

March 1, 2006

Kelly D. Foglesong
540 Northeast "F" Street
Linton, IN 47441

Re: Formal Complaint 06-FC-33; Alleged Violation of the Access to Public Records Act by the City of Linton

Dear Mr. Foglesong:

This is in response to your formal complaint alleging that the City of Linton ("City") violated the Access to Public Records Act by denying you access to a list of results from a recent drug test given to city employees.

BACKGROUND

You went to the City Hall on January 18, 2006, and orally requested the drug test results of city employees. You were told by the Linton Human Resources Manager that the Mayor, Tom Jones, had told her not to disclose that information to you. When you received this denial, you handed the Manager a written request for a "list of drug test results recently given to city employees." You allege that you have yet to receive the information or a formal letter denying you the information.

I sent a copy of your complaint to the City. Mayor Jones sent a responsive letter dated February 9, 2006. I have enclosed a copy of the letter for your reference. Mayor Jones stated that you are a city councilman. As a councilman, you were aware of the newly-implemented drug screening policy, and were also informed that policies regarding the drug testing were being completed. The City Personnel Policy was created by executive order on August 8, 2005. Because the entire manual is public record, you could have reviewed it. The Mayor cited to Indiana Code 5-14-3-4(b)(8) as the exemption applicable to the records that you seek. Mayor Jones acknowledged that a list of test results without identifying information would be disclosable. However, no such record exists and would have to be created to comply with your request. Because the testing company sends the test results to the City by individual employee,

and the test results are maintained in the individual's personnel file, the records are protected from disclosure. Further, the Mayor attempted to give you information in the aggregate by creating a letter that stated: Of the employees who participated in the mandatory citywide drug testing on January 10th, the results have come back with a 2% positive result." Finally, the Mayor stated that a letter was available to you within 24 hours as required by the Access to Public Records Act.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). If a public agency receives a request for a record in person, the public agency is required to respond within 24 hours or the record is deemed denied. IC 5-14-3-9(a). If a request is made orally, either in person or by telephone, a public agency may deny the request orally. IC 5-14-3-9(c). However, if a request initially is made in writing, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny a written request for a record if the denial states the exemption or exemptions authorizing the public agency to withhold the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c). A public agency is not required to compile or create a record to satisfy a person's request for information. Rather, the APRA requires that a public agency make available its current records.

Under section 4 of the APRA, certain records may be withheld in the discretion of the public agency. Among other types of records, personnel files of public employees may be excepted, 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.

IC 5-14-3-4(b)(8).

Mayor Jones provided me with a copy of Chapter 2 of the City Personnel Policies. Section 2.10 sets out the policy of the City regarding the contents of an employee's personnel file. In relevant part, subsection 3 states that the medical portion of the personnel file would contain alcohol and drug test results. In addition, section 2.11 entitled "Access to Personnel Files" states that "No information shall be provided to any person concerning the employment of the employee other than job title, department, date of hire, date of termination, and wages."

It is my opinion that the City may withhold the drug test results of individual employees. The drug test results are part of the employees' personnel file. In addition, drug test results are not among the types of information from an employee's personnel file that *must* be disclosed.¹

¹ The City Personnel Policy manual states that only certain limited information from a personnel file will be disclosed; the policy was not wholly consistent with the APRA. State law specifically requires that all the following information be disclosed: The name, compensation, job title, business address, business telephone

See IC 5-14-3-4(b)(8)(A) – (C). Therefore, it was not a violation of the APRA for the City to deny you these records. In addition, under the APRA the City was not required to compile a list of test results at your request.

You also complained that you had not received a letter specifying the reason for denial of the records. Although the Human Resources Manager could orally deny your in-person request for records, once you reduced your request to writing, the City was required to issue a written denial within 24 hours of its receipt of the written request.

In the City's response, it appears that the Mayor has stated that the letter was produced within a 24 hour period, but I do not have a copy of a denial letter, only the letter giving you the aggregate result of the tests. If the City did not send you a written denial that contained the citation to the personnel file exemption, IC 5-14-3-4(b)(8), including the name and title or position of the person responsible for the denial, this omission would have been a violation of the Access to Public Records Act.

CONCLUSION

For the foregoing reasons, the City of Linton could withhold the individual drug test results pertaining to its public employees, and was not required to create a list of individual results without identifying information. The City of Linton may have violated the Access to Public Records Act if it failed to issue a written denial in a timely manner that conformed to the requirements of IC 5-14-3-9(c).

Sincerely,

Karen Davis
Public Access Counselor

cc: Mayor Tom Jones

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. IC 5-14-3-4(b)(8)(A). I urge the City to revise its policy to conform to the APRA, and to disclose all required information at a person's request.