

OPINION OF THE PUBLIC ACCESS COUNSELOR

DAWN M. ADAMS,
Complainant,

v.

INDIANA PROTECTION & ADVOCACY
SERVICESCOMM'N.,
Respondent.

Formal Complaint No.
20-FC-99

Kristopher L. Cundiff¹
Deputy Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Indiana Protection and Advocacy Services Commission violated the Access to Public Records Act.² Commission chairperson Amber O'Haver filed an answer to the complaint with this office. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the

¹ Attorney in active good standing, duly admitted to the practice of law in the State of Indiana.

² Ind. Code § 5-14-3-1-10.

formal complaint received by the Office of the Public Access Counselor on July 28, 2020.

BACKGROUND

This case involves a dispute over retention, access, and destruction of certain personnel records of the Indiana Protection and Advocacy Services Commission (“Commission”).

On May 14, 2020, Dawn M. Adams³ (“Complainant”) filed a public records request with the Commission seeking the following:

Copies of all Indiana Disabilities Rights (IDR) employee survey responses that were sent to and used by the Indiana Protection and Advocacy Services (IPAS) Commission during [Ms. Adams’] 2017 performance review.

On June 5, 2020, the Commission responded to Adams and asserted that it had no responsive records in its custody or control. The Commission explained that the employees completed the surveys, sealed them in an envelope, and sent them to then-IPAS Commission chairperson Dr. Robert Walson. The Commission noted that it did not create copies of the survey responses and the originals remained with Dr. Walson who destroyed them—along with other documents—when he left the Commission in 2018.

On July 28, 2020, Adams filed a formal complaint alleging the Commission’s destruction of the records resulted in an improper denial of access under the Access to Public

³ Adams previously served as Indiana Disability Rights Executive Director.

Records Act. Adams contends the records she requested are personnel records from 2017; and thus, she is unsure whether the Commission destroyed the records within the time frame authorized under the law.

On August 18, 2020, the Commission filed a response to Adams' complaint. The Commission reiterated that it has no records responsive to the request because the agency destroyed the records and they no longer exist.

The Commission contends that it tried to obtain responsive records by contacting former chairperson Dr. Robert Walson. The Commission asserts that Dr. Walson stated he no longer had the records and that the survey responses were likely destroyed after he left the Commission in 2018. The Commission says Dr. Walson "destroyed the documents without consulting the PAC, fellow Commission members, or IDR staff." As a result, the Commission cannot provide the survey responses to Adams because they no longer exist.

Moreover, the Commission says that at the time the IDR staff completed the surveys, the agency told the respondents that their answers would be confidential; and thus, the Commission never made copies of the responses.

The Commission concluded by noting its understanding of the importance of properly retaining and protecting public records and indicated that it is proactively taking steps to ensure public access laws are properly included in the Commission policy and procedure manual.

ANALYSIS

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.

The Access to Public Records Act (“APRA”) says “(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 the Indiana Protection and Advocacy Services Commission (“Commission”) is a public agency for the purposes of the APRA; and thus, subject to the law’s disclosure requirements. Ind. Code § 5-14-3-2(q)(6).

Therefore, unless otherwise provided by statute, any person may inspect and copy the Commission’s public records during regular business hours. *See* Ind. Code § 5-14-3-3(a). Even so, APRA contains both exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)–(b).

2. Defining public record

Under APRA, “public record” means:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Here, the records at issue are surveys that IDR staff completed at the request of the Commission as part of Adams’ performance review in 2017. By definition, these are public records under APRA.

3. Duty to protect public records

A key issue in this case is whether the Commission had a duty to retain the records requested by Adams.

Under APRA, public agencies have a duty to protect public records from “loss, alteration, mutilation, or destruction.” Ind. Code § 5-14-3-7. Additionally, a public official or agency may not destroy or otherwise dispose of any government record, except in accordance with a record retention schedule or with the written consent of the Indiana Archives and Records Administration. *See* Ind. Code § 5-15-5.1-14.

Toward that end, APRA provides that public records may be destroyed in accordance with statutory retention

schedules, or for records not subject to a retention schedule, in the ordinary course of business. *See* Ind. Code § 5-14-3-4(h)(1)–(2).

