

January 28, 2005

Sent Via Facsimile

Mr. Richard R. Fox
109 Bank Street
New Albany, IN 47150

Re: Formal Complaint 04-FC-238; Alleged Violation of the Access to Public Records Act by Floyd Memorial Hospital and Health Services

Dear Mr. Fox:

This is in response to your formal complaint alleging that Floyd Memorial Hospital and Health Services ("Hospital") violated the Access to Public Records Act by withholding the employment contract of the Hospital's chief executive officer. I find that the Hospital should disclose the employment contract.

BACKGROUND

By letter dated November 8, 2004, you sought a copy of Bryant Hanson's employment contract. Mr. Hanson is the Hospital's chief executive officer. On November 15, Mr. J. Scott Waters, an attorney representing the Hospital, wrote you a letter with his first response. He stated that he would seek direction of the Hospital Board on your request and would be in contact with you. This letter was faxed to you on November 15.

On November 24, Mr. Waters sent you a letter in which he declined to disclose the Hanson employment agreement, citing Ind.Code 5-14-3-4(b)(8). He also stated that the Board would be subject to the proscriptions of IC 5-14-3-10(a), making it a class A misdemeanor for the Board to knowingly or intentionally disclose the Hanson employment agreement. The letter disclosed the following information regarding Mr. Hanson's employment: compensation, job title, business address, business telephone number, job description, education and training background, and previous work experience. Mr. Waters also offered to share with you information regarding comparable compensation for hospital executives.

You filed your complaint with this office on December 20, 2004. In your complaint, you challenge the position of the Hospital that the Hanson employment contract is part of a personnel file. You claim that all employment contracts are disclosable public records.

I sent a copy of your complaint to the Hospital. In response, Mr. Waters wrote on behalf of the Board of Trustees of the Hospital. He reiterated his position that the Hanson contract is part of a personnel file, excepted from disclosure under IC 5-14-3-4(b)(8). You have received a copy of that response. The parties have also sent me additional responses to assist me in determining the requirements with respect to disclosure of an employment contract.

ANALYSIS

The Access to Public Records Act states:

[G]overnment is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the 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. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

Ind.Code 5-14-3-1.

Accordingly, any person may inspect and copy the public records of a public agency during the agency's regular business hours, except as provided in section 4 of the APRA. IC 5-14-3-3(a). One category of records that are excepted from disclosure at the discretion of a public agency is personnel files of public employees. IC 5-14-3-4(b)(8). Certain specified information about a public employee must be disclosed notwithstanding an agency's discretion to not disclose the personnel file of a public employee. Among the types of information that must be disclosed are the employee's 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. IC 5-14-3-4(b)(8)(A).

The question presented by your complaint is fairly straightforward: is an employment contract of a public employee nondisclosable at the discretion of the agency under the "personnel file" exception? Although Indiana courts have not construed section 4(b)(8) in the context of an employment contract, in my opinion, the employment contract of a public employee must be disclosed unless other applicable law makes it confidential.

The Hospital does not dispute that it is a public agency under IC 5-14-3-2. It is a county hospital organized under IC 16-22, and a governing board operates the hospital for Floyd County. As a public agency, it is subject to the Access to Public Records Act. There is also no dispute that the Hanson employment contract is a public record. The Hospital maintains that an employment contract of a Hospital employee is a part of the employee's personnel file and as such is nondisclosable at the discretion of the agency.

As I stated earlier, no Indiana court has construed the language of the personnel file exception with respect to its scope. The advisory opinions of this office likewise have not offered an opinion on this precise issue. In a related issue concerning the nature of personnel file information, this office observed (without holding) that payroll time cards on particular employees were more in the nature of financial records, not personnel file information. *Opinion of the Public Access Counselor 04-FC-96*. It is apparent that this office has recognized that records may relate to a particular employee and the person's employment without automatically bringing the record within the ambit of the personnel file exception.

