



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

Jun 18, 2012

Jenna Throw
PETRY, FITZGERALD & LESS, P.C.
107 N. Main St.; P.O. Box 98
Hebron, Indiana 46341
Via e-mail: petry@netnitco.net

Re: *Informal Inquiry 12-INF-31; The applicability of I.C. § 5-14-3-4(b)(8) to certain records maintained by a law enforcement agency.*

Dear Ms. Throw:

This is in response to your informal inquiry regarding Ind. Code § 5-14-3-4(b)(8) and its applicability to certain records maintained by a law enforcement agency. Pursuant to I. C. § 5-14-3-9(e), I issue the following informal opinion in response to your inquiries. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA") I.C. § 5-14-3-1 *et seq.*

BACKGROUND

Your inquire whether the following information is required to be disclosed under the APRA, primarily in light of I.C. § 5-14-3-4(b)(8):

1. The following records or materials concerning an individual police officer:
 - a. Performance review;
 - b. Disciplinary write-ups;
 - c. Internal and External Complaints (formal and informal);
 - d. Certifications;
 - e. Awards;
 - f. Proof of attendance for courses, lectures, training, or reviews;
 - g. Date of hire by the Police Department;
 - h. Transcript or recording (audio and video) of any administrative and disciplinary meetings and hearings related to the officer;
 - i. Diploma(s) and date(s) the officer attended the Indiana Police Academy in addition to any other training to be eligible to serve as a law enforcement officer; and,
 - j. Certificate or any evidence of training and certification for

- administration of evidential breath tests.
2. Employee handbook/SOP for employees of the Police Department.
 3. Dates and times of all training programs (whether offered or mandated, in-house or out-of-department) for law enforcement officers, patrol persons, officers, or deputies of the Police Department concerning evidentiary breath testing, in-court testimony, report writing and detection, and investigation of traffic infractions and criminal offense.

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 Police Department (“Department) 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 Department’s 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.

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
- (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. However, it is important to note that I.C. § 5-14-3-4(b)(22) provides that notwithstanding (b)(8)(A), the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or date of first employment of a law enforcement officer who is operating in an undercover capacity may be disclosed at the discretion of the agency. *See* I.C. § 5-14-3-4(b)(22) and *Opinions of the Public Access Counselor 07-FC-263 and 09-FC-191*. Also, I.C. § 5-14-3-4.3 provides that nothing contained in section 4(b)(8) of this chapter requires a law enforcement agency to release to the public the job title or job description of law enforcement officers.

I am not aware of any prior case law, advisory opinion issue by the Public Access Counselor's Office or statute that definitively provides what type of records can, may, or shall be kept in an employee's personnel file. The Indiana Commission on Public Records' general retention schedule that is applicable to all state agencies defines a personnel file as:

[a] state agency's documentation of the employee's working career with the state of Indiana. Typical contents could include the Application for Employment, PERF forms, Request for Leave, Performance Appraisals, memos, correspondence, complaint/grievance records, miscellaneous notes, the Add, Rehire, Transfer, Change form from the Office of the Auditor of State, Record of HRMS Action, and/or public employee union information. Disclosure of these records may be subject to IC 5-14-3-4(b)(2)(3)(4) & (6), and IC 5-14-3-4(b)(8). *See* Records Retention and Disposition Schedule, State Form 5 (R4/ 8-03).

I note this language is not necessarily binding on the Department as it applies to state agencies. I have not reviewed the Department's retention schedule as to personnel records. However, it is instructive for discerning the types of information and documentation that are typically included in a public employee's personnel file. *See Opinions of the Public Access Counselor 09-FC-244 and 11-INF-71*.

As applicable to your inquiry:

- a. Performance reviews - If these records are maintained in the officer's personnel file, the records would be disclosed at the Department's discretion. Performance appraisals are specifically noted in the state's general retention schedule as to what documents are generally found in an employee's personnel file.

