

## OPINION OF THE PUBLIC ACCESS COUNSELOR

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KOHL HARRINGTON<sup>1</sup>

*Complainant,*

v.

PURDUE UNIVERSITY,

*Respondent.*

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Formal Complaint No.

20-FC-119

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Luke H. Britt

Public Access Counselor

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BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging Purdue University violated the Access to Public Records Act.<sup>2</sup> Legal Services Coordinator Kaitlyn Heide filed an answer on behalf of Purdue. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to

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<sup>1</sup> An additional complainant, Harry Duty, filed a nearly identical formal complaint. The analysis below pertaining to emails will apply to his complaint as well.

<sup>2</sup> Ind. Code § 5-14-3-1-10.

the formal complaint received by the Office of the Public Access Counselor on August 26, 2020.

### **BACKGROUND**

This case involves a dispute over access to records from the Office of the State Chemist. This opinion will address both access to emails and access to official definitions of feed ingredients adopted by the Association of American Feed Control Officials.

On August 5, 2020, Kohl Harrington (Complainant) filed a public records request with Purdue University seeking the following:

I am requesting all email records for the entire months of January 2020 and February 2020 for Robert Geiger pertaining to the key word; AAFCO. I am requesting that the records be provided to me digitally.<sup>3</sup>

AAFCO is the Association of American Feed Control Officials. Six days later, Purdue responded to the request and asked Harrington to provide an identified sender and recipient to meet standards of reasonable particularity, citing factors established by this office and state courts over the years.

Harrington takes exception to these factors and argues his request is sufficiently specific. Harrington characterizes the invitation to narrow his request as a “personal favor” to make Kaitlyn Heide’s job easier.

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<sup>3</sup> The second complainant’s request was identical for April 20, however, included approximately 300 potential senders and recipients.

He filed his complaint on August 17, 2020. This office originally denied the complaint after concluding the request was deficient and Purdue's invitation to narrow was justified. Nevertheless, we capitulated at Harrington's insistence and consolidated this complaint with a subsequent one that contained a more meritorious issue.

On August 17, 2020, Harrington filed another request with Purdue seeking the following:

All records for "The official definitions of feed ingredients and official feed terms adopted by the Association of American Feed Control Officials and published in the official publication of that organization."

Kaitlyn Heide at Purdue reached out to this office for guidance. She explained that AAFCO provides its 2020 official publication on its website with the information Harrington seeks for a fee. He can purchase it directly from AAFCO, but it is a copyrighted document and not a public record Purdue can provide under APRA. We agreed with that assessment on August 20.

Harrington argues AAFCO is a "shadow government organization" and seemingly is legislating from the private sector. He also argues the feed ingredient definitions adopted by the State Chemist are regulations that have the force of law and should be as transparent as a promulgated rule or statute. Toward that end, he filed his complaint on August 27.

Purdue maintains that the definitions are found exclusively in the official publication of AAFCO and are not Purdue's to provide, even pursuant to a public records request.

## ANALYSIS

### 1. The Access to Public Records Act

The Access to Public Records Act (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.” Ind. Code § 5-14-3-1. Purdue University (Purdue) is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy Purdue’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

## **2. Requests for emails**

The crux of the initial dispute is whether the request by Harrington meets particularity standards set by APRA, our courts, and this office.

Under APRA, a request for inspection or copying “must identify with reasonable particularity the record being requested.” Ind. Code § 5-14-3-3(a)(1). Requiring reasonable particularity relieves a public agency from the guesswork of having to anticipate exactly what a requester is seeking.

To borrow an idiom from our colleagues at the Hoosier State Press Association, a request should be more like a rifle less like that of a shotgun.

Although “reasonable particularity” is not statutorily defined, the Indiana Court of Appeals addressed the meaning of the phrase in two seminal cases.

First, in *Jent v. Fort Wayne Police Dept.*, 973 N.E.2d 30 (Ind. Ct. App. 2012), which involved a dispute about daily incident report logs, the court concluded that reasonable particularity “turns, in part, on whether the person making the request provides the agency with information that enables the agency to search for, locate, and retrieve the records.” 973 N.E.2d at 34.

The second case specifically addressed emails and the sufficiency of search parameters. See *Anderson v. Huntington County Bd. of Com’rs*, 983 N.E.2d 613, (Ind. Ct. App. 2013). The *Anderson* court essentially ratified a 2012 opinion of the Public Access Counselor pursuant to an underlying formal

complaint between the two parties. In sum, that opinion began an ongoing effort by this office to pare down and identify the necessary factors of a particularized email request.

Particularly, certain search parameters need to be identified in that request, namely a sender and a recipient for a channel of communication. This office has also repeatedly suggested that those “channels” of communication be limited as well to a manageable number – four to six “lanes” at a time. This is why the second complainant was consolidated. Three hundred lanes of communication is too many by any measure.

Notably, the Indiana Supreme Court denied transfer in both cases, which indicates the two cases could be read harmoniously.

Even so, in an attempt to clarify for Harrington, this office sent an email to both parties on August 17, 2020, upon receipt of his complaint:

After review of the documents you submitted, it is not unreasonable for Ms. Heide to seek more information pursuant to your request. It is not a personal favor to her, as you indicate, rather it is what Indiana courts have interpreted as reasonably particular pursuant to Indiana Code section 5-14-3-3(a) and therefore what my office regularly advises.