Further, in *Opinion of the Public Access Counselor 99-FC-07*, Ms. O'Connor (the former public access counselor) wrote: "While I agree that an employee's contract may be retained in personnel files for the purpose of the school corporation, a teacher's contract must be disclosed under IC 20-6.1-4-3." I do not read this statement to mean that in the absence of a specific statute mandating disclosure, a contract retained in the personnel file is subject to the exemption. Indeed, such a rule would shield important information from disclosure if a record were conveniently placed in an employee's personnel file without justification. I do not believe that the Hospital attempts any subterfuge, but earnestly wishes to argue in good faith that the Hanson employment contract is part of Hanson's personnel file. In fact, I acknowledge the personnel context to which the contract relates.

With respect to IC 20-6.1-4-3, one could draw two inferences from the existence of this specific mandate that a teacher's contract be disclosed. The first is that the legislature believed it would not otherwise be subject to disclosure and wished to make it disclosable as an exception to the Access to Public Records Act. An opposite inference may be drawn that the teacher contract provision is an expression of the legislature's intent that a public employment contract be disclosed as a matter of policy, and no inference about the legislature's knowledge of how the more general APRA would operate on a teacher contract may be drawn at all. I believe the latter inference is more compelling.

You have cited to a non-binding advisory opinion of the Indiana Attorney General. In that opinion, the Attorney General opined that the employment contract of the superintendent of Wicker Memorial Park was a disclosable public record notwithstanding the personnel file exception:

"If the Public Record Law is liberally construed to implement the public policy of the state, the employment contract of any public official or employee must be made available for public inspection upon request. Such contracts contain only the terms and conditions of public employment. Voters and taxpayers are entitled

to know how much public servants are paid and what duties the public servants perform.”

1987 Op. Ind. Att'y Gen. No. 16

I also found cases in one jurisdiction that are directly on point. Missouri law has held that a contract of a public employee is subject to disclosure and was not personnel file information under Missouri's Sunshine law. *Librach v. Cooper*, 778 S.W.2d 351 (Mo.App.E.D. 1989); *North Kansas City Hospital Bd. of Trustees v. St. Luke's Northland Hospital*, 984 S.W.2d 113 (Mo.App.W.D. 1998). In *Librach*, the court held that the terms of a severance agreement between the Board and the former superintendent of the school district were subject to inspection. The court held that the severance agreement was not an “individually identifiable personnel record” that could be withheld under Missouri's version of the personnel file exception. The court applied the state's mandate to construe the Sunshine law liberally and the exceptions narrowly, and declined to consider the severance agreement, or any employment agreement of a public employee, as a personnel record:

“Public employees may not wish their employment contracts known, but this personal desire is insignificant when contrasted to the public's interest in knowing what their public servants are being paid and under what terms and conditions. The [Missouri] General Assembly did not expressly create an exception for employment contracts and we decline to do so by implication.”

Id. at 355.

This rule was followed by the *North Kansas City Hospital* court involving employment contracts of a public hospital.

Given the Indiana legislature's expressed intent that the provisions of the Access to Public Records Act be construed liberally in favor of disclosure, and the exceptions narrowly construed, I opine here that the employment contract of the Hospital's chief executive officer is not a personnel file record, and is therefore subject to the general rule of disclosure.

Given the conclusion drawn here, it is not necessary to offer any opinion as to the completeness of the Hospital's response to your request for the contract. However, I wish to point out that information regarding the term of the contract (equivalent to the first and last dates of employment, required under IC 5-14-3-4(b)(8)(A)) were omitted from the information supplied by the Hospital. Also, in my opinion “compensation” means more than merely the salary. In the context of a contract, I believe that all forms of compensation such as bonus incentives (contemplated in IC 16-22-3-10(1)) should be disclosed. This additional guidance is not meant to detract from the firmness of my opinion regarding the need to disclose the employment contract, but merely recognizes that my opinions are advisory only.

CONCLUSION

For the foregoing reasons, I find that the employment contract of the chief executive officer of Floyd Memorial Hospital and Health Services is a public record that is disclosable without exception under the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. J. Scott Waters, IV