STATE OF INDIANA

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Mr. Warren A. Auxier
Via email: ICWtraveler@aol.com

Mr. William J. Jenner
Via email: jjenner@wjennerlaw.net

Re: Informal Inquiry 11-INF-71; City of Madison

Dear Sirs:

This is in response to your informal inquiries regarding the City of Madison ("City"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

The inquiries submitted are as follows:

(a) What is the affect of the District Court's order issued in *Lessley v. The City of Madison* ("*Lessley*"), under Cause No. 4:07-CV-136-DFH-WGH, that unsealed 900 pages of officer misconduct records in regards to Mr. Auxier's request made pursuant to the APRA. Does the Court's ruling unsealing the misconduct records eliminate the ability of the City to cite to any applicable discretionary exceptions provided in I.C. § 5-14-3-4(b)(1)-(23)?

(b) Are the officer disciplinary records made confidential by any state or federal law?

(c) Does the City have the ability to cite to I.C. § 5-14-3-4(b)(8) in light of the records being disclosed via discovery in *Lessley*? Further, if the records were kept outside the personnel files of said officers, would the City be allowed to cite to I.C. § 5-14-3-4(b)(8).

(d) The applicability of the Freedom of Information Act ("FOIA") on the request made of the City and what is the interplay, if any, between the APRA and FOIA. Are there any rules of the Federal Court that would apply to Mr. Auxier's request?

BACKGROUND

On January 19, 2007, City police officers pulled over a vehicle containing three individuals for a broken license plate light. *Lessley v. The City of Madison,* Entry on Pending Motions, August 21, 2009, page 4. Thereafter, a strip search was conducted after the officer's smelled marijuana emanating from the car. *Id.* The search resulted in marijuana being found on Ms. Lessley, who was arrested and charged with possession of marijuana. *Id*. The charges were later dismissed. *Id.* A suit was later filed by all three individuals against the officers involved in the stop and search, the City and its supervisory officials, the fire station, and two volunteer firefighters. *Id.* The case was ultimately settled prior to trial.

During the discovery process, the plaintiffs sought to unseal the misconduct records of the defendant police officers. *Lessley v. The City of Madison*, Order on Motion to Remove "Confidential" Designation, February 27, 2009, page 1-2. The misconduct records were initially sealed pursuant to a protective order issued by the Court. *Id*. at 1-2. The Magistrate noted in his decision that the defendants were unable to cite, nor was the Court able to locate, any authority which supported the assertion that police officer disciplinary files were confidential. *Id*. at 4. Pursuant to Rule 26 of the Federal Rules of Evidence, upon a showing of good cause, the Court may enter a protective order to protect any party to a lawsuit from annoyance or embarrassment. *Id*. at 5; Fed.R.Civ.P. 26(c). Rule 26 implicitly protects an individual's privacy interest. Any protective order sought by the defendants must only protect properly demarcated categories of legitimately confidential information. *Id*. at 6. In determining whether to disclose specific information, the Court must consider privacy interests, whether the information sought is important to public health and safety, and whether a public official is seeking protection. *Id.* The Court ultimately unsealed the misconduct records citing the public's interest in full disclosure is strongest in those instances where the discovery materials form the basis for a judicial decision. *Id.* at 8. The Magistrate instructed redaction requirements as to certain officer personal information contained in the misconduct records. *Id.* at 8-9.

The City appealed the Magistrate's Order to Judge Hamilton, who affirmed the ruling. *Lessley,* Entry on Pending Motions, page 81. Judge Hamilton noted that Indiana law does not clearly forbid the disclosure of the records, the misconduct of the City police officer was relevant, and is a matter of public importance. *Id.* at 82. It is not apparent what portion of the misconduct records were filed with the Court. After issuing the August 21, 2009 Order, the parties reached a settlement as to all issues. As part of the settlement, the parties agreed that the 900 pages of misconduct records would be returned to the City and that the Plaintiff's would keep the records and the information contained within the records confidential.

