



STATE OF INDIANA

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March 31, 2016

Mr. Eric Weddle
1630 North Meridian Street
Indianapolis, Indiana 46202

Re: Formal Complaint 16-FC-32; Alleged Violation of the Access to Public Records Act and the Open Door Law by Trine University

Dear Mr. Weddle:

This advisory opinion is in response to your formal complaint alleging Trine University ("Trine") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 et. seq. and the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 et seq. Trine University has responded to your complaint via counsel, Ms. Heather H. Willey, Esq. Her response is enclosed 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 January 25, 2016.

BACKGROUND

Your complaint dated January 25, 2016 alleges Trine University violated the Access to Public Records Act and the Open Door Law by not providing you with notice for all 2016 meetings. Trine asserted to you it is not subject to Indiana Public Access laws as it is a private university.

On February 29, 2016 counsel responded. Counsel states Trine is a private university and asserts private universities do not fall under the definition of a public agency within the APRA or the ODL. Therefore, counsel asserts Trine is not subject to the APRA or the ODL.

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. Trine University as an educational institution is not a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1), however, it may be subject to access provisions under certain circumstances.

Trine University is a private institution. It is the opinion of this Office that private universities and colleges in Indiana are not subject to the Open Door Law or Access to Public Records Act. However, there are instances when a private university can undertake an activity or function which would expose those activities to public scrutiny. See *Opinion of the Public Access Counselor 14-FC-239; and 14-FC-306*. Access to public records and meetings in those circumstances are limited to the documents and activities germane to that activity.

When a third-party private entity steps in the shoes of a public agency as a ‘state actor’, it can become custodian of public records when it creates documents for the government’s benefit. See *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005). Additionally, a private entity is deemed a state actor when the state delegates a traditionally public function to the private entity. *Wade v. Byles*, 83 F.3d 902, 905 (7th Cir.1996). 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.

In the present case, Trine operates as an authorizer of public charter schools under Ind. Code § 20-24-1-2.5. Charter schools are public educational institutions. Ind. Code § 24-20-1-4. Authorizing a charter school is voluntary and private sponsors who do so must comply with the requirements set forth in Ind. Code § 20-24-2.2-1.2.

The Education Clause, Article 8, Section 1, of the Indiana Constitution, states:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

By permitting private universities to authorize charter schools, the General Assembly has outsourced a government function to a traditionally non-government actor. And therefore by voluntarily undertaking the responsibility of authorizing a charter school, Trine University has become the functional equivalent of a regulatory entity. Delegation or privatization of a government responsibility does not wipe away the intended purpose of access laws. Consider the following from the Tennessee Court of Appeals:

Privatization may be desirable in itself, but it should not come without . . . leaving public accountability intact. Not only should the public be able to monitor the private company’s activities, but the monitoring should be on the same terms as when the public agency was the information vendor.

Memphis Pub’g Co. v. Cherokee Children & Family Svcs., Inc., 87 S.W.3d 67, 76 (Tenn. 2002)

It should be emphasized again that public scrutiny is limited to the narrow scope of the authorization process and does not extend to the University as a whole. Trine University is a private institution and access to its records and meetings applies only to the charter school authorization process. Additionally, it would lean against the notion of fairness to hold them instantly accountable when they have functioned as a private organization in the past without prior guidance. This Opinion is strictly advisory and I decline to issue a conclusive determination they violated the Access to Public Records Act or the Open Door Law.

Regards,

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

Luke H. Britt
Public Access Counselor

Cc: Ms. Heather H. Willey, Esq.; Ms. Hayleigh Columbo