

March 26, 2004

Mr. Kenneth D. Cress  
1300 North Brentwood Lane  
Muncie, Indiana 47304

*Re: Formal Complaint 04-FC-29: Alleged Violation of the Access to Public Records Act by Ball State University*

Dear Mr. Cress:

This is in response to your formal complaint alleging that Ball State University (the University) denied you access to public records in violation of the Indiana Access to Public Records Act (APRA) (Ind. Code, §5-14-3-1 *et seq.*). The University has submitted a response to your complaint, and a copy of that response is attached for your review. For the reasons set forth below, I find that the University's denial of access to the public record at issue did not violate the APRA.

#### BACKGROUND

This matter relates to your written request to the University seeking to obtain a copy of the 2003 Economic Impact Study of the Horizon Convention Center. This study was conducted by University professor, Dr. Patrick M. Barkey, Ph.D., Director of Economic Policy and Studies, Bureau of Business Research. The study was commissioned pursuant to an agreement between the University and the Muncie-Delaware County Chamber of Commerce. The agreement called for the University to perform research and address the following question: "[H]ow would the local economy look today if the Convention Center had never been built." Agreement, Attachment A. According to the agreement, "[t]he answer to this question provides a quantitative estimate of the effect of the Center on employment levels, income, retail sales, tax revenues, and population in Delaware County today." Agreement, Attachment A. The agreement proposed to study the economic impact of the Convention Center using a mathematical model of the East Central Indiana economy. "The model, leased for [the] study from Regional Economic Models, Inc. (REMI), is a mathematical representation of interactions of the eight-county ECI region." Agreement, Attachment A. The agreement called for the University's researcher to work with the Convention Center staff and

downtown development officials to develop an economic footprint of the regional economy and to “subjectively assess the extent to which other businesses and activities have been directly influenced by the operations of the [Convention Center].” Agreement, Attachment A. The information gathered would then be used “to derive the ultimate impact of the [Convention Center] on the aggregate East Central Indiana economy.” Agreement, Attachment A. The agreement described the outcome of the study to be a “written research report, summarizing results and thoroughly documenting the methods used to derive them.” Agreement, Attachment A.

On February 16, 2004, the University denied your request for a copy of the economic impact study that was produced pursuant to this agreement. In denying your request, the University asserted that the responsive document is a university “research document” and as such it is subject to nondisclosure pursuant to Indiana Code 5-14-3-4(a)(6), providing for the mandatory nondisclosure of “[i]nformation concerning research, including actual research documents, conducted under the auspices of an institution of higher education.”

This complaint followed.<sup>1</sup> In response to your complaint, the University characterizes the responsive record as the “actual research document” and maintains that its nondisclosure of the record was proper *and required* under Indiana Code 5-14-3-4(a)(6).

#### ANALYSIS

The public policy of the APRA is set forth in the preamble to that statute, and states:

[I]t is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing 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.

IC 5-14-3-1. In enacting the APRA and the broad policy supporting access to public records, the Indiana General Assembly at the same time acknowledged and determined that public policy required that certain records were appropriate to be maintained as confidential. Indeed, Indiana Code 5-14-3-4 sets forth thirty-one (31) instances in which the public agency must or may withhold disclosure of public records (IC 5-14-3-4), and

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<sup>1</sup> I note that you previously submitted a complaint against the Delaware County Civic Center Authority (the funding agency for the study), for an earlier denial of access to the same record. That complaint was not timely submitted and is pending with this office for an informal inquiry response. The Delaware County Farm Bureau, Inc., submitted a letter in support of your complaints and requesting that this office issue an opinion supporting disclosure.

Indiana Code 5-14-3-3(a) subjects access to public records to the exemptions as set forth in that section (IC 5-14-3-3(a)). Even the preamble acknowledges that some public records are not subject to disclosure. *See* 5-14-3-1 (“This 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.”) (Emphasis added).

Indiana Code 5-14-3-4(a) sets forth the exemptions to disclosure that are mandatory. That is to say, if the information sought by a request for records falls within one of the exemptions set forth therein, the public agency does not have discretion; it “may not” disclose the records “unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery.” IC 5-14-3-4(a). One of the mandatory exemptions to disclosure is for those records that include “[i]nformation concerning research, including actual research documents, conducted under the auspices of an institution of higher education.” IC 5-14-3-4(a)(6).

