STATE OF INDIANA

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November 19, 2009

Mr. David R. Kurtz
118 W. Ninth St.
Auburn, IN 46706

Re: Formal Complaint 09-FC-244; Alleged Violation of the Access to Public Records Act by the Auburn Board of Public Works and Safety

Dear Mr. Kurtz:

This advisory opinion is in response to your formal complaint alleging the Auburn Board of Public Works and Safety ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*.

BACKGROUND

In your complaint, you allege that you requested a record from the Board regarding the disciplinary proceedings of two police officers: Officer Christopher Pongratz and Officer Brett Browand. The officers were subject to discipline as a result of allegedly engaging in sex with an 18-year-old woman while on duty. Specifically, you are seeking a "transcript of Police Chief Martin McCoy's interview with an unidentified 18-year-old female, regarding her alleged sexual contact with one or more officers of the Auburn Police Department." You argue that you are entitled to the information under Indiana Code section 5-14-3-4(b)(8)(C), which provides that disclosable records regarding public employees include "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."

In response to your request, the city attorney W. Erik Weber wrote you a letter in which he stated that the disciplinary action taken against one of the officers -- Cpl. Pongratz -- remains pending before the Board and is not final. The Board thus believed section 4(b)(8)(C) did not apply at the time of your request. Mr. Weber also took the position that the records were exempt from disclosure at the discretion of the agency "under IC 5-14-3-4(b)(1), Investigatory Records of law enforcement agencies, and IC 5-14-3-4(b)(6) Deliberative materials."

You reject the Board's reasoning for its denial of your request. Specifically, you argue that final action was taken when the Board voted to terminate the officer and that the appeal of the decision is more akin to an effort to overturn a final action than a final action in itself. You reason that Mr. Weber's "logic would allow such a record to be kept secret until an officer has exhausted all remedies, board appeal, lawsuit, and appellate review." You argue that such a result was not the intent of the General Assembly when it included section 4(b)(8)(C).

Regarding the claimed investigatory records exception, you argue that when the record is submitted as part of the administrative appeal, it loses the protection of section 4(b)(1) "as an investigatory record entered as evidence into a court case would become a public record available for inspection and copying by the public."

Regarding the deliberative materials exception to APRA, you argue that this provision only makes confidential portions of records that are "opinion or speculative nature" that are submitted for decision making purposes. You argue that it would be incorrect to try and make the entire record confidential under this provision. You acknowledge that if the person who conducted the interview added personal views and opinions about whether or not the 18-year-old was lying, that would arguably fall under the exception when given to the Board to consider the officer's termination. However, you believe that the transcript of the interviewer and young woman's conversation is not opinionated or speculative material; it is verbatim recitation of the interview.

My office forwarded a copy of your complaint and attached materials to the Board. Mr. Weber's response on behalf of the Board is enclosed for your review. Mr. Weber maintains his position that the disciplinary actions against the officers in question are not final. He states that on September 10, 2009, the Board preliminarily accepted recommendations of termination that was made by Chief McCoy on September 8th. However, according to Indiana Code section 36-8-3, no final decision can be made until an officer is given a full opportunity for a hearing. Based on that statute, Mr. Weber argues that final action has not been taken and section 4(b)(8)(C) of the APRA did not apply at the time you submitted your request. Mr. Weber also notes that the findings of fact and conclusions of law which resulted from the October 22, 2009, hearing were provided to you the same day the decision was rendered.

Mr. Weber also maintains his view that the transcript is an investigatory record of a law enforcement agency and, therefore, exempt from disclosure under APRA section 4(b)(1). Mr. Weber notes that the transcript was obtained by Chief McCoy, was investigatory in nature, and was not a part of either officer's personnel files.

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. GCCS 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 GCCS'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).

"Final Action" Under APRA Section 4(b)(8)(C)

Initially, I note that Mr. Weber states in his response that the transcript has never been part of either officer's personnel file. In that case, section 4(b)(8)(C) would not apply because that section pertains only to the personnel files of public employees. The Indiana Commission on Public Records' general retention schedule that is applicable to all state agencies defines a personnel file as

> [a] state agency's documentation of the employee's working career with the state of Indiana. Typical contents could include the Application for Employment, PERF forms, Request for Leave, Performance Appraisals, memos, correspondence, complaint/grievance records, miscellaneous notes, the Add, Rehire, Transfer, Change form from the Office of the Auditor of State, Record of HRMS Action, and/or public employee union information. Disclosure of these records may be subject to IC 5-14-3-4(b)(2)(3)(4) & (6), and IC 5-14-3-4(b)(8).

