



STATE OF INDIANA

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March 25, 2013

Brian Vukadinovich
1129 E. 1300 N.
Wheatfield, Indiana 46392

Re: Formal Complaint 13-FC-68; Alleged Violation of the Access to Public Records Act by the Town of Cedar Lake

Dear Mr. Vukadinovich:

This advisory opinion is in response to your formal complaint alleging the Town of Cedar Lake ("Town") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* David M. Austgen, Attorney, responded on behalf of the Town. His response is enclosed for your reference.

BACKGROUND

You allege that on January 7, 2013 you submitted a written request for records to the Town. As applicable to your formal complaint, you sought copies of the following:

- Records of disciplinary actions taken against Mary Joan Dickson during the course of her employment to include any formal charges, the factual basis for any disciplinary action in which final action has been taken such as admonishment(s), reprimand(s), and write-up(s), etc...;
- Records of any complaint of any kind that have been submitted against Mary Joan Dickson by members of the public or town officials in any form such as letters, emails, etc. . . ;
- Records of any matters wherein Mary Joan Dickson was involved with breaking any town policies or regulations concerning any matters such as anti-nepotism policies during the course of her employment.

On January 25, 2013, Mr. Nicolini denied your request in writing pursuant to I.C. § 5-14-3-4(b). You allege that the Town's denial of your request was improper.

In response to your formal complaint, Mr. Austgen advised that your request for records of the Town commenced on January 7, 2013 and continues to the present. Some of the requests that have been made are for records which do not fit any exception under I.C. § 5-14-3-4(b). Other requests are overly broad, lack specificity, and are couched

with a catch-all request for “any and all” records for email communications. Mr. Nicolini provided a written response to your January 7, 2013 request on January 25, 2013 and advised you of the records that would be provided and those that would be withheld pursuant to the applicable exception. Mr. Nicolini met with you in person on January 29, 2013 and provided all records responsive to your January 7, 2013 request. Subsequent to the Town’s January 29, 2013 production, you submitted a separate public records request which the Town advised in written correspondence that it believed the request was overly broad and asked for more specificity. Mr. Austgen provided that you have not provided the Town with any further specificity regarding your January 29, 2013 request.

As to your formal complaint, Mr. Austgen maintains that it appears that you are asserting that there have been formal charges filed against Ms. Dickson, with documents providing the factual basis for the same, wherein “final action” has been taken. If such “final action” was taken on a matter concerning formal charges against Ms. Dickson, the Town agrees that it would be required to provide certain records pursuant to I.C. § 5-14-3-4(b)(8). However, based upon the review and assessment by Mr. Nicolini, there has been no final action on any formal charges against Ms. Dickson. Thus, there are no public records to provide pertaining to your January 7, 2013 request. Mr. Nicolini has been continually prompt in addressing all requests and concerns that you have forwarded to the Town. The Town believes it has fulfilled all responsibilities under the APRA in response to your requests.

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 Town 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 Town’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). The APRA provides 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.

Your request of the Town sought:

- Records of disciplinary actions taken against Mary Joan Dickson during the course of her employment to include any formal charges, the factual basis for any disciplinary action in which final action has been taken such as admonishment(s), reprimand(s), and write-up(s), etc...;
- Records of any complaint of any kind that have been submitted against Mary Joan Dickson by members of the public or town officials in any form such as letters, emails, etc. . . .;
- Records of any matters wherein Mary Joan Dickson was involved with breaking any town policies or regulations concerning any matters such as anti-nepotism policies during the course of her employment.

The Town denied your request pursuant to I.C. 5-14-3-4(b). Initially I would note that the Town would be required to cite to the specific exemption if it elected to exercise its discretion and deny your request under section 4(b) of the APRA. *See* I.C. § 5-14-3-9(c). Thus, the Town acted contrary to the requirements of section 9(c) of the APRA by only

citing to I.C. § 5-14-3-4(b) to deny the request. After reviewing your formal complaint and the Town's response, it is clear that the exemption referred to by the Town in its original denial was I.C. § 5-14-3-4(b)(8). In the Town's response to your formal complaint, Mr. Austgen advised that there has been no final action on any formal charges for Ms. Dickson.

The only punishment that would require the Town to provide information under I.C. § 5-14-3-4(b)(8)(C) would be if the employee was suspended, demoted, or discharged. Here, you sought information for incidents where the employee was "admonished, reprimanded, or written up." Such disciplinary actions would not require a factual basis to be provided by the Town; the Town would have discretion in such instances pursuant to I.C. § 5-14-3-4(b)(8). The Town has provided that there has been no final action on any formal charges for Ms. Dickson. As such, it is my opinion that the Town did not act contrary to I.C. § 5-14-3-4(b)(8)(C) in response to your request. It is not clear from the Town's response if there are any current formal charges pending against Ms. Dickson. If there are, the Town would be required pursuant to I.C. § 5-14-3-4(b)(8)(B) to provide information relating to the status of such charges.

As to your request for any complaints that have been submitted against Ms. Dickson, the Town would not violate the APRA by exercising its discretion and denying your request pursuant to I.C. § 5-14-3-4(b)(8) if such records are maintained in Ms. Dickson's personnel file. As to your request for records related to Ms. Dickson breaking any town policies or regulations, if Ms. Dickson was not suspended, demoted, or discharged, there are no pending formal charges against her, and that all records are maintained in her personnel file, the Town would not violate the APRA by exercising its discretion and denying your request pursuant to I.C. § 5-14-3-4(b)(8).

Lastly, although not addressed in your formal complaint, you have requested from the Town all emails from three email addresses. The APRA requires that a records request "identify with reasonable particularity the record being requested." I.C. § 5-14-3-3(a)(1). "Reasonable particularity" is not defined in the APRA, but the public access counselor has repeatedly opined that "when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity." See *Opinions of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. See generally IC 5-14-3-1; *Opinions of the Public Access Counselor 02-FC-13; 05-FC-87; 11-FC-88*. The Indiana Court of Appeals held in *Anderson* that a request for electronic communication that fails to provide the sender, recipient, and date range is not considered to be reasonably particular. *Anderson v. Huntington County Bd. of Comm'rs*, 2013 Ind. App. LEXIS 36 (Ind. Ct. App. Jan. 29, 2013) (<http://www.in.gov/judiciary/opinions/pdf/01291301jgb.pdf>). The Town has sought further specific information so that it may be able to commence the process of collecting all records that would be responsive. It is my opinion that the Town's actions are in compliance with section 3(a) of the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the Town acted contrary to section 9(c) of the APRA by failing to cite to the specific exemption in its original denial that would authorize the withholding of the records requested. It is my opinion that the Town did not act contrary to I.C. § 5-14-3-4(b)(8)(C) in response to your request. If there are current formal charges being, it is my opinion that the Town would be required pursuant to I.C. § 5-14-3-4(b)(8)(B) to provide information relating to the status of such charges. As to all other issues, it is my opinion that the Town has not violated the APRA.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: David M. Austgen