



STATE OF INDIANA
MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 27, 2013

Mr. James A. Hartman
9744 Castle Woods Cove
Indianapolis, Indiana 46280

Re: Formal Complaint 13-FC-157; Alleged Violation of the Access to Public Records Act by the Indiana Horse Racing Commission

Dear Mr. Hartman:

This advisory opinion is in response to your formal complaint alleging the Indiana Horse Racing Commission ("Commission") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Lea Ellingwood, General Counsel, responded on behalf of the Commission. Her response is enclosed for your reference.

BACKGROUND

As applicable to your formal complaint, you provide that on or about February 18, 2013, you submitted a written request for records to the Commission for copies of correspondence between Administrative Law Judge Kathryn Hostetter ("ALJ") and the Commission regarding her February 8, 2012 arrest and subsequent conviction and her December 3, 2012 arrest. On May 6, 2013, the Commission denied your request pursuant to I.C. § 5-14-3-4(b)(8) ("personnel exception"). You argue that the Commission has no authority to cite to the personnel exception to deny your request as the ALJ is not a public employee; rather, the ALJ is an independent contractor. At the time of the initial arrest, the ALJ was working under contract with the Commission; section 22 of the contract provided that the ALJ was acting as an independent contractor for the Commission. The ALJ was working under a similar contract at the time of her subsequent arrest.

In response to your formal complaint, Ms. Ellingwood advised that in light of the fact that exceptions to disclosure under the APRA are to be narrowly tailored and the personnel exception is only applicable to "public employees", the Commission has now provided all records responsive to your request that were previously not disclosed pursuant to the personnel exception.

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 Commission 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 Commission’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). 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. 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).

The APRA provides that that certain personnel records may be withheld from disclosure:

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(8) Personnel files of public employees and files of applicants for public employment, 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.

However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information

generally on all employees or for groups of employees without the request being particularized by employee name. 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.

The parties do not dispute that the ALJ is an independent contractor of the Commission. While there is nothing that would prohibit a public agency from maintaining a personnel file for an independent contractor, the personnel exception is only applicable to public employees and applicants for public employment. Accordingly, it is my opinion that the Commission may not cite to I.C. § 5-14-3-4(b)(8) as a basis in denying your request for information related to an independent contractor. *See also Opinion of the Public Access Counselor 12-FC-335.* Prior to the issuance of this opinion, all records not previously disclosed by the Commission pursuant to the personnel exception were provided, which I trust to be in satisfaction of your formal complaint.

CONCLUSION

For the foregoing reasons, it is my opinion that the Commission may not cite to I.C. § 5-14-3-4(b)(8) as a basis in denying your request for information related to an independent contractor of the agency. As all previous records not disclosed by the Commission pursuant to the personnel exception have now been provided, I trust this to be in satisfaction of your formal complaint.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Lea Ellingwood