In the fall of 2011, Mr. Auxier submitted to the City a request pursuant to the APRA, requesting in part, copies of the 900 pages of misconduct records that were previously unsealed by the Court. The City in turn has disclosed some records in response, but primarily denied his request citing I.C. § 5-14-3-4(b)(8).

ANALYSIS

I will address each of the issue submitted by the parties separately.

(a) What is the affect of the District Court's order issued in *Lessley* that unsealed 900 pages of officer disciplinary records in regards to Mr. Auxier's request made pursuant to the APRA. Does the Court's ruling unsealing the records eliminate the ability of the City to cite to any applicable discretionary exceptions provided in I.C. § 5-14-3-4(b)(1)-(23)?

The City does not dispute that the Court ordered the records unsealed in *Lessley* pursuant to the rules of discovery. The rules of discovery are governed by the Federal Rules of Civil Procedure. The City maintains the Court's unsealing the record does not mean that the information in misconduct records is automatically made available to the public pursuant to a request made via the APRA. Following the Court's ruling in *Lessley*, the matter was settled. The City maintains that the Court's decision with regard to discovery issues in a civil lawsuit does not change the fact that the misconduct records are part of the officer's personnel file and the City may exercise its discretion in disclosing the records pursuant to I.C. § 5-14-3-4(b)(8).

Mr. Auxier concedes that the Court's order regarding the confidentiality status of the requested misconduct records does not strip the City of the ability to cite to any applicable discretionary exception found in I.C. § 5-14-3-4(b)(1)-(23). Discovery materials are generally considered to be private until they are filed with the Court. Mr. Auxier maintains that the City's ability to cite to any application discretionary exception under the APRA became moot when the requested discovery material was unsealed and formed the basis of a judicial decision.

The right to public access in Indiana to judicial records is governed by overlapping constitutional, statutory, or common-law rules. There is a common law "general principle of publicity" that the courts records are presumptively open to the public. Matters submitted to the court were accessible under the right of access doctrine, even though they were not part of the court file, because the court considered them in making its ruling. *FTC v. Standard Fin. Mgmt. Corp*., 830 F.2d 404, 410 (1st Cir. 1987). The Seventh Circuit has established that the public has a strong interest in having access to court documents. *Hicklin Engineering, L.C., v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006). As a case moves to summary judgment and trial, the "public interest in access to the evidence takes on much greater weight." *Rochlin v. Cincinnati Ins. Co.*, 2006 WL 897894 at *1 (S.D. Ind. Apr. 5, 2006). Mr. Auxier argues that the Court in *Lessley* relied on the misconduct records as part of the Court's summary judgment order; as such the records should be made available by the City in response to a request made pursuant to the APRA.

Initially I would note that the FOIA is applicable to federal agencies, of which the City is not. 5 U.S.C.S. § 551. Further, the FOIA is not applicable to the federal or state judicial court systems. *Id.* The FOIA disclosure regime is distinct from civil discovery.

Stonehill v. IRS, 558 F.3d 534, 538 (D.C. Cir. 2009); *Rimmer v. Holder*, 2011 U.S. Dist. LEXIS 107883 at 22 (M.D. Tenn. Sept. 22, 2011). Different considerations determine the outcome of efforts to obtain disclosure (relevance, need, and applicable privileges, bounded by the district court's exercise of discretion) in the discovery regime under Fed. R. Civ. P. 26(b)(1), than in the statutory exceptions reflecting a congressional balancing of interests in the FOIA. *Stonehill,* 558 F.3d *at* 538; *See* North v. Walsh, 881 F.2d 1088, 1095 (D.C. Cir. 1989).

While a protective order issued by a court may limit the parties' ability to disclose information obtained during discovery, no such limitations are applicable to records received pursuant to a FOIA request. *Stonehill*, 558 F.3d at 539; See *FTC v. Grolier Inc.*, 462 U.S. 19, 28 (1983); *Loving v. Dept of Defense*, 550 F.3d 32, 39 (D.C. Cir. 2008). Not all documents available in discovery are also available pursuant to FOIA. *FTC,* 462 U.S. at 28 ("The logical result of respondent's position is that whenever work-product documents would be discoverable in any particular litigation, they must be disclosed to anyone under the FOIA. We have previously rejected that line of analysis").

