



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
HEATHER NEAL

Indiana Government Center South  
402 West Washington Street, Room W460  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
www.IN.gov/pac

March 13, 2009

Greg Fallon  
345 South High Street  
Muncie, Indiana 47305

*Re: Formal Complaint 09-FC-53; Alleged Violation of the Access to Public Records Act by Ball State University*

Dear Mr. Fallon:

This advisory opinion is in response to your formal complaint alleging Ball State University ("University") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the University's response to the complaint for your reference. It is my opinion the University has not violated the APRA.

## BACKGROUND

You filed the present complaint on February 11, 2009, alleging that in January 2009 you sent to the University a request for access to a number of records, specifically electronic mail messages ("emails") sent between members of the University staff. You received copies of several records in response to the request, a number of which you allege were completely redacted. You allege the redaction was excessive and as such you were denied access to public records.

The University responded to the complaint by letter dated February 26 from attorney James Williams. In preparing the response to the complaint, Mr. Williams' law firm reviewed the records in their entirety and agrees with the University that the redactions were appropriate. The University contends it followed the requirements of I.C. § 5-14-3-6 and provided to you any disclosable material contained in the requested records. The University contends the remainder of the material is excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(6). While you allege that nearly every single line of the emails was redacted, the University indicates that there were 32 emails responsive to the request and nine of those were provided in their entirety. The remaining communications were redacted, but the sender, date, time, and recipient were provided.

The University provides detail regarding each of the redacted records. In summary, each of the redacted records consists of material which is speculative in nature or expression of opinion and is communicated for the purpose of decision making.

## 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).

When a record contains both disclosable and nondisclosable information and an agency receives a request for access to the record, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. I.C. § 5-14-3-1.

Here, the University has identified 32 records responsive to your request. Nine of those records were released in their entirety and as such are not at issue. The remaining 23 records were provided with the text of the emails redacted. The University contends those materials were redacted at the discretion of the agency pursuant to the so-called deliberative materials exception to disclosure, found at I.C. § 5-14-3-4(b)(6).

To the extent the emails contain information that is not expression of opinion or speculative in nature, and is not inextricably linked to non-disclosable information, that information must be disclosed.

The Indiana Court of Appeals addressed a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2005):

However, *section 6 of APRA* requires a public agency to separate discloseable from non-discloseable *information* contained in public

records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-discloseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.

Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id.* at 913-14.

If there is information which is not expression of opinion or speculative in nature and is not inextricably linked with the nondisclosable materials, that information should be provided. Here, the University provided the sender, date, time and recipient information for each email. I would agree that information, in this case, is not inextricably linked with the nondisclosable material.

The University contends the remainder of the 23 emails consist of deliberative material. The University provides a privilege log summarizing the nature of the information contained in each email. Based on the privilege log, I believe each email consists of speculative or opinion material communicated for the purpose of making personnel decisions. While my office does not have the authority to conduct an in camera review of redacted records and as such I have not reviewed the records in their entirety, it is my opinion the University can sustain the burden of proof for nondisclosure based on the deliberative materials exception found at *I.C. § 5-14-3-4(b)(6)*.

#### CONCLUSION

For the foregoing reasons, it is my opinion the University has not violated the APRA.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: James Williams, DeFur Voran LLP  
Sali Falling, Ball State University