The specificity set forth in *Jent v. Fort Wayne Police Dept.*, 973 N.E.2d 30 (Ind. Ct. App. 2012) does require an identified sender AND an identified recipient for an email request. While the other parameters are flexible – and you have

indeed satisfied those – the named parties to the communication are typically non-negotiable.

Even still, sometimes agencies can be flexible. I do not know who Mr. Geiger is, but if he works regularly with the AAFCO, I presume there would be the amount of documents Ms. Heide indicates. If so, she is entitled by law to ask you to narrow the search. If there were only a few messages, however, I would encourage Purdue not to be so technocratic about applications of those parameters. To that end, I am copying Ms. Heide.

Public records access, at least in Indiana, is not a guessing game but a requester must have some idea that a document exists – idiomatically, a rifle as opposed to a shotgun. Therefore you may seek any probable or likely sender or recipient associated with Mr. Geiger. Alternatively, you may seek them by job title, i.e. the State Chemist or communications director, etc. if you don't know their exact name. And you may seek four individuals at a time, after which you may request four more and so forth.

To the extent this message is confusing (email request specificity can be a tricky issue), please do not hesitate to call me with any questions and I'd be glad to walk you through some options.

To her credit, Heide took this office's recommendation and conducted the search. It yielded a multitude of emails even though Mr. Geiger retired from the State Chemist's office in January. The results were multiplied by the fact that Geiger cited his membership in AAFCO in his signature block.

This makes sense as AAFCO is comprised of public officials across the state. It certainly does not imply any wrongdoing, shadow government agencies, deep state, or ghost employment as is alluded by Harrington.

In actuality, AAFCO is a private nonprofit organization out of Champaign, Illinois that is comprised of public sector officials nationwide but they have no regulatory authority outside of providing recommendations and academic resources that states may or may not adopt.

In any case, Purdue rightfully relies on caselaw and prior public access counselor opinions in its invitation to narrow down the request. It is neither a denial nor an unreasonable barrier to access. Purdue has not violated the Access to Public Records Act by following the holdings of the judiciary and this office.

### **3. AAFCO publications**

Harrington's second complaint is an interesting one but not novel to this office. He seeks copies of material not developed or created by a public agency, but intellectual property of a private organization, which is in the possession of a public agency. The AAFCO publication costs \$150 to download for non-AAFCO members.

Under APRA, the definition of public record is quite broad and all-encompassing:

“Public record” means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media,



chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). By definition, almost anything can become a public record: the copy of *War and Peace* at a local library branch; the chemistry 101 textbook in the Purdue bookstore; the Black's Law Dictionary on this desk.

But does that mean all of those types of records can be copied at ten cents per page by a requester?

Prior public access counselors have opined that copyrighted material in the possession of public agencies do not have to be copied and produced in the same manner as other public records.<sup>4</sup> That analysis, in essence, is that the Federal Copyright Act<sup>5</sup> would prevent the sale of copyrighted material to a third party, thus falling under Indiana Code section 5-14-3-4(a)(3). Notably, those cases also considered rules and standards incorporated by reference.

Indeed, authorities are fairly mixed as to whether this argument by a public agency is credible and there is no authority that would directly affect Indiana. It is unclear whether courts would consider the fair use doctrine when a third party requests copyrighted material from a public agency for noncommercial purposes, but other states have not held public agencies liable for releasing third party materials pursuant to a public records request.

This issue is also complicated by the fact that the AAFCO Official Publication includes official definitions of feed

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<sup>4</sup> *Opinions of the Public Access Counselor* 09-FC-88 & 277

<sup>5</sup> 17 USC §§ 1-14 et.al.

ingredients and official feed terms adopted by the state chemist. Indiana Code section 15-19-7-34(b) states:

In the interest of uniformity, the state chemist shall adopt the following by rule unless the state chemist determines that the following are inconsistent with this chapter or are not appropriate to conditions that exist in Indiana:

- (1) The official definitions of feed ingredients and official feed terms adopted by the Association of American Feed Control Officials and published in the official publication of that organization.

Apparently, this is the case and the state chemist has adopted the definitions and terms of the AAFCO. These are not rules, however, that are binding on any substantive right or affirmatively regulate the public in any way. They are reference material that apply to a specific industry. Harrington fails to identify how the definitions have regulatory impact, at least in a manner that would necessitate official codification by the Indiana General Assembly. Materials incorporated by reference are scattered throughout Indiana code without specific enumeration: CDC guidelines, building and electrical codes, etc.

The legislature ratifies this practice:

If incorporation of the text in full would be cumbersome, expensive, or otherwise inexpedient, an agency may incorporate by reference into a rule part or all of any of the following matters:

- (1) A federal or state statute, rule, or regulation.

(2) A code, manual, or other standard adopted by an agent of the United States, a state, or a nationally recognized organization or association.

Ind. Code § ~~4-22-2-21~~. Nothing in the Indiana Code implies that copyrighted materials incorporated by reference can be provided to a requester either free of charge or even consistent with the per page fee schedule established by the APRA.

To that end, this office remains unconvinced that the Indiana General Assembly, vis-à-vis APRA, requires Indiana public agency to provide copies of third party copyrighted material to the public upon request.

## **CONCLUSION**

Based on the foregoing, it is the opinion of this office that Purdue University has not violated the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

**Luke H. Britt**  
Public Access Counselor