See Records Retention and Disposition Schedule, State Form 5 (R4/ 8-03). I note this language is not necessarily binding on the Board because it applies to state agencies. However, it is instructive for discerning the types of information and documentation that are typically included in a public employee's personnel file. Disciplinary information is not specifically included in the listing, but an employee's "complaint/grievance records" are. If the police department typically includes disciplinary information and documentation in its employees' personnel files, the Board should not make an exception for the transcript in order to avoid the requirements of section 4(b)(8).

If the transcript is (or should have been) included in the officers' personnel files, the APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, 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) (emphasis added). Therefore, a public agency is required to disclose a record concerning "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." It is my understanding that the Board's "final action" took place on October 22, 2009, when the Board accepted the recommendation of Chief McCoy to terminate the officers' employment.[1] Because your request was filed on October 15, 2009, it is my opinion that the Board did not violate the APRA by refusing to disclose the record to you at that time. Given that this Board's argument against disclosure is rendered moot by the fact that final action has occurred, we must turn to the Board's other claimed exemptions in order to analyze whether the record may be withheld on some other basis.[2]

Intra-Agency Deliberative Materials

The Board also claims that it can withhold the record under the "deliberative material" exception to the APRA, which applies to records that are "intra-agency or interagency advisory or deliberative material . . . that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making." I.C. § 5-14-3-4-(b)(6). Here, there is no indication that the transcript constituted an expression of opinion, was speculative in nature, or was communicated for the purpose of decision making. The fact that a record is *used* in decision making does not make it deliberative material; it must meet all of the elements of section 4(b)(6). Consequently, it is my opinion that the Board cannot rely upon this exception to the APRA in withholding the transcript.

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[1] To an extent, I agree with your argument regarding the question of whether an action could ever be final considering the possibility of civil suits and appellate review. However, I consider the acceptance of the recommendation "final action" in this case because, unlike the additional remedies available to the officers, the acceptance of the recommendation of termination is a procedural right granted to them via statute rather than one elected by them post-termination.

[2] In *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 915 (Ind. Ct. App. 2003), the Indiana Court of Appeals noted that the disclosure requirements of section 4(b)(8) of the APRA do not trump the remaining exceptions to disclosure in section 4. The court held,

> If 4(b)(8)(A) through (C) trumped all exceptions to disclosure, one would not expect them to be listed under the section 4(b)(8) exception. More importantly, to read section 4(b)(8)(C) to trump all other exceptions would render other portions of section 4 superfluous.
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> …
>
> Thus, we hold that sections 4(b)(8)(A), (B), and (C) are exceptions only to the disclosure exceptions listed in sections 4(b)(8) and (12). However, the section 4(b)(8)(A), (B), and (C) exceptions do not trump the remaining disclosure exceptions listed in section 4.

Id.

Investigatory Records of a Law Enforcement Agency

The APRA defines "law enforcement agency" as "an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders…." I.C. § 5-14-3-2(m)(6). It is not entirely clear from this definition whether the Board is a "law enforcement agency" under the APRA. In 2007, Counselor Davis encountered a somewhat similar dilemma regarding the Indianapolis Fire Department. She advised:

> If the IFD has a department that engages in the investigation of alleged criminal offenders, then records compiled in the course of an investigation of a crime that are created, received, retained, maintained, or filed with that department may be withheld in the agency's discretion [as investigatory records of a law enforcement agency]. It is the IFD's burden to show that a record fits an exemption. IC 5-14-3-1; IC 5-14-3-9(g).

Opinion of the Public Access Counselor 07-FC-28. Following Counselor Davis' logic, the Board might constitute a "law enforcement agency" under section 2(m)(6) because it has a department (i.e., the police department) that engages in the investigation of alleged criminal offenders. I agree with Counselor Davis, however, that the burden is on the Board to show that it is a law enforcement agency. In my opinion, the Board has not yet sustained that burden.

Moreover, investigatory records are records compiled during the course of the investigation of a *crime*. I.C. § 5-14-3-2(h). The investigatory records exception is one of the broadest exceptions in the APRA; it allows a law enforcement agency to withhold nearly all records it compiles during the course of the investigation of a crime. *See Opinion of the Public Access Counselor 09-FC-95*. However, the statute is clear that the exception only applies to investigations involving crimes (or suspected crimes) and not to all investigations generally. If the investigation involving the two officers was an investigation into employee misconduct and not a criminal investigation, the investigatory records exception does not apply. Based on the information before me, it is my opinion that the Board has not yet met its burden to show that the investigatory records exception applies to the record at issue here.

CONCLUSION

For the foregoing reasons, it is my opinion that the Board did not violate the APRA when it denied your request for access to the transcript before a final action occurred with respect to the officers' employment. Further, it is my opinion that the Board should disclose the record to you in response to a timely request for access unless

the Board can demonstrate that it is a "law enforcement agency" and that the record involved the investigation of a crime within the meaning of the APRA.

Best regards,

Andrew J. Kossack
Public Access Counselor

cc: W. Erik Weber, Mefford, Weber and Blythe