

February 2, 2006

Sent Via Facsimile

Ms. Julie Wheeland
502 Eagle Court
Valparaiso, IN 46383

*Re: Consolidated Formal Complaints 06-FC-2; 06-FC-3; Alleged Violation of the
Access to Public Records Act by Porter, a County Hospital*

Dear Ms. Wheeland:

This is in response to your formal complaints alleging that Porter violated the Access to Public Records Act ("APRA") by withholding certain information from a personnel file, and not timely disclosing other records.

BACKGROUND

I have consolidated two complaints that you filed with the Office of the Public Access Counselor. The first, #06-FC-2, alleges that the information provided to you by Porter in response to a request for "all information in Hugh King's personnel file related to the disciplinary action that resulted in his suspension and termination" was not sufficient under the APRA. In your second complaint, #06-FC-3, you allege that Porter has constructively denied access to documents contained in three requests that you sent Porter on September 1, 2005. As of the date of your second complaint, Porter had only acknowledged that it was working on production. Because you have neither received any updated information about the progress of Porter in compiling records, nor have you received the records, you believe that Porter violated the APRA.

I sent a copy of your complaints to Porter. I received in response a letter from Porter's Vice President of Corporate Compliance & Internal Audit, Ms. Shelley Koltnow. In her response to 06-FC-2, Ms. Koltnow stated that Porter has disclosed the factual basis for Mr. King's termination. In her response to 06-FC-3, Ms. Koltnow stated that you typically receive

much of the information that you requested, other information was being identified and compiled for legal review, and other records would be denied. A letter would be sent to you indicating the status of your requests. Ms. Koltnow indicated that the response time is reasonable because your requests are broad, often indefinite, and duplicative. They also implicate a large number of documents. Also, documents are not stored in a central repository. Many must be reviewed for information that must be redacted. Therefore, Porter has not violated the Access to Public Records Act with respect to either complaint, according to Ms. Koltnow.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). A public agency that receives a request via U.S. Mail, facsimile, or electronic mail must respond within seven (7) days, or the request is deemed denied. IC 5-14-3-9(b). A public agency may deny a written request for a record if it issues the denial in writing, including a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record. IC 5-14-3-9(c). What is contemplated for an agency response is acknowledgement that the agency received the request, and information regarding how and when the agency intends to comply.

The APRA does not contain a requirement that an agency produce a record within a time certain. Rather, the agency should produce the records within a reasonable period of time, under the facts and circumstances. What is reasonable depends upon the number of records requested, the number of responsive records, whether the records are recent or aged, and whether the records are located off-site, among other considerations.

Personnel files of current or former public employees are exempt from disclosure at the discretion of the public agency. IC 5-14-3-4(b)(8). However, even if the public agency declines to make the entire personnel file available, the public agency is required to disclose certain information. Among the information that must be disclosed from a personnel file is “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.” IC 5-14-3-4(b)(8)(C).

To address your request for information about the King disciplinary matter, Porter sent you a memorandum dated December 2, 2005, in which Mr. Gregg Wallander, counsel for Porter, drafted the “factual basis” for the “principal component” of the disciplinary action:

“Mr. King was terminated for disclosing confidential personnel matters, marketing programs and strategic planning, as well as for the misuse and distortion of information known to him only by virtue of his role as Vice President and Chief Financial Officer. Such conduct constituted substantial cause as that term was defined by his employment agreement, i.e. the ‘failure to comply with established [Porter] policies and procedures’ and the ‘unauthorized disclosure or use of a trade secret or other confidential’ information.”

You contend that this information was inadequate to comply with the APRA, because Porter usually supplies the actual termination letter when you have requested similar information

from a personnel file in the past. You also state that Mr. Wallander omitted the dates on which Hugh King's suspension began and ended, the precise description of the conduct which resulted in the suspension, and which rules or codes were violated. You contend that Mr. Wallander should have stated what specific confidential personnel matters, marketing programs, and strategic planning were implicated in his dismissal.

Porter contends that, in accordance with other opinions of the Public Access Counselor, Porter was not required to disclose the source document that shows the factual basis for the discharge of the employee. In *Opinion of the Public Access Counselor 02-FC-22*, the former Public Access Counselor opined that under the prior version of the law, the required disclosure was of "information" rather than a record. Therefore, this office stated that it is sufficient for the agency to opt to draft a record that supplied "information concerning disciplinary actions in which final action has been taken and that resulted in the employee being disciplined or discharged," as the former version read. An opinion that I issued in *Opinion of the Public Access Counselor 05-FC-7* followed the opinion in *02-FC-22*.

As cited above, the current standard for required disclosures of final disciplinary action from a personnel file does not contain the word "information." "Factual basis" is not defined in the APRA. The underpinnings for our opinion in *02-FC-22*, the use of the term "information," is no longer in play in the current version of the statute. Although I do not disapprove of an agency opting to draft a factual basis by creating a new document when the requester is agreeable to this method of compliance with the APRA, I can find no basis for adhering to that part of *02-FC-22* relating to this issue, in light of the change in the language. I note that "information" is still in that part of the law mandating disclosure of information relating to the status of any formal charges against the employee. A public agency may provide this latter information by creating a document.

If a person requests a record containing the "factual basis" for a final disciplinary action, the agency must disclose the factual basis from any responsive records. However, Porter is not required to disclose every part of a record or records that contain the "factual basis." If a record contains disclosable and nondisclosable information, the agency is required to separate the nondisclosable part of the record and disclose the remainder. IC 5-14-3-6(a).¹ I find that Porter did not intentionally violate the APRA, given our former precedents.

Porter contends that it has not denied you records identified in your September 1 request by delaying production. Rather, it constructs a careful argument that it contends demonstrates compliance with the APRA. However, I am not convinced that the circumstances cited justify the span of time that has elapsed from your request. Four months is a lengthy period of time in which to wait for the records that you requested or a denial of the records. Further, we have stated many times that a public agency, in order to demonstrate that it is complying, should remain in regular communication with the requester, as well as disclose records that become

¹ Porter may wish to consider whether the holding in *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003), that factual matters not inextricably linked with the government agency's decision making process must be disclosed, applies to a record containing both disclosable and nondisclosable information from a personnel file. Without further research, I decline to opine whether or not the *Indianapolis Star* holding is applicable where personnel file information is concerned.

available before others are ready. To the extent that Porter has given you some of your requests in connection with public meetings of the Board, Porter is not required to provide additional copies of these records. IC 5-14-3-9(e).

From an examination of your specific requests, I would advise Porter to seek clarification from you as to the scope of your requests. In addition, some requests suggest that a record may not already exist, such as your request for “a list of all contracted services, including the scope and nature of such services.” While any such contracts are disclosable, no list may exist. However, if Porter intended to comply by locating all responsive contracts, Porter should have disclosed those contracts as it identified them, rather than waiting five months to make any of the records available.

You requested “the objective of and anticipated source of financing for the [2005-2007] capital expenditures.” Porter contends that any records fitting that request would disclose information that is exempt under the Public Hospital Act, IC 16-22-3-28. Without opining whether such an exemption would apply to the records you requested, I believe that Porter has had more than ample time within which to review your September 1 request and deny it, at least on the basis of the argument Porter made in its complaint response. In any event, Porter must identify what records are responsive, and state the exemption that applies to each record. *See* IC 5-14-3-9(c).

CONCLUSION

For the foregoing reasons, Porter should provide you with records that disclose the “factual basis” for the termination of Mr. King, subject to Porter’s obligation to remove nondisclosable material. Also, it is my opinion that Porter has unreasonably delayed disclosure of the records you requested, in violation of the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Shelley Koltnow