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July 26, 2013

Mr. Kerry Hultquist
13332 Redding Drive
Fort Wayne, Indiana 46814

Re: Informal Inquiry 13-INF-39; Andrews Town Council

Dear Mr. Hultquist:

This informal opinion is in response to your inquiry regarding the denial of records issued by the Andrews Town Council ("Council") 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. Michael Hartburg, Attorney, responded on behalf of the Council. His response is enclosed for your reference.

BACKGROUND

By way of background, Van Juillerat served as the Andrews Town Marshal for twenty years. On March 19, 2013, the Council demoted Mr. Juillerat to Deputy Town Marshall at a special meeting of the Council that was open to the public. You have been hired by Mr. Juillerat to serve as his attorney.

On March 11, 2013, the Council held a public meeting. Prior to any discussion regarding Mr. Juillerat, Council President John Harshbarger made a motion to replace Mr. Juillerat with his deputy, Curt Vanover. Without any discussion, Councilman Raymond Tackett seconded the motion. Following the passage of the motion, Council President Harshbarger expressed dissatisfaction with certain action taken by Mr. Juillerat's as Town Marshal. Councilman Michael Rohler stated he was not aware of the proposal or any of the problems addressed by Council President Harshbarger. Council President Harshbarger then presented Councilman Rohler with a document containing what he considered to be insubordinate action taken by Mr. Juillerat. After reviewing the record, Councilman Rohler expressed concerns over certain labor violations and due process. Council President Harshbarger stated that the Town Marshall serves at the pleasure of the Council. Councilman Rohler suggested that the Council hold an executive session to address the issue, but Council President Harshbarger advised that the Council's attorney did not believe that an executive session was proper due to the fact that the Council was not taking any disciplinary action. Councilman Rohler then

requested additional time to review the issue. The Council then decided to confer with its attorney but tentatively set an executive session to discuss the issue. The Council thereafter cancelled the tentatively scheduled executive session.

On March 13, 2013, the Council held a special public meeting to discuss reassignments within the police department and any other matters brought before the body. At the request of Mr. Juillerat's attorneys, two notices were provided for the March 19, 2013 special meeting. At the meeting's commencement, Council President Harshbarger read a statement that informed those present that it was his intention at the previous Council meeting to reassign Mr. Juillerat to the Deputy Marshall position, and have Deputy Vanover elevated to the position of Marshall. Without any discussion, Council President Harshbarger made a motion, to be effective immediately, that Mr. Juillerat be reassigned to Deputy Marshall and Deputy Vanover be assigned as the Town Marshall. Without any discussion, Councilman Tackett seconded the motion. Councilman Rohler again expressed his reservations. A roll call vote was taken and the motion carried by a vote of 2-1. The Council then elected to take public comment, but adjourned the meeting when the Council was quested whether the ODL was violated.

Thereafter, a request was made of the Council for a copy of the record introduced by Council President Harshbarger during the March 11, 2013 meeting. The Council denied the request pursuant to I.C. § 5-14-3-4(b) and Andrew Town Code Section 30.25(B). When asked for a more specific citation to the Indiana Code, it was noted to the Council that pursuant to the I.C. § 5-14-3-4(b)(8), such records were required to be produced as a disciplinary action had been taken that resulted in a demotion. The record referenced at the March 11, 2013 meeting was alleged to contain actions of insubordination by Mr. Juillerat. The APRA requires that all personnel file information is to be made available to the employee or the employee's representative. Further, the record falls within the provision of Town Code § 31.053, which requires the Clerk of the Council make available all communications, reports, petitions, or any other papers addressed to the Council. Clearly, Council President Harshbarger addressed the Council with the record; as such the record must be disclosed pursuant to the Town Code. The Council's denial failed to properly comply with section 9 of the APRA and the Council's attempt to characterize Mr. Juillerat's demotion as something other than a disciplinary action is pre-textual and serves merely as subterfuge.

In response to your inquiry, Mr. Hartburg advised that the inquiry frames Mr. Juillerat's demotion from Town Marshal to Deputy Marshal as a disciplinary proceeding. The discipline of an Indiana public safety employee is governed by I.C. § 36-8-3-4. The section sets out in detail how a public safety employee must be treated in employment matters and includes a disciplined employee's entitlement due process. However, subparagraph (m) of the section stated that, "[e]xcept as provided in I.C. § 36-5-2-13 [requiring council approval], the executive may reduce in grade any member of the police . . .department who holds an upper level policy making position. The reduction in grade may be made without adhering to the [due process] requirements of subsections (b) through (l). The Council acted pursuant to subparagraph (m) when it demoted Mr. Juillerat. Mr. Juillerat was not demoted pursuant to a disciplinary action.

