involvement in the incident. This request was denied by your predecessor for a lack of reasonable particularity, FERPA considerations, and the investigatory records exception. You were then asked by the newspaper to reconsider the denial and they provided key search terms which were the first and last name of the account holders. You claim the provision would not sufficiently narrow down the search. Your inquiry regards the appropriateness of the denial based on the three justifications.

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. Purdue University is a public agency for the purposes of the APRA. See

¹ Amended March 5, 2014 for reclarification.

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).

Reasonable Particularity

I most recently addressed the topic of reasonable particularity of emails in *Informal Opinion 13-INF-68*. Much of that particular analysis will be incorporated herein. The request was for "all emails to and from any university email account held by [approximately 14 Purdue.edu account holders] for the time period of January 24, 2013 to present". Assuming no other exemptions would apply, your question is whether this request is reasonably particular on its face.

The "reasonable particularity" standard is a subjective case-by-case determination often left to the discretion of the agency. Indiana courts have addressed the issue twice in recent history. Consider *Jent v. Fort Wayne Police Dept.*, 973 N.E.2d 30 (Ind. Ct. App. 2012), and again in *Anderson v. Huntington County Bd. of Com'rs.*, 983 N.E.2d 613 (Ind. Ct. App. 2013). The Court in *Jent* held that:

Whether a request identifies with reasonable particularity the record being requested turns, in part, on whether the person making the request provides the agency with information that enables the agency to search for, locate, and retrieve the records.

...a requested item has been designated with 'reasonable particularity' if the request enables the subpoenaed party to identify what is sought and enables the trial court to determine whether there has been sufficient compliance with the request.

Therefore, the determination of particularity lies with the agency who must demonstrate whether the search can be conducted with the information provided. The Court in *Anderson v. Huntington* suggested a sender, a recipient and a timeframe is sufficient. The case only involved four individual accounts and still yielded over 9500 hits.

If no other APRA exception would apply in the present case, you have indicated the search itself may be too broad to produce documents responsive to the request. Therefore, it would be reasonable to ask the paper to provide search terms which would actually narrow the request to a manageable query.

FERPA

From *Opinion of the Public Access Counselor 12-INF-33*:

Congress enacted FERPA in 1974 "under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student education records." *Gonzaga Univ. v. Doe*, 536

N.E.2d 273, 278 (2002). FERPA provides in part that no funds shall be made available under any program to any education agency or institution which has a policy or practice of permitted the release of education records (or personally identifiable information contained therein) of students without the written consent of their parents to any individual, agency, or organization.” 20 U.S.C. § 1232g(b)(1). Further, no funds shall be made available to any education agency which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records unless there is written consent from the student’s parents. 20 U.S.C. § 1232g(b)(2).

34 C.F.R. § 99.3(f) prohibits the disclosure of “information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstance, to identify the student with reasonable certainty.” 34 C.F.R. § 99.3(g) further prohibits disclosure of “information requested by a person who the education agency or institution reasonably believes knows the identity of the student to whom the education record relates.

Pursuant to I.C. § 5-14-3-4(a)(3), an agency is prohibited from disclosing records which are declared confidential by federal law. Indiana’s Court of Appeals has stated “FERPA is a federal law which required education records to be kept confidential.” *Incorporated Operating Division of Ind. Newspaper, Inc. v. Trs. Of Ind. Univ.*, 787 N.E.2d 893, 904 (Ind. Ct. App. 2003).

The question at hand is whether a student email is an education record. Or perhaps more pointedly, is it even a public record at all? You have provided an example of case law from Arizona in the case of Jared Lee Loughner, another alleged shooter. *In Phoenix Newspapers, Inc. v. PIMA Community College*, Case No. C20111954, Arizona Superior Court, Pima County (2011), the Court opined student emails were not educational records as they were not maintained by the school in a secure database such as other more traditional information. See also *S.A. v. Tulare County Office of Education* (E.D. Cal. 2009) (student emails not education records) and *Rhea v. Dist. Of Trustees of Santa Fe Coll.* 109 So.3d 851 (2013) (emails not “maintained” by school are not education records).

Furthermore, as student emails are not created by University staff or employees, it is worthwhile to discuss whether a student email should be classified as a public record. Records created by a public agency are certainly public records; however, typically any information captured and maintained by a public agency *is* as well. Student email traffic will flow through a University email server, but the operative question is whether the communication is maintained in any way before deletion. Student-student email is also different than student-professor or student-staff email.

In short, Courts differ in their interpretation of FERPA as it applies to student email. I am not aware of any Indiana case law deciding the matter. From a public access standpoint, I would opine emails between students are not public record subject to disclosure.

Investigatory Records

You have also indicated you denied the request based upon the investigatory records exception of the APRA and campus police is the law enforcement agency responsible for the investigation of the shooting. The investigatory records exception to the APRA provides a law enforcement agency has the discretion to disclose or not disclose its investigatory records. See Ind. Code § 5-14-3-4(b)(1). An investigatory record is “information *compiled in the course of* the investigation of a crime.” Ind. Code § 5-14-3-2(i) (emphasis added).

In construing any statute, Indiana courts will look to the plain, ordinary, and usual meaning of the language unless the statute itself clearly provides a contrary meaning. *Marion County Sheriff's Merit Bd. v. Peoples Broadcasting Corp.*, 547 N.E.2d 235, 237 (Ind. 1989). Nontechnical, 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).

Because the statutory language is clear the exception does not only apply to those records created by law enforcement agencies, but also to those records compiled by law enforcement agencies *compiled in the course of* an investigation, it is my opinion any Purdue.edu accounts and emails obtained and compiled in the course of an investigation can be construed as “investigatory records” within the meaning of Section 2(i).

CONCLUSION

Even by liberally construing the terms of the APRA, it is my opinion the University is justified in not disclosing the emails requested based on FERPA and the investigatory records exception under the APRA.

Best Regards,



Luke H. Britt
Public Access Counselor