



# STATE OF INDIANA

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August 25, 2016

Mr. Ben L. Quiggle  
421 South 2<sup>nd</sup> Street  
Elkhart, Indiana 46516

*Re: Formal Complaint 16-FC-164; Alleged Violation of the Access to Public Records Act by the Elkhart County Human Resources Department*

Dear Mr. Quiggle:

This advisory opinion is in response to your formal complaint alleging the Elkhart County Human Resources Department ("Department") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-3-1 et. seq. The Department has responded via counsel, Ms. Denise Davis, Esq. Her response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on July 14, 2016.

## **BACKGROUND**

Your complaint dated July 13, 2016 alleges the Elkhart County Human Resources Department violated the Access to Public Records Act by denying your records request.

On June 14, 2016, you sent a records request to the Department seeking records related to the termination of a county employee. In response, the Department informed you certain records regarding the decision to fire the employee would be withheld. Instead, you were given the notice forms related to the termination.

You submitted a second records request, seeking the employee file and the internal investigation report. You were informed the records would not be disclosed because they are investigatory, speculative in nature and because they were used in an executive session.

On July 29, 2016 the Department responded. The Department asserts your requests were overly broad and lacked reasonable particularity. The Department contends its response provided sufficient factual basis regarding the termination, noting the records which were provided listed the policy violated. The Department contends its denial regarding the internal investigation report was properly denied as an

investigatory record, as interagency deliberative material and a record created for discussion as an executive session. *Indiana Code §§ 5-14-3-4(b)(1), (b)(6) and (b)(12)*.

The Department contends the denial was proper because the records include detailed statements from witness interviews conducted during the investigation. The Department notes the investigatory records exemption does not differentiate between a pending or closed investigation. The Department also contends the records are deliberative materials and were prepared for an executive session.

### 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 Indiana Code 615 N.E.2d 441 -1*. The Elkhart County Human Resources Department is a public agency for the purposes of the APRA. *See Indiana Code § 5-14-3-2(n)(1)*. Accordingly, any person has the right to inspect and copy the Department’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14- 3-3(a)*.

Generally, personnel files are exempt from disclosure except for basic employment information. *See Indiana Code § 5-14-3-4(b)(8)*. When an employee is terminated, however, the factual basis for the disciplinary action becomes public record. Upon your request for the employee’s entire personnel file, the Department rightfully cited this exemption to disclosure.

You also asked for the internal investigation leading up to the termination, as well prompting the Department to raise the investigatory records exemption. An investigatory record is “information compiled in the course of the investigation of a crime.” *See Indiana Code § 5-14-3-2(h)*. The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. Under *Althaus v. The Evansville Courier Company*, 615 N.E.2d 441 (Ind. Ct. App. 1993) - this exemption may continue to apply to an investigatory record even after the conclusion of an investigation.

The issue in the present case is whether the investigation was of a “crime” defined by Indiana law as a felony or misdemeanor under Indiana Code § 35-41-1-6. The mere fact an internal investigation of a public employee just so happened to be conducted by a law enforcement agent does not mean the investigation was of criminal activity. In order for a public agency to have the discretion to exercise the “investigatory record” exemption to disclosure, the agency must be a law enforcement agency. In this case, it appears as if the factual basis for the termination was an internal policy violation of the Elkhart County Park Board Code of Conduct. The Department has not alleged an actual “crime” and therefore I do not believe the investigatory record exemption would apply.

The Department also cites Indiana Code § 5-14-3-4(b)(12). Former Public Access Counselor Karen Davis addressed this provision in *Advisory Opinion 05-FC-256*. She wrote the following:

*However, it is not sufficient that the record must merely relate to an executive session. It must also have been specifically prepared for discussion in an executive session. Hence, if the material excepted from disclosure by the CAB sets out specific agenda items to be discussed in an upcoming executive session, the excepted material would meet the exception. As with the exception for deliberative materials, to the extent that material redacted under this exemption is not exempt or “inextricably linked” to exempt material, it should be disclosed. See Opinion of the Public Access Counselor 05-FC-256.*

The Department states the report was “specifically prepared for discussion in an executive session on a personnel matter.” If this is the case, then this exemption is properly invoked. In any case, any investigation report of employee discipline is most likely going to be in a personnel file. The majority of a personnel file, unless it is among the information listed in Indiana Code § 5-14-3-4(b)(8), is exempt from disclosure.

Nevertheless, all that is required for disclosure upon request is the factual basis of the underlying cause of the employee termination. Public Access Counselors in the past have opined this factual basis, undefined by Indiana law, may be cursory in nature and satisfied by a mere reference to a policy. I disagree. When employees are hired by a public entity to carry out civic duties paid for by taxpayer monies, a degree of transparency is required when that employee is disciplined for being a poor steward of their responsibilities. “Factual basis” is not a term of art. It should include actual facts of the misdeeds supporting a policy violation. It does not have to be a detailed narrative or include names of victims or specific summaries, but it should give the reader a reasonable idea of why someone was fired, suspended or demoted.

I counseled the County to be mindful of other employees who may have been affected by the terminated employee’s behavior. They are entitled to a reasonable expectation of privacy. Furthermore, other sensitive workplace details may be withheld at the discretion of the employer. However, that discretion should be exercised judiciously. While most public records requests do not have to be fulfilled by creating a document, sometimes it may be prudent to do so. The APRA requires a factual basis to be disclosed. Therefore if one does not exist, a document may have to be generated to satisfy the requirement. In doing so, the public agency has the opportunity to balance the considerations I have listed above with any expectation of privacy. It seems to have done so with the creation of a summary clarification response, however, it merely restates the policy violations in Formal Action Notices. I still contend a factual basis requires more than that.

Therefore, it is my recommendation that the County revisit the summary clarification response and provide a set of details which would give a reader a reasonable idea of the behavior which led to the termination. In doing so, I reiterate that specific details could continue to be withheld in order to preserve any privacy interests at stake.

Regards,

A handwritten signature in black ink, appearing to be the initials 'JHB' with a stylized flourish underneath.

Luke H. Britt  
Public Access Counselor

Cc: Ms. Denise C. Davis, Esq.