



# STATE OF INDIANA

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July 15, 2019

DeAnna L. Poon  
Assistant General Counsel  
Indiana Utility Regulatory Commission

**Re: Informal Opinion; 19-INF-12;**

Dear Ms. Poon:

This is in response to your request for an informal opinion on the applicability and impact of the Indiana access laws on research from state educational institutions. Your question involves the negotiations between a public university and the Indiana Utility Regulatory Commissioner ("IURC"), and research arising from those eventual agreements.

## **BACKGROUND**

The IURC has an existing contract with Purdue University ("Purdue") to be the state utility forecasting group ("SUFSG") as required by Indiana code section 8-1-8.5-3.5. In addition, Purdue provides the Commission with work to assist it in completing obligations to the 21<sup>st</sup> Century Energy Policy Development Task Force ("Task Force"), newly created by Indiana code section 2-5-45-2.

The Commission is negotiating with Lawrence Berkeley National Laboratory, housed within the University of California ("Univ. California"). Univ. California will assist the Commission in its statutory duties related to the Task Force. It will provide research to the Commission and written and oral reports of the research to the Indiana General Assembly and the Task Force. Governor Holcomb has already appointed a professor from Univ. California (specifically from the Lawrence Berkeley National Laboratory) to the Task Force, and those expenses will be paid under the proposed contract.

The Commission is also in negotiations with Indiana University ("IU"). IU will assist the Commission in its statutory duties related to the Task Force by conducting a research project and provide a written report discussing the research.

The IURC first asks whether the University of California is a qualifying state educational institution for the purposes of the Access to Public Records Act ("APRA"). Next, it inquires as to the disclosability of agreements with a state educational institution.

## 1. STATE EDUCATIONAL INSTITUTIONS

In order for a public university to qualify for research exceptions under the APRA, it must qualify as such. While the APRA does not define “state educational institution,” its sister statute, the Open Door Law, does. It defers to Indiana code section 21-7-13-32 to define a state educational institution<sup>1</sup> which says:

- (a) "State educational institution" means any university, college, or other educational institution:
  - (1) existing on or after March 29, 1971;
  - (2) in Indiana;
  - (3) that provides programs of:
    - (A) collegiate or university education; or
    - (B) other postsecondary education; and
  - (4) that is supported in whole or in part by appropriations made by the general assembly.
  
- (b) The term refers to the following:
  - (1) Ball State University.
  - (2) Indiana State University.
  - (3) Indiana University.
  - (4) Ivy Tech Community College.
  - (5) Purdue University.
  - (6) University of Southern Indiana.
  - (7) Vincennes University.

While this definition is chapter-specific as to the Open Door Law, it is instructive as to the General Assembly’s intent to treat in-state universities as state educational institutions for the purpose of the access laws. It is not this Office’s opinion that the General Assembly intended to include any and all state educational institutions that exist nationwide, only those in Indiana over which the laws of Indiana have dominion.

Therefore it is the opinion of this Office that the University of California is not a state educational institution as defined by the Indiana access laws, however, Indiana University and Purdue University most definitely fall into the statutory definition.

Even still, that does not automatically make sensitive materials submitted to the Task Force disclosable by Univ. California. There are a litany of exceptions to disclosure which may apply to reports and work product submitted to the IURC by the University including but not limited to, deliberative material, trade secrets, work product of the General Assembly, etc. These considerations are not state-specific.

## 2. CONTRACTS WITH STATE EDUCATIONAL INSTITUTIONS

The IURC’s second question involves the extent to which these agreements are confidential. Information regarding the research of state educational institutions are considered to be confidential by the APRA. Indiana code section 5-14-3-4(a)(6) considers confidential:

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<sup>1</sup> Ind. Code § 5-14-1.5-2(1).

Information 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.

