



# STATE OF INDIANA

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January 2, 2014

Mr. Anthony Davidson  
61 N. 14<sup>th</sup> Ave.  
Beech Grove, IN 46107

*Re: Formal Complaint 13-FC-339; Alleged Violation of the Access to Public Records Act by the City of Beech Grove Clerk-Treasurer*

Dear Mr. Davidson,

This advisory opinion is in response to your formal complaint alleging the City of Beech Grove Clerk-Treasurer ("Clerk-Treasurer") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Clerk-Treasurer responded to your complaint. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on December 13, 2013.

## BACKGROUND

Your complaint alleges the City of Beech Grove Clerk-Treasurer violated the Access to Public Records Act by denying producing records responsive to your request.

On December 10, 2013, you sent a public records request to Mr. Dan McMillan, Clerk-Treasurer, requesting email communication between Mr. McMillan and a former City employee. Mr. McMillan denied your request on December 11, 2013 claiming the email communication is part of the employee's personnel file and therefore your records request was denied.

You argue that the emails are public record pursuant to the APRA and cannot be claimed as part of a personnel file as the Clerk-Treasurer alleges.

## ANALYSIS

The public policy of the APRA states that "a (p) roviding person 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 Ind. Code § 5-14-3-1. The City of Beech Grove Clerk-Treasurer's Office is a public agency

for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Clerk-Treasurer's public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See Ind. Code § 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 (7) days of receipt, the request is deemed denied. See Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

You are correct in stating email communications of public agencies are public record. This position has been long held by the Public Access Counselor and those communications often contain information of significant public interest. Moreover, your request is reasonably particular in that it names both the sender, the recipient and a timeframe. See *Anderson v. Huntington County Bd. of Com'rs.*, 983 N.E.2d 613 (Ind. Ct. App. 2013).

The Clerk-Treasurer claims the release of the email communication should be withheld because they fall into the public employee personnel file exception under the APRA. Ind. Code § 5-14-3-4(b)(8) treats the release of the following records as discretionary:

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.

I have spoken with Mr. McMillan regarding the nature of the email communications. He maintains all of the emails deal exclusively with the employee's job performance and ultimate resignation. He asserts none of the emails concern anything but the employee's specific personnel information. Furthermore, he insists none of the exceptions in (A), (B), and (C) would apply.

Generally speaking, not all communication addressing personnel matters are part of the personnel file exception under the APRA. To that point, several former Public Access Counselors have opined accordingly and I concur. See *Ops. of the Public Access Counselor 09-FC-238; 04-FC-328; 04-FC-96.*

While the Courts have not defined the breadth and scope of what is encompassed by a “personnel file”, it is my opinion the term is not limited to a paper folder file in a human resources drawer. On the other hand, I do not believe that it was intended to be an all-encompassing protection against disclosing anything relating to personnel matters.

The answer lies somewhere in the middle. For a public record to be part of a personnel file, a nexus to personnel issues is not enough. It has to be a record that would typically be contained in a traditional personnel file. The emails, as Mr. McMillan has described them, are specific and narrow enough in nature to fit the description if they are truly performance evaluation related and a documentation of a corresponding resignation.

As a further word of warning, justifiable personnel file exemptions are very fact-specific. For example, a public agency (including the Clerk-Treasurer in the current instance) could not attempt to subvert the APRA by placing any and all items of varying importance in a “personnel file” in order to shield them from disclosure. There has to be a reasonable basis to correlate the public record to a personnel file. Although that rationale is subjective.

Additionally, I have not been given the opportunity to conduct an *in camera* review of the documentation. However, as this opinion is advisory in nature and I am not a finder of fact, I cannot state with absolute certainty the emails exclusively contain typical personnel file information. If there is material in the email which would not fit the above analysis, then the burden would be on the Clerk-Treasurer to redact the personnel file information and to disclose the non-discretionary material.

## CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access Counselor the City of Beech Grove Clerk-Treasurer did not violate the Access to Public Records Act to the extent the records requested contain legitimate personnel file information. If other matters are discussed in those emails, they would need to be disclosed unless the Clerk-Treasurer asserts another APRA exemption.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor

Cc: Mr. Dan McMillan