



# STATE OF INDIANA

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March 1, 2013

Mr. David Day  
Church, Church, Hittle & Antrim  
Two North Ninth Street  
Noblesville, Indiana 46061

Mr. Jeff Eakins  
*The Banner*  
24 N. Washington St.  
Knightstown, Indiana 46148

Re: *Informal Inquiry 13-INF-07; I.C. § 5-14-3-4(b)(8)(C)*

Dear Sirs:

This informal opinion is in response to your inquiry regarding the compliance of Charles A. Beard Memorial School Corporation's ("CAB") response to Mr. Eakins request for information pursuant to I.C. § 5-14-3-4(b)(8)(C). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

## BACKGROUND

The CAB terminated two bus drivers from their employment on January 15, 2013. Thereafter, Mr. Eakins submitted the following written request for records:

"With respect to the two bus drivers who were terminated, we would like the following, which the Access to Public Records Act requires to be released:

- a. Their names, compensation, job titles, education and training background, previous work experience, and date of employment with CAB;
- b. Information relating to the status of any formal charges against these employees; and
- c. The factual basis for their discharge and any other disciplinary action that may have been taken against them prior to their discharged that resulted in their suspension or demotion."

In response to the request, the CAB provided the following:

“R.C.

Compensation: Daily rate of \$61.56

Job Title: School Bus Driver

Education: High School Graduate

Training Background: Completed all requirements to obtain CDL License and School Bus Endorsement

Previous Work Experience: Pool Cover Specialists, Burger King

Date of Employment: March 28, 2011 to January 15, 2013

There are no formal charges pending

Factual basis: Violated IC 9-21-8-59

J. H.

Compensation: Daily Rate of \$63.62

Job Title: School Bus Driver

Education: High School Diploma

Training Background: Completed all requirements to obtain CDL License and School Bus Endorsement

Previous Work Experience: Retired (Worked Daimler Chrysler, Thermo Transport, Whittier Lane Baptist Church)

Date of Employment: November 10, 2006 to January 15, 2013

There are no formal charges pending

Factual Basis: Violated School Board Policy # 4213: Student Supervision and Welfare”

The focus of the inquiry is whether the CAB’s response complied with I.C. § 5-14-3-4(b)(8)(C). The CAB believes that the response complies with prior guidance from the Indiana Court of Appeals and previous opinions of the Public Access Counselor; Mr. Eakins maintains that the law would require further facts regarding the incident that led to the disciplinary action.

In support of the propriety of the disclosure, Mr. Day acknowledged that the APRA is to be liberally construed. However, in matters involving personnel issues, the Indiana Court of Appeals noted in *Baker v. Town of Middlebury* the countervailing public policy concerns for the protection of employee privacy, efficient personnel management, and employee morale. *Baker* held:

“Our determination that it was appropriate for the Council to compile its list of rehires in private session, rather than in public, also comports with the guiding principles of the statute and with public policy protecting the privacy of rights of individuals with respect to sensitive personnel matters. Specifically, private discussion of an employee’s job performance evaluation does not significantly prevent or impair the public’s knowledge or understanding of the people’s business, and it is the public interest to promote efficient personnel management and maintain employee morale.

Furthermore, permitting employee evaluations to take place in private session prevents the employee from experiencing public embarrassment related to the critique of his or her work performance and avoids needless injury to the employee's reputation." *Baker v. Town of Middlebury*, 753 N.E. 2d 67, 72 (Ind. Ct. App. 2001).

In Mr. Day's review of previous opinions issued by the Public Access Counselor, specifically 12-FC-110, he maintains that the Counselor has balanced the policy of the APRA for disclosure with the personnel concerns noted in *Baker* in determining what constitutes an adequate response under I.C. § 5-14-3-4(b)(8)(C). Mr. Day provides in comparing the CAB's disclosure with other responses deemed in compliance by the Counselor, the CAB met the requirements of (b)(8)(C). Deviating from the statutory requirements of providing a "factual basis" in favor of the "actual facts" of the incident would be an expansion of the language of the APRA.

