



# STATE OF INDIANA

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October 31, 2014

Ms. Paula Lavigne  
ESPN Plaza  
Bristol, CT 06010

*Re: Formal Complaint 14-FC-239; Alleged Violation of the Access to Public Records Act ("APRA") by the University of Notre Dame Security Police Department*

Dear Ms. Lavigne,

This advisory opinion is in response to your formal complaint alleging the Notre Dame Security Police Department ("NDSPD") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The NDSPD has responded via Mr. Brian Guarraci, Esq., Associate General Counsel. His response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on October 9, 2014.

## BACKGROUND

Your formal complaint alleges the Notre Dame Security Police Department violated the Access to Public Records Act by not providing records to you as mandated by Ind. Code. §5-14-3-3.

On or about September 19, 2014, ESPN sought incident reports from NDSPD related to named student athletes. Your request was denied by NDSPD who argued the Police Department is not a public law enforcement agency and therefore is not subject to Indiana Access laws.

NDSPD responded to your formal complaint stating that because Notre Dame is a wholly private university with the authority to appoint and administer law enforcement officers, their police force is not a public agency. They cite to Ind. Code § 21-17-5-2 which gives the governing board of an educational institution the authority to establish a campus police force. They also cite three prior Public Access Counselor's opinions which state private university police are not subject to the access laws.

## DISCUSSION

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. The question at hand is whether the Notre Dame Security Police Department is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person would have the right to inspect and copy NDSPD 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).

Notre Dame University is undoubtedly a private institution. The University itself is not subject to the Indiana Access to Public Records Act. However, they do have the authority under Ind. Code § 21-17-5-2 to appoint a police force and administer a law enforcement program. Three prior Public Access Counselor Opinions have concluded the police force answers solely to the private university and therefore are not public institutions accountable to any other political subdivision or body politic.

The authority for private universities to create police departments is not inherent. It is granted by the State of Indiana through the General Assembly. Likewise, police power is not inherent to a private entity. Police powers of a state are conferred by the Tenth Amendment to the U.S. Constitution. See generally, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

A private entity is deemed a state actor when the state delegates a traditionally public function to the entity itself. *Wade v. Byles*, 83 F.3d 902, 905 (7th Cir.1996). It should be noted that in *Wade*, the Court found a campus security guard was *not* a public actor, but only because the guard did not have general police powers. To wit, *Payton v. Rush–Presbyterian–St. Luke's Med. Ctr.*, 184 F.3d 623, 628 (7th Cir.1999) holds:

If, however, the privately employed special officers are “no substitute for the police” in that they are not “entrusted with all powers possessed by the police,” then the special officer is not considered a state actor. When, for example, a special officer's only recourse in a given situation is to call the police for help, it is “a far cry from delegating all of the powers of the regular police patrol to the special officer.”

The Courts have made a distinction between private security or campus guards and actual police forces with arrest powers. For example, in *Finger v. State*, 799 N.E.2d 528, 532 (Ind.2003), the police force of another private school - Butler University – was found to be subject to constitutional restraints and public scrutiny.

The analysis extends to other private entities as well. In *United States v. Hoffman*, 498 F.2d 879 (7th Cir.1974), the Court held privately employed railroad policemen, were state actors. The Court stressed the policemen were “authorized on a continuing and full-

time basis to search actively for criminals and ... to use the powers of the state when their search [was] successful.”

Consider also the persuasive authority of the Third Circuit in *Henderson v. Fisher*, 631 F.2d 1115 (1980)

Therefore, the delegation of police powers, a government function, to the campus police buttresses the conclusion that the campus police act under color of state authority.

It is clear the Notre Dame Security Police Department holds itself out to be an actor of the State of Indiana. From the NDSPD website found at <http://ndsp.nd.edu/about-ndsp/>:

The University of Notre Dame Security Police Department ...**is fully authorized as a police agency by the State of Indiana.** The department employs both sworn police officers and non-sworn campus safety officers who patrol campus and respond to emergencies. Additional staff members work as security monitors or in other support positions in the department. Notre Dame police officers complete state mandated training requirements established for law enforcement officers and **have the same legal authority as any other police officer in Indiana.** Notre Dame Security Police staff frequently work with city, county, state and federal law enforcement authorities. Agencies cooperate whenever possible on investigations and crime prevention programs to provide the best possible police services to our campus **and local communities.** Notre Dame Security Police staff offer an array of other services for the community. When you do not know who to call, feel free to contact us for assistance.

Emphasis added.

The Notre Dame law enforcement agency is clearly operating under the color of the law, enforcing Indiana criminal code and not mere campus policy or disciplinary procedures. They also have the authority to police the surrounding community. They even have a 911 dispatch. If a law enforcement agency has police powers, then they should be subject to the typical scrutiny given to traditional police forces. Police powers come from the State – they do not spring forth organically. University police hold themselves out as a law enforcement agency enforcing criminal code.

The U.S. Supreme Court in *Evans v. Newton*, 382 U.S. 296, 299, 86 S. Ct. 486, 488, 15 L. Ed. 2d 373 (1965) stated:

In actions that would otherwise be deemed "private" may be so "impregnated with a governmental character" as to be limited by the constitutional restrictions on state action. That is to say, when private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations.

This may be inconsistent with previous Public Access Counselors' opinions, but I do not believe that it is inconsistent with the spirit of the Access to Public Records Act. By statute, I am to liberally construe the APRA. The ultimate test is from where their power is derived. The police force is established by the governing body of a private institution, but their powers are not inherent nor are they derived from Notre Dame University. The police powers come from the State of Indiana. I am not comfortable saying an organization can hide behind the cloak of secrecy when they have the power to arrest and create criminal records and exercise the State's police powers. Enforcing University policy and internal safety are mutually exclusive to police powers and enforcing criminal code.

As to the records themselves, the NDSPD have been operating in reliance on prior PAC opinions which have found otherwise. It would lean against the notions of fairness to hold them instantly accountable when they have functioned as a private organization. This Opinion is strictly advisory and I decline to issue a conclusive determination they violated the Access to Public Records Act. The Notre Dame Security Police Department is now on notice, however, this Office considers them a public law enforcement agency for future public access requests and the creation of documentation found at Ind. Code § 5-14-3-5(c).

### **CONCLUSION**

For the foregoing reasons, it is the Opinion of the Public Access Counselor the Notre Dame Security Police Department should be considered a public law enforcement agency subject to the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor

Cc: Mr. Brian P. Guaracci, Esq.