



STATE OF INDIANA

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September 20, 2012

Mike Green
Public Information Officer
Allen County Board of Commissioners
200 East Berry Street, Suite 410
Fort Wayne, Indiana 46802

Re: Informal Inquiry 12-INF-37; Personnel Records

Dear Mr. Green:

This is in response to your informal inquiry regarding personnel records. Pursuant to Ind. Code § 5-14-3-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.*

BACKGROUND

You inquire whether elected officials are considered to be employees of a political subdivision and if complaints filed against them can be withheld from disclosure under the APRA.

On June 18, 2012, a private citizen submitted to the Allen County Ethics Commission ("Commission") conflict of interest complaints against Sheriff Ken Fries ("Sheriff") and County Councilman Paul Moss ("Councilman") involving a traffic stop that occurred on June 2, 2012. Upon receipt of the complaints, the Commission sent letters to both parties requesting formal responses within thirty days. Those responses are to be used by the Commission in determining whether to dismiss the complaints or move forward with a hearing at its September 8, 2012 meeting. Under Allen County Code Title 18-1-9-2(b)(iii), adopted by the Allen County Board of Commissioners ("Commissioners") in 2005:

The Commission's evidence relating to an investigation is confidential until the earlier of: (1) the time the respondent is notified of the hearing; or (2) the time the respondent elects to have the records divulged.

In effect, the responses would be treated in the same manner as information contained in an employee's personnel file, which is governed by I.C. § 5-14-3-4(b)(8). At the time of

the adoption of the ordinance, the Commissioners believed that the records would be considered personnel matters and not subject to disclosure.

In researching the question of whether an elected official is considered to be public employee, you discovered a ruling made by the Marion County Superior Court in *Crawford v. Berry*, under Cause No. 49-D10-1106-PL-23491. The defendants in *Crawford* were elected members of the Indiana House of Representatives, who argued that they were employees of the State. In recognition of such fact, the parties argued that fines withheld from their regular compensation violated the law, which set out procedures to be followed with respect to deductions from employees' wages. As part of the court's conclusions, it determined that the definition of employer found in I.C. § 22-2-2-3 and I.C. 22-2-6-1(b) includes "the state and any political subdivision of the state." The court further noted an Internal Revenue Service regulatory ruling that elected officials are to be treated as employees has been adopted by the State and incorporated in I.C. § 6-3-1-6. Both the Sheriff and Councilman receive a salary from Allen County, a political subdivision of the State, the salaries are treated as W-2 wages, and both are listed as employees of the county for purposes of health insurance, pension, and other benefits. Thus, you argue that it would be reasonable to conclude that the individuals are employees of the County, in which case the Ethics Commission would have discretion over whether documents maintained in their personnel file could be disclosed pursuant to I.C. § 5-14-3-4(b)(8).

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. Accordingly, any person has the right to inspect and copy a public agency'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).

Initially I would note that you have framed your inquiry as whether a public official may be considered an employee of a political subdivision. However, the APRA provides that the law is applicable to public agencies. A public agency is defined as:

"Public agency", except as provided in section 2.1 of this chapter, means the following:

(1) Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.

(2) Any:

(A) county, township, school corporation, city, or town, or any board, commission, department, division,

bureau, committee, office, instrumentality, or authority of any county, township, school corporation, city, or town;

(B) political subdivision (as defined by IC 36-1-2-13); or

(C) other entity, or any office thereof, by whatever name designated, exercising in a limited geographical area the executive, administrative, judicial, or legislative power of the state or a delegated local governmental power.

(3) Any entity or office that is subject to:

(A) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or

(B) an audit by the state board of accounts that is required by statute, rule, or regulation.

(4) Any building corporation of a political subdivision that issues bonds for the purpose of constructing public facilities.

(5) Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff.

(6) Any law enforcement agency, which means an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff's department of a political subdivision, prosecuting attorneys, members of the excise police division of the alcohol and tobacco commission, conservation officers of the department of natural resources, gaming agents of the Indiana gaming commission, gaming control officers of the Indiana gaming commission, and the security division of the state lottery commission.