The APRA requires narrowly construing its exceptions.<sup>2</sup> Contracts and agreements with outside entities are not considered to be non-disclosable by the APRA, however, substantive portions of an associated scope of work might. Certain terms, if revealed, may jeopardize the integrity of other information the General Assembly intended to keep secret. Therefore to the extent and agreement contains a scope of work for research which would fall under Indiana Code section 5-14-3-4(a)(6), it may be redacted or contained in an addendum which should be withheld.

Nonetheless, the very purpose of the agreements is to satisfy Indiana Code sections 2-5-45-7, and -8 – Task Force recommendations and reports to the General Assembly, the Governor, the IURC and others.

Toward that end, this confidentiality extends to other state agencies with a hand in the process, i.e. the Department of Administration or the Attorney General’s Office vis-à-vis Indiana Code section 5-14-3-6.5 (a “public agency” that receives a confidential record from another agency “shall maintain the confidentiality of the public record”).

While disclosing findings to its contracted partners does not strip the records of their status as confidential, the IURC, the General Assembly, and any other public agency recipient of research material has an obligation to keep the research confidential unless another statute mandates disclosure. Other agencies may be aware of this, but a memo or cover sheet expressing the sensitivity of a scope of work is advisable.

### **3. NEGOTIATION MATERIAL**

Similarly, the APRA considers the final offer of public financial resources extended to a research prospect by a state educational institution able to be withheld at the discretion of the parties. To wit, Indiana code section 5-14-3-4(b)(28) states:

Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency: Records relating to negotiations between a state educational institution and another entity concerning the establishment of a collaborative relationship or venture to advance the research, engagement, or educational mission of the state educational institution, if the records are created while negotiations are in progress. The terms of the final offer of public financial resources communicated by the state educational institution to an industrial, a research, or a commercial

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<sup>2</sup> *Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n*, 810 N.E.2d 1179, 1181 (2004)

prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

Partnering with IURC is an indication that the state educational institution seeks to advance its research mission, therefore the IURC's agreement falls within this definition. Negotiation materials may be withheld.

#### **4. RELEASE OF RESEARCH RESULTS**

Research is not explicitly defined in statute but can generally be categorized as the methodology and intellectual property that goes into a systematic investigation of a problem in order to present a conclusion, recommendations, or set of facts.

These conclusions will be presented to the Task Force. Recommendations and a report are to be generated pursuant to Indiana code sections 2-5-45-7&8 and released to the public. Presumably research findings will include the conclusions and results of the research conducted by the educational institutions. To that end, some of the research materials will be disclosed in the report. What is doubtful, however, are the portions of research that the General Assembly intended to keep confidential will be disclosed, i.e. the methodology, research strategies, procedures, systems and approaches used to conclude findings. Amalgamating and synthesizing the research findings to create recommendations and a report for public inspection does not necessarily compromise the underlying research.

In any event, a waiver may be advisable to protect the state's interest in disclosing certain material. IURC includes such a waiver in their inquiry which should be adequate for those purposes.

#### **5. STATE UTILITY FORECASTING**

Finally, the IURC presents a question as to whether Purdue's work related to the state utility forecasting group constitutes research. Indiana Code section 8-1-8.5-3.5 provides: "The [C]ommission shall establish a permanent forecasting group to be located at a state supported college or university within Indiana." Purdue's SUFG "shall develop and keep current a methodology for forecasting the probable future growth of the use of electricity within Indiana and within this region of the nation. To do this, the group shall solicit the input of residential, commercial, and industrial consumers and the electric industry." *Id.* The Commission does not consider this work to be "research" but more akin to developing methodology and forecasting.

Although Purdue is a state educational institution and a research organization, not everything it does qualifies as "research." Based on the information provided, the work it does with utility forecasting are service-oriented as opposed to traditional research. Therefore this Office does not consider those services to be research.

IURC's concern involves the contracts posted to the State's transparency portal. Without reviewing the contract, I cannot make a definitive statement, however, it does not appear

to be any more or less sensitive than any other State contract. Redactions should be unnecessary.

Please do not hesitate to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to be 'LH Britt', written in a cursive style.

Luke H. Britt  
Public Access Counselor