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To:	James Dimos	**From:**	Stephanie Mammon, Adm. Asst.
Fax:	(317) 237-3900	**Date:**	April 20, 2015
Phone:		**Pages:**	_12___ (including cover sheet)
Re:	ESPN et al v University of ND Security 1501-MI-000017	**CC:**	

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Attached is an Order on Cross Motions for Dismissal and Judgment on the Pleadings entered this date.

STATE OF INDIANA)
) SS:
ST. JOSEPH COUNTY)

ST. JOSEPH SUPERIOR COURT

CAUSE NO. 71DO7-1501-MI-00017

ESPN, INC. AND PAULA LAVIGNE,

PLAINTIFFS

VS

UNIVERSITY OF NOTRE DAME SECURITY POLICE DEPARTMENT, A DEPARTMENT OF THE UNIVERSITY OF NOTRE DAME DU LAC,

DEFENDANT

- FILED -
APR 20 2015
St. Joseph Superior Court Clerk

ORDER ON CROSS MOTIONS FOR DISMISSAL AND JUDGMENT ON THE PLEADINGS

This cause came on for hearing on April 1, 2015, on Motions under Trial Rule 12(C) filed by both sides. First, on February 12, 2015, a Motion for Dismissal and Judgment on the Pleadings (the "Notre Dame Motion") was filed by the Defendant herein, denominated as "The University of Notre Dame Security Police Department, a Department of The University of Notre Dame Du Lac" (hereinafter referred to as "Notre Dame"). Thereafter, on March 10, 2015, Plaintiffs, ESPN, Inc., and Paula Lavigne (collectively referred to herein as "ESPN"), filed their Cross-Motion for Judgment on the Pleadings (the "Cross-Motion"). ESPN appeared at the hearing by its counsel of record, Attorneys James Dimos and Jennifer A. Rulon. Notre Dame likewise appeared by its counsel of record, Attorneys Damon R. Leichty and Georgina D. Jenkins.

ANALYSIS AND DISCUSSION

A. Introduction and Trial Rule 12(C).

The Court makes no findings of fact in a matter such as this. "The interpretation of a statute is a question of law." *In Re: Custody of G.J.*, 796 N.E.2d 756, 760 (Ind.Ct.App. 2003); and *Indiana Family & Social Services Administration v. Radigan*, 755 N.E.2d 617 (Ind.Ct.App. 2001). However, the Court does note that both parties have attempted to introduce facts outside of the pleadings. Those facts include the content of Notre Dame's website, whether or not Notre Dame maintains records responsive to ESPN's records request, and that ESPN has made similar requests to another university. None of those matters are properly before the Court on the pending Motions. Accordingly, those matters have not been considered by the Court in reaching its decision.

The Court views this as a straightforward (but certainly not a simple) matter of statutory construction. The job of this Court is to interpret and construe the statute in question, not to legislate. "If a statute is unambiguous, that is, susceptible to but one meaning, we must give to the statute its clear and plain meaning." *Bolin v. Wingert*, 764 N.E.2d 201, 204 (Ind. 2002).

Both sides have thoroughly and effectively briefed and argued their respective positions, and they have presented to the Court an extremely interesting case. The Court expected skilled advocacy by both sides – and neither side has disappointed.

By the Notre Dame Motion and the Cross-Motion, both parties seek the entry of a judgment on ESPN's Complaint pursuant to Trial Rule 12(C) of the Indiana Rules of Trial Procedure. Trial Rule 12(C) reads as follows:

> (C) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

A Trial Rule 12(C) motion attacks the legal sufficiency of the pleadings. *See Midwest Psychological Center, Inc. V. Indiana Depart. of Admin.*, 959 N.E.2d 896, 902 (Ind.Ct.App. 2011). In considering a Trial Rule 12(C) motion, the Court must accept as true all well-pleaded facts in the complaint and base its decision solely on the pleadings. *See Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010). Judgment on the pleadings is appropriate only when "the facts shown by the pleadings clearly establish that the non-moving party cannot in any way succeed under the facts and allegations therein." *Midwest Psychological Center, Inc.*, 959 N.E.2d, at 902.