(7) Any license branch staffed by employees of the bureau of motor vehicles commission under IC 9-16.

(8) The state lottery commission established by IC 4-30-3-1, including any department, division, or office of the commission.

(9) The Indiana gaming commission established under IC 4-33, including any department, division, or office of the commission.

(10) The Indiana horse racing commission established by IC 4-31, including any department, division, or office of the commission. I.C. § 5-14-3-2(m).

As it relates to the APRA, I have rephrased the inquiry to whether a public official is considered to be an employee of a public agency.

You provide that the Sheriff and Councilman are employed by Allen County, a political subdivision of the state. The respective public agencies for the Sheriff and Councilman would be the Allen County Sheriff's Department and the Allen County Council. Prior counselors have advised since 2001 that neither the APRA nor the Open Door Law defines "employee". See *Opinions of the Public Access Counselor 01-FC-51; 07-FC-305; 09-INF-40; & 10-INF-04*. "When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself." *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. App. 1998). As such, counselors have referenced *Webster's Dictionary* to define the term "employee" See *Opinions of the Public Access Counselor 01-FC-51; 07-FC-305; 09-INF-40; 10-INF-04*. *The New International Webster's Dictionary & Thesaurus* defines employee as "One who works for another in return for a salary, wages, or other consideration." *The New International Webster's Dictionary & Thesaurus* (318), 2000. You have provided that the Sheriff and Councilman receive a salary, their salaries are treated as W-2 wages, and both are listed as employees of the county for purposes of health insurance, pension, and other benefits. As such, it is my opinion that the Sheriff and Councilman can be considered to be employees of the agencies they are elected to represent.

As to whether the responses filed by the Sheriff and Councilman may be excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(8); the APRA provides that a public agency denying access in response to a written public records request must put the denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. See I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials

other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47.*

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).

It should be noted that I.C. § 5-14-3-4(b)(8), by itself, does not make any record maintained in an employee's personnel file confidential. In other words, the information referred to in (A) - (C) must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at its discretion.

I am not aware of any prior case law, advisory opinion issue by the Public Access Counselor's Office or statute that definitively provides what type of records can, may, or shall be kept in an employee's personnel file. 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).

While the language is not necessarily binding as applied here, it is instructive for discerning the types of information and documentation that are typically included in a public employee's personnel file.

You have provided that the Commission was created by the Allen County Commissioners in 2005. A request pursuant to the APRA for a copy of the responses filed by the Sheriff and Councilman would need to be submitted to the agency that maintains the record. Both individuals were required to submit their response to the Commission within thirty days of receipt, who I am assuming is the only entity that maintains a copy.

From what has been provided, I am unable to determine whether the Commission is a separate public agency, apart from the Commissioners, or alternatively, if it is considered to be a governing body of the Commissioners. Further, do the Commissioners, as the county executive, maintain personnel files on employees of the county? The answers to both of these inquiries will determine, in my opinion, whether the Commission could deny a request for a copy of the responses. If the Commission is considered to be a governing body of the Commissioners, and the Commissioners maintain personnel files on county employees, then it is my opinion that the Commission could exercise its discretion and deny a request for the responses pursuant to I.C. § 5-14-3-4(b)(8), *if* such records are normally maintained in the employees' personnel file (emphasis added). Alternatively, if the Commission is considered to be a separate public agency, it is my opinion that the Commission would not have the authority to deny a request pursuant to I.C. § 5-14-3-4(b)(8). This is based on the premise that the Sheriff and Councilman are not employees of the Commission; rather they would be considered employees of the agency they were elected to represent. If the Commission is a wholly separate agency, apart from the Commissioners, Sheriff's Department and County Council, under such circumstances it is my opinion that the Commission would not retain discretion to deny a request pursuant to subsection I.C. § 5-14-3-4(b)(8) in response to a request made under the APRA.

If I can be of additional assistance, please do not hesitate to contact me.

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 distinct "Hoage" at the end.

Joseph B. Hoage
Public Access Counselor