



STATE OF INDIANA

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July 13, 2011

Mr. Steven T. Gerber
[Address Redacted]

Re: Formal Complaint 11-FC-149; 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 (“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 DNR’s response to your complaint is enclosed.

BACKGROUND

In your complaint, you allege that DNR violated the APRA by failing to provide you with certain disciplinary information regarding three former DNR employees. In your June 8, 2011, written request, you asked for access to the following:

1. A copy of the Service record for William Snyder including disciplinary records.
2. A copy of the Service record for Jerry Shepherd including disciplinary records.
3. The Factual Basis for a 5 day Suspension of Jerry Shepherd on April 24, 2009.
4. A copy of the Service record for Kevin Pensinger including disciplinary records.

DNR Chief Legal Counsel Cameron F. Clark responded to your request the following day. Mr. Clark’s response to item #3 read,

Lt. Shepherd was suspended for 5 days on April 14, 2009, which suspension was to have begun April 20, 2009, and concluded April 24, 2009, for violation of a direct order. This information was provided to you previously in response to your September 2, 2010, request of a similar nature regarding Lt. Shepherd’s April, 2009, suspension.

In response to each of the other three elements of your request, Mr. Clark stated that “[t]he documents you have requested are not disclosable pursuant to Indiana Code 5-14-3-4(b)(8).”

On June 14th, you submitted a second request in which you more particularly requested the factual basis for disciplinary actions taken against the employees (other than Mr. Shepherd) in your first request, as well as two additional DNR employees. On June 24th, DNR responded to that request by informing you that the officers were “suspended from duty on June 7, 2011, for a period of ten (10) working days for neglect of duty,” “demoted on November 28, 2010, for failure to follow a direct order and misuse of state property,” “suspended from duty on January 7, 2008, for a period of ten (10) working days for acts unbecoming an officer and/or conduct that would tend to bring the Division into disrepute, or impair its efficient and effective operation,” and “suspended from duty on June 6, 2011, for a period of five (5) working days for neglect of duty.” You argue that these statements by the DNR are incomplete because they “lack[] the factual basis which is comprised of much more than just the end result....”

In response to your complaint, Mr. Clark denies that DNR violated the APRA. He argues that DNR’s responses to your requests for the factual basis of the disciplinary actions are sufficient under the APRA. He states that DNR service records contain only some information that must be disclosed under subsections 4(b)(8)(A) - (C), such as the officers’ names, dates of hire, education, and rank, but DNR considers the remainder of the service records’ contents nondisclosable personnel file information. He also notes that the issues of service records and the factual basis of disciplinary records were addressed by the public access counselor in a previous opinion (*Op. of the Public Access Counselor 10-FC-212*) concerning your request for the same regarding Jerry Shepherd.

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. DNR is a “public agency” under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy 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).

I note that this is the third complaint you have filed against DNR regarding the “factual basis” issue. *See Op. of the Public Access Counselor 09-FC-75; Op. of the Public Access Counselor 10-FC-212*. The two advisory opinions issued in response to those complaints also discussed whether DNR’s statements in response to your previous requests for the factual basis for disciplinary actions -- which are substantially similar to those provided in response to your requests at issue here -- were sufficient. Both my predecessor and I concluded that they were sufficient. I see no reason to depart from this line of decisions at this time and hereby incorporate the analyses and conclusions from

those opinions here. Since Counselor Neal's decision in 2009, DNR has operated under the assumption that such responses were sufficient to form the factual basis of a disciplinary action. It would be inappropriate for me to conclude that DNR violated the APRA by responding in a manner that this office has twice concluded was appropriate. On the other hand, I acknowledge that the question of what constitutes the "factual basis" of discipline will continue as long as that phrase remains undefined in the APRA. Other sections of the APRA, such as section 5, for example, include a detailed list of the type of specific information that must be released from law enforcement records upon request:

(c) An agency shall maintain a daily log or record that lists suspected crimes, accidents, or complaints, and the following information shall be made available for inspection and copying:

(1) The time, substance, and location of all complaints or requests for assistance received by the agency.

(2) The time and nature of the agency's response to all complaints or requests for assistance.

(3) If the incident involves an alleged crime or infraction:

(A) the time, date, and location of occurrence;

(B) the name and age of any victim, unless the victim is a victim of a crime under IC 35-42-4;

(C) the factual circumstances surrounding the incident; and

(D) a general description of any injuries, property, or weapons involved.

The information required in this subsection shall be made available for inspection and copying in compliance with this chapter. The record containing the information must be created not later than twenty-four (24) hours after the suspected crime, accident, or complaint has been reported to the agency.

I.C. § 5-14-3-5(c). If disputes continue to occur regarding how much detail of the "factual basis" of discipline should be released to the public, perhaps the General Assembly should clarify its intent with a more specific list of the type of information that agencies should release upon request. Without such specificity, it will remain difficult for agencies to determine whether they have satisfied their disclosure obligations under the APRA, and also for members of the public (and this office) to recognize when agencies' responses are noncompliant.

That said, DNR's June 9th response to you was not wholly compliant with the APRA, which requires public agencies to separate and/or redact the nondisclosable information in public records in order to make the disclosable information available for inspection and copying. I.C. § 5-14-3-6(a). DNR's response cited to the personnel records exception to the APRA in denying you access to the employees' service records, but concedes that those records contain some disclosable information, including the name, date of hire, education, and sometimes rank of the officer. Rather than exempting the entire service record from disclosure, the APRA required DNR to redact the nondisclosable information and make the remainder available. Alternatively, if DNR believed that you would not be interested in the public information in the service record, DNR could have informed you that the majority of the record would be redacted and the

copy costs associated therewith and provide you with the opportunity to either withdraw your request or proceed with that understanding.

Moreover, although DNR relied upon the deliberative material exception to the APRA in its response to your complaint, DNR did not cite that exception when it denied you access to the Statement of Charges for each of the employees. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c). Notwithstanding this technical violation, however, the applicability of the deliberative materials exception to DNR Statement of Charges was also addressed in *Op. of the Public Access Counselor 10-FC-212*, so I decline to rehash that issue at this time under identical circumstances.

CONCLUSION

For the foregoing reasons, it is my opinion that DNR should have separated nondisclosable material from disclosable material in accordance with section 6 of the APRA rather than issuing a blanket denial of your request. Moreover, DNR technically violated subsection 9(c) by failing to cite to the appropriate exception to the APRA in its denial. DNR did not otherwise violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Cameron F. Clark