



STATE OF INDIANA

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December 6, 2012

Ms. Sarah Steele Riordan
201 N. Illinois Street, Suite 1900
Indianapolis, Indiana 46244

Re: Informal Inquiry 12-INF-51

Dear Ms. Riordan:

This is in response to your informal inquiry concerning the disclosability of pension amounts paid to retirees pursuant to Ind. Code 36-8-10-12 ("Trust Statute"). Pursuant to I.C. § 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"), I.C. § 5-14-3-1 *et seq.*

BACKGROUND

In your informal inquiry, you provide that your firm represents a public entity that currently employs individuals who previously retired from a county police department. These individuals receive pension payments pursuant to the Trust Statute. The pension fund is not overseen or administered by the Public Employees Retirement Fund ("PERF"). Your client has received a request for the monthly amount each individual receives under the Trust Statute. As there is no conclusive authority governing the release of this information, you seek guidance as to whether the information must be disclosed in response to a public records request.

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* I.C. § 5-14-3-1. Accordingly, any person has the right to inspect and copy a public agency's records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

The APRA provides that a public agency denying access in response to a written public records request must put the 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). Counselor O'Connor provided the following analysis regarding section 9:

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. *Opinion of the Public Access Counselor 01-FC-47*.

Pursuant to the Trust Statute, a sheriff's department and a trustee may establish and operate an actuarially sound pension trust as a retirement plan for the exclusive benefit of the employee beneficiaries. *See* I.C. § 36-8-10-12(a). The statute provides the framework for which the fund may be established and operated. *See* I.C. § 36-8-10-12 *et seq.* The General Assembly in establishing other pension programs has provided the information maintained by the entity responsible for the program is considered to be confidential, minus certain required disclosures. For example, I.C. § 36-8-8-5(e) provides that the “1977 fund records of individual members and membership information are confidential, except for the name and years of service of a 1977 fund member.” Further, the records of individual members and membership information concerning a public pension or retirement fund administered by the Board of Trustees of the Indiana Public Retirement System are confidential, except for the name and years of service of a member. *See* I.C. § 5-10.5-6-4. As applicable here, the Trust Statute does not provide that records or information concerning those individuals receiving benefits are confidential nor are the funds administered by the Board of Trustees of the Indian Public Retirement System.

I am not aware of any case from the Indiana Supreme Court or Court of Appeals that has addressed this issue regarding the confidentiality of records under Trust Statute. However, Court of Appeals has addressed arguments raised when the Trust Statute was

silent as to a specific issue. *Vanderburgh County v. West*, 564 N.E.2d 966, 967 (Ind. Ct. App. 1991). In *West*, the Court held:

“The amendment clearly allows persons retiring after 1984 to collect pension benefits increased up to two percent (2%) for each year of service over twenty years. The statute does not address whether years served before a particular plan’s effective date are within the scope of the 2% increase. The original statute validating pension plans also is silent as to whether years served before a plan becomes effective are counted to determine benefit eligibility. . . . Therefore, we interpret the lack of a provision on prior service credit as an indication of the legislature’s intent to disallow prior service credit.” *Id.*

Whether the omission of confidentiality provisions in the Trust Statute was an oversight by the General Assembly or if the absence reflects the General Assembly’s specific intent that the information at issue is to be disclosed upon request is unknown; however as the statute currently reads, it is my opinion that the information that is the subject of the request is not made confidential under the Trust Statute or any other provision of state law.

Aside from the confidentiality provisions found in state and federal law, the APRA provides that certain personnel records may be withheld from disclosure at the discretion of the agency. The statute provides:

“(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(8) 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.

However, all personnel file information shall be made available to the affected employee or the employee’s representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request

being particularized by employee name. I.C. § 5-14-3-4(b)(8).”

It should be noted that I.C. § 5-14-3-4(b)(8), by itself, does not make any record maintained in an employee’s personnel file confidential. In other words, the information referred to in (A) - (C) must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at its discretion.

In your informal inquiry, you have provided that the entity who has received the request employs individuals who have previously retired from a county police department. Thus, there is no dispute whether the entity maintains a personnel file for the individual’s in question. I.C. § 5-14-3-4(b)(8)(A), provides that a public employee’s compensation must be disclosed under the APRA. While the entity that employs the individual must provide the compensation paid by the entity, the law does not provide that the entity must provide information related to compensation received by an employee from his or her previous employment, including a separate public agency. There is specific information that an public agency must provide under (b)(8)(A) regarding an employee’s background and history (e.g. education and training, previous work experience); compensation received from a prior employer however is not provided for. You have advised that the individual’s received payments under the Trust Statute in connection with their previous employment with a county police department; the payments are in no way connected or part of the individual’s current compensation received from the entity. As such, it is my opinion that the entity, at its discretion, may deny the request for information pursuant to I.C. § 5-14-3-4(b)(8) if the records are maintained in the employee’s personnel file

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

Best regards,

A handwritten signature in black ink, appearing to read "Joe Hoage". The signature is stylized with a large initial "J" and "H".

Joseph B. Hoage
Public Access Counselor