



# STATE OF INDIANA

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David Smith  
Indiana Protection and Advocacy Services  
Via email: [drsmith@ipas.in.gov](mailto:drsmith@ipas.in.gov)

*Re: Informal Inquiry re: I.C. § 5-14-3-4(b)(8)*

Dear Mr. Smith:

This informal opinion is in response to your inquiry on behalf of the Indiana Protection and Advocacy Services ("IPAC"). 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 § 5-14-3-4 *et seq.*

You inquire whether the release of records by IPAS to the Indiana Protection and Advocacy Services Commission ("Commission") would subject the records in question to disclosure under the APRA. If so, you inquire whether the information may be provided in the course of an executive session, such that the information would continue to be protected from disclosure under the APRA. As a way of background, IPAS will be providing the results of its annual employee performance review evaluation and ratings ("evaluation") of its employees to members of the Commission for informational purposes only, with no future action to be taken or discussion at a public meeting. With the exception of the Executive Director, the Commission does not author or participate in the creation of an evaluation.

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. IPAS is a public agency for the purposes of the APRA. See I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy IPAS's public 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).

A request for records may be oral or written. See I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. See I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. See I.C. § 5-14-3-9(b). Under the

APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. See I.C. § 5-14-3-9(c).

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 at the discretion of the agency, 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 at their discretion. However, the Court of Appeals has recognized that a public agency may waive an applicable APRA exception if the agency allowed access to its material to one party and denied access to another based on an APRA exception. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003).

There is no dispute that the evaluations are kept in the respective employees' personnel file. As such, while IPAS is required under I.C. 5-14-3-4(b)(8)(A) to provide the compensation for each employee, it would retain discretion to provide the evaluation pursuant to I.C. 5-14-3-4(b)(8). It is my opinion that IPAS, by providing to the Commission an employee's evaluation, would not waive the ability of IPAS to deny a request received under the APRA pursuant to I.C. 5-14-3-4(b)(8). IPAS is governed by the Commission, who amongst other responsibilities is charged with establishing and maintaining all necessary offices. See I.C. 12-28-1-12(1). The records in question are internally being made available so as to allow the members of the Commission to perform the duties of their office and are not being provided in response to a request for records under the APRA. If IPAS disclosed an evaluation in response to a request received under the APRA, then pursuant to *Indianapolis Star*, it is my opinion that the agency would no longer retain the discretion to deny such requests. However, that is not the case as applied to your inquiry. Accordingly, it is my opinion that IPAS would not jeopardize its authority to deny a request pursuant to I.C. 5-14-3-4(b)(8) for an employee's evaluation by providing the information to members of the Commission who govern the agency.

As to your inquiry regarding the ODL, the fact that a record is provided and/or discussed during an executive session does not automatically mean that the record is confidential. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. See I.C. § 5-14-3-9(c). A governing body may meet in executive session to discuss a job performance evaluation of an individual employee under I.C. 5-14-1.5-6.1(b)(9). If for example, a governing body was provided with information/records in the course of discussing a job performance evaluation of an individual employee in an executive session, the agency would still retain discretion under I.C. 5-14-3-4(b)(8) [and/or possibly IC 5-14-3-4(b)(12)]to deny a request for said records in response to a request made pursuant to the APRA.

Please let me know if I can be of any further assistance.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage  
Public Access Counselor