



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 8, 2012

Sherry J. Chapo
10214 W Deputy Pike Road
Deputy, Indiana 47230

Re: Formal Complaint 12-FC-137; Alleged Violation of the Access to Public Records Act by the Jefferson County Auditor

Dear Ms. Chapo:

This advisory opinion is in response to your formal complaint alleging the Jefferson County Auditor ("Auditor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Jefferson County Auditor Celeste Reed provided a written response to your formal complaint. Her response is enclosed for your reference. I have granted your complaint priority status pursuant to 62 Indiana Administrative Code 1-1-3.

BACKGROUND

In your formal complaint, you allege that on May 14, 2012 you appeared at the Jefferson County Health Department ("Department") for a previously scheduled open records request. At that time, as to former administrator Ralph Armand, you requested to review his time sheets and/or employee service record for calendar years 2010-2012, including overtime/compensatory and vacation hours. You were instructed at the time to submit your request in writing.

On May 15, 2012, you submitted a handwritten request to Tammy Monroe, interim administrator. You were directed to contact the Jefferson County Auditor, Celeste Reed, to schedule an appointment to review the requested documents. On May 23, 2012, the Auditor returned your call and provided that the time sheets that you requested were part of Mr. Armand's personnel file and she was unable to fulfill your request. You asked for, and she was unable to provide, a citation to the specific statute authorizing nondisclosure. The Auditor confirmed that the State Board of Accounts ("SBOA") informed her that she should not have disclosed the original claim form to you.

On May 24, 2012, you addressed the denial of access at a public meeting of the Jefferson County Commissioners. At that time, you acknowledged that certain requested



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information may be deemed confidential and protected from disclosure or redaction pursuant to I.C. § 5-14-3-6(a), but the collection of time as is applies to accounting, finance, or payroll records is indeed a public record.

On May 25, 2012, you made a formal written request to the Auditor and Health Department for the Employee Service Record (State Form 990A) or SBOA equivalent and the itemization and all supporting documents relied upon to verify the \$20,260 appropriations paid to Mr. Armand. On May 29, 2012, you faxed a records request to Dr. Hossler at the Jefferson County Health Department for information pertaining to Mr. Armand's personnel file and the factual basis for any disciplinary or final actions. On May 29, 2012, you conducted a phone conference with the Auditor. The Auditor acknowledged receipt of both requests and suggested to wait for the county attorney's reply.

On May 30, 2012, Wilmer Goerning, Attorney for the County, provided that the County was not in a position to disclose the requested Employee Service Record and formally denied your request. He stated that the Auditor had previously cited I.C. § 5-14-3-4(b)(8) in denying your request, which you believe is an erroneous statement. As to your request to the Jefferson County Health Department, Mr. Goerning advised that there is no disciplinary documentation in Mr. Armand's personnel file relating to his discharge as the Administrator. You are requesting records supporting the final action taken against Mr. Armand, which may not be limited only to his personnel record.

In response to your formal complaint, the Auditor advised that all records have been provided to you in compliance with the APRA. Certain information, including time cards, personal, sick, and vacation time used by Mr. Armand was denied pursuant to I.C. § 5-14-3-4(b)(8). As to her request for records regarding why Mr. Armand was terminated, the Auditor provided that it did not maintain any records that were responsive to your request. Mr. Armand was terminated by the Jefferson County Health Board, not the Auditor, and the Health Board has not provided the Auditor with any further documentation.

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 Auditor 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 Auditor's



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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).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

You have alleged that the initial denial issued by the Auditor failed to cite to a specific statutory code authorizing the nondisclosure. The Auditor and Attorney Goerning have provided that I.C. § 5-14-3-4(b)(8) was cited in denying your request for records related to Mr. Armand. The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. As such, if the Auditor failed to comply with the requirements of section 9 of the APRA by not citing to a specific statutory code in denying your request, it acted contrary to the APRA. But, if the Auditor cited to I.C. § 5-14-3-4(b)(8) and provided the name and person responsible for the denial, then it is my opinion that the Auditor complied with the requirements of the APRA.

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, 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



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(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. I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above 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 their discretion.

As to your request for Mr. Armand's time cards and any personal, sick, and vacation time information, the Auditor has provided that records you have sought are maintained in Mr. Armand's personnel file. I am not aware of any statute, case law, or advisory opinion issued by the Public Access Counselor's Office that definitively provides what type of records can, may, or shall be kept in an employee's personnel file. While it is possible that not all public agencies will maintain such information in an employee's personnel record, it is my opinion that the Auditor has met its burden to show that the information you requested was maintained in Mr. Armand's personnel file. It should be noted that the records that you seek are not confidential and are public record; however, the Auditor retains discretion under I.C. § 5-14-3-4(b)(8) to deny a request for disclosure. As long as the Auditor has not denied you access to information that it is required to provide under I.C. § 5-14-3-4(b)(8), it is my opinion that it did not violate the APRA in response to your request.¹

As to your request for the factual basis for any disciplinary or final actions resulting in the discharge of Mr. Armand as administrator, the Auditor has provided that it does not have any records that are responsive to that request. Initially, I would note that your formal complaint was filed against the Auditor, whereas your request for the factual basis was submitted to the Jefferson County Health Officer, a separate public agency. The Auditor provided that the Jefferson County Health Board terminated Mr. Armand's employment. Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public

¹ I would note that the APRA is separate and distinct from discovery. You have indicated in your formal complaint that you intend to bring a civil action pursuant to I.C. § 36-2-6-4(f) against the Auditor and/or County. While the Auditor may deny your request for records maintained in a personnel file pursuant to the APRA, the same result may not occur in response to a discovery request submitted pursuant to the Indiana Trial Rules in connection with the above referenced anticipated litigation.



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agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy...”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*. As applicable here, it is my opinion that the Auditor did not violate the APRA by failing to provide a record that it did not maintain.²

CONCLUSION

For the foregoing reasons, if the Auditor failed to comply with the requirements of section 9 of the APRA by not citing to a specific statutory code in denying your request, it acted contrary to the APRA. But, if the Auditor cited to I.C. § 5-14-3-4(b)(8) and provided the name and person responsible for the denial, then it is my opinion that the Auditor complied with the requirements of the APRA. As to all other issues, it is my opinion that the Auditor did not violate the APRA.

Best regards,

A handwritten signature in black ink that reads "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Celeste Reed

² Regarding your request submitted to the Jefferson County Health Board for the factual basis of Mr. Armand’s termination pursuant to I.C. § 5-14-3-4(b)(8)(C), advisory opinion 12-FC-110 addressed the issue of record creation as it pertains to (b)(8)(C). A copy of the advisory opinion may found at the following link: <http://www.in.gov/pac/advisory/files/12-FC-110.pdf>