September 15, 2005

Sent Via Facsimile and U.S. Mail

Mr. Charles L. Berger
Berger & Berger
313 Main Street
Evansville, IN 47708-1485

Re: Informal Inquiry Response; Question Regarding Disclosure of Personnel File under the Access to Public Records Act ("APRA")

Dear Mr. Berger:

On August 29, 2005, you requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind. Code 5-14-4-10(5), I am issuing this letter in response to your request. You are requesting my opinion on behalf of the City of Evansville and Fraternal Order of Police (collectively, "City"), and at the behest of the *Evansville Courier and Press* (the "Press"). The City and FOP have disputed whether the *Evansville Courier and Press*, or any member of the public, is entitled to certain personnel file information. I set out the question to be considered, and my response, below.

The City and the Press ask the same question, although the question is framed differently by the parties. The question is:

> *Is the public, including the Evansville Courier and Press, entitled to receive more than the final determination made at a public meeting of the Merit Commission regarding disciplinary actions which have been taken and made final against an employee of the Evansville Police Department? Is the Evansville Courier and Press entitled to more than the contents of the Minutes of the Merit Commission for the meeting at which said action on the discipline of the Officer has been taken in final form? If the answer to either question is yes, to what additional information would the Press be entitled?*

You have not provided me with any of the documentation from the Merit Commission meeting, but I believe I can answer the question without perusing it.

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). Section 4(b) contains discretionary exceptions to disclosure. One such exception to disclosure is for personnel files of current or former public employees. IC 5-14-3-4(b)(8). Although a public agency may exempt personnel files of public employees, the public agency is required to disclose certain specified information from those files. *See* IC 5-14-3-4(b)(8)(A)-(C).

At issue in this matter is "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." IC 5-14-3-4(b)(8)(C). This is information from a personnel file that must be disclosed to a person upon request. As of July 1, 2005, this language was corrected from the two versions that were a result of the 2003 legislature. In 2003, the legislature enacted two laws, each of which amended *different parts* of section 4 of the APRA.

In P.L. 200-2003, the legislature amended section 4(b)(8) to read as it appears in the preceding paragraph (the "factual basis" version). In P.L. 173-2003, the legislature made amendments to other subsections of section 4, but left section 4(b)(8) alone; hence, the language of section 4(b)(8) read as it had prior to any 2003 amendments—"Information concerning disciplinary actions in which final action has been taken and that resulted in the employee being disciplined or discharged." Neither bill referred to the other, and the compiler of the Indiana Code duly printed both versions in the Indiana Code.

The question of which version prevailed has only historical significance, since the legislature corrected the statute to conform to the version in P.L. 200-2003. *See* P.L. 210-2005, SECTION 1. Hence, for requests for information from a personnel file received by a public agency after July 1, 2005, the effective date of SECTION 1 of P.L. 210-2005, the "factual basis" version is the law.

For requests for personnel file information prior to July 1, 2005, one must turn to rules of statutory construction to aid in determining which version prevailed. Statutes relating to the same general subject matter are in *pari materia* and should be construed together so as to produce a harmonious system. *Indiana Alcoholic Beverage Commission v. Osco Drug, Inc.*, 431 N.E.2d 823 (Ind. App. 1982). It appears that the legislature, having made separate amendments to the same section of the Indiana Code, did not intend to "undo" that part of one bill that made amendments to section 4(b)(8), and therefore, I do not believe the two bills to be repugnant with respect to the language in section 4(b)(8). The correction that was passed in 2005 bears out this opinion, since it corrected the clause to the "factual basis" version.

Therefore, whether the request of the Press was received by the City prior to or after July 1, 2005, the law required that the City disclose "the factual basis for a final disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged."

In an advisory opinion written in 2002 by my predecessor Anne Mullin O'Connor, interpreting the prior version of the law ("information concerning disciplinary actions..."), Ms. O'Connor stated that the minimum information relating to disciplinary action that must be disclosed is: 1) the type of disciplinary action lodged against the employee; 2) when the discipline was lodged, including the time period for the discipline; and 3) why the discipline was lodged (i.e., a description of the conduct and whether it was a violation of personnel rules or another code of conduct, etc.). *Opinion of the Public Access Counselor 02-FC-22.*

I endorse this view of the information required to be disclosed under the current law, except that the current law narrows the types of disciplinary actions that must be disclosed. Currently, only suspensions, demotions, or discharges are types of disciplinary actions required to be disclosed. Hence, with respect to the first element stated in *02-FC-22*, the public agency must state the type of action taken, but reprimands would not form the basis for a *required* disclosure (agencies may certainly disclose more than is required). With respect to the second element, the time period involved would likely be relevant only to suspensions. In my opinion, the third element would apply—the public agency, in disclosing the factual basis for a disciplinary action, would disclose a description of the conduct and whether it was a violation of personnel rules or other code of conduct or law.

Accordingly, the answer to the first part of the question is: yes, the Press is entitled to more than the final determination made at a public meeting of the Merit Commission. This assumes that the final determination made at the meeting merely states that an officer was demoted on a certain date, for example. Under this assumption, the factual basis for the demotion, or as stated above, the conduct leading to demotion and the rule or policy that was violated, would be absent.

The second part of the question is whether the Press is entitled to more than the contents of the Minutes of the Merit Commission meeting at which the final action was taken. The answer is "it depends." I have not seen the minutes of the Merit Commission meeting. If the minutes contain the factual basis as described above, it would be sufficient for the City to disclose the minutes to fulfill the request. If the minutes are not adequate, the City would have to supplement its response to the Press's records request by providing the factual basis from other records or by creating a record to supply the factual basis.

A supplemental two-part question that was posed by the Press is 1) whether the phrase "final action" is meant to limit public access to records of that final action; 2) or is the public entitled to underlying documents that form the basis for the disciplinary action? The negative answer to the first part of the question does not necessarily lead to a positive answer to the second, I would observe.

I take it that the Press has simply restated the original question: is the record of the Merit Commission's final determination adequate to supply the factual basis for the disciplinary action? Regardless of the import of the question, in my opinion, the legislature intended that only those disciplinary actions in which "final action has been taken" are included in subsection (b)(8)(C). The information that must be disclosed is the *factual basis for a disciplinary action;* the remainder of the provision is modifying language, explaining under what circumstances the

factual basis must be disclosed (only when final action has been taken). Section (b)(8)(C) applies to myriad public agencies, some of which do not take personnel actions by way of governing bodies like the Merit Commission. Hence, I do not interpret the "final action" language to allow a public agency to disclose only the governing body's "final action."

With respect to the second part of the supplemental question, in my opinion, so long as the public agency discloses the factual basis, including the conduct involved and the personnel rule violated, it is not required to disclose any and all underlying documents that form the basis for the final disciplinary action.

I hope this guidance responds fully to the question and assists the City in determining its obligations under the Access to Public Records Act. Please feel free to call or write me if you have any other questions.

Sincerely,

Karen Davis
Public Access Counselor