



STATE OF INDIANA

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August 25, 2008

David Hill, Noelle Steele, Bill McCleary
22 West New Road
Greenfield, Indiana 46140

Re: Formal Complaint 08-FC-184; Alleged Violation of the Access to Public Records Act by the City of Greenfield

Dear Mr. Hill, Ms. Steele, and Mr. McCleary:

This advisory opinion is in response to your formal complaint alleging the Greenfield Board of Works, the Greenfield Police Department, and the Mayor of Greenfield, to which I will collectively refer as the "City," violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. A copy of the City's response to the complaint is enclosed for your reference. It is my opinion the City has not violated the APRA.

BACKGROUND

You allege that the City violated the APRA by denying you access to records related to the factual basis for the disciplinary action of an employee. Specifically, you allege that on July 9, 2008 the Greenfield Board of Works unanimously approved a 45-day suspension for a Greenfield police officer. You allege that when you sought to learn the factual basis for the disciplinary action (pursuant to I.C. § 5-14-3-4(b)(8)(C)), the City provided you with only a short statement indicating the officer had been suspended for violating the police department's standard operating procedures. You allege that the City's response to the request does not meet the standard of "factual basis" as required by the APRA.

You contend a memorandum from Steve Key of the Hoosier State Press Association and a consolidated opinion from my predecessor (*Opinion of the Public Access Counselor 06-FC-2 and 06-FC-3*) support your position. You filed this complaint on July 29, 2008. In addition to the complaint and the two documents previously mentioned, you include correspondence from the City, a copy of the records provided to you as well as the press release regarding the matter, and two items from your newspaper's coverage of the matter.

The City responded to the complaint by letter dated August 7 from attorney Gregg Morelock. Mr. Morelock indicates that two additional documents exist related to the matter – his electronic mail message to Ms. Steele as well as your newspaper’s editorial of July 11, 2008. Mr. Morelock indicates that when the issue arose, he telephoned and spoke to me. Mr. Morelock indicates that I told him the City was complying with the APRA in providing the record indicating the suspension was based on a violation of the standard operating procedure. Mr. Morelock indicates that while the City respects Mr. Key’s opinion, the opinion contained in the memorandum to Mr. Hill is unsubstantiated by case law. Mr. Morelock agrees with Mr. Key’s acknowledgement that what constitutes a factual basis lies within the discretion of each governmental entity.

Further, Mr. Morelock contends the City complies with *Opinion of the Public Access Counselor 02-FC-22*. The City contends the complaint is based on the complainants’ lament that the City did not provide all the information the complainants deem desirable. Finally, Mr. Morelock points out that the July 11 editorial in the complaints’ newspaper acknowledges the City’s actions were within the law and appropriate.

ANALYSIS

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

The APRA excepts from disclosure “personnel files of public employees and files of applicants for public employment, except for:

...

(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).

The issue here relates to your request for records containing the factual basis for the suspension of the police officer. The City provided you a copy of a document dated July 9 by which Chief John Jester requested the suspension of the officer for “violation of the Standard Operating Procedures of the Greenfield Police Department.” You contend this document does not meet the “standard of ‘factual basis’ for explaining disciplinary actions required by statute.”

In my opinion, the conflict here has arisen not out of a production of records issue but a creation of records issue. Certainly the APRA provides that the factual basis for disciplinary action in the personnel file of a public employee is required to be disclosed by the agency. *See* I.C. § 5-14-3-4(b)(8)(C). What the APRA does not require an agency

to do, though, is create any particular record. Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. This opinion is an opinion long held by previous public access counselors as well, as evidenced by a 1999 opinion issued by Counselor O'Connor:

There is no obligation for a public agency to create a new record in order to respond to a public records request, although there is nothing that prevents a public agency from accommodating such requests.
Opinion of the Public Access Counselor 99-FC-09, available at <http://www.in.gov/pac/advisory/files/99fc09.pdf>.

Here, you sought to learn the factual basis of the disciplinary action leading to suspension of the officer. Mr. Morelock indicated in his July 14 letter addressed to Ms. Steele that “the only documents contained therein [in the officer’s personnel file] responsive to your request are documents that I believe you already have copies of, but I have enclosed, namely the request of Chief Jester to the Board of Works and Public Safety to suspend Patrolman William Phillips for 45 days to begin Saturday, July 12, 2008.” Mr. Morelock indicates that in his July 11 response to the request he indicated the City believed certain exceptions applied to the records at issue. In his July 14 letter he indicated that because no other records responsive to the request exist as personnel records, the City would not invoke the exceptions.

If I recall accurately the telephone conversation I had with Mr. Morelock, we discussed the issue of creation versus production. I recall discussing with him my opinion that the APRA does not require an agency to create records which do not exist. I indicated that if records do exist which provide the factual basis for the disciplinary action, at least the portion of the records containing the factual basis would be disclosable but that other information contained in the record may fall under an exception to disclosure, depending on the nature of the information. If this were the case, the disclosable information should be separated from the nondisclosable information and the disclosable information provided. *See* I.C. § 5-14-3-6

As it relates to the present issue, though, the latter portion of our discussion was not applicable. As I understand it, the records provided to you (or the two versions of the same record) are the only records which are responsive to your request, personnel records which provide the factual basis for a disciplinary action. While I appreciate the analysis of Mr. Key in the memorandum to Mr. Hill as well as the opinions of my predecessors in the earlier-referenced opinions, it is my opinion that many of the issues presented therein are moot in this particular instance because no further records exist. As Counselor Davis noted in *Opinion of the Public Access Counselor 06-FC-2 and 06-FC-3*, “[i]f a person requests a record containing the ‘factual basis’ for a final disciplinary action, the agency must disclose the factual basis *from any responsive records.*” *Id.*, available at http://www.in.gov/pac/advisory/files/06-FC-2_06-FC-3.pdf, *emphasis added*.

It is certainly my opinion that the General Assembly has made it clear the public has a right to know the factual basis for a disciplinary action leading to the suspension, demotion or discharge of a public employee when the factual basis is contained in the agency's personnel files. *See* I.C. § 5-14-3-4(b)(8)(C). But I do not agree with the assertion that this provision requires a public agency to create a record containing a certain minimum amount of information. It is my opinion the City is not required by the APRA to create a record responsive to a request but instead to provide access to records which already exist. *See* I.C. § 5-14-3-3, requiring disclosure, and I.C. § 5-14-3-2(n), defining "public record" as a record that has been created, received, retained, maintained, or filed by or with a public agency. *Emphasis added.*

The General Assembly has, in another provision in the APRA, provided an affirmative duty on the part of law enforcement agencies to maintain a certain record:

An agency *shall maintain* a daily log or record that lists . . .
I.C. § 5-14-3-5(c), *emphasis added.*

Absent a similar provision related to personnel file records, it is my opinion the APRA does not require a public agency to maintain specific records but instead protects the right of the public to inspect and copy records which already exist at the time of the request.

CONCLUSION

For the foregoing reasons, it is my opinion the City has not violated the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Mayor Brad DeReamer, City of Greenfield
Gregg Morelock, Brand Davis & Morelock