



STATE OF INDIANA

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OPINION OF THE PUBLIC ACCESS COUNSELOR

KARA M. KENNEY

Complainant,

v.

PERRY TOWNSHIP SCHOOLS

Respondent.

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17-FC-115

ADVISORY OPINION

July 10, 2017

This advisory opinion concerns a formal complaint alleging Perry Township Schools (“School”) violated the Access to Public Records Act (“APRA”). Ind. Code §§ 5-14-3-1–10. On June 23, 2017, the School responded, by and through counsel, Séamus P. Boyce. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on May 22, 2017.

BACKGROUND

Ms. Kara M. Kenney, (“Complainant”), filed a formal complaint that alleged the School violated the APRA by denying access to records requested.

The Complainant and the School agree that the Board of Trustees for the School met on May 8, 2017, and voted to discontinue the Superintendent’s contract. On May 9, 2017, the Complainant requested information regarding whether the contract was terminated “for cause” and if not, the amount the School would pay the Superintendent. The School responded to the Complainant via the School’s attorney. The School declined to provide the reason why the contract was discontinued, claiming it was a confidential personnel matter under Indiana Code section 5-14-3-4(b)(8). Yet, the School mischaracterized this section of the APRA as protecting confidential records. This section deems certain records to be released at the discretion of the agency. Indiana Code section 5-14-3-4(a) deems certain records to be confidential and



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nondisclosable. The School specified that the decision was not subject to Indiana Code section 5-14-3-4(b)(8)(c), which stipulates that the factual basis for disciplinary action that results in the employee "being suspended, demoted, or discharged" is disclosable to the public. In its response to the Complainant, the School also linked a copy of the Superintendent's contract. The Complainant then filed her Complaint with my Office which I received on May 22, 2017. The School was notified of the Complaint on May 22, 2017, and we received the response of the School on June 23, 2017.

The School's response asserts that the Board's decision to discontinue the contract was not a disciplinary action. The School clarifies in the response that the decision to discontinue the contract was without any finding of fault and was not a result of a breach of contract. The specific provision of the contract the School references regarding acceptable cancellation of the Contract by the Board is as follows:

The Board provides the Superintendent with a written notice that it is canceling this Contract without a finding a fault or the existence of a breach of this Contract, and pays the Superintendent three hundred and twenty-five thousand dollars [\$325,000] in a lump sum or on a schedule of payments agreed to by the parties, in exchange for a written release of all existing claims and causes of action relating to his employment by the Board from the Superintendent.

In its response, the School emphasizes that the Superintendent was not terminated. Rather, the School says that the Board decided to discontinue the contract pursuant to the terms of the contract that were mutually agreed upon by both parties. The School references 16-FC-302, where I opined that "'termination' does not suggest a voluntary separation."

The School's position is that by providing the link to the publicly available contract, which contains information about the Superintendent's compensation, and specifying that the decision to discontinue the contract was not a disciplinary action but a discontinuation of the contract, the School completely fulfilled the Complainant's records request.

ANALYSIS

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." Ind. Code § 5-14-3-1. Perry Township Schools is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2(n). So, any person has the right to inspect and copy the School's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. Ind. Code § 5-14-3-3(a).



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The School is correct that linking the contract available online provided the Complainant with the clause providing for a \$325,000 payment in certain situations. The School's response to Complainant simply says the decision to discontinue the contract was made pursuant to the terms of the contract, and that it was not a disciplinary action. Contrary to the School's statement, the May 19th response suggests a unilateral decision ("*The Board's decision to discontinue the employment relationship...they do not plan on providing further description of the decision to discontinue his employment*").

Based upon Ind. Code § 20-28-8-7(a), a contract with a superintendent may indeed be terminated at any time with the mutual consent of the School Board and the superintendent. However, there is absolutely no indication in the response to the public records request that the decision was mutual. It refers to a fallacious "confidential personnel matter" reason which only serves to cause confusion. This becomes even more misleading when coupled with the fact that Ind. Code § 20-28-8-7(b) enumerates the reasons for involuntary termination as immorality; misconduct in office; incompetency; or willful neglect of duty – *all of which would require a factual basis for dismissal and all of which are matters of significant public concern*. A contract does not usurp the provisions of Indiana Code nor does the fact that the agreement to the terms of the agreement were mutually agreed upon imply that the *termination* of the contract was mutual.

I have been assured by the School that the termination of the contract was mutually agreed upon and the separation was voluntary. That may very well be true. But I do not fault the Complainant for suspecting otherwise when there is no indication from the initial statement that this was the case. Even the meeting minutes do not mention any reference to a buyout, written notice of cancellation or discussion of any personnel matter that would remotely qualify as "confidential".

Therefore, if true, the School is correct that APRA does not require it to disclose the reasoning for the discontinuation of the contract, since this was not a disciplinary action. The School, however, ought to be mindful that such a large payout will generate public concern about the use of public resources. The buyout to the sum of \$325,000 is a substantial amount of money for any public employee or official and is going to raise suspicion and curiosity. To be dismissive of this consideration is imprudent. To that end, the General Assembly has very recently passed legislation to limit the amount of a buyout in a superintendent's contract. During the 2017 legislative session, the legislature enacted Senate Enrolled Act 182, which amended Indiana Code § 20-28-8-6, to limit buyouts in superintendent contracts created after June 30, 2017, to the lesser of one year's salary or \$250,000. This is still a significant sum, however, the General Assembly's intent was undoubtedly to protect taxpayer money from exorbitant pre-ascertained damages clauses after a public employee is no longer on a public agency's payroll.



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It should be noted that compensation, including buyout and settlement amounts, must be disclosed upon request under Ind. Code § 5-14-3-4(b)(8).

The School did not provide enough detail in its response to the Complainant to confirm that the buyout clause was triggered, and therefore, I cannot agree that the School originally provided the compensation information to the Complainant as requested. Providing a link to the contract in its entirety is not enough. In the School's response to the notice of the complaint, it confirms that the payout clause was triggered by stating that the action was "without a finding of fault or the existence of a breach of [the] contract." I am unsure why the School did not include this information in its response to Complainant to confirm the buyout provision was indeed triggered. Had that occurred, this complaint may have been altogether avoided.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor did not violate the Access to Public Records Act for failing to provide a factual basis for disciplinary action but rather initially failed to specifically state the buyout amount as required under the compensation portion on Ind. Code § 5-14-3-4(b)(8).

Regards,

Luke H. Britt

A handwritten signature in black ink, appearing to read "L. H. Britt".

Public Access Counselor

Cc: Mr. Séamus P. Boyce