As set forth above, the records at issue in this complaint are public records under APRA. The Commission concedes that the records existed but have since been destroyed; and thus, there are no records responsive to her request. Adams contends this amounts to an improper denial of access under APRA.

APRA provides no exemption or exception to disclosure based on an agency's improper destruction of records. In other words, the law does not provide an escape valve if an agency's denial is based on a failure to retain records as required. Instead, APRA imposes an affirmative duty on an agency to protect public records from destruction unless authorized by statute or in accordance with a governing retention schedule.

Based on the information presented in this case, the Commission likely should have retained the records requested by Adams.

Indeed, the Commission does not have an agency-specific schedule governing retention of the records requested by Adams. Even so, there is a general retention and disposition schedule for state agencies that addresses different types of records including employee personnel records.⁴

Here, Adams argues—and the Commission does not dispute—that the requested records are personnel records

⁴ <https://www.in.gov/iara/files/gr.pdf>.

from 2017. So, this office will presume the records are personnel records for purposes of retention and disclosure.

Most state personnel records are covered by the general retention schedule and the retention period varies based on the type of record. Notably, the general retention schedule covers secondary agency personnel folders (GRPER-6), which applies to any personnel records created or maintained separately from the employee's central personnel file. Secondary personnel records may include, among other things, documentation collected by a supervisor to substantiate performance reviews, which are also known as "fact files." The retention schedule requires an agency to transfer secondary personnel records to the employee's primary personnel file (GRPER-5) when the employee leaves the state agency.

Agencies are required to retain the GRPER-5 records for one year after the employee leaves the agency or at the conclusion of any litigation, whichever is later. Then, the agency must transfer certain records from that personnel file to the state's records center. Eventually, the agency may destroy some of those records. Generally, this is two years after the transfer date mentioned above.

In the end, most employee personnel records should still exist for at least three years after the employee leaves the agency. By all accounts, Adams is squarely in that time frame.

Notably, APRA provides agencies discretion to withhold most of what is in a public employee's personnel file. *See* Ind. Code § 5-14-3-4(8).

That same statute, however, declares the following:

[A]ll personnel file information shall be made available to the affected employee or the employee's representative.

Id. If the requested records qualify as personnel records and there is not another applicable exemption or exception to disclosure, the Commission should still have them and make them available to Adams as requested.

Even if the records are not personnel records and outside the reach of that retention schedule, an agency's general files are only eligible for destruction after three years. *See* GRADM-4.

Bottom line, there is more reason than not to conclude that the Commission had a duty to maintain and protect the records at issue in this complaint in accordance with APRA and the state's retention schedules. It is also more plausible than not that the records qualify as personnel records that are disclosable to Adams upon request.

If, for some reason, the records are not personnel records, the only thing affected here is the issue of disclosure. Since general agency files are not eligible for destruction until after three years goes by, the records should still exist. The Commission would have to rely on a disclosure exemption or exception to withhold the records from disclosure.

Although there are some factual issues that remain unclear in this case, Adams makes a more compelling argument about why the Commission should have retained—and ultimately disclosed—the records she requested.

The Commission's primary point is that it cannot provide records to Adams that do not exist, which ordinarily would be a useful argument in a dispute like this. That argument is enfeebled when the nonexistent records should still be around somewhere.

Even so, the Commission notes that its former chairperson, who is no longer on the Commission, is the person responsible for the destruction of the records and he destroyed the records based on a good faith belief the records were confidential under the law.

Even if formed in good faith, the confidentiality of a public record is not governed by a public official's subjective belief. Such determinations are best left to the legislature.

What is more, even if the records were confidential that would not green-light an agency or official to destroy those records in a manner that is inconsistent with the state's retention schedules. The confidentiality and retention of public records are different issues altogether.

As a final aside, this office appreciates the Commission's candor and commitment to properly adhering to the retention and access laws going forward. This is especially true as it relates to the Commission's incorporation of public access information into its onboarding process for new Commission members.

CONCLUSION

It is the opinion of this office that the Indiana Protection and Advocacy Services Commission violated the Access to Public Records Act by failing to comply with Indiana Code section 5-14-3-7.

A handwritten signature in black ink that reads "Kristopher Cundiff". The signature is written in a cursive style with a large initial 'K' and a long, sweeping tail on the 'C'.

Kristopher L. Cundiff
Deputy Public Access Counselor