



STATE OF INDIANA

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March 14, 2012

Ms. Margaret Fosmoe
South Bend Tribune
225 W. Colfax Avenue
South Bend, Indiana 46626
Via email: mfosmoe@sbtinfo.com

Re: *Informal Inquiry 12-INF-08; Indiana University*

Dear Ms. Fosmoe:

This is in response to your informal inquiry regarding Indiana University ("University") filed with the Public Access Counselor's Office on March 5, 2012. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Emily Springston, Associate General Counsel, responded on behalf of the University. Her response is enclosed for your reference.

BACKGROUND

On January 27, 2012, you submitted a public records request to the University for records pertaining to Professor Otis Grant. Specifically, you requested the following information from Professor Grant's personnel file:

1. The dates of his first and last employment.
2. For the most recent fiscal year, his job title, compensation, and job description.
3. Information about the formal charges against Professor Grant.
4. The factual basis for any disciplinary action in which final action had been taken and that resulted in Professor Grant being suspended, demoted, or discharged; and the date of any such action.

On February 21, 2012, Kenneth Baierl, Director of Communication and Marketing, responded on behalf of the University and provided the following responses to your inquiries:

1. Mr. Grant's first day of employment at IU South Bend was August 1, 1999. His last day of employment was December 31, 2011.

2. Mr. Grant's job title was Associate Professor of Law and Society, Department of Sociology & Anthropology, College of Liberal Arts & Sciences, and his compensation for 10 months was \$ 53,954. To our knowledge, Mr. Grant did not have a specific job description. He had responsibilities in the areas of teaching, scholarship, and service.
3. N/A
4. Mr. Grant was dismissed from the faculty of Indiana University on the grounds that he engaged in serious personal and professional misconduct. The finding of misconduct was primarily based on representations he made at the time of his hiring and subsequently during his tenure at Indiana University. Mr. Grant is grieving the decision concerning his employment through the Faculty Board of Review at IU South Bend.

You maintain that the University has not complied with the APRA in its response when providing the factual basis for Professor Grant's dismissal. Pursuant to Indiana law, you believe that the taxpayers and Professor Grant's former students and colleagues deserve to know the precise factual details regarding his dismissal as a tenured faculty member.

In response to your informal inquiry, Ms. Springston advised that the factual basis for dismissal that has been provided to you complied with the requirements of the I.C. § 5-14-3-4(b)(8)(C). Pursuant to previous opinions issued by the Public Access Counselor's Office, a detailed account is not required of an agency in responding to an inquiry for the factual basis of a dismissal. The APRA does not require a "disclosure of a detailed narrative of the events leading to a suspension or termination. *See Opinion of the Public Access Counselor 09-FC-175*. Previous disclosures, including "an incident involving conduct becoming of an officer" or "conduct unbecoming of an employee", have been deemed to be compliant with the law. *See Opinions of the Public Access Counselor 02-FC-22; 05-FC-75; and 09-FC-175*.

Here the University provided information describing the type of discipline that was lodged and further, when and why it was lodged. In addition, the University maintains it went beyond the requirements of the APRA in providing further details of Professor Grant's personal and professional misconduct (i.e. "finding of misconduct was primarily based on representations Professor Grant made at the time of hiring and subsequently during this tenure at Indiana University").

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 I.C. § 5-14-3-1*. The University is a public agency for the purposes of the APRA. *See I.C. § 5-14-3-2*. Accordingly, any person has the right to inspect and copy the University's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See I.C. § 5-14-3-3(a)*.

The APRA provides that certain personnel records may be withheld from disclosure:

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(8) 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;

(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.

However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name. I.C. § 5-14-3-4(b)(8).

You believe that the University has acted contrary to I.C. § 5-14-3-4(b)(8)(C) by not providing an adequate factual basis for Professor Grant's dismissal.

I am not aware of any Indiana case law that has addressed or defined what specific types of information must be provided by a public agency pursuant to I.C. § 5-14-3-4(b)(8)(C). In a review of prior opinions issued by the Public Access Counselor's Office, the following have been considered to comply with the requirements of the law:

- “suspended from duty on June 7, 2011, for a period of ten (10) working days for neglect of duty” – *See Opinion of the Public Access Counselor 11-FC-149*.
- “demoted on November 28, 2010, for failure to follow a direct order and misuse of state property” – *Id.*
- “suspended from duty on January 7, 2008, for a period of ten (10) working days for acts unbecoming an officer and/or conduct that would tend to bring the Division into disrepute, or impair its efficient and effective operation” – *Id.*
- “suspended from duty on June 6, 2011, for a period of five (5) working days for neglect of duty.” *Id.*