Following this line of rationale, the Public Access Counselor has held that the APRA exists to allow persons access to inspect and copy records of a public agency. *See* I.C. § 5-14-3 *et. seq.* However, the APRA operates independently of the discovery process. *See Opinion of the Public Access Counselor 08-FC-32, 08-FC-224.* Nothing in the APRA requires a court order for an individual to be permitted access to public records, unless the records are declared confidential under I.C. § 5-14-3-4(a). However, a public agency may not deny a request made pursuant to the APRA in light of ongoing litigation between the parties. *See Opinions of the Public Access Counselor* 02-FC-38, 05-FC-169.

As stated prior, the FOIA is not applicable to the City, state, or federal courts. *See* 5 U.S.C.S. § 551. The ability to disclose or deny a discovery request is distinct and separate from a disclosure or denial made in response to a request made via the APRA. Mr. Auxier has made a request pursuant to the APRA, to which the City is required to respond. I am not aware of any statue, case law, or court order that has stripped the ability of the City to cite to any exception under the APRA in responding to Mr. Auxier's APRA request. The Court in *Lessley* unsealed the misconduct records took great measure to review the APRA in determining whether the misconduct records where confidential, to which it concluded they were not. I have found nothing contrary to the Court's findings. If the Court were to have held that the misconduct records were confidential, then it would follow that the records would have remained sealed. However, the Court unsealing the records during federal litigation does not provide that the City must disclose the same records, in the same form, in response to Mr. Auxier's APRA request. If the City can meet its burden under the APRA in citing to one of the mandatory or discretionary exceptions found under I.C. § 5-14-3-4(a)-(b), then it could rightfully deny Mr. Auxier's request.

Mr. Auxier noted that the Court relied on the misconduct records when making a judicial decision in *Lessley*. Thus, it would logically follow that the records would be on

file with the Court and Mr. Auxier could submit a request to the Court. Generally, material filed with the federal court is subject to public access, minus a protective order. 1-5 Moore's Federal Practice – Civil § 5.33; *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 780 (1st Cir. 1988); *In re Agent orange Prod. Liab. Litig.*, 821 F.2d 129, 146 (2nd Cir. 1987); *In re Consumers Power Co. Sec. Litig.*, 109 F.R.D. 45, 50 (E.D. Mich. 1985). Courts have held that third parties have a sufficient interest to intervene in an action in order to gain access to discovery. *Id*. Mr. Auxier's inability to obtain the misconduct records from the City under the APRA pursuant to I.C. § 5-14-3-4(b)(8), would not limit his ability to seek the same records from the Court that presided over *Lessley*. The APRA, including I.C. § 5-14-3-4(b)(8) would not be applicable to Mr. Auxier's request of the Court, as it would not be considered a public agency pursuant to the APRA. *See* I.C. § 5-14-3-2(m).

(b) Are the officer disciplinary records made confidential by any state or federal law?

As held in *Lessley,* there is no state or federal law that would make the officer disciplinary records confidential. To the extent that the records contain confidential information (i.e. medical records, social security numbers, etc…) the City would be able to redact the information by citing to the applicable state or federal law. The City, if it chose not to exercise its discretion under I.C. § 5-14-3-4(b)(8), could then release the remaining portions of the record.

(c) Does the City have the ability to cite to I.C. § 5-14-3-4(b)(8) in light of the records being disclosed via discovery in *Lessley*? Further, if the records were kept outside the personnel files of the officers, would the City be allowed to cite to I.C. § 5-14-3-4(b)(8).

As stated in (a), it is my opinion that the City still retains the ability to cite to any discretionary exception found under I.C. § 5-15-3-4(b)(1)-(23) in response to a request made pursuant to the APRA following the order issued in *Lessley*.

