

March 21, 2000

Mr. Robb Baum
516A Burford Hall
Terre Haute, IN 47809

Re: Advisory Opinion 00-FC-
8 *Denial of Access to Public Records by Indiana State University.*

Dear Mr. Baum:

This is in response to your formal complaint, which was received on February 25, 2000. You have alleged that Indiana State University ("ISU") has violated the Indiana Access to Public Records Act ("APRA"), Indiana Code chapter 5-14-3, by denying you access to public records that you requested in a letter dated January 31, 2000. Ms. Melony A. Sacopulos, Executive Assistant to the President and General Counsel for ISU responded to your complaint in a letter dated February 29, 2000. A copy of her response is enclosed for your reference. For the reasons stated below, it is my opinion that ISU did not violate the APRA when they denied you access to information you requested because they do not currently maintain a public record that satisfies your request.

BACKGROUND

According to your complaint, you sent a public records request dated January 31, 2000, to the Director of the Student Judicial Programs at ISU requesting access to and a copy of the final results of any disciplinary proceedings under the ISU Code of Student Conduct against students who were alleged perpetrators of crimes of violence or nonforcible sex offenses for the 1998-1999 school year. Your request was based upon the 1998 amendments to the federal law, which are set forth at 20 USCA §1232g (b)(6)(B) and (C)¹. In her February 2nd response to your request, Ms. Bonita Odom McGee, Director of the Student Judicial Programs, stated that she was unable to comply with your request as ISU has yet to determine how it will respond to the 1998 amendments. Ms. McGee noted that the change in federal law would not require universities to disclose the information you requested, but the Legal Affairs office for ISU is now reviewing the issue and will be making recommendations in the near future. Ms. McGee stated that she did not believe that the APRA applies to disciplinary records of institutions of higher education and that this state law would not serve as a basis for releasing student record information.

In response to your formal complaint, Ms. Sacopulos clarified the response previously provided by Ms. McGee. Ms. Sacopulos noted that ISU is governed by and follows the APRA. Student information, however, is generally protected from disclosure under the Family Educational and Rights to

Privacy Act, commonly known as "FERPA," and codified at 20 U.S.C. §1232g. The APRA provides that if information is confidential under federal law, it is also confidential under state law. Ind. Code §5-14-3-4(a). In 1998, the U.S. Congress amended the FERPA to allow, but not require, disclosure of certain information concerning crimes of violence and nonforcible sex offenses without student permission. 20 U.S.C. §1232g(b)(6)(B). ISU could not provide this information even if it chose to do so because they do not currently categorize violations of its student conduct code as "crimes of violence" or "nonforcible sex offenses" and there is no state statute that requires ISU to create the list or record you requested. ISU is currently reviewing the 1998 amendments to the FERPA, mentioned in Ms. McGee's letter to you, but ISU is not required to create a public record that does not exist in order to respond to your request.

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." Ind. Code § 5-14-3-1. ISU is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of ISU during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

One of the exceptions provided at Indiana Code section 5-14-3-4(a)(3) is for records "required to be kept confidential by federal law." Public records that are confidential under Indiana Code section 5-14-3-4(a) may only be disclosed pursuant to some other state or federal statute or by order of a court under the rules of discovery. Under the FERPA, 20 U.S.C. §1232g, education records cannot generally be disclosed without permission of a student in the case of institutions of higher education. Your request to ISU for information concerning crime information as it relates to student disciplinary actions, was based upon the 1998 amendments to the FERPA which provides, in pertinent part, as follows:

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding--
(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and
(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

20 USCA §1232g(b)(6), as added by Public Law 105-244 (1998). This provision does not require an institution of higher education to disclose such information, only that the institution is not prohibited by FERPA from disclosing the information upon request. According to their responses to your request and complaint, ISU is currently considering how to proceed under these amendments.

The question remains whether the APRA requires ISU to disclose the information specified at 20 U.S.C. §1232g(b)(6)(B) to you upon request.² The general rule of the APRA is that public records are to be disclosed upon request unless they are excepted from disclosure. Ind. Code §5-14-3-3. If information held by ISU is confidential under federal law, the APRA does not permit disclosure of such information by public agencies except as provided under Indiana Code section 5-14-3-4(a). The FERPA, however, now excepts the information you requested from the general prohibitions against disclosure of student education records. ISU, however, does not currently maintain any lists or documents that contain the information you requested. According to ISU, the current student code of conduct does not categorize offenses as "crimes of violence" or "nonforcible sex offenses." Further, ISU is not required to produce the information you requested under any state statute. It is well recognized by Indiana courts that there is no obligation for a public agency to create a public record in order to respond to a public records request. See, *Laudig v. Marion County Board of Voters Registration*, 585 N.E.2d 700, 706 (Ind. App. 1992). For this reason, ISU was not obligated to create a public record in response to your request and therefore, did not violate the APRA by denying your request. If, however, an institution of higher education in Indiana does maintain the information you requested, it is my opinion that that institution would have to disclose that upon request under the APRA.

CONCLUSION

It is my opinion that Indiana State University did not violate the Access to Public Records Act by failing to produce the information you requested under 20 U.S.C. §1232g(b)(6)(B) and (C) because they do not currently maintain such information. If an institution of higher education in Indiana does maintain such information, however, it is my opinion that this information must be disclosed under the APRA.

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: Ms. Melony A. Sacopulos
Indiana State University

1 You asked for name of student charged, violation committed and any sanction imposed by the University.

2 The APRA does not specifically address disclosure of university student disciplinary records. As of December, 1999, Georgia is the only state that I am aware of that has required the disclosure of these records that are now exempted from the general rule of nondisclosure under FERPA.