



STATE OF INDIANA

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October 22, 2014

Ms. Kim Kilbride
C/o South Bend Tribune
225 W. Colfax Ave.
South Bend, IN 46626

Re: Formal Complaint 14-FC-217; Alleged Violation of the Access to Public Records Act ("APRA") by the City of South Bend

Dear Ms. Kilbride,

This advisory opinion is in response to your formal complaint alleging the City of South Bend ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* Mr. Paul E. Singleton, Esq., Assistant City Attorney, has responded on behalf of the City. 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 September 19, 2014.

BACKGROUND

Your complaint dated September 16, 2014, alleges the City of South Bend violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On or about September 3, 2014, you requested from the City information regarding a named former City employee. The employee was terminated and among the information sought, you wanted a factual basis for the termination. The City responded by providing you with a document which indicated the factual basis for the termination was based on "skill set and judgment." You argue this is not a sufficient factual basis for disclosure purposes.

The City has responded to your request by reiterating the reasons of "skill set and judgment" are sufficient to form the factual basis of which disclosure is mandated.

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 Ind. Code § 5-14-3-1. The City of South Bend 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 City’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).

Ind. Code § 5-14-3-2 states the release of the following records are 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.

The information in subsection (C) is at issue here. The factual basis to terminate the City employee was cited as being “skill set and judgment.” The statement is rather vague and does not specifically reference any City policy or personnel matter. The City correctly points out public employees of South Bend are employed at-will and not subject to any merit status procedure or employment appeal. They may be terminated for any reason. It does not have to be just cause.

The civil servant in question was also employed by the City as an attorney. Attorney’s skill set and judgment are critical to their employability. Using sound judgment and possessing a specific set of skills is germane to their job performance.

You state the reason for a public employee’s termination goes to the very heart of government accountability. This may very well be true, yet if a supervising attorney makes the determination the employee lacked the skill set and judgment to serve in an effective manner, then retaining the employee would be an affront to governmental accountability.

It is also likely the attorney was let go for demonstrating lack of judgment on a particular case or matter. If a detailed description of the lawyer's shortcomings were disclosed, it may compromise the City's representation on that particular matter.

There does not have to be a specific instance or set of instances referenced by an agency when terminating a professional employee. If "lack of skill set and judgment" sounds nebulous, it is because an attorney's job description and performance is inherently nebulous. If the employee was employed in an esoteric capacity or dealt with a hard skill, I would expect the factual basis to be more concrete. But an attorney is hired for their soft skill set and ability to exercise sound judgment. If these traits are deficient or substandard, that is enough factual basis to release them from employment.

CONCLUSION

It is the Opinion of the Public Access Counselor that the City of South Bend did not violate the Access to Public Records Act.

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. Paul Singleton, Esq.