B. Interpretation of Access to Public Records Act.

The University of Notre Dame is a private university located in St. Joseph County, Indiana. It has been sued in this Court by ESPN and ESPN's reporter because Notre Dame allegedly has records that ESPN wants and that Notre Dame has withheld. ESPN alleges that Notre Dame has to produce the requested records under Indiana law because Notre Dame exercises certain "police powers."

Specifically, ESPN's Complaint asks the Court to require Notre Dame to produce records of the University of Notre Dame Security Police Department ("NDSP"), which ESPN alleges is a "university police force." ESPN claims that Notre Dame and NDSP are required to produce the requested records pursuant to Indiana's Access to Public Records Act ("APRA") contained in Indiana Code §5-14-3-1 *et seq*. The Complaint

alleges also that NDSP is a "public law enforcement agency" under APRA. In fact, ESPN uses that term no less than seven (7) times in its Complaint, even though that term is not contained in APRA.

As an initial matter, it is noted that Notre Dame's campus police officers do not constitute a separate legal entity. The enabling statute that authorizes Indiana's private colleges and universities to appoint campus police officers, only allows the colleges and universities themselves to do so. See Indiana Code §21-17-5-1 *et seq.* It does not authorize the colleges and universities to establish separate and distinct legal entities to exercise police powers.

In fact, the statute does not use the term "campus police department," "campus police force," or any similar term. All it does is authorize the colleges and universities themselves to appoint police officers with certain enumerated powers. If Notre Dame is a "public agency" because it appoints police officers, it is a public agency, period. Thus, the question raised by ESPN's Complaint is really whether the University of Notre Dame, the entire University of Notre Dame, is now required to produce all of its records (such as academic, business and financial records) simply because it appoints campus police officers.

Any analysis of the pending motions must begin with the quite recent decision of our Indiana Supreme Court in *Evansville Courier & Press v. Vanderburgh County Health Department*, 17 N.E.3d 922 (Ind. 2014), which held that:

> APRA is intended to ensure Hoosiers have broad access to most government records:
>
> > A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that

> all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the 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. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

Ind. Code §5-14-3-1(2010). Thus, we apply a presumption in favor of disclosure, and the burden rests upon the Department to rebut that presumption. *Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208, 212 (Ind. 1991). *Evansville Courier & Press*, at 928-929.

The Court remains ever mindful of the important policy reflected in APRA and the need to interpret the statute consistent with that policy. Yet, the *Evansville Courier* decision does not really provide much guidance in determining whether a private entity can be made subject to the production requirements of APRA. *Evansville Courier* stands for the proposition that APRA is to be "liberally construed" in determining what records must be produced by a governmental agency. It cannot be taken as authority for the proposition that APRA must be "liberally construed" in order to cause private citizens to be subject to APRA.

APRA only applies to records of an entity or organization that is a "public agency." That term is defined in the various paragraphs of Indiana Code §5-14-3-2(n). Notre Dame initially focuses on the part of the definition contained in Indiana Code §5-14-3-2(n)(6), which provides that a public agency includes:

> Any law enforcement agency, which means an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff's department of a political subdivision, prosecuting attorneys, members of the excise police division of the alcohol and tobacco commission, conservation officers of the department of natural resources, gaming agents of the

> Indiana gaming commission, gaming control officers of the Indiana gaming commission, and the security division of the state lottery commission.

Notre Dame contends that it does not fall within that statutory definition. The Court agrees. Notre Dame is clearly not "an agency or a department of any level of government."

However, the inquiry does not end there. The definition of "public agency" also includes entities and organizations described in the other paragraphs of subsection (n). ESPN argues that paragraph (1) of that subsection [I.C. §5-14-3-2(n)(1)] is the critical paragraph. It provides that a "public agency" includes:

> (1) Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.