- b. Disciplinary write-ups – If these records are maintained in the officer’s personnel file, the records would be disclosed at the Department’s discretion. However, the Department would be required to comply with I.C. § 5-14-3-4(b)(8)(B) & (C), should formal charges be filed against the officer or if the officer is suspended, demoted, or discharged after final action has been conducted in a disciplinary action. *See Opinions of the Public Access Counselor 02-FC-22 and 12-FC-110.*
- c. Internal and External Complaints (formal and informal) – If the records are maintained in the Officer’s personnel file, the records would be disclosed at the Department’s discretion. Complaint/Grievance Records are specifically noted in the state’s general retention schedule as to what documents are generally found in an employee’s personnel file.
- d. Certifications – I.C. § 5-14-3-4(b)(8)(A) provides that the Department would be required to provide education and training background in response to a request made pursuant to the APRA. If the certifications in question are related to the officer’s educational or training background, (b)(8)(A) would require their disclosure.
- e. Awards – I.C. § 5-14-3-4(b)(8)(A) provides that the Department would be required to provide education and training background in response to a request made pursuant to the APRA. If the award in question related to the officer’s educational or training background, (b)(8)(A) would require their disclosure.
- f. Proof of attendance for courses, lectures, training or reviews – I.C. § 5-14-3-4(b)(8)(A) provides that the Department would be required to provide education and training background in response to a request made pursuant to the APRA. If the attendance records are maintained and related to the officer’s educational or training background, (b)(8)(A) would require their disclosure.
- g. Date of hire by the Police Department – This Department would be required to provide this information pursuant to I.C. § 5-14-3-4(b)(8)(A).
- h. Transcript or recording (audio or video) of any administrative and disciplinary meetings and hearing related to the officer – The Department would be required to comply with I.C. § 5-14-3-4(b)(8)(B) and (C) in providing information regarding formal charges and a factual basis for any disciplinary action that resulted in an officer being suspended, demoted, or terminated.
- i. Diploma(s) and date(s) the officer attended the Indiana Police Academy in addition to any other training to become eligible to serve as a law enforcement officer – I.C. § 5-14-3-4(b)(8)(A) provides that the Department would be required to provide education and training background in response to a request made pursuant to the APRA. I believe (b)(8)(A) would require the disclosure of such records.
- j. Certificate or any evidence of training or certification for administration of evidential breath tests - I.C. § 5-14-3-4(b)(8)(A) provides that the Department would be required to provide education and training background in response to a request made pursuant to the APRA. If the certifications in question are related to the officer’s educational or training background, (b)(8)(A) would require their disclosure.

2. Employee handbook/SOP for employees of the Police Department –

I am not aware of any state or federal statutory code that would provides that an employee handbook or SOP would be considered confidential. It is important to note that when a record contains both disclosable and nondisclosable information and an agency receives a request for access, the agency shall “separate the material that may be disclosed and make it available for inspection and copying.” *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1. It may be possible that certain sections of an employee handbook or SOP may contain information that is not subject to disclosure under the APRA. If an exception to disclosure would apply, the Department would be required to redact the nondisclosable information, cite to the relevant statutory code that would allow for the nondisclosure, and provide the remaining disclosable information. *See Opinions of the Public Access Counselor 04-FC-153 and 06-FC-27.*

3. Dates and times of all training programs (whether offered or mandated, in-house or out-of department) for law enforcement officers, patrol persons, officers, and Deputy’s of the Police Department concerning evidentiary breath testing, in-court testimony, report writing and detection, and investigation of traffic infractions and criminal offense –

I.C. § 5-14-3-4(b)(8)(A) provides that the Department would be required to provide education and training background in response to a request made pursuant to the APRA. If the information in question relates to the officer’s educational or training background, (b)(8)(A) would require their disclosure. I would also remind the Department that the APRA does not require an agency to create a record in response to a request. *See Opinions of the Public Access Counselor 01-FC-61 and 08-FC-113.* At the time of the request, if the Department did not maintain a record that was responsive to the request, the Department would not be obligated to create a new record in order to satisfy the request.

Also, the Department should be aware that *all* personnel file information shall be made available to the affected employee or the employee’s representative. *See* I.C. § 5-14-3-4(b)(8). However, this subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees with the request being particularized by employee name. Thus, the Department may require that the request be particularized to an individual, rather than a request for “all officers” of the Department. *See Opinion of the Public Access Counselor 11-INF-14.*

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

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor