



# 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

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Re: *Formal Complaint 09-FC-42; Alleged Violation of the Access to Public Records Act by Indiana University*

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

## BACKGROUND

You allege that on February 2, 2009 you requested from the University access to your "student record." Specifically, it appears you seek materials related to the University's decision to deny you admission. You contend that because the material was used in "a very concrete manner" you should be provided access to those records. Your complaint was postmarked February 6 and received by my office on February 10.

The University responded to the complaint by letter dated February 25. The University clarifies that your request concerns two classes of documents: your student record and all materials related to the University's decision to deny you admission. As the University explains, you have been enrolled as a student at the University on three separate occasions. When you applied for reinstatement after you were dismissed, your application was twice rejected. The University has offered to provide you access to records related to your status as a student on those three occasions. The University contends, though, that records related to the denial of your application are not disclosable.

The University contends that the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C.A. §1232g *et. seq.*, specifically excepts from disclosure the records you have requested. Further, the state APRA excepts from disclosure any records required to be kept confidential by federal law. The University argues that the records are required to be kept confidential by FERPA and as such are excepted from disclosure under the APRA. Finally, the University contends that even if FERPA did not apply, the deliberative materials exception in the APRA, found at I.C. § 5-14-3-4(b)(6), would except the records from disclosure at the discretion of the agency.

## 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 provides that records which are required by federal law to be kept confidential may not be disclosed by an agency unless disclosure is required by state or federal statute or ordered by a court under the rules of discovery. I.C. § 5-14-3-4(a)(3). The Court of Appeals of Indiana has stated that "for the purposes of I.C. § 5-14-3-4(a)(3), FERPA is a federal law which requires education records to be kept confidential." *An Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003). Because the records at issue are educational records covered by FERPA and because FERPA is a federal law which requires education records to be kept confidential, FERPA controls disclosure of the requested records.

As the University contends, FERPA and its implementing regulations specifically address the type of records to which you have requested access:

(c) An individual who is or has been student at an educational institution who applies for admission at another component of that institution does not have the rights under this part with respect to records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.  
34 CFR 99.5(c) (2008).

As the University explains, you were dismissed from the University Division in 2006. Your applications for re-admission in 2007 and 2008 were, therefore, applications for admission at another component of the University. You were not accepted, and therefore you are not entitled to access to those records.

Further, even if FERPA did not apply, the deliberative materials exception to the APRA would allow the University the discretion to withhold the records from disclosure. That exception gives the agency the discretion to withhold the following:

Records that are intra-agency or interagency 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.  
I.C. § 5-14-3-4(b)(6).

This deliberative materials exception is a broad exception which can be relied upon so long as the records are either speculative or are expressions of opinion *and* are communicated for the purpose of decision making. Indiana law does not provide a pre- and post-decision distinction, so the records may be withheld even after a decision has been made. Nothing in the APRA supports your claim that because the records were used in “a very concrete manner” you should be entitled access to them. It is my opinion the University has demonstrated it can bear the burden of proof to sustain the denial of access to the records you have requested.

#### 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: Michael Klein, Associate University Counsel, Indiana University