The City maintains that the misconduct records were produced to the Plaintiff's in *Lessley* as part of a discovery request asking for personnel/disciplinary files and have always been classified by the City as personnel records. Regardless of what files may have been labeled or where they were kept, all documents created regarding a city employee's employment are personnel files. Just because an agency might maintain multiple files does not mean that the character and nature of the contents of the files are altered. The contents and character of these files are clearly personnel and are characterized as such.

Mr. Auxier maintains that the misconduct records were kept outside the personnel files of the respective officers. I.C. § 5-14-3-4(b)(8) states "Personnel files of public employees" and does not automatically exempt any record that could be put in an employee's personnel file, but was not. In addition, placing a document in a public employee's personnel file does not automatically exempt the document from public

disclosure. Mr. Auxier argues that during the *Lessley* litigation, the City originally stated that the files were not part of the officer's personnel files but part of the personal files of the Police Chief ("Chief"). The City should not be allowed to change their designation of these records from personnel files to personal files in order to withhold them from a request.

In addition, the Court referenced exhibits 106 and 107 and provided that the requested police misconduct records at issue here were no different from what has been proffered in the exhibits. Mr. Auxier provides I.C. § 5-14-3-4(b)(8) would not apply to exhibits 106, 107, and other complaints filed against the officers. Mr. Auxier would argue that I.C. § 5-14-3-4(b)(21) is applicable, but does not allow for the entire complaint to be withheld from public disclosure, just the complainant's telephone number and address in most cases.

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, 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.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file.

I am not aware of any prior case law, advisory opinion issue by the Public Access Counselor's Office or statute that definitively provides what type of records can, may, or shall be kept in an employee's personnel file. The Indiana Commission on Public Records' general retention schedule that is applicable to all state agencies defines a personnel file as:

> [a] state agency's documentation of the employee's working career with the state of Indiana. Typical contents could include the Application for Employment, PERF forms, Request for Leave, Performance Appraisals, memos, correspondence, complaint/grievance records, miscellaneous notes, the Add, Rehire, Transfer, Change

> form from the Office of the Auditor of State, Record of HRMS Action, and/or public employee union information. Disclosure of these records may be subject to IC 5-14-3-4(b)(2)(3)(4) & (6), and IC 5-14-3-4(b)(8). *See* Records Retention and Disposition Schedule, State Form 5 (R4/ 8-03).

I note this language is not necessarily binding on the City because it applies to state agencies. I have not reviewed the City's retention schedule as to personnel records nor am I aware if any such schedule exists. However, it is instructive for discerning the types of information and documentation that are typically included in a public employee's personnel file. Misconduct records are not specifically included in the listing, but an employee's "complaint/grievance records" are. If the City typically includes disciplinary/misconduct information, complaints, and documentation in its employees' personnel files, then it is my opinion that the City could cite to I.C. § 5-14-3-4(b)(8) in denying Mr. Auxier's request. *See Opinion of the Public Access Counselor* 09-FC-244.

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). I note the following analysis provided by Counselor O'Connor:

> Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. (emphasis added). *Opinions of the Public Access Counselor 01-FC-47.*

In response to a public records request, the City is not required to provide a detailed explanation authorizing nondisclosure. However, in an action before a court, the City would have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit." The Court, not the Public Access Counselor, has the statutory authority to conduct an in camera review of the records to determine whether any part of it may be withheld pursuant to the APRA. *See* I.C. § 5-14-3-9(h); *See Opinion of the Public Access Counselor* 05-FC-256. I have not, nor do I have the authority to review the misconduct records. At this point, the City may deny the request, citing to its discretion powers under I.C. § 5-14-3-4(b)(8), and comply with the other remaining requirements of section 9 of the APRA. However, the burden of proof would remain with the City to sustain its denial before the Court. *See* I.C. § 5-14-3-9(f).