In *Robinson v. Indiana University*, 659 N.E.2d 153 (Ind. Ct. App. 1995), the Indiana Court of Appeals addressed the application of this exemption in the context of a request for animal research applications. The application records at issue included factual background information concerning the researcher, project and funding source, a summary of the purpose of the research project and describing the animal used in it, and a questionnaire concerning the procedures and controls that would be used in the project. 659 N.E.2d at 157. The application records also contained more subjective information, including the researcher’s justifications for choice of species and technique. 659 N.E.2d at 157. The court acknowledged that the APRA required a liberal construction in favor of disclosure of public records, and that exemptions should be construed narrowly. However, the court noted that the Indiana General Assembly’s inclusion of the “concerning research exception ... indicat[ed] the legislature's intent to extend nondisclosure to a larger number of records.” 659 N.E.2d at 156. With regard to applications concerning animal research, the court determined that those records were of a scientific or experimental nature so as to concern research and fell squarely within the exemption and were subject to nondisclosure. 659 N.E.2d at 157. The court stated:

We agree with the trial court's determination that the information sought by the research applications was “information concerning research conducted by [or] under the auspices of Indiana University.” Record at 4-5. The application seeks information about the researcher, the nature of the proposed or ongoing research project, and procedures to be employed throughout the project. The sole subject matter of the application is a research project and related personnel and procedures. Even in the narrowest sense, the information sought by the application concerns research. As such, it was not subject to disclosure under the Public Records Act.

659 N.E.2d at 157.

Here, the record at issue also plainly falls within the exemption cited by the University. The sole product that was to be created pursuant to Dr. Barkey's research and subject to the agreement between the Chamber of Commerce and the University is the study report at issue, a "written research report, summarizing results and thoroughly documenting the methods used to derive them." It is the actual research document. Moreover, as described in the agreement commissioning its creation, it contains the subjective assessments of the researcher regarding the "extent to which ... businesses and activities have been directly influenced by the operations of the [Convention Center]," and that would be used to "derive the ultimate impact of the [Convention Center] on the aggregate East Central Indiana economy." Agreement, Attachment A. As was the case in *Robinson*, "[t]he sole subject matter of the [study] is a research project and related personnel and procedures. Even in the narrowest sense, the information sought by the [study] concerns research." *Robinson*, 659 N.E.2d at 157. Based on the plain language of the statutory exemption, and the undisputed content of the record at issue, I must find that the record falls within the statutory exemption cited by the University for its nondisclosure.

That said, a question remains as to whether the University is obligated to disclose any portion of the actual research document pursuant to Indiana Code 5-14-3-6. That statute provides that if a public record contains both disclosable and nondisclosable information, the public agency is required to separate the material that may be disclosed and to make that material available for inspection and copying. IC 5-14-3-6; *see Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893, 913-14 (Ind. Ct. App. 2003) (holding that factual matters that are not inextricably linked with other non-disclosable materials such as the opinions and speculation of the author should not be protected from public disclosure).

The University asserts that Indiana Code 5-14-3-6 does not apply to an "actual research document" under the mandatory nondisclosure provisions of Indiana Code 5-14-3-4(a)(6). *Robinson* seemingly supports that contention inasmuch as the court in that matter approved of the nondisclosure of research "applications" *including the factual data contained within those records*. *See Robinson*, 659 N.E.2d at 157. The more recent *Trustees of Indiana University* decision brings that into question. In that matter, the court found that the federal law governing the confidentiality of student education records, also a mandatory exemption to disclosure set forth in Indiana Code 5-14-3-4(a), did not prohibit production of a redacted record, and remanded the matter to the trial court to address the issue of redaction. *Trustees of Indiana University*, 787 N.E.2d at 909 ("if identifiable student information were to be redacted from these notes, we are unable to see how they would be education records protected by [federal law]"). However, while the redaction of "identifiable student information" might be capable of transforming an education record *as an "education record" is defined by federal law* to an otherwise disclosable public record, I cannot similarly conclude that the redaction of the subjective assessments and conclusions from an actual research document makes that record any less an actual research document under Indiana Code 5-14-3-4(a)(6). *Compare* IC 5-14-

3-4(a)(6) (exempting disclosure of an “actual research *document*”) (emphasis added) *with* IC 5-14-3-4(b)(6) (exempting disclosure of “advisory or deliberative material ... that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.”). On this point, I follow *Robinson* and leave the parties to resolve any perceived conflict in the court’s decisions on the University’s obligations under Indiana Code 5-14-3-6 for a subsequent civil action that may be brought under the APRA. *See* IC 5-14-3-9.

Because the report requested is the actual research document concerning research by a university and conducted under the auspices of an institution of higher learning, the University had no choice but to withhold the record pursuant to Indiana Code 5-14-3-4(a)(6). IC 5-14-3-4(a) (exempting records from disclosure and providing that the records “may not be disclosed by the public agency” unless some other statute requires the disclosure of the specific records). Accordingly, I find that the nondisclosure did not violate the APRA.

#### CONCLUSION

Your request seeks information that is exempted from production and may not be disclosed by the University pursuant to Indiana Code 5-14-3-4(a)(6). Accordingly, it is my opinion that the University did not violate the APRA when it denied you access to the record.

Sincerely,

Michael A. Hurst  
Public Access Counselor

cc: Mr. Jon H. Moll