

December 10, 2007

Eugenie Reich
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Cambridge, Massachusetts

Via electronic mail to Eugenie.reich@gmail.com

Dear Ms. Reich:

This is in response to your informal inquiry dated February 17, 2007 in connection with your request under the Access to Public Records Act (“APRA”)(Indiana Code 5-14-3) for records from Purdue University (“Purdue”) relating to the investigation of the Taleyarkhan bubble fusion matter. I apologize for the delay in the response. Upon my appointment by Governor Daniels effective July 1 of this year, I found a backlog of informal inquiries. I am currently endeavoring to address those inquiries and issue an opinion in each matter pursuant to Indiana Code §5-14-4-10(5).

BACKGROUND

You allege that your request for access to a copy of the Taleyarkhan bubble fusion review was denied by Purdue on September 14, 2006. Purdue denied your request based on two exceptions to disclosure listed in the APRA. First, pursuant to I.C. §5-14-3-4(a)(6), public agencies may not disclose “information concerning research, including actual research documents, conducted under the auspices of an institution of higher education, including information (a) concerning any negotiations made with respect to the research; and (b) received from another party involved in the research.” Second, pursuant to I.C. §5-14-3-4(b)(6), public agencies have the discretion to except “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.”

On March 7, 2007, Purdue further denied your request for access to a copy of the inquiry report into misconduct allegations against Taleyarkhan and a copy of any record at Purdue that shows the names of the people appointed to serve on the inquiry panel that reached a determination announced regarding allegations of misconduct against Taleyarkhan. In denying you request, Purdue, again relied on I.C. §5-14-3-4(a)(6) and I.C. §5-14-3-4(b)(6). Further, Purdue asserted that I.C. §5-14-3-4(a)(3) prohibits the release of records “required to be kept

confidential by federal law.” Purdue contends that the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C.A. 1232(g) *et seq.* and its implementing regulations as well as 42 U.S.C. 289b and its implementing regulations require confidentiality of information.

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." Ind. Code §5-14-3-1. Purdue is clearly 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 the public records of Purdue 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 contains four exceptions to disclosure which may be applicable here. The following two categories of public records are excepted from section 3 of the APRA 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:

- (3) Those required to be kept confidential by federal law.
- (6) 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.

I.C. §5-14-3-4(a).

The following two categories of public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(6) Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

(8) Personnel files of public employees and files of applicants for public employment, except for:

- (A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) information relating to the status of any formal charges against the employee; and
- (C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

I.C. §5-14-3-4(b).

When a state statute or federal law declares information confidential, those records may not be disclosed by the agency. 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), Family Educational Rights and Privacy Act (“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). Counselor Karen Davis, in *Opinion of the Public Access Counselor 06-FC-191*, opined that education records and personally identifiable information contained therein are records directly related to a student, maintained by an educational agency and including, but not limited to, a list of personal characteristics that would make the student's identity easily traceable, or other information that would make the student's identity easily traceable. *Id.*

Here, your request for access to a copy of the Taleyarkhan bubble fusion review and a copy of the inquiry report into misconduct allegations against Taleyarkhan might contain personally identifiable information related to a student, as Taleyarkhan's research was conducted not only by Mr. Taleyarkhan himself but by his team, which I understand was composed of students. As such, the portions of the records containing personally identifiable information is required to be withheld from disclosure pursuant to I.C. §5-14-3-4(a)(3).

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 should be construed narrowly. However, the court noted that 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.

Here, your request is for several records that contain information concerning research. Your requests are not simply about the investigation into Mr. Taleyarkhan's alleged misconduct. Arguably, to exam Mr. Taleyarkhan's conduct is to exam whether the research is valid. As Purdue indicated, "the examination committee will review available materials and interview individuals both inside and outside of Purdue, as appropriate, to identify specific issues of concern regarding the research." As such, it is my opinion Purdue appropriately denied your request for a copy of the Taleyarkhan bubble fusion review and a copy of the inquiry report into misconduct allegations against Taleyarkhan as well as other records related to the research under the research exception to disclosure found in I.C. §5-14-3-4(a)(6).

Purdue further contends that the records you request regarding the investigation may be withheld from disclosure under the deliberative materials exception found in I.C. §5-14-3-4(b)(6), which provides that intra-agency deliberative material, which contains expressions of opinion or is speculative in nature and is communicated for the purposes of decision making, may be excepted from disclosure at the discretion of the agency. Although Purdue bears the burden of proof to sustain a denial of access (See I.C. §5-14-3-9(f)), it is my opinion Purdue may rely on this exception to the extent the records are expressions of opinion or are speculative in nature or are communicated for the purposes of decision making.

Finally, I.C. §5-14-3-4(b)(8) provides that some personnel files of public employees may be excepted from disclosure at the discretion of the agency. Here, as the investigation is about Mr. Taleyarkhan's conduct, some of the records you requested could certainly be contained in Mr. Taleyarkhan's personnel file. So long as Purdue can sustain the denial of access (See I.C. §5-14-3-9(f)), Purdue may deny your request pursuant to I.C. §5-14-3-4(b)(8). If the information you

seek is required to be disclosed pursuant to I.C. §5-14-3-4(b)(8) (e.g. factual basis for disciplinary action resulting in suspension, demotion or termination), Purdue would be required to disclose that information but may still withhold from disclosure the remainder of the personnel file.

CONCLUSION

For the foregoing reasons, it is my opinion Purdue has not violated the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor