



December 15, 2021

Pamela Whitten  
Office of the President  
Indiana University  
Bryan Hall 200  
107 S. Indiana Ave.  
Bloomington, Indiana 47405

*Sent via Electronic Mail (iupres@iu.edu)*

Dear President Whitten:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned by the inquiry into the emails of law professor Steve Sanders by a law firm that has previously been retained by Indiana University (IU) in other matters, as well as accusations by General Counsel Jacqueline Simmons that Sanders's speech on matters of institutional affairs violated university policy. Professor Sanders's investigation into the university's handling of its presidential search and subsequent publications on that topic are protected by the First Amendment.

### **I. Sanders Publishes a Story on IU's Presidential Search Process**

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

Steve Sanders is a tenured law professor at Indiana University Maurer School of Law. On October 4, 2021, Sanders posted a story to *Medium* detailing how the Indianapolis law firm Hoover, Hull, Turner LLP—which has been retained by the university in other matters<sup>1</sup>—had made a request under the Indiana Access to Public Records Act (APRA) for any emails of his

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<sup>1</sup> See, e.g., Notices of Appearance in *Doe v. Trustees of Indiana Univ.*, No. 1:20-cv-02006-JRS-MJD (S.D. Ind., Aug. 25, 2020), ECF No. 14; *Doe v. Trustees of Indiana Univ.*, No. 1:21-cv-00973-JRS-MPB (S.D. Ind., Apr. 23, 2021), ECF No. 16.

relating to IU’s presidential search.<sup>2</sup> Sanders noted that he had been doing research for an upcoming article about IU’s presidential search process, and he hypothesized that the request was on behalf of IU itself in an effort to find the details of how Sanders learned the information he acquired for that article.<sup>3</sup>

Sanders posted the article concerning his investigation into the presidential search to *Medium* on October 6.<sup>4</sup> In that article, Sanders discussed at length the results of his investigation, including that IU’s Board of Trustees substituted its own candidates for the four offered by the search committee.<sup>5</sup> Sanders also accused the Board of violating the Indiana Open Door Law because it never publicly discussed or approved a payment of about \$582,000 to the outgoing president for “consulting services.”<sup>6</sup>

Thereafter, Sanders submitted an APRA request of his own in an effort to discover who was behind the request for his emails. Sanders also filed a complaint with the Indiana Public Access Counselor formally alleging that IU violated the Open Door Law.<sup>7</sup>

Jacqueline Simmons, IU’s General Counsel at the time, responded to Sanders’s Public Access Counselor complaint on November 3, 2021.<sup>8</sup> While the primary purpose of the letter was to respond to Sanders’s allegations that IU violated the Open Door Law, Simmons also asserted that Sanders violated multiple IU policies. Specifically, Simmons alleged that Sanders violated the university’s policies on management of institutional data (DM-01) and disclosing information to third parties (DM-02).<sup>9</sup>

## **II. IU’s Actions Chill Expression Protected by the First Amendment**

If the law firm’s APRA request was indeed made on behalf of IU, the university contravenes its obligations under the First Amendment and its own laudable promises of free speech and academic freedom. Additionally, IU’s accusation that Sanders violated university policy by investigating its presidential search process and publishing his findings chills his and other faculty members’ protected expression in violation of the First Amendment.

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<sup>2</sup> Steve Sanders, *I’ve been looking into IU’s presidential search. Now a law firm is demanding to snoop through my email.* (Oct. 4, 2021), available at <https://medium.com/@stevesan/ive-been-looking-into-iu-s-presidential-search-and-now-a-law-firm-is-demanding-my-email-c1ba151404f8>.

<sup>3</sup> *Id.*

<sup>4</sup> Steve Sanders, *You have no idea how strange this has been’: The long, difficult search for IU’s 19th President* (Oct. 6, 2021), available at <https://medium.com/@stevesan/you-have-no-idea-how-strange-this-process-has-been-the-difficult-search-for-iu-s-19th-president-f61b473014d4>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Complaint of Steve Sanders to the Indiana Public Access Counselor concerning Open Door Law violation by Indiana University (Oct. 8, 2021) (on file with author).

<sup>8</sup> Indiana University’s Response to Formal Complaint 21-FC-169 (Nov. 3, 2021) (on file with author).

<sup>9</sup> *Id.*

### **A. *The First Amendment Applies to IU as a Public University***

It has long been settled law that the First Amendment is binding on public universities like IU.<sup>10</sup> Accordingly, the decisions and actions of a public university must be consistent with the First Amendment. The Supreme Court of the United States has recognized that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment[.]”<sup>11</sup>

In addition, IU rightly proclaims a commitment to upholding its First Amendment obligations as one of its institutional values. The university promises that it “is committed to protecting the rights of students, *academic appointees*, staff, and invited guests and visitors to free speech and expressive activity, such as assembling and speaking in public areas of campus, as well as *writing, publishing*, and inviting speakers *on any subject*.”<sup>12</sup> IU also states that it “is committed to the concept of academic freedom and recognizes that such freedom, accompanied by responsibility, attaches to all aspects of a teacher’s or librarian’s professional conduct. Within this context, each person observes the regulations of the University, and maintains the right to criticize and to seek revision and reform.”<sup>13</sup>

### **B. *Simmons’s Allegations that Sanders Violated University Policy Unconstitutionally Chills Sanders’s Protected Expression***

When Sanders inquired into and published commentary on the presidential search process, he was exercising his First Amendment right to speak on a matter of public concern. IU’s formal assertions, through its chief legal representative, that Sanders’s protected expression violates university policy are contrary to the university’s well-established obligations under the First Amendment, chilling protected expression.

