



STATE OF INDIANA

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September 26, 2012

The Walker Law Group, P.C.
Ms. Camille Clayton
363 South Lake Street
Gary, Indiana 46403

Re: Formal Complaint 12-FC-247; Alleged Violation of the Access to Public Records Act by the City of East Chicago

Dear Ms. Clayton:

This advisory opinion is in response to your formal complaint alleging the City of East Chicago ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Carla Morgan, Attorney, responded on behalf of the City. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request to the City for copies of three (3) settlement agreements. The City responded in writing to your request and advised that all settlement agreements that had been requested were entered into under a confidentiality agreement and therefore the City could not disclose the records.

In response to your formal complaint, Ms. Morgan advised that the information that had been requested were settlement agreements entered into between the City and current or former employees. The City's position is that the records are part of an employee's file; thus are not subject to disclosure under the APRA. Further, the documents fall under a confidentiality clause that is stated in the actual agreement and binding on both parties. The City is of the belief that the requestor is attempting to evade the rules of discovery in making a request under the APRA. Ms. Morgan noted that the settlements which were paid out by the City are public record, were voted on and approved by the Common Council at the Council's regularly scheduled public meetings, which are televised on the local cable channel. As a result, the City believes the settlements are subject to release via the APRA. The City's objection is against the release of the actual settlement agreements itself.

In *Knightstown Banner LLC v. Town of Knightstown*, the Town's argument against the release records was that it was not in possession of the settlement records in question and therefore, the records could not be considered public records. Here, the City agrees that it is in possession of the records, that they are public documents, but they fit an exception due to the fact that they are part of the employees' personnel file and contain confidentiality clauses which are binding on the City.

ANALYSIS

The public policy of the APRA states that "(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." *See* I.C. § 5-14-3-1. The City is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the City's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA a public agency denying access in response to a written public records request must put the denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if



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this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47.*

In the City's original response to your request, the City advised that it was denying your request due to the settlement agreements were entered into under a confidentiality agreement and therefore the City cannot disclose the contents of the record. As provided by Counselor Davis, ". . . the parties to an agreement cannot deem information confidential in abrogation of the Access to Public Records Act." See *Opinion of the Public Access Counselor 06-FC-172*; see also *Indiana Office of Technology Informal Inquiry January 11, 2006* (http://www.in.gov/pac/informal/files/Disclaimer_inquiry_by_Office_of_Technology.pdf). Counselor Hurst opined that:

"A public agency has no authority to declare or agree to maintain a public record as "confidential," and such record maintained by a public agency may be withheld from disclosure only if it falls within one of the narrow and limited exceptions set forth in Indiana Code 5-14-3-4. Thus, if a settlement agreement -- even one with a "confidentiality clause" -- is "created, received, retained, maintained, or filed by or with a public agency," it is a "public record" under the APRA and subject to disclosure under the provisions of that statute." See *Opinion of the Public Access Counselor 03-FC-130.*

Accordingly, it is my opinion that the City violated section 9(c) of the APRA by failing to cite to a specific exemption or exemptions authorizing the withholding of the records that were sought.

The City has now provided in response to your formal complaint that the records are exempt from disclosure due to they are maintained as part of a personnel file under I.C. § 5-14-3-4(b)(8). The APRA provides that certain personnel records may be withheld from disclosure at the discretion of the agency:

(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:

(8) Personnel files of public employees and files of applicants for public employment, except for:

(A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

(B) information relating to the status of any formal charges against the employee; and

(C) 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.

However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name. I.C. § 5-14-3-4(b)(8).

It should be noted that I.C. § 5-14-3-4(b)(8), by itself, does not make any record maintained in an employee's personnel file confidential. The information referred to in (A) - (C) must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at its discretion.

I am not aware of any prior case law, advisory opinion issue by the Public Access Counselor's Office or statute that definitively provides what type of records can, may, or shall be kept in an employee's personnel file. The Indiana Commission on Public Records' general retention schedule that is applicable to all state agencies defines a personnel file as:

[a] state agency's documentation of the employee's working career with the state of Indiana. Typical contents could include the Application for Employment, PERF forms, Request for Leave, Performance Appraisals, memos, correspondence, complaint/grievance records, miscellaneous notes, the Add, Rehire, Transfer, Change form from the Office of the Auditor of State, Record of HRMS Action, and/or public employee union information. Disclosure of these records may be subject to IC 5-14-3-4(b)(2)(3)(4) & (6), and IC 5-14-3-4(b)(8). *See* Records Retention and Disposition Schedule, State Form 5 (R4/ 8-03) (<http://www.in.gov/icpr/files/gr.pdf>)



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The general retention schedule for county/local agencies defines “personnel files” as “Personnel records containing documentation of the employee’s working career with the county/local government unit.” See GEN 10-27 (http://www.in.gov/icpr/files/county_general.pdf). “Legal Files” are defined in the same schedule as, “All records pertaining to litigation with the county/local government and all supporting documentation.” See GEN 10-5 (http://www.in.gov/icpr/files/county_general.pdf). The language is not necessarily binding here, but it is relevant for discerning the types of information and documentation that are included in a public employee’s personnel file. See 11-INF-71 and 09-FC-244.

The settlement agreement in *Knightstown* involved a civil rights lawsuit filed by a former employee and a request was made pursuant to the APRA for a copy of the agreement. *Knightstown Banner*, 838 N.E.2d 1127, 1134. In *Knightstown*, the Court ruled that the settlement agreement would be considered a public record that was subject to inspection under the APRA and ordered that a copy of the record be provided. *Id.* Similarly, the settlement agreements that were requested of the City involved current or former employees of the City. It would logically follow that had I.C. § 5-14-3-4(b)(8) been applicable to such agreements, at a minimum, the issue would have been addressed in *Knightstown*. It is my opinion that a settlement agreement entered into between a public agency and a current or former employee is not the type of record that may be exempt from disclosure pursuant to I.C. § 5-14-3-4(b)(8). In light of the description of files contained in the general retention schedules adopted by the Indiana Commission on Public Records, the ruling in *Knightstown*, and the openness and transparency that the APRA was intended to promote, it is my opinion that the City cannot deny a request for the settlement agreements in reliance on I.C. § 5-14-3-4(b)(8).

Lastly, I would note that the APRA exists to allow persons access to inspect and copy public records maintained by a public agency. The APRA operates independently of the discovery process. However, I am not aware of any language in the Trial Rules or the APRA that would prohibit a party in litigation from making a public records request under the APRA. See *Opinion of the Public Access Counselor 02-FC-38; 09-FC-94; 11-FC-270*.

CONCLUSION

For the foregoing reasons, it is my opinion that the City violated section 9 of the APRA by failing to cite to a specific exemption authorizing the withholding of the records that were sought.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Carla Morgan