



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

April 15, 2011

Mr. Zach Ammerman
940 E. 7th St.
Ernie Pyle Hall, Rm. 120
Bloomington, IN 47405

*Re: Formal Complaint 11-FC-71; Alleged Violation of the Access to
Public Records Act by Indiana University*

Dear Mr. Ammerman:

This advisory opinion is in response to your formal complaint alleging Indiana University ("IU") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* IU's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that you filed "a request for information contained in the following public record: Annual Research Report, Animal and Plant Health Inspection Service (APHIS) Form 7023 for the most recent year, preferably 2010 or later" (the "Form"). IU annually submits the Form to the U.S. Department of Agriculture ("USDA") in accordance with federal regulations. The USDA publishes the Form online, but the latest version available via its website is from 2009. IU cited to Ind. Code § 5-14-3-4(a)(6) when it denied your request, but you argue that IU should release the Form because "it is a federally required document that will be freely available to the public once the Department of Agriculture posts it on its website."

In response to your complaint, IU Associate General Counsel Thomas P. Gannon maintains IU's denial based on Ind. Code § 5-14-3-4(a)(6). He explains that research facilities such as IU are required to file the Form each year with the USDA in accordance with the Animal Welfare Act ("AWA"), but that nothing in the AWA mandates public access to the Form. In fact, Section 6(B) of the AWA provides that "[n]o rule, regulation, order, or part of this chapter shall be construed to require a research facility to disclose publically [sic] or to the Institutional Animal Committee during its inspection, trade secrets or commercial or financial information which is privileged or confidential," and the Code of Federal Regulations includes language maintaining the confidentiality of research records in 9 C.F.R. § 2.35(f). Moreover, according to Mr. Gannon, USDA

routinely redacts completed Form 7023s prior to posting them on its website. He argues that subsection 4(a)(6) of the APRA requires that IU maintain the Form as confidential because the Form is “information concerning research, conducted under the auspices of an institution of higher education” within the meaning of that exception. Finally, he notes that while IU has no obligation to provide you with the Form or the information contained therein, you can obtain some of the information by contacting the USDA directly.

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.” I.C. § 5-14-3-1. IU is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy IU’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Several categories of public records are excepted from section 3 of the APRA (granting requesters the right to inspect and copy public records) and may not be disclosed by a public agency 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. *See generally* I.C. § 5-14-3-4(a). Two such types of records are those required to be kept confidential by federal law, I.C. § 5-14-3-4(a)(3), and

[i]nformation concerning research, including actual research documents, conducted under the auspices of a state educational institution, including information: (A) concerning any negotiations made with respect to the research; and (B) received from another party involved in the research.

I.C. § 5-14-3-4(a)(6). As Mr. Gannon notes, in *Robinson v. Indiana University*, 659 N.E.2d 153 (Ind. Ct. App. 1995), the Indiana Court of Appeals acknowledged that the APRA requires a liberal construction in favor of disclosure of public records, and the exemptions to disclosure should generally 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 large number of records.” *Id.* at 156. With regard to applications concerning research, the court said the records were of a scientific or experimental nature so as to concern research and fell squarely within the exemption and were thus subject to nondisclosure. *Id.* at 157. Based on this reasoning from our Court of Appeals, it is my opinion that subsection 4(a)(6) of the APRA prohibits IU from releasing the Form for public inspection. *See Informal Inquiry 07-INF-64, Records of Purdue University, December 10, 2007*, available at http://www.in.gov/pac/informal/files/64_Informal_Purdue_University_research_records.pdf.

I would encourage you to contact the USDA to inquire about the availability of more recent versions of the Form and, if necessary, submit a Freedom of Information Act request for access to those documents. Because the USDA is a federal agency, I do not have the authority to opine specifically on the accessibility of that agency's records. *See* I.C. §§ 5-14-4-10 (empowering the public access counselor to issue advisory opinions regarding the "public access laws"); 5-14-4-3 (defining "public access laws" to include only state statutes or rules governing access to public meetings or public records).

CONCLUSION

For the foregoing reasons, it is my opinion that IU did not violate the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

cc: Thomas P. Gannon