ESPN's position, in essence, is that Notre Dame exercises the state power of providing police services. While the police officers appointed by Notre Dame may not be exactly like other police officers, they do have the authority to exercise the most critical police functions on and around the Notre Dame campus, including the authority to investigate criminal activity and make arrests. *See* Indiana Code §21-17-5-4(a).

Our Indiana Supreme Court has recognized that private universities who appoint campus police officers are "state actors" as to the actions of those officers for constitutional law purposes. "A private entity is deemed a state actor when the state delegates to it a traditionally public function." *Finger v. State*, 799 N.E.2d 528, 532 (Ind. 2003). In that case, our Indiana Supreme Court held that the campus police department operated by Butler University was a "state actor" for purposes of determining the constitutional limits on the search and seizure powers of that department.

The powers given to officers appointed by Indiana's private colleges and universities are significant. "The delegation of police powers, a governmental function, to the campus police buttresses the conclusion that the campus police act under the color of state authority." *Henderson v. Fisher*, 631 F.2d 1115, 1118 (3rd Cir. 1980), quoted with approval in *Finger v. State*, at 532. However, it does not follow that Notre Dame is a public agency under APRA simply because NDSP is a "state actor" for constitutional law purposes. *Kentner v. Indiana Public Employers' Plan, Inc.*, 852 N.E.2d 565, 573-74 (Ind.Ct.App. 2006).

The Indiana Legislature delegated to the governing boards of Indiana's accredited private colleges and universities the authority to appoint officers with significant police authority. See Indiana Code §§21-17-5-3, 21-17-5-4, and 21-17-5-7. However, the powers exercised by those officers are not part of the executive, administrative, judicial or legislative power of the state. Rather, because the Legislature has granted those powers to private third parties, namely the "governing board" of each of the colleges and universities, they are powers granted by the state. The governing boards are "state actors" for purposes of determining the constitutional limits of such power. But that does not cause them to become "public agencies" under APRA. Id. at 572. APRA is a statute. Interpreting that statute does not involve the same analysis as imposing and defining the limits of police powers under the United States Constitution. They are simply two (2) different concepts. ESPN is not alleging a constitutional right to the records.

ESPN's position is that a private entity that has been authorized by the state to exercise a power that the state has traditionally exercised, such as police powers, automatically becomes a "public agency" under APRA. The Public Access Counselor

essentially agreed with that conclusion when it issued his opinion dated October 31, 2014. The only paragraph of Indiana Code §5-14-3-2(n) cited by the Public Access Counselor was paragraph (n)(1). The Public Access Counselor stated that he was "not comfortable" that a private organization could have police powers and not be subject to APRA. He then concluded that "the Notre Dame Security Police Department should be considered a public law enforcement agency subject to the Access to Public Records Act." (emphasis added)

Maybe the Public Access Counselor is correct that Notre Dame should be covered by APRA with respect to the activities of its police officers. But the question before the Court is whether it is covered. It may be hard to argue with the policy that an entity exercising police powers should have to disclose its records pertaining to such actions. However, an entity falling within the definition of a "public agency" is an agency subject to APRA disclosure for all purposes. There is no "to the extent of" language in paragraph (n) (1). It is difficult to fathom that the Indiana Legislature, without directly saying so, would intend the University of Notre Dame, Taylor University, Valparaiso University (and on and on) to have to produce pursuant to APRA all of their records concerning any matter whatsoever to anyone who asks, simply because those private institutions availed themselves of the Legislature's invitation to appoint campus police officers.

The Court recognizes that ESPN is not asking for all of the records of Notre Dame; only those records pertaining to police activities. The Court is not unnecessarily looking for a "slippery slope." Rather, recognizing the expansive effect of ESPN's interpretation of APRA is instructive as to the Legislature's intent. ESPN's position

would lead to results that cannot be attributed to the Legislature absent a clear expression by the Legislature.