Mr. Eakins maintains that the CAB would not meet the requirements of providing a "factual basis" by simply referencing a state statute or school corporation policy. While the violation of the statute and/or policy may provide the legal basis for the termination, this would not provide a factual basis for the agency's action in terminating the employee. Counselor Davis opined in 2005 that a factual basis for an employee's termination should "disclose a description of the conduct and whether it was a violation of personnel rules or other code of conduct or law." Without a description of the conduct, all the public is left with is the CAB's conclusory statement that the agency has determined the employee has violated a policy or law. The agency's conclusion may be drawn from the factual basis, but is not the factual basis itself. While the agency would not be required to release every single detail, at a minimum it would be required to provide the basics as to when, where, and how the alleged violation occurred.

Without requiring such disclosure, the public is unable to determine if public agency's conclusion that a statute or policy had been violated was accurate. The APRA's underlying policy of providing "full and complete information regarding the affairs of government and the official acts of those who represent (citizens) as public officials and employees" shall require the release of a factual basis that at the very least includes a description of the conduct in addition to the agency's conclusion as to whether or not the conduct violated a policy or state law. As noted by Counselor Kossack, issues regarding what constitutes a "factual basis" are likely to continue until such time as the General Assembly acts to further clarify what information is required to be released pursuant to I.C. § 5-14-3-4(b)(8)(C). In the absence of such legislative action, Mr. Eakins would urge that the Counselor follow the guidance of Counselor Davis and O'Connor and require public agencies to provide a basic description of the conduct that leads to an employees' firing and not just the agencies conclusions that the policy or law has been violated.

## 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 CAB 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 CAB’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).

The APRA provides 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) 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. As noted by Mr. Eakins, I.C. § 5-14-3-4(b)(8) does not automatically exempt a record from disclosure; requests denied under (b)(8) are made at the agency’s discretion, minus the specific requirements of (A) – (C). While the records that fall under (b)(8) may contain certain information that is confidential (e.g. social security numbers), by itself (b)(8) does not provide confidential status to any record.

I am not aware of any Indiana case law that has addressed or defined what specific types of information must be provided by a public agency pursuant to I.C. § 5-14-3-4(b)(8)(C). In an advisory opinion written interpreting the prior version of the law (“information concerning disciplinary actions...”), Counselor 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.). See *Opinion of the Public Access Counselor 02-FC-22*. Counselor Davis endorsed Counselor O’Connor’s analysis of the law in a subsequent informal opinion. See *Informal Opinion – September 15, 2005, Evansville Courier* ([http://www.in.gov/pac/informal/files/Evansville Courier and Press and City personnel file.pdf](http://www.in.gov/pac/informal/files/Evansville_Courier_and_Press_and_City_personnel_file.pdf)). Counselor Kossack provided further analysis in a 2010 advisory opinion:

I agree with Counselor Neal insofar as I do not believe that the APRA requires public agencies to release every piece of information related to a disciplinary action. That much is clear from the plain meaning of the provision’s language calling for the factual *basis* to be disclosed. Webster’s dictionary defines “basis” as, “(1) That on which anything rests; support; foundation. (2) Fundamental principle. [and] (3) The chief component or ingredient of a thing.” Webster's Third New International Dictionary 50 (1992). As a general rule of statutory construction, if a statute is unambiguous (i.e., susceptible to but one meaning), Indiana courts give the statute its clear and plain meaning. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001). The General Assembly’s choice of that word does not lead me to conclude that every minute detail regarding the discipline should be disclosed; rather, the “chief component” should be. Here, it is my opinion that DNR has disclosed that chief component to you by informing you that the suspension was the result of the officer’s disobeying a direct order. See *Opinion of the Public Access Counselor 10-FC-212*.

