



STATE OF INDIANA

MICHAEL R. PENCE, Governor

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December 5, 2013

Mr. Chad D. Wuertz, Esq.
22 East Washington St.
210 Victoria Centre
Indianapolis, IN 46204

Re: Formal Complaint 13-FC-317; Alleged Violation of the Access to Public Records Act by the Marion County Sheriff's Office

Dear Mr. Wuertz,

This advisory opinion is in response to your formal complaint alleging the Marion County Sheriff's Office ("MCSO") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* Ms. Sarah Steel Riordan, Counsel for the MCSO, responded to your formal complaint. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on October 30, 2013.

BACKGROUND

Your complaint dated October 30, 2013 alleges the Marion County Sheriff's Department violated the Access to Public Records Act by denying your request for records in violation of Ind. Code § 5-14-3-3(b).

On or about October 1, 2013, you served upon the MCSO a records request seeking the following information:

- The public portion of the personnel file for Sgt. April Strode
- Copies of any off-duty work permits issued to Sgt. April Strode for work with or for Lucas Oil Stadium and/or Protection Plus
- Copies of any policy, procedure, standard operating procedure, general order, rule, regulation or any other item or thing that describes the policy or directive of the Marion County Sheriff's Department as it pertains to preventing, prohibiting or disrupting the video and/or audio recording of Marion County Sheriff's deputies engaged in their official duties.

Your contention is the MCSO did not provide a factual basis for a portion of the disciplinary records. You also maintain the MCSO also denied a more detailed factual basis for the discipline pursuant to the investigatory records exception of the APRA.

In its response, the MCSO argues that all of the records responsive to your request were provided to you and the factual basis was, in fact part of the disciplinary notices. No mention was made as to the investigatory records 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 Ind. Code § 5-14-3-1. The Marion County Sheriff’s Department is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Department’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

A request for records may be oral or written. See Ind. Code § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See Ind. Code § 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 (7) days of receipt, the request is deemed denied. See Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

The APRA excepts from disclosure “personnel files of public employees and files of applicants for public employment, except for:

(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.”

Ind. Code § 5-14-3-4(b)(8).

Factual basis is not defined in the APRA, nor is it contemplated anywhere else in the Indiana Code. Former Public Access Counselors have opined, and I am inclined to agree, factual basis can be a cursory statement of a violation of a policy or reference to a policy and not a detailed narrative of the summary of the discipline.

The legislature, by promulgating Ind. Code § 5-14-3-4(b)(8), has recognized the right to privacy of public employees when it comes to personnel files. They have also recognized, however, disciplinary issues are of public interest and therefore should be disclosed. And although the public’s right to know of disciplinary action taken against public employees

is acknowledged, nothing in the APRA requires an agency to create a detailed factual basis for the discipline. If it is the policy of the agency to reference a policy or an employee handbook, etc., on the disciplinary notice, then they are not required to create a document to satisfy a request.

If there is additional information further detailing the factual basis for the employee discipline, then it is subject to disclosure. But if the disciplinary notice is only memorializing the discipline by a perfunctory reference, only that documentation must be released. An agency is not required to create records pursuant to a request.

It is unclear from the materials provided what records, if any, would be subject to the investigatory records exemption found at Ind. Code § 5-14-3-2(i). Investigatory records are defined as records compiled in the course of the investigation of the crime. I cannot determine if any of the disciplinary actions or underlying allegations rose to the level of triggering a criminal investigation, but if they did, they would not be subject to disclosure. This is regardless of whether formal charges are brought or if the investigation is complete.

CONCLUSION

For the foregoing reasons, it is my opinion the Marion County Sheriff's Department has not violated the Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a large, sweeping flourish underneath.

Luke H. Britt
Public Access Counselor

Cc: Ms. Sarah Steele Riordan