



STATE OF INDIANA

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October 4, 2013

Mr. Gregory Small, Esq.
Po Box 100
City Hall
401 N. Morton
Bloomington, IN 47402

Re: Informal Inquiry 13-INF-51; Payroll Records

Dear Mr. Small:

This is in response to your informal inquiry regarding the release of certified payroll records subject to the requirements of the Access to Public Records Act ("APRA"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the APRA, I.C. § 5-14-3-1 *et seq.*

BACKGROUND

On September 9, 2013 you submitted a request for an informal opinion regarding the release of certified public records relating to the Bloomington Transportation Project. As Attorney for the City of Bloomington ("City"), you have requested guidance as to the discretionary withholding of records as set forth in Ind. Code § 5-14-3-4(a)(5).

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 City of Bloomington is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the City's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. *See* Ind. Code § 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* Ind. Code § 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* Ind. Code § 5-14-3-9(b).

The APRA requires that personnel records are exempt from disclosure unless the information sought relates to “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”. *See* Ind. Code § 5-14-3-4(a)(8)(A). However, the APRA only addresses personnel records of public agencies employees and not contractors particularly.

In regard to the request at hand, you specifically inquired as to the certified payroll records for all workers of Lamar Construction on the Bloomington Transportation Project. Although not stated specifically in your request, presumably Lamar Construction is a contractor for the City. While the APRA does not reference payroll records of third-party vendors, it is a reasonable assumption that because private entities are not subject to the APRA; then public access considerations would not be applicable to those entities. The agent-principal relationship alone with the vendor would not rise to the level of extending public access to the contractor.

A caveat to that argument is a situation where the public agency somehow receives the payroll information for their use under the contract. As soon as the information is in the hands of a public agency, then the APRA would be triggered. Once in the hands of a public agency, it becomes public record.

An exception to the discretionary standard of that provision is the statute you cited, Ind. Code § 5-14-3-4(a)(5) which states confidential information is not discretionary and therefore shall not be released. If the contract specifically addresses the confidentiality of the third-party salaries or personnel records, then the information shall not be released under basic breach of contract law. *See Berkel & Co. Contractors, Inc. v. Palm & Assocs., Inc., 814 N.E.2d 649, 655 (Ind. Ct. App. 2004).*

Therefore, if the payroll records are kept exclusively by the contractor, they are not public. However, if the records are provided to the agency, they become public records even though the agency did not create the record.

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 'LH Britt', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor