



STATE OF INDIANA

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May 17, 2016

Mr. Seth Slabaugh
345 South High Street
Muncie, Indiana 47305

Re: Formal Complaint 16-FC-87; Alleged Violation of the Access to Public Records Act by the City of Muncie

Dear Mr. Slabaugh:

This advisory opinion is in response to your formal complaint alleging the City of Muncie, Ms. Sarah Beach ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 et. seq. The Office has responded via counsel, Mr. David Carr, Esq. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on April 11, 2016.

BACKGROUND

Your complaint dated April 12, 2016 alleges the City of Muncie, Ms. Sarah Beach violated the Access to Public Records Act by improperly denying your records request.

On March 5, 2016 you hand-delivered a records request to the City seeking records related to the firing of a City employee. You also asked for the personal information for the applicants for the vacated position. Your request was denied because the termination was not final and therefore no records were responsive to your request. You were told the City would supplement its response once the termination was complete. Your request for personal information was denied because the City interprets the APRA to not require disclosure of the personal information of job applicants.

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 Ind. Code § 5-14-3-1*. The City of Muncie is a public agency for the purposes of the APRA.

See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the City's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

The City has informed you the termination was not yet final as the decision is being vetted through a union grievance process. I am not familiar with the unionization of Muncie public employees, however, it is clear a final decision was made by the City in regard to the employee's status. It has gone past the investigation stage and the employee is no longer reporting to work with the City. The APRA does not make a distinction between at-will employees and unionized or merit employees.

Pursuant to Ind. Code § 5-14-3-4(b)(8)(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 must be disclosed. That the decision may be ratified or overturned by a third-party arbitrator is irrelevant – final action of the City has unequivocally been taken and the employee has been effectively terminated as a result. The purpose of the disclosure is to allow the public to gain information as to the decision-making process by the City. As far as the City is concerned, final action has been taken.

The City next has informed you it is not required to disclose personal information of job applicants. Again, Indiana Code § 5-14-3-4(b)(8) governs the disclosure of employee information. However, the City interprets this provision to not include applicants to City employment. I disagree.

The General Assembly has excepted from disclosure personnel files and applicants for public employment. However, there is an exception to the exception which clearly includes applicants. It states in Ind. Code § 5-14-3-4(b)(8) the following is excluded from disclosure:

Personnel files of public employees and files of applicants for public employment, 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.*

Emphasis added.

The City relies upon the last item in the list as justification for withholding the name, compensation, job title, business address, business telephone number, job description, education and training background, and previous work experience of applicants. It argues that the exception to disclosure only includes present or former officers or employees of the agency. Before exploring this issue, I did not agree with this interpretation for the following reasons.

In regard to the final item, ‘*of present or former officers or employees of the agency*’ only modifies ‘*dates of first and last employment*’ and not the rest of the list. There is a serial comma between ‘*previous work experience*’ and ‘*dates of first and last employment*’ thereby separating the last item from the rest of the list’. In terms of grammatical construction, each item should ostensibly stand alone.

Any ambiguity is further resolved by the logical fact a public agency would not have the first dates of employment (because the applicant is not yet hired) or last dates of employment from another employer (because the applicant may not have quit her previous job).

However, I had not considered the Court’s ruling in *South Bend Tribune v. South Bend Community School Corporation*, 740 N.E. 2d 937 (Ind. App. 2000). It held that ‘*of final or former officers or employees of the agency*’ modifies the entirety of subsection (b)(8)(A). Therefore the City is correct in that applicant information is non-disclosable. The City interprets *Baker v. Town of Middlebury*, 753 N.E. 2d 67 (Ind. App. 2001) to further support an applicant’s privacy interest, however, interestingly enough, that case involved employee termination as opposed to an applicant. The South Bend Tribune Case is the controlling authority on the issue. I apologize for any confusion on this matter.

However, the Court in Baker also states, “It can be presumed that the legislature intended its language to be applied in a logical manner consistent with the underlying policies and goals of the statute.” The purpose of the APRA is public disclosure of governmental decisions and actions. Liberally construing the statute – as is required by APRA’s preamble – the factual basis of the discipline should have been disclosed to you upon request.

CONCLUSION

Based on the forgoing, it is the Opinion of the Public Access Counselor the City of Muncie has violated the Access to Public Records Act as to the factual basis of the discipline, but not for withholding applicant information.

Regards,



Luke H. Britt
Public Access Counselor

Cc: Mr. David J. Carr, Esq.