As to the document in question, Council President Harshbarger has advised that the record was an ongoing note to himself of things to discuss with the Town Marshall, that he commenced preparing after taking office. He maintained the notes on all of the Town's departments as a means of setting goals and establishing an agenda. Some of the points on the list were discussed with Mr. Juillerat in a private meeting conducted in January 2013. The record was never introduced as a record to be discussed at a public meeting. Some of the items listed were never discussed with Mr. Juillerat or anyone else. Council President Harshbarger noted that the record was simply notes for his own use. The record was provided to Councilman Rohler upon request, but the record was not discussed and Councilman Rohler did not comment on it. Some of the items contained in the record, without explanation, could be taken out of context and only Council President Harshbarger would be able to complete the thoughts contained therein.

As the record were not part of a disciplinary action and given the circumstances of Mr. Juillerat's demotion, the record qualifies as a record exempt from disclosure pursuant to I.C. § 5-14-3-4(b)(6) and Town Code § 30.25(b).

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 Council 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 Council'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.

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 Council's original denial of your request only cited to I.C. § 5-14-3-4(b), without any further specificity; it is my opinion that the denial failed to comply with the requirements of section 9 of the APRA as it failed to cited to the specific subdivision within (4)(b) that would grant the Council authority to deny such a request. As noted, the Council clarified its denial to you upon receiving your follow-up inquiry.

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.

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* It is impossible for me to reach a legal conclusion whether Mr. Juillerat was demoted from his position as Town Marshal as a result of a disciplinary action or pursuant to the Council's authority provided under I.C. § 36-5-2-13 from the inquiry that was submitted and the Council's two page response. You have indicated that you intend to seek legal redress with the trial court regarding all issues related to Mr. Juillerat's demotion; the trial court would retain authority to make factual determinations, review affidavits, observe testimony, etc. . . . From what has been provided here, I.C. § 5-14-3-4(b)(8)(C) provides that if an employee has been demoted as a result of a disciplinary action in which final action has been taken, the public agency shall provide a factual basis for the disciplinary action from its records. If Mr. Juillerat was demoted as a result of a disciplinary action, the Council would be required to provide a factual basis for the disciplinary action from records maintained by the Council. However, if Mr. Juillerat's demotion was not the result of a disciplinary action and the record was not maintained in Mr. Juillerat's personnel file, then the Council would not be prohibited from citing to any other applicable exception within state or federal law to deny the request that was submitted.

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 Council; however, it is instructive for discerning the types of information and documentation that are typically included in a public employee's personnel file. Just because a record mentions an employee's name does not equate that it automatically becomes part of the employee's personnel file. Further, I do not have the authority to conduct an in-camera review of the record; however again, the trial court would retain such authority. *See* I.C. § 5-14-3-9(h). From Council President Harshbarger's description of the record, the record contains a variety of information related to the Council and Town, all of which is not applicable to Mr. Juillerat. I would also note that there has been no showing that the record was maintained in Mr. Juillerat's personnel file.

The Council ultimately cited to I.C. § 5-14-3-4(b)(6) to deny your request. The General Assembly has provided that records that qualify as deliberative materials may be disclosed at the discretion of the public agency. *See* I.C. § 5-14-3-4(b)(6). The subdivision provides that:

> Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making. I.C. § 5-14-3-4(b)(6).

Deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1.* Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64.* The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must also be interagency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17.* However, the deliberative materials exception does not provide a pre- and post-decision distinction, so that the records may be withheld even after a decision has been made. *See Opinion of the Public Access Counselor 09-INF-25.*

When a record contains both discloseable and nondiscloseable information and an agency receives a request for access, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1. The Indiana Court of Appeals provided the following

guidance on a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.,* 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate dislcoseable from non-dislcoseable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-dislcoseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
>
> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id*. at 913-14.

The Council has relied solely on the deliberative materials exception to deny your request. As such, while the Council could redact certain parts of the record that contain speculative and deliberative opinion, it would still be required to provide the remaining factual information, unless the material was inextricably linked. The Council has made no indication that the deliberative material in the record was inextricably linked to the factual material. As such, it is my opinion that the Council should redact the deliberative material from the record and provide a redacted copy contained all factual information that remains.

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

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Michael Hartburg