#### **i. Sanders’s investigation into IU’s presidential search is protected by the First Amendment.**

If Sanders’s expression was pursuant to his duties as a professor, it is protected by academic freedom. Several federal courts of appeal have acknowledged that academic speech enjoys First Amendment protection even if it occurs pursuant to a professor’s official duties.<sup>14</sup> Most recently, the United States Court of Appeals for the Sixth Circuit made clear that, in their teaching and scholarship, “professors at public universities retain First Amendment protections.”<sup>15</sup> One important function of university professors is the ability to participate in shared governance of the institution. To that end, IU policy expressly recognizes that

<sup>10</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>11</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>12</sup> IND. UNIV., THE FIRST AMENDMENT AT INDIANA UNIVERSITY UA-14 (rev. Jan. 5, 2020), <https://policies.iu.edu/policies/ua-14-first-amendment-indiana-university/index.html> (emphasis added).

<sup>13</sup> IND. UNIV., CODE OF ACADEMIC ETHICS ACA-33 (rev. Nov. 12, 2019), <https://policies.iu.edu/policies/aca-33-code-academic-ethics/index.html>.

<sup>14</sup> See, e.g., *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019); *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011).

<sup>15</sup> *Meriweather v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021).

“[a]cademic freedom includes the freedom to express views on matters having to do with the university and its policies, and on issues of public interest generally.”<sup>16</sup> Accordingly, Sanders has an interest as a member of the faculty in the operations and leadership selection of IU and whether the university is upholding its duties to act transparently. That interest and Sanders’s attempts to hold the university accountable are protected by academic freedom.

If you view Sanders’s activity as separate from his role as a professor, the First Amendment protections are even stronger. Faculty members at public universities do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment,”<sup>17</sup> but instead retain a right to speak—and to gather information<sup>18</sup>—as private citizens on matters of public concern. Sanders’s inquiry and articles on IU’s presidential search process are speech as a private citizen, not actions undertaken at the direction of or on behalf of the university. The “critical question” in determining whether the speech was that of an employee or private citizen is “whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”<sup>19</sup> Colleges ordinarily do not employ their faculty to post on their personal blogs, and public expression directed to a public audience—as opposed to a faculty member’s chain of command—are indicia of speech as a private citizen.

Sanders’s posts also address matters of public concern. “Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community[.]”<sup>20</sup> Indiana University is the state’s flagship institution of higher education, and all citizens of Indiana have an interest in the university’s administration and how its leaders are chosen. That hundreds of thousands of taxpayer dollars were paid to the outgoing president heightens the already-significant community interest. Sanders’s investigation and subsequent blog posts fall squarely within the rights afforded to him as a faculty member and a member of the university community.

## **ii. Accusations of policy violations chill protected speech.**

Accusations that constitutionally protected speech violates university policy can themselves violate the First Amendment, even if the speaker is never actually disciplined for that speech. The question is not whether formal punishment is meted out, as even threats of punishment can violate the First Amendment.<sup>21</sup> The objective test that courts apply is whether the conduct “would likely deter a person of ordinary firmness from continuing to engage in protected activity.”<sup>22</sup>

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<sup>16</sup> *University Policies: Academic Freedom*, IND. UNIV., <https://policies.iu.edu/policies/aca-32-academic-freedom/index.html#policyStatement> (last visited Dec. 8, 2021).

<sup>17</sup> *Connick v. Myers*, 461 U.S. 138, 140 (1983).

<sup>18</sup> The First Amendment protects not only the right to speak, but the corollary rights to solicit and receive information. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

<sup>19</sup> *Lane v. Franks*, 573 U.S. 228, 240 (2014).

<sup>20</sup> *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

<sup>21</sup> *Surita v. Hyde*, 665 F.3d 860, 878 (7th Cir. 2011) (“The First Amendment prohibits threats of punishment designed to discourage future speech.”).

