OPINION OF THE PUBLIC ACCESS COUNSELOR

BOB SEGALL,
Complainant,

v.

MSD WARREN TOWNSHIP,
Respondent.

Formal Complaint No.
18-FC-24

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Metropolitan School District of Warren Township ("District") violated the Access to Public Records Act[1] ("APRA"). Attorney Jessica Billingsley filed a response on behalf of the School. 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 February 8, 2018.

[1] Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

The Metropolitan School District of Warren Township ("District") reassigned two elementary school principals to classroom teaching positions. WTHR Investigative reporter Bob Segall ("Complainant") contends that he learned in December 2017 that "at least two school district employees [had] been suspended, lost their positions as principals and offered other jobs within the school district." Segall claims as he attempted to gather more information about the suspensions and discover why the principals had been "demoted" the School district's media and communications director and the School Board president informed him that they were unable to share any information because the District and the two affected employees had signed "confidential settlement agreements," which prevented public discussion regarding discipline or demotion.

On December 15, 2017, Segall made the following records request to the District:

> [P]ortions of the personnel files of MSD Warren Township employees Robin LeClaire, Charles Woods and Ryan Russell that contain the following information:
>
> A. 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;
> B. information relating to the status of any formal charges against them; and
> C. the factual basis for any disciplinary action in which final action has been taken and that

> resulted in any of these employees being suspended, demoted, or discharged.
>
> If any of the information requested has changed within the past two months, I am requesting that you provide the information both as of October 15, 2017, as well as December 15, 2017, to reflect any changes in job title, compensation and job description.

The District replied to Segall on January 22, 2018, with a summary of the information requested. Specifically, the School's reply included: the names; annual compensation; job titles as of January 19, 2018; business addresses and phone numbers; education and training background; previous work experience; as well as dates of first and last employment with the School.

The District's summary also expressly stated the following:

> There are no formal charges against any of the above employees. Further, none of the employees above have been subject to disciplinary action resulting in suspension, demotion, or discharge.

On January 12, 2018, Segall submitted a second public records request to the District seeking the following:

> The amount of each weekly (or bi-weekly) paycheck issued by MSD Warren Township between October 1, 2017 and January 12, 2018 to Robin LeClaire.
>
> The amount of each weekly (or bi-weekly) paycheck issued by MSD Warren Township between October 1, 2017 and January 12, 2018 to Charles Woods.

> The amount of each weekly (or bi-weekly) paycheck issued by MSD Warren Township between October 1, 2017 and January 12, 2018 to Ryan Russell.
>
> I am requesting **either** a copy of each paycheck issued to each employee during the stated timeframe **or** the amount of each paycheck and the payment date.

Six days later, the School responded by stating that it would not release the requested paycheck information and directed the Segall to the online document portal where employment contracts could be found. Segall emphasized that he requested copies of paychecks, not employment contracts, and that the amount and date of each weekly paycheck during a specified time period is not included in the employment contracts posted in the portal.

Segall contacted this Office to discuss whether public employee payment disbursements are exempt from disclosure under APRA or subject to release. This Office informed Segall that a public employee's annual compensation and the amount of individual payments are both disclosable and should be disclosed when requested.

On January 25, 2018, Segall renewed his January 12 request and reminded the School that APRA requires a public agency to provide the specific statutory exemption that authorizes the denial of a public records request. At the time of filing the formal complaint, Segall had not received a response to the renewed request.

On February 8, 2018, Segall filed a formal complaint against the District alleging an APRA violation. This Office notified

the District of the complaint on February 9, 2018 and it filed an answer to the complaint on March 7, 2018.

The District responds by denying that an APRA violation has occurred. First, the District argues that it assigned the two principals to instructional positions as part of a "voluntary personnel file agreement;" and thus, it was not required to create a factual basis in accordance with APRA. Next, the District contends that it properly responded to Segall's request regarding paycheck and personnel file details as required by APRA. Finally, the District posits that it responded to Segall's requests in reasonable time.

ANALYSIS

The primary issue in this case is easy to state but less simple to answer. At issue is whether the MSD of Warren Township's reassignment of two elementary school principals to instructional positions constitutes a disciplinary action that resulted in a suspension, demotion, or discharge; and therefore, requiring disclosure of a factual basis of that action under the Access to Public Records Act ("APRA").

Further at issue in this case is whether the school district complied with APRA when it failed to disclose copies of the paychecks issued to the affected employees, or—in the alternative—the amount of each paycheck and the payment dates.

Each of these issues will be addressed in turn.

1.

