



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

September 18, 2013

Mr. Andrew D. Walker
345 S. High Street
Muncie, Indiana 47305

Re: Formal Complaint 13-FC-241; Alleged Violation of the Access to Public Records Act by the Randolph Eastern School Corporation

Dear Mr. Walker:

This advisory opinion is in response to your formal complaint alleging the Randolph Eastern School Corporation ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Lisa K. Smith, Superintendent, responded in writing to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that on August 15, 2013, you served the School with a records request regarding the suspension of the high school football coach. Specifically, you asked for the factual basis for the final action resulting in the football coach being suspended. Ms. Smith denied your request over the telephone and in writing on August 16, 2013, stating final action had not yet been taken and the suspension was pursuant to a pending investigation.

In response to your formal complaint, Ms. Smith contends the release of the records you seek are discretionary under the APRA, as there was no final action taken.

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 School 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 School'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). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

The School suspended their high school football coach pending investigation on or about August 9-15, 2013. The suspension was with pay and was pursuant to an investigatory effort into an undisclosed incident. Formal charges were not brought against the coach.

The APRA provides that certain personnel records may be withheld from disclosure:

(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.

The School contends the release of the records is discretionary and the records are exempt from mandatory disclosure, because the suspension was pending investigation at the time of the request. It is well established that the APRA is to be liberally construed. However, in matters involving personnel issues, the Indiana Court of Appeals has noted in *Baker v. Town of Middlebury*, 753 N.E. 2d 67, 72 (Ind. Ct. App. 2001) the countervailing public policy concerns for the protection of employee privacy, efficient personnel management, and employee morale are vital. Indeed, the reputation of an individual who works with children would be unequivocally harmed by the disclosure of false allegations. This is in contrast to a school worker whose behavior established a factual basis for accusations that can be proven by a measurable standard. Because the school had not yet made a final disposition as to any allegations, public disclosure of those accusations would presumably cause a significant amount of harm to an employee who could eventually be held blameless. The school has advised this turned out to be the case in the current scenario.

The statute only mandates the disclosure of a factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged. No disciplinary action existed in the current case, only an investigatory action. If the basis for a pending investigatory action were to be disclosed, there would be a potential risk of compromising the integrity of the investigation.

The APRA does not mandate that a public agency must disclose records that do not exist nor does it compel an agency to create records for the satisfaction of a request. *Opinion of the Public Access Counselor 01-FC- 61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). Further, a public agency is not required to create a record in response to a request made under the APRA. The School has subsequently determined that no factual basis ever existed that would justify a final action leading to further suspension, demotion or discharge of the coach.

CONCLUSION

Based on the foregoing reasons, it is my opinion that the School acted in compliance with the APRA in determining that the release of the requested personnel records of the public employee was discretionary.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

cc: Lisa K. Smith