



STATE OF INDIANA

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October 18, 2010

Mr. Steven T. Gerber
[Address Redacted]

Re: Formal Complaint 10-FC-212; Alleged Violation of the Access to Public Records Act by the Indiana Department of Natural Resources

Dear Mr. Gerber:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Natural Resources (the "DNR") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. A copy of the DNR's response to your complaint is enclosed.

BACKGROUND

In your complaint, you allege that on September 2, 2010, you requested via telephone access to DNR records that show the factual basis for the five-day suspension of Lt. Jerry Shepard on April 14, 2009. DNR responded to your request by stating, "Lt. Shepard was suspended for violation of a direct order," but did not provide any documents showing the factual basis for that decision. On September 10th, you made a second request for a copy of the Statement of Charges filed by Capt. Troche against Lt. Jerry Shepard dated April 6, 2009. DNR responded on September 13th and informed you that the record was not disclosable.

DNR Chief Legal Counsel Kari Evans Bennett responded to your complaint. Mr. Evans Bennett maintains that her response to you informing you that Mr. Shepard was suspended for violation of a direct order satisfies her obligations to provide the factual basis for the suspension. With regard to your request for the Statement of Charges, Ms. Evans Bennett claims that DNR has the authority to withhold it from disclosure under I.C. § 5-14-3-4(b)(6) and (b)(8). She states that DNR's division of Law Enforcement uses the Statement of Charges in disciplinary proceedings regarding Indiana Conservation Officers. The Statement of Charges contains internal deliberative material, including expressions of opinion communicated for the purpose of decision making, which is nondisclosable per I.C. § 5-14-3-4(b)(6). If the discipline is recommended, other documents called Special Orders are created to document the discipline. Ms. Evans

Bennett adds that DNR has already provided you with the Special Order conferring the discipline, but the Statement of Charges is a personnel record that DNR does not disclose to the public. In order to comply with the provision in subsection 4(b)(8)(C) requiring DNR to disclose the factual basis for the suspension, Ms. Evans Bennett noted in her response that the suspension was the result of the officer's violation of a direct order.

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.” I.C. § 5-14-3-1. The DNR does not contest that it is a “public agency” under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the DNR's public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Personnel files of public employees are generally excepted from disclosure at the discretion of the agency, except for the items specifically required by the APRA to be disclosed. I.C. § 5-14-3-4(b)(8). One of those items 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.” I.C. § 5-14-3-4(b)(8). However, as Counselor Neal opined,

I.C. § 5-14-3-4(b)(8) does not require an agency to allow inspection of all records related to a personnel action. For instance, I do not think the law would require disclosure of a detailed narrative of the events leading to a suspension or termination. Instead, the factual basis for the action must be disclosed. The agency has the discretion to provide more than that but is only required to disclose the portion of the record identifying the factual basis that lead to the suspension.

Opinion of the Public Access Counselor 09-FC-175. I agree with Counselor Neal insofar as I do not believe that the APRA requires public agencies to release every piece of information related to a disciplinary action. That much is clear from the plain meaning of the provision's language calling for the factual *basis* to be disclosed. Webster's dictionary defines “basis” as, “(1) That on which anything rests; support; foundation. (2) Fundamental principle. [and] (3) The chief component or ingredient of a thing.” Webster's Third New International Dictionary 50 (1992). As a general rule of statutory construction, if a statute is unambiguous (i.e., susceptible to but one meaning), Indiana courts give the statute its clear and plain meaning. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001). The General Assembly's choice of that word does not lead me to conclude that every minute detail regarding the discipline should be disclosed; rather, the “chief component” should be. Here, it is my opinion that DNR has disclosed that chief component to you by informing you that the suspension was the result of the officer's disobeying a direct order.

Moreover, a public agency need not disclose records that pertain to the factual basis of a disciplinary action if those records are excepted from disclosure by another exception to the APRA. For example, if a record constituted attorney work product but contained information regarding the disciplinary action, an agency could withhold that record on the basis of the work product exception in subsection 4(b)(2). Consequently, if the record here was deliberative material under subsection 4(b)(6), the DNR may withhold it at its discretion. The deliberative materials exception is found at I.C. § 5-14-3-4(b)(6):

(b) Except as otherwise provided by subsection (a), the following 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.

Thus, the deliberative materials exception requires that the withheld material be expressions of opinion or speculative in nature *and* communicated for the purpose of decision making. To the extent the withheld material fits both criteria as the DNR maintains, it is deliberative material under the APRA, which means that pursuant to I.C. § 5-14-3-4(b)(6) the DNR acted within its discretion by refusing to release it to you. In my opinion, the DNR has sustained its burden of proof to sustain its denial.

CONCLUSION

For the foregoing reasons, it is my opinion that the DNR did not violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Kari Evans Bennett