As to the whether the City may cite to I.C. § 5-14-3-4(b)(8) if certain records were kept in the Chief's personal files or if records were kept in both the Chief's personal files and his personnel files, the record is not entirely clear regarding the status of the records or their location. In Chief Wolf's deposition taken on April 25, 2008, the following exchange occurred on pages 91-92 regarding the "personal" files:

> Q: With respect to personnel matters of police officer, were there files kept on their personnel record?
>
> A: Yes
>
> Q: How were those files kept during your tenure as Chief of Police?
>
> A: Formal Reprimands or any type of action taken would have been put in their personnel files. Discussions that I may have had with an officer from time to time, I would have kept them in my own personal files.
>
> Q: Where would be the formal reprimand personnel file kept?
>
> A: In their personnel file
>
> Q: Where is that file kept? Is that something kept in your office?
>
> A: Yes, it's in a cabinet in the Chief's office
>
> Q: And then the discussion file I understand is a separate file form the personnel file?
>
> A: Yes

Q: And where is that file kept?

A: In a file in the Chief's Office.

The City maintains that the misconduct records have always been classified by the City as personnel records. Mr. Auxier challenges that assertion, in part by citing to the deposition testimony of the Chief. The Public Access Counselor is not a finder of fact. *See Opinion of the Public Access Counselor* 11-FC-80. I cannot determine from the Chief's deposition testimony, and all other documents that have been provided, that as to the 900 pages of misconduct record that Mr. Auxier has requested (which I have never reviewed), what specific records were kept in the Chief's personal files, what records were kept in the Chief's personnel files, what records were kept in both of the Chief's files, whether the City maintained other personnel files for the officers in locations beyond the Chief's office, and whether the City considered the Chief's personal files also to be a personnel files of the City. I would agree with Mr. Auxier that placing a record in an employee's personnel file does not *automatically* exempt the record from disclosure, nor does the exception *automatically* apply to any record that could be put in the employee's personnel file, but was not (emphasis added). The APRA specifically provides the "personnel files of a public employee." *See* I.C. § 5-14-3-4(b)(8). I would also agree with the City's contention that an employee of a public agency might have multiple personnel files, kept in various locations. An employee of the Public Access Counselor's Office for example would have a personnel file located in the Counselor's office, but might also have a personnel file at the State Personnel Department. As to either file under the hypothetical, the agency could cite to I.C. § 5-14-3-4(b)(8) if it chose to deny a request for records kept in the personnel file. As stated previously, if the City kept officer misconduct information in an officer's personnel file, it could cite to (b)(8) in denying Mr. Auxier's request. Without the ability to review the records in question, I cannot determine what records, if any, that if kept outside the officer's personnel file would prevent the City from being able to cite to (b)(8) in denying a request.

Mr. Auxier has stated that Officer Royce, one of the defendants in *Lessley*, had requested his personnel file from the City, to which the City allegedly maintained it produced his complete personnel file to him. The City advised Officer Royce that the Chief's "personal" files were not considered to be a personnel file. Again, the Public Access Counselor is not a finder of fact. I.C. § 5-14-3-4(b)(8) does provide that *all* personnel file information shall be made available to the affected employee or the employee's representative (emphasis added). Thus, the City would be required to provide all information from all of Officer Royce personnel files, regardless of where the records were kept. If it's the City's contention that the personal files of the Chief are also personnel files of the City, then it should have produced all records from the Chief's personal files in response to Officer Royce's request. Keeping in mind that (b)(8) requires mandatory disclosure to the individual employee, but discretionary disclosure as to all other inquiries. Alternatively, if the City considers the Chief's "personal" files to not be a personnel file, then it cannot cite to I.C. § 5-14-3-4(b)(8) in denying their disclosure in response to a request made pursuant to the APRA. In other words, the answer to whether the Chief's "personal" files are "personnel" files should not change

depending on who is making the request.

(d) The applicability of the FOIA on the request made of the City and what is the interplay, if any, between the APRA and FOIA. Are there any rules of the Federal Court that would apply to the requested information being made public?

As stated prior in (a), the FOIA does not apply to the City or the Court pursuant to 5 USC 551; both of the parties are generally in agreement on this point. While the APRA and FOIA have been established to govern the process to which public records shall be disclosed from state and federal agencies, there is no specific interplay between the state and federal statutes. I am also not aware of any other rules of the Federal Court that would apply to a request made pursuant to the APRA.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

Joseph B. Hoage
Public Access Counselor