



# STATE OF INDIANA

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November 1, 2008

Marcus Baxter  
c/o Kimberly Jeselskis  
Macey Swanson and Allman  
445 North Pennsylvania Street; Suite 401  
Indianapolis, Indiana 56204

*Re: Formal Complaint 08-FC-218; Alleged Violation of the Access to Public Records Act by the Indiana State Police*

Dear Mr. Baxter:

This advisory opinion is in response to your formal complaint alleging the Indiana State Police ("ISP") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. It is my opinion the ISP violated the APRA if the ISP maintains any personnel file information related to your employment with the ISP and has denied you access to those records.

## BACKGROUND

You filed a complaint on October 10, 2008, alleging that you have requested from the ISP a copy of personnel file records related to your employment by the ISP. You allege you made a verbal request for a copy of the personnel file on July 25, and the request was denied. You further allege your legal counsel submitted a written request to the ISP dated August 1. You include a copy of this request. In the August 1 request, you asked for copies of your personnel file, including but not limited to information related to any formal charges as well as the factual basis for discharge. The ISP sent you a letter dated August 13, indicating the ISP maintains no records responsive to the request.

Your counsel sent another request to the ISP dated September 3, wherein you again requested a copy of your personnel file. You provided a copy of the ISP's policy regarding the creation and retention of an employee's personnel file. The ISP responded to this request by letter dated October 2. The ISP indicated that no formal charges were prepared because you were a probationary employee and as such no records related to formal charges are maintained by the ISP. Further, the ISP contends that in the case of probationary employees, a factual basis related to discharge is not prepared.

My office sent a copy of the complaint to the ISP and invited the ISP to respond to the complaint. The ISP did not respond in writing, and when my office telephoned the agency to inquire about a response, Susan Dean of ISP indicated that her October 2 response to you can be used as her response to the complaint. Further, Ms. Dean indicated that probationary employees can be discharge, demoted or suspended without a hearing.

## 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 ISP 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 ISP 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).

You, both personally and through your legal counsel, have requested from the ISP a copy of your personnel file, including but not limited to information related to formal charges and the factual basis for your discharge. Personnel files of public employees may, in the agency's discretion, not be disclosed. I.C. § 5-14-3-4(b)(8). Contained in this exception to disclosure are three exceptions, or categories of records which must be disclosed, including information related to formal charges against an employee as well as the factual basis for disciplinary action resulting in termination, demotion or suspension. I.C. § 5-14-3-4(b)(8)(B) and (C). It appears the ISP has focused on these two types of records to the exclusion of other personnel file records. The ISP contends it does not maintain records related to formal charges or the factual basis for your discharge because your employment status did not require the ISP to create and maintain such records. Certainly nothing in the APRA requires an agency to create records; instead it requires an agency to provide access to records which have been created.

But this is not the only issue presented here. While you identified the foregoing as types of records included in your request, you did request a copy of your entire personnel file. The APRA's exception to disclosure of personnel file records contains the following provision:

However, all personnel file information shall be made available to the affected employee or the employee's representative.  
I.C. § 5-14-3-4(b)(8).

While the APRA does not require the ISP to create records in order to respond to a request, it does require an agency to provide access to records it maintains which are not excepted from disclosure. You have requested a copy of your personnel file records. The APRA not only does not except such records from disclosure but specifically provides that all personnel file information shall be made available to the affected employee or the employee's representative. *Id.* As such, any personnel file information maintained by the ISP related to your employment should be disclosed. Based on the

ISP's policy related to personnel files, the personnel file should have been created upon your hiring and should be retained by the ISP for three years after your discharge.

#### CONCLUSION

For the foregoing reasons, it is my opinion the ISP violated the APRA if the ISP maintains any personnel file information related to your employment with the ISP and has denied you access to those records.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Susan Dean, Indiana State Police