



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

November 13, 2009

Mr. Garry L. Coleman
1004 Linsmore S. Dr. Apt. D
Indianapolis, IN 46227

Re: Formal Complaint 09-FC-238; Alleged Violation of the Access to Public Records Act by the Indiana Department of Local Government Finance

Dear Mr. Coleman:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Local Government Finance ("DLGF") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* For the following reasons, it is my opinion that DLGF did not violate the APRA.

BACKGROUND

In your complaint, you allege that DLGF violated the APRA by failing to provide you with an unredacted version of your employee performance appraisal, which was an attachment to an email between two members of DLGF (hereinafter, "Attachment"). In response to your request, DLGF attorney Micah Vincent sent you an email in which he stated that the record you requested was not a part of your permanent file and that it was exempt from disclosure because it was an expression of opinion communicated within the agency for the purpose of decision making (i.e., it was exempt from disclosure pursuant to the intra-agency deliberative materials exception to APRA).

You reject DLGF's reasoning and maintain that you are entitled to access the Attachment. You argue that the APRA makes no distinction between permanent personnel file information and "inactive, temporary or secondary" personnel file information. You also cite the Indiana Commission on Public Records' retention schedule information in claiming that performance appraisals are included in a state employee's personnel file. You also take issue with the DLGF's claim that the Attachment is exempt from disclosure under the APRA's intra-agency deliberative materials exception. You state that DLGF's claim is "devoid of any factual support."

My office forwarded a copy of your complaint to DLGF. Mr. Vincent's response on behalf of DLGF is enclosed for your review. Mr. Vincent states that the document

you requested was an attachment on an email from one staff member of DLGF to another staff member. The email message states that the attachment “[n]eeds to be spell/grammar checked.” The author of the message also writes, “Let’s discuss tomorrow.” Because you requested “[a]ny and all other internal DLGF communications relative to [you]” from DLGF, this email message and the attachment was produced in redacted form. Mr. Vincent also notes that the email is dated January 9, 2008, but your review period was from April 1st to March 1st of a given year. According to Mr. Vincent, the Attachment was used in the decision to terminate your employment on January 25, 2008.

Mr. Vincent clarifies his original statement to you that the Attachment was not part of your “permanent file” by stating that the record is not part of your *personnel* file. According to Mr. Vincent, the Attachment is not now and has never been located in your personnel file. The redacted version was produced to you not as a result of your request for personnel file information, but as a result of your request for “other internal DLGF communications” regarding you.

Finally, Mr. Vincent elaborates on DLGF’s invocation of the intra-agency deliberative materials exception to the APRA. Mr. Vincent states that the record falls under that exception because it (1) is a communication between two members of DLGF; (2) was based on opinions regarding your job performance for the purpose of evaluating your employment status; and (3) was created for the purpose of making a decision regarding your employment status. With regard to the latter element, Mr. Vincent notes that the Attachment was not your employee performance appraisal report, but rather a template for the decision makers to use to communicate internally concerning the status of your employment.

ANALYSIS

The public policy of the APRA states, “[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.” I.C. § 5-14-3-1. DLGF does not dispute that it constitutes a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy DLGF’s public records during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Personnel files of public employees are generally excepted from disclosure at the discretion of the agency, except for the items specifically required by the APRA to be disclosed. I.C. §5-14-3-4(b)(8). However, all personnel file information shall be made available to the affected employee or employee’s representative. I.C. §5-14-3-4(b)(8).

Here, DLGF has released all of the information that was included in your personnel file. DLGF claims that the Attachment was never a part of your personnel file. “[T]his 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." *Opinion of the Public Access Counselor 04-FC-238*. If the Attachment were a final performance appraisal, I would agree with you that it should be part of your personnel file and, consequently, available for you to inspect and/or copy. However, here the DLGF notes that the Attachment has never been a part of your personnel file because, rather than being created in conjunction with the performance appraisal process, it was speculative material for the DLGF to use in its decision regarding your employment status. If the Attachment was not a part of your personnel file, it is my opinion that the DLGF did not violate the APRA by failing to produce it to you in response to a request for all of your personnel file information.

In the absence of an applicable exception to the APRA, the Attachment would presumably be available for you to access in response to your request for "other internal DLGF communications" regarding you. Here, however, the DLGF has claimed that the Attachment falls under the intra-agency deliberative materials exception to APRA. *See* I.C. § 5-14-3-4(b)(6). DLGF bears the burden of proof that the Attachment is subject to the deliberative materials exemption. *See* I.C. § 5-14-3-1; I.C. § 5-14-3-9(g). To discharge its burden, DLGF must show that the document is intra-agency, is an expression of opinion or speculative, and was communicated for the purpose of decision making. Ultimately, a court would view the document *in camera* if you or anyone else filed a lawsuit to compel the DLGF to disclose the Attachment in unredacted form. *See* IC 5-14-3-9(h). Assuming Mr. Vincent's description of the Attachment and the purposes for which it was created are accurate, it is my opinion that DLGF did not violate the APRA by failing to disclose the Attachment to you on this basis.

CONCLUSION

For the foregoing reasons, it is my opinion that DLGF did not violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Micah Vincent, Indiana Department of Local Government Finance