The Access to Public Records Act ("APRA")

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1. Further, 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." *Id.* There is no dispute that MSD of Warren Township ("District") is a public agency for the purposes of the APRA; and thus, subject to the Act's disclosure requirements. Ind. Code § 5-14-3-2(q)(6).

Therefore, unless otherwise provided by statute, any person may inspect and copy the District's public records during regular business hours. *See* Ind. Code § 5-14-3-3(a).

Still, APRA contains both mandatory and discretionary exceptions to the general rule of disclosure. Specifically, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

Notably, a public agency is required to make a response to a written request that has been mailed within seven (7) days after it is received or the request is deemed denied. *See* Ind. Code § 5-14-3-9(c). If a records request is provided in writing, and the request is denied, the denial must also be provided in writing and contain a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record as well as the name and title of the official denying the record. Ind. Code § 5-14-3-9(d).

1.1 Personnel Files of Public Employees and Applicants

A noteworthy exception to the rule of disclosure under APRA is the exception for the personnel files of public employees and files of applicants for public employment. In truth, APRA provides public agencies with the *discretion* to withhold these records from public disclosure. Ind. Code § 5-14-3-4(b)(8) (*emphasis added*).

Yet, solidly embedded in the discretionary exception for personnel files of employees and applicants is an exception—to the exception—that provides the following:

> (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.

In effect, a public agency has discretion to withhold personnel records but lacks discretion to withhold the information set forth in subsections (A), (B), and (C). That means, upon a proper request, a public agency must disclose the factual basis for a disciplinary action in which final action has been taken and that resulted in an employee being suspended, demoted, or discharged. This makes public employees distinguishable from their private sector counterparts. Private sector employees enjoy a broader privacy expectation in regard to their employment compared to public employees. This is, at least in part, because public employees are civil servants and ultimately accountable to the public-at-large.

1.11 Disclosure of a Factual Basis

APRA mandates public agencies to disclose—upon proper request—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. Ind. Code § 5-14-3-4(b)(8).

In other words, when a disciplinary action results in the employee being suspended, demoted or discharged, then APRA requires a factual basis be disclosed.

1.12 Suspension, Demotion, or Discharge

The District contends that no result of a disciplinary action occurred; and thus, no factual basis is required because the two principals voluntarily and "freely bargained" to be reassigned as instructors.

Segall is not buying the School's explanation for the changes. He argues that characterizing the demotion of two school principals as "voluntary reassignments" for which there was no preceding disciplinary action is unreasonable.

This Office has no reason to doubt that the two principals opted to accept a contract to continue on as instructors rather than principals. What is unclear—and more relevant here—is what happened that prompted the parties to the bargaining table in the first place.

For instance, the Seventh Circuit Court of Appeals recognized that when a principal is "voluntarily reassigned," that is, when a principal is *induced* to return to the classroom, it constitutes a demotion. *Morgan v. South Bend Cmty. Sch. Corp.*, 797 F.2d 471 (7th. Cir. 1986).

Indeed, this Office recognizes that not all employment demotions are a result of a disciplinary action. For example, a school corporation may—as a result of restructuring or

building closure—experience a justifiable decrease in the number of principals or other administrative positions. In that case, a former principal who returns to the classroom, it seems, has been demoted but without a preceding disciplinary action.

In the alternative, perhaps a principal or administrator decides—after experiencing the unrestricted joys associated with management—to return to the classroom of their own volition and accord. Certainly this is truly voluntary.

Granted, there may be more examples of an employment demotion that does not occur as a result of a disciplinary action, but the School does not make any such claim. Instead, the School argues that the two principals returned to the classroom as result of a "voluntary personnel file agreement." In its answer the School seems to frame this issue as a contract issue. While the parties may have negotiated terms of the agreement and mutually consented to a contract amendment, the employees would not have had to bargain *but for the School's insistence that they do so.*

This Office, of course, is not concerned about the contractual agreement that the two former principals reached with the School that ultimately returned them to the classroom. For purposes of this complaint, the relevant inquiry is whether a disciplinary action *induced* the former principals' return to classroom. If so, a factual basis may required in accordance with APRA. It is the condition precedent that triggers the statute, not the legalese framing the end result.

Segall contends that he learned in December 2017 that two of the District's employees had been "suspended, lost their positions as principals, and offered other jobs within the

school district." It is worth mentioning that the District does not dispute Segall's assertion that it suspended the two principals prior to their move to the classroom.

Further, the District does not deny that it reassigned the two principals to "instructional roles." Rather, it argues that no disciplinary action occurred because the reassignments were made in accordance with a "voluntary personnel file agreement."

