



# STATE OF INDIANA

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April 6, 2009

Helen Marchal  
Chief of Staff/Chief Counsel  
Marion County Prosecutor's Office  
251 East Ohio Street  
Indianapolis, Indiana 46204

*Re: Informal inquiry 09-INF-16 regarding the Marion County Prosecutor's Office*

Dear Ms. Marchal:

This advisory opinion is in response to your informal inquiry dated March 20, 2009. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

You write on behalf of the Marion County Prosecutor's Office ("Prosecutor") regarding records related to the termination of an employee. Pursuant to the Access to Public Records Act ("APRA") (Ind. Code 5-14-3), the Prosecutor's Office is a public agency. *See* I.C. § 5-14-3-2(m)(2). Your inquiry is whether the APRA excepts the requested records as investigatory records of a law enforcement agency.

The public policy of the APRA states, "[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." I.C. § 5-14-3-1. The Prosecutor's Office is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the Prosecutor during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The APRA provides that at the discretion of the agency, the following (among others) may be withheld from disclosure:

Investigatory records of law enforcement agencies.  
I.C. § 5-14-3-4(b)(1).

Investigatory records are defined as “information compiled in the course of the investigation of a crime.” I.C. § 5-14-3-2(h). The Prosecutor is a law enforcement agency. I.C. § 5-14-3-2(m)(6).

Further, 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.

Here, you have received a request for access to the “termination letter and related records” pertaining to a former employee of the Prosecutor. The employee’s mother was arrested on March 9, 2009 for insurance fraud. Her daughter was employed by the Prosecutor. The subsequent investigation and service of a search warrant at their shared home created concerns regarding the employee’s veracity as to statements made to your office on March 9. The employee was terminated on March 13. You have received a request for access to records related to that termination. The Prosecutor’s position is that those records are investigatory records of a law enforcement agency and as such can be withheld from disclosure pursuant to I.C. § 5-14-3-4(b)(1).

Certainly investigatory records of the Prosecutor can be withheld from disclosure at the discretion of the agency, pursuant to I.C. § 5-14-3-4