Both parties have devoted a great deal of time in their respective briefs to the concept of "legislative acquiescence." Between 2003 and 2011, three (3) different Public Access Counselors issued opinions to the effect that private colleges who appoint campus police officers are not public agencies under APRA. Notre Dame argues that since the Legislature did not amend APRA after those opinions were issued, the Legislature should be deemed to have intended the result reflected by the opinions. While Notre Dame has cited no case law or other authority directly applying the doctrine of legislative acquiescence to an advisory opinion given by the Public Access Counselor, its point is well taken. If the Legislature thought that those three (3) Public Access Counselors were wrong, and that private colleges and universities in Indiana were intended to be public agencies under APRA, the Legislature has had since 2003 to codify that intent. It has not done so.

It may have been preferable if APRA expressly included or excluded private colleges and universities and/or their campus police departments in defining public agency. Nevertheless, the statute is clear enough. The Legislature authorized private colleges and universities to appoint officers who exercise certain police powers. Therefore, Notre Dame is not exercising an executive, administrative, judicial or legislative power of the state. It is exercising powers granted by the state.

The Court shares the Public Access Counselor's discomfort with the notion that a private party can exercise police powers without providing to the public the access to records required by APRA. The Court is similarly uncomfortable with the notion that a

private entity could be subject to APRA for all purposes without any clear expression that the Legislature intended such a result. Yet, ultimately this case is not about "comfort." It is about what the statute says. Over an eight (8) year period from 2003-2011, three (3) different Public Access Counselors interpreted the statute, on three (3) separate occasions, as not applying to private colleges and universities that appoint police officers. Those opinions were correct when given, and they remain correct today.

ESPN's position assumes that the Indiana Legislature has the constitutional authority to require a private person or entity that is not publicly funded to produce its records under APRA. Such a requirement would certainly give rise to grave concerns about the right to privacy and the right to be free from unreasonable searches and seizures. However, those concerns do not have to be addressed in this order. The Indiana Legislature has not attempted to impose on private colleges and universities the obligation to comply with APRA. The Court will not substitute its judgment for that of the Legislature.

Perhaps ESPN would argue that APRA should be narrowly interpreted as only applying to private colleges with respect to their campus police activities. Perhaps that is why it used the term "public law enforcement agency" so frequently in its Complaint. However, an entity either is or is not a public agency. The Legislature only authorized the colleges and universities themselves to appoint police officers. The Court cannot re-write the statute so that it applies to certain activities of an entity, and not to others.

Even with the concerns about privacy and unreasonable searches and seizures discussed above, the Legislature may very well have the authority to pass a law that would require public access to records under APRA to the extent that the records pertain

to the exercise of state authorized police powers. After all, the colleges and universities are not obligated to appoint police officers. However, as things now stand, there is nothing in the language of the statute that could be interpreted as limiting access to the records of a private university to only those pertaining to police activities. Now, after all the years that APRA has been in effect and generally understood to not apply to private universities, it would not be appropriate for the Court to, in essence, re-write the statute. The Indiana Legislature has had many years to expressly provide that Indiana's private colleges and universities are subject to APRA. It has never done so. This Court will not strain the language of the statute in order to do what the Legislature has not, even though there are indeed persuasive reasons why the statute should be amended to read the way ESPN desires.

DECISION

Perhaps this case will cause the Indiana Legislature to consider this important matter. ESPN makes persuasive policy arguments. However, based on how the statute now reads, Notre Dame's Motion must be, and hereby is, granted and sustained. Pursuant to Trial Rule 12(C) the Complaint filed by ESPN on January 15, 2015, is hereby dismissed. The Cross-Motion filed by ESPN is denied and overruled.

Copies of this Order sent to Attorneys James Dimos and Jennifer A. Rulon, and to Attorneys Damon R. Leichty and Georgina D. Jenkins, all by regular mail.

All of which is ordered this 20th day of April, 2015.

Steven L. Hostetler, Judge
St. Joseph Superior Court

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