

July 27, 2005 Opinion Regarding Disclosure of an Employee Severance Agreement by the
Public Employees' Retirement Fund

July 27, 2005

Sent Via Facsimile

Mr. William Frayer
Staff Attorney
Public Employee's Retirement Fund
143 West Market Street
Indianapolis, IN 46204

*Re: Informal Inquiry Response; Request for Agreement Entered Into Between Public
Employees Retirement Fund and Former Employee*

Dear Mr. Frayer:

You have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

Specifically, you have asked for my opinion regarding whether an agreement that was entered into between the Public Employees Retirement Fund (PERF) and a former employee of PERF must be disclosed pursuant to the Indiana Access to Public Records Act ("APRA"). In my opinion, PERF must disclose the settlement agreement.

The agreement was entered into between PERF and a former employee in settlement of a dispute regarding the former employee's termination from employment with PERF. I have not viewed the settlement agreement, but have been told that by explicit terms, the parties had agreed to not discuss the agreement or divulge the contents of the settlement agreement to anyone. The agreement contemplated and accompanied a payment from PERF (or the state) to the former employee in settlement of claims that the employee may have pursued against PERF. In addition, the settlement agreement was entered into after the termination of the employee was effective. PERF would deny disclosure of the settlement agreement in accordance with the confidentiality provisions of the settlement agreement, but proffers the personnel file exemption under the APRA at IC 5-14-3-4(b)(8) as the statutory basis for not disclosing the settlement agreement to *The Indianapolis Star* upon its APRA request for the document.

It is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code 5-14-3-1. Providing persons with the 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. *Id.* The burden of proof to show that a record is nondisclosable is on the public agency that would deny the record. *Id.*

Any person may inspect and copy the public records of any public agency except as provided in section 4 of the APRA. IC 5-14-3-3(a). Hence, if a public agency maintains a public record, it must disclose it unless the record meets an exemption contained in section 4 of the APRA. Section 4 contains exemptions from disclosure for confidential public records, IC 5-14-3-4(a), and for records that an agency may decline to disclose in its discretion, IC 5-14-3-4(b).

A public agency may decline to disclose the personnel files of current and former public employees and files of applicants for public employment, except for certain information that it is *required* to disclose. IC 5-14-3-4(b)(8). Agreements or contracts are not among the specific types of information that must be disclosed under IC 5-14-3-4(b)(8)(A)-(C). PERF entered into a settlement agreement that contained a confidentiality provision. It is not clear whether PERF believed that this provision would withstand the effect of the APRA because of the personnel file exception, or in spite of the APRA's general rule of disclosure. However, now that PERF has received a request for the settlement agreement, PERF has asked for guidance with respect to whether the personnel file exception would apply to this public record.

Earlier this year, I issued an advisory opinion that found that an employment agreement between Floyd Memorial Hospital and its chief executive officer had to be disclosed because the employment agreement was not personnel file information. *Opinion of the Public Access Counselor* 04-FC-238. I will not restate in detail the analysis here, but the reasoning in 04-FC-238 drives my opinion in this similar matter involving what is essentially a separation agreement. In 04-FC-238, I cited an Indiana attorney general opinion involving an employment contract of a public employee, stating that the employment contract was not protected by Indiana's personnel file exception. 1987 Op. Ind. Att'y Gen. No. 16. I also cited two Missouri appellate cases, one involving a separation agreement. The Missouri court opinions, only persuasive authority in Indiana, deemed such agreements not within the purview of a similar personnel file exemption in the Missouri open records law. *Librach v. Cooper*, 778 S.W.2d 351 (Mo.App.E.D. 1989); *North Kansas City Hospital Bd. of Trustees v. St. Luke's Northland Hospital*, 984 S.W.2d 113 (Mo.App.W.D. 1998). Other jurisdictions have found that 1) confidential settlement agreements are not protected under that state's personnel file exception, *In Re Des Moines Independent Community School District v. Des Moines Register & Tribune Co.* 487 N.W.2d 666 (Iowa 1992); and 2) that confidential settlement agreements of public agencies are disclosable in spite of the chilling effect such disclosure may have on the ability to negotiate a settlement, where the policy favoring disclosure won out over the general policy of encouraging settlement. *Anchorage School District v. Anchorage Daily News*, 779 P.2d 1191 (Alaska 1989).

In my opinion, the settlement agreement involving a former public employee is disclosable and not protected by the personnel file exemption. This result is even more compelling under these facts, where the employee had been terminated and was no longer an employee at the time the agreement was executed, making its classification as “personnel file” marginally appropriate, although I acknowledge that the record related to the former employee’s employment. The agreement is also disclosable in spite of the confidentiality provision in the agreement, in view of the easy circumvention of the APRA that such provisions could produce, and in view of the absence of an exemption in section 4 of the APRA for confidential agreements of public agencies.

I appreciate your asking me to opine on this important issue. Please feel free to contact me if you have any questions.

Sincerely,

Karen Davis
Public Access Counselor

cc: Steven Schultz