



STATE OF INDIANA

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March 8, 2010

Mr. Mitchell R. Heppenheimer
Heppenheimer & Korpel, P.C.
704 W. Washington Ave.
South Bend, IN 46601

Re: Informal Inquiry 10-INF-4; Records of the St. Joseph County Airport Authority

Dear Mr. Heppenheimer:

This is in response to your informal inquiry regarding the St. Joseph County Airport Authority ("Authority"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Indiana Public Access Records Act ("APRA"), I.C. § 5-14-1 *et seq.*

BACKGROUND

Your inquiry relates to the Authority's operation of the airport located in South Bend, Indiana. The Authority previously entered into a public works contract with Majority Builders, Inc. ("MBI") to complete an expansion of one of the concourses at the airport terminal. The Authority has recently received requests for records under the APRA regarding schedules of wages filed by MBI and its subcontractors.

MBI has provided the Authority with income information as required by federal statutes, rules, and regulations. However, MBI is asking the Authority to withhold employees' names, addresses, and social security numbers. MBI argues in a letter to the Authority that release of certified payrolls and personal identifiers such as names, addresses, and social security numbers are confidential under Exemption 6 of the Freedom of Information Act ("FOIA"). MBI maintains that releasing that information would violate federal law. MBI further argues that because the information is confidential under FOIA, it is also confidential under section 4(a)(3) of the APRA.

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.” I.C. § 5-14-3-1. You do not dispute that the Authority is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Authority’s public records during regular business hours unless the records are excepted from disclosure as confidential or nondisclosable under the APRA. I.C. § 5-14-3-3(a).

MBI argues that the requested information is confidential under the federal Freedom of Information Act (“FOIA”), 5 U.S.C.S. § 552 *et seq.* FOIA requires federal agencies to allow access to their records to any person who complies with the procedures set forth in FOIA. However, FOIA only applies to federal executive branch agencies; state agencies and officials are not subject to FOIA. *Berg v. Obama*, 574 F. Supp. 2d 509, 527 (E.D. Pa. 2008), *citing Dunleavy v. New Jersey*, 251 Fed. App’x 80, 83 (3d Cir. 2007) (“FOIA does not impose an obligation on state agencies”); *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999) (“[I]t is beyond question that FOIA applies only to federal and not to state agencies.”); *Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 83 (1st Cir. 1997) (“FOIA . . . applies only to federal executive branch agencies”); *Day v. Shalala*, 23 F.3d 1052, 1064 (6th Cir. 1994) (APA “pertains to federal agencies”); *Brown v. Kelly*, No. 93-5222, 1994 U.S. App. LEXIS 9964, 1994 WL 36144, at *1 (D.C. Cir. Jan. 27, 1994) (per curiam) (FOIA does not apply to state agencies); *St. Michael’s Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of “agency” under FOIA “does not encompass state agencies or bodies”); *Johnson v. Wells*, 566 F.2d 1016, 1018 (5th Cir. 1978) (state board of parole not agency within meaning of FOIA). Because I have no information before me that indicates the Authority is an “agency” within the meaning of subsection 551(1) of FOIA, I am not persuaded that FOIA applies to the information requested here.

FOIA’s applicability notwithstanding, some of the requested information is unquestionably confidential under the APRA. The APRA lists social security numbers as confidential information that may not be disclosed by a public agency. I.C. § 5-14-3-4(a)(12). Moreover, personnel files of public employees are generally excepted from disclosure at the discretion of the agency, except for the items specifically required by the APRA to be disclosed. I.C. §5-14-3-4(b)(8). However, all personnel file information shall be made available to the affected employee or employee’s representative. I.C. § 5-14-3-4(b)(8). The APRA does not define either the word “employee” as used within subsection 4(b)(8). As a general rule of statutory construction, if a statute is unambiguous (i.e., susceptible to but one meaning), courts give the statute its clear and plain meaning. *See Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001). Webster’s Dictionary defines an “employee” as “[o]ne who works for another in return for a salary, wages, or other consideration.” Webster’s Third New International Dictionary 318 (1992). Under this definition, because the employees of MBI are performing their duties on behalf of the Authority in return for compensation, they are

likely “employees” within the meaning of I.C. § 5-14-3-4(b)(8). That section of the APRA notes that personnel files of public employees may be withheld from disclosure at the agency’s discretion. *Id.* However, certain information such as the employees’ names, business addresses, business telephone numbers, etc. must be disclosed upon request. I.C. § 5-14-3-4(b)(8)(A) - (C). In accordance with this section of the APRA, it is my opinion that the Authority has discretion to withhold the employees’ home addresses, but the APRA requires the employees’ names to be disclosed.

I base this opinion upon relevant portions of the APRA and FOIA. If MBI believes that another federal statute classifies the relevant information as confidential, the APRA would require such information to be withheld under section 4(a)(3). However, it is my opinion that MBI has not yet made such a showing because MBI cites a federal statute in support of its argument -- FOIA -- that does not apply to the Authority. Under the APRA, the burden of proof for any denials of access to public records is on the agency that would deny access. *See* I.C. § 5-14-3-1. In my opinion, the Authority would not sustain its burden of proof if it were to deny access to the MBI employees’ names.

CONCLUSION

For the foregoing reasons, it is my opinion that the Authority may not disclose the employees’ social security numbers. Moreover, the Authority has discretion under subsection 4(b)(8)(a) to withhold the employee’s home addresses. However, nothing in the APRA requires or permits the Authority to withhold names of MBI’s employees if those names appear on records maintained by the Authority.

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

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor