



STATE OF INDIANA

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June 10, 2013

Ms. Sheila A. Wolfe
14197 Dove Drive
Carmel, Indiana 46033

Re: Informal Inquiry 13-INF-31; Carmel Clay School Corporation

Dear Ms. Wolfe:

This informal opinion is in response to your inquiry regarding the denial of records issued in response to your request that was submitted to the Carmel Clay School Corporation ("School") pursuant to the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. Andrew Manna, Attorney, responded on behalf of the School. His response is enclosed for your reference.

BACKGROUND

You provide that on September 25, 2012 you submitted a written request for records to the School for two employee's Secondary Teacher Highly Qualified Verification Forms ("Forms") completed for 2009-2010, 2010-2011, 2011-2012, and 2012-2013. On September 28, 2012, the School acknowledged the receipt of your request. On October 12, 2012, Andrew Manna denied your request in writing pursuant to I.C. § 5-14-3-4(b)(8). You challenge the School's authority to deny your request pursuant to I.C. § 5-14-3-4(b)(8).

In response to your informal inquiry, Mr. Manna advised that you requested information that pertains to a data sheet that the School is required to file with the Indiana Department of Education. The records are maintained in each employee's personnel file; thus the School elected to exercise its discretion and deny your request pursuant to I.C. § 5-14-3-4(b)(8).

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. The School 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 the School'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). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the School acknowledged in writing your September 25, 2012 request within the time requirements provided under section 9(b) of the APRA.

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). 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*.

The School, in writing, cited to I.C. § 5-14-3-4(b)(8) to deny your request. The APRA provides that that certain personnel records may be withheld from disclosure:

(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).

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. Here, the School has provided that the Forms requested were maintained in each employee's 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 School; however, it is instructive for discerning the types of information and documentation that are typically included in a public employee's personnel file. Based on the description of the Forms from both parties, it is my opinion that the Forms would commonly be kept in the specific employee's personnel file. Thus the School would retain discretion to deny your request pursuant to I.C. § 5-14-3-4(b)(8).

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 distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Andrew Manna