As a preliminary matter, it seems plain enough that final action has been taken resulting in the demotion of two employees. The term "demotion" is not statutorily defined under APRA. In the absence of a statutory definition, demotion is defined as "a reduction in grade or rank."[2] Certainly this is the case here although it appears as if their contractual compensation remained the same.

Notably, the District offers no explanation of what a "voluntary personnel file agreement" is and neither does APRA, the Indiana Code, or state case law. Even Internet search engines failed to render a *single* result of the term "voluntary personnel file agreement" when enclosed in quotation marks. Without quotation marks, searches returned thousands of results, including some about "voluntary terminations;" "voluntary separation agreements;" "voluntary modification of employment" and the like.

Plainly enough, the term is ambiguous.

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[2] Merriam-Webster.com, *Demotion*, https://www.merriam-webster.com (last visited April. 2, 2018).

If the District indeed suspended the two affected employees prior to their demotion as alleged—especially an unpaid suspension—it raises a presumption of a preceding disciplinary action.

Based on the shortage of facts and evidence in this case, it is impossible to determine whether the commencement of negotiation was forced or whether it was truly voluntary. This is the first test of whether a factual basis is necessary. In the instant case, the School has not satisfied its burden of qualifying the demotion as voluntary.

1.13 Disciplining Dysfunctional Behavior vs. Administering Performance Management

The second test is whether the underlying reason for the demotion is disciplinary in nature versus a correction of performance deficiencies. In order for a factual basis to be required, a demotion, suspension or termination must be predicated upon disciplinary action.

The crux of the parties' disagreement in this case is whether a disciplinary action occurred. Unfortunately, APRA does not define the term *disciplinary action.* Thus, the question is one of statutory interpretation.

Ideologically, managers have an investment in employees they hire. Training time and costs as well as disruptions in workforce make it inconvenient to reassign employees indiscriminately. Speaking in human resources terms, managers will seek to correct performance deficiencies through coaching, additional training and education, and nurturing.

Inversely, dysfunctional behavior will often be met with swift action to avoid negative consequences to the agency, other employees and in cases of schools, students.

While both situations may be addressed with progressive methods of management/discipline, we hesitate to qualify all performance management actions as disciplinary. The problem in the instant case is the existence of a confidentiality agreement which prevents the parties from arguing which is the case here.

The real reason for the District's decision to demote these two principals remains unclear. To be sure, this office is doubtful about the District's contention that the demotions are purely a result of voluntary contract negotiations rather than an imposed condition of employment. Granted, it is possible. Even so, the mere existence of a nondisclosure agreement between the parties sits in tension with the District's argument.

This office cannot agree with the notion that any public agency has the authority to bargain away the right of the people to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees by simply calling a disciplinary action "voluntary" after the fact. To do so would be antithetical to the legislature's stated policy with APRA.

Note well, the goal here is not to besmirch or otherwise contaminate the reputations or derail the careers of public employees. Nor is it appropriate for this office to needlessly interfere with public employee contract negotiations. The goal of this office is to help ensure the rights of the public that

the employees whose salary they pay are being good stewards of public resources, and that the supervisors over them are managing personnel competently.

While this particular situation may not warrant a factual basis, public agencies should be mindful of perception and to consider the public's right to know in all actions.

1.14. Pay Stubs and Compensation

In *Opinion of the Public Access Counselor 17-FC-275*, I noted that much of the information in Ind. Code § 5-14-3-8(a) can be summarized and a new document created for the purposes of disclosure of that information. Much of that information is static and would not change.

In the instant case, however, compensation is very much an issue of public curiosity as the employees were reassigned and demoted to new positions. While annual compensation very well may have remained the same under the amended employment contract, it stands to reason Segall would want verification of that. In cases where compensation may deviate for reasons including, but not limited to, reassignment, leaves of absence, administrative leave, etc., other documents should be provided in order to verify consistency or demonstrate fluctuation.

Similar to timesheets, pay stubs or salary warrants are not typically a part of a personnel file, but are almost always contained in a finance or payroll file which is mutually exclusive from a personnel file. This office has long advised those materials are disclosable minus any confidential information which can be redacted. The Complainant asked for less than six months' worth of those materials so it is not a

matter of a lack of specificity. To the extent possible, records reflecting pay on a more granular level should be disclosed.

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CONCLUSION AND RECOMMENDATIONS

Based on the foregoing, it is the opinion of the Public Access Counselor that the Metropolitan School District of Warren Township did not violate the Access to Public Records Act if the demotions in question were not predicated on disciplinary action. Additionally, it is the recommendation of the Counselor that records should be disclosed indicating a more exact reflection of compensation other than an aggregate annual sum, which may or may not be regular.

Luke H. Britt
Public Access Counselor