- “suspended for violating a direct order” – *See Opinion of the Public Access Counselor 10-FC-212.*
- “an incident involving conduct becoming an officer” – *See Opinion of the Public Access Counselor 09-FC-75.*
- “violation of the Standard Operating Procedures of the Greenfield Police Department.” *See Opinion of the Public Access Counselor 08-FC-184.*
- “Mr. King was terminated for disclosing confidential personnel matters, marketing programs and strategic planning, as well as for the misuse and distortion of information known to him only by virtue of his role as Vice President and Chief Financial Officer. Such conduct constituted substantial cause as that term was defined by his employment agreement, i.e. the ‘failure to comply with established [Porter] policies and procedures’ and the ‘unauthorized disclosure or use of a trade secret or other confidential’ information.” *See Opinions of the Public Access Counselor 06-FC-2 & 06-FC-3.*

In an advisory opinion written interpreting the prior version of the law (“information concerning disciplinary actions...”), Counselor O’Connor stated that the minimum information relating to disciplinary action that must be disclosed is: 1) the type of disciplinary action lodged against the employee; 2) when the discipline was lodged, including the time period for the discipline; and 3) why the discipline was lodged (i.e., a description of the conduct and whether it was a violation of personnel rules or another code of conduct, etc.). *See Opinion of the Public Access Counselor 02-FC-22.* Counselor Davis endorsed Counselor O’Connor’s analysis of the law in a subsequent informal opinion. *See Informal Opinion – September 15, 2005, Evansville Courier* ([http://www.in.gov/pac/informal/files/Evansville Courier and Press and City personnel file.pdf](http://www.in.gov/pac/informal/files/Evansville_Courier_and_Press_and_City_personnel_file.pdf)). Counselor Kossack provided further analysis in a 2010 advisory opinion:

I agree with Counselor Neal insofar as I do not believe that the APRA requires public agencies to release every piece of information related to a disciplinary action. That much is clear from the plain meaning of the provision’s language calling for the factual *basis* to be disclosed. Webster’s dictionary defines “basis” as, “(1) That on which anything rests; support; foundation. (2) Fundamental principle. [and] (3) The chief component or ingredient of a thing.” Webster’s Third New International Dictionary 50 (1992). As a general rule of statutory construction, if a statute is unambiguous (i.e., susceptible to but one meaning), Indiana courts give the statute its clear and plain meaning. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001). The General Assembly’s choice of that word does not lead me to conclude that every minute detail regarding the discipline should be disclosed; rather, the “chief component” should be. Here, it is my opinion that DNR has disclosed that chief component to you by informing you that the suspension was the result of the officer’s disobeying a direct order. *See Opinion of the Public Access Counselor 10-FC-212.*

As alluded to by previous public access counselor's, without a more specific instruction from the General Assembly regarding what is required to be provided in the factual basis, it will remain difficult for agencies to determine whether they have satisfied their disclosure obligations under the APRA, and also for members of the public (and this office) to recognize when agencies' responses are noncompliant. *See Opinion of the Public Access Counselor 11-FC-149.* As stated prior, I am unaware of any decision by the Indiana Supreme Court or Court of Appeals that has addressed what is considered to be an adequate factual basis pursuant to I.C. § 5-14-3-4(b)(8)(C).

As applicable here, the University provided in its response the following regarding the factual basis for the termination of Professor Grant:

Mr. Grant was dismissed from the faculty of Indiana University on the grounds that he engaged in serious personal and professional misconduct. The finding of misconduct was primarily based on representations he made at the time of his hiring and subsequently during his tenure at Indiana University. Mr. Grant is grieving the decision concerning his employment through the Faculty Board of review at IU South Bend.

I would note that the University provided to you in the same correspondence, Professor Grant's last date of employment. From the statement, the University has provided type of disciplinary action lodged against Professor Grant (dismissal), when the disciplinary action was lodged (December 31, 2011), and why the discipline was lodged (Professor Grant engaged in serious personal and professional misconduct, primarily based on representations he made at the time of his hiring and during his tenure at the University). The University further provided Professor Grant is appealing the decision concerning his employment. As such, based on a review of prior advisory opinions issued by the Public Access Counselor, it is my opinion that the University complied with I.C. § 5-14-3-4(b)(8)(C) in providing the factual basis for Professor Grant's dismissal.

If I can be of any further assistance to either party, please do not hesitate to contact our office.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Emily Springston