As alluded to by previous public access counselor’s, without a more specific instruction from the General Assembly regarding what is required to be provided in the factual basis, it will remain difficult for agencies to determine whether they have satisfied their disclosure obligations under the APRA and also for members of the public (and this office) to recognize when agencies’ responses are noncompliant. See *Opinion of the Public Access Counselor 11-FC-149*. In a review of prior opinions issued by the Public Access Counselor’s Office, the following have been considered to comply with the requirements of the law:

- “suspended from duty on June 7, 2011, for a period of ten (10) working days for neglect of duty” – See *Opinion of the Public Access Counselor 11-FC-149*.
- “demoted on November 28, 2010, for failure to follow a direct order and misuse of state property” – *Id.*
- “suspended from duty on January 7, 2008, for a period of ten (10) working

days for acts unbecoming an officer and/or conduct that would tend to bring the Division into disrepute, or impair its efficient and effective operation” – *Id.*

- “suspended from duty on June 6, 2011, for a period of five (5) working days for neglect of duty.” *Id.*
- “suspended for violating a direct order” – *See Opinion of the Public Access Counselor 10-FC-212.*
- “an incident involving conduct becoming an officer” – *See Opinion of the Public Access Counselor 09-FC-75.*
- “violation of the Standard Operating Procedures of the Greenfield Police Department.” *See Opinion of the Public Access Counselor 08-FC-184.*
- “Mr. King was terminated for disclosing confidential personnel matters, marketing programs and strategic planning, as well as for the misuse and distortion of information known to him only by virtue of his role as Vice President and Chief Financial Officer. Such conduct constituted substantial cause as that term was defined by his employment agreement, i.e. the ‘failure to comply with established [Porter] policies and procedures’ and the ‘unauthorized disclosure or use of a trade secret or other confidential’ information.” *See Opinions of the Public Access Counselor 06-FC-2 & 06-FC-3.*
- Mr. Grant was dismissed from the faculty of Indiana University on the grounds that he engaged in serious personal and professional misconduct. The finding of misconduct was primarily based on representations he made at the time of his hiring and subsequently during his tenure at Indiana University. Mr. Grant is grieving the decision concerning his employment through the Faculty Board of review at IU South Bend. *See Informal Opinion of the Public Access Counselor 12-INF-08.*

After reviewing the information provided by the CAB for R.C., I am able to discern that R.C. was terminated from his employment as a bus driver by CAB on January 15, 2012 for violating I.C. § 9-21-8-59. I.C. § 9-21-8-59 provides that a person may not use a telecommunications device to type, transmit, or read a text message or an electronic mail message while operating a vehicle unless the device is used in conjunction with hands free or voice operated technology, or unless the device is used to call 911 to report a bona fide emergency. *See I.C. § 9-21-8-59.* From CAB’s response, the requestor is aware of type of disciplinary action that was lodged (termination), when the disciplinary action was lodged (January 15, 2013), the conduct that led to disciplinary action (using a telecommunications device to type, transmit, or read a text message or an electronic mail message while operating a vehicle), and the applicable agency policy or state law that the conduct violated (I.C. § 9-21-8-59). It is my opinion that the CAB’s response as to R.C. was compliant with I.C. § 5-14-3-4(b)(8)(C).

As to J.H., I am able to discern that J.H. was terminated from his employment as a bus driver by CAB on January 15, 2013 for violating School Board Policy # 4213: Student Supervision and Welfare. As opposed to R.C. who was terminated for violating a state law, J.H. was terminated for violating of a school board policy. I have not been

provided a copy of School Board Policy #4213, but assume that a copy would be provided by CAB in response to a request for records made under the APRA. From CAB's response, the requestor is aware of the type of disciplinary action that was lodged (termination), when the disciplinary action was lodged (January 15, 2013), and the applicable agency policy that was violated (School Board Policy # 4213 relating to Student Supervision and Welfare). Upon review of the School Board Policy, the requestor would be able to denote further detail regarding the nature of the conduct that led to termination. In light of previous guidance by the Public Access Counselor regarding the appropriateness of a response providing the factual basis of a disciplinary action, it is my opinion that the CAB's response as to J.H. was compliant with I.C. § 5-14-3-4(b)(8)(C).

Please let me know if I can be of any further assistance.

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 long, sweeping underline.

Joseph B. Hoage  
Public Access Counselor