<sup>22</sup> *Id.*

Investigations into protected expression or declarations that protected speech violates policy may meet this standard.<sup>23</sup> For example, a public university launched an investigation into a tenured faculty member’s writings on race and intelligence, announcing an *ad hoc* committee to review whether the professor’s expression—which the university’s leadership said “ha[d] no place at” the college—constituted “conduct unbecoming of a member of the faculty.”<sup>24</sup> This investigation itself constituted an implicit threat of discipline, and the resulting chilling effect amounted to a cognizable First Amendment harm.<sup>25</sup>

Here, the university’s general counsel, an administrator charged with developing and implementing employment policies, wrote in a letter to an office of the State of Indiana asserting that one of its faculty members violated two university policies. Although Simmons did not issue a specific threat of discipline to Sanders directly, she did provide in an official communication on behalf of the University that “[i]n publishing . . . confidential information on *Medium*, Professor Sanders violated multiple IU policies.”<sup>26</sup>

This authoritative assertion—an accusation by the university’s principle legal officer of a policy violation, and which, if enforcement proceedings are brought, carries with it the possibility of termination—satisfies the ordinary firmness test. An ordinary faculty member would be dissuaded from continuing to engage in his or her protected expression upon learning that the university’s administration believes his or her speech is unlawful and may be punished in the future. Likewise, other faculty members who learn of the formal position taken by the university will be chilled from exercising their rights—whether as private citizens or as faculty members—to gather information, request records,<sup>27</sup> and share their findings. Simmons’s accusation before the Indiana Public Access Counselor that Sanders violated university policy is likely to deter both Sanders and other IU faculty members from engaging in protected expression.

### ***C. If IU is Behind the Law Firm’s APRA Request, IU Chills Sanders’s Protected Expression***

The Academic Freedom Alliance (AFA) has also written a letter to you regarding this situation, focusing specifically on the APRA request for Sanders’s emails.<sup>28</sup> In his letter on behalf of the AFA, Keith Whittington explains that, while faculty emails are legally subject to public records requests, “[i]t would be a particularly troubling attack on academic freedom if faculty emails are accessed at the request of university officials.”<sup>29</sup> The letter explains in

<sup>23</sup> See, e.g., *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

<sup>24</sup> *Levin v. Harleston*, 966 F.2d 85, 89 (2d Cir. 1992).

<sup>25</sup> *Id.* at 89–90.

<sup>26</sup> Indiana University’s Response to Formal Complaint 21-FC-169 (Nov. 3, 2021) (on file with author).

<sup>27</sup> The Indiana Access to Public Records Act provides that “[a]ny person” may request and inspect public records. Ind. Code § 5-14-3-3(a). Once public records are provided to a citizen, the state has no right to restrain their distribution. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (if one “lawfully obtains” information, “state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”).

<sup>28</sup> Letter from Keith Whittington, Chair of the Academic Freedom Alliance, to Pamela Whitten, President of Indiana University (Nov. 15, 2021) (on file with author).

<sup>29</sup> *Id.*

detail how public records requests for faculty emails can be abused and used to chill academic freedom.

Indeed, IU policy at the time generally prohibited technicians or administrators from accessing electronic information like emails except in specific circumstances, such as reasonable belief that an individual has committed a violation of law or policy.<sup>30</sup> Even then, the university must make a reasonable effort to notify the affected individual.<sup>31</sup> Interestingly, that policy was updated Monday to add that “[u]niversity administrators shall not initiate a public records request under [APRA] seeking access to electronic information (as defined in this policy) of Indiana University students, faculty or staff.”<sup>32</sup> While we applaud this policy change, which was reportedly made on your initiative, it only adds to our concern that IU itself was behind the request for Sanders’s emails.

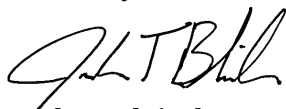
FIRE joins AFA to request that IU clearly state whether the APRA request filed by Hoover, Hull, Turner, LLP was done on the university’s behalf. If the university is the client of the firm in this matter, we call on IU to waive any privilege, including the attorney-client privilege, in order to bring public transparency to its administrators’ conduct in responding to public criticism.<sup>33</sup>

### **III. Conclusion**

Sanders’s investigation and *Medium* posts are clearly protected. IU’s accusation that Sanders violated university policy by publishing those posts, and any involvement of IU in seeking Sanders’s emails, impermissibly chills speech protected by the First Amendment and academic freedom.

We request receipt of a response to this letter no later than the close of business on January 4, 2022, stating whether the APRA request into Sanders’s emails was made at IU’s behest and confirming that IU will not pursue an investigation or disciplinary sanctions against Sanders in this matter.

Sincerely,



Joshua Bleisch  
Faculty Legal Defense Fund Fellow  
Indiana University Maurer School of Law, Class of 2019

Cc: Joseph Scodro, Interim Vice President and General Counsel

Encl.

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<sup>30</sup> IND. UNIV., PRIVACY OF ELECTRONIC INFORMATION AND INFORMATION TECHNOLOGY RESOURCES IT-07 (rev. Aug. 17, 2011) <https://policies.iu.edu/policies/it-07-privacy-it-resources/index.html>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> IU is the holder of any such privilege and can waive it at its pleasure.

## Authorization and Waiver for Release of Personal Information

I, Steve Sanders, do hereby authorize Indiana University (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.



12/15/2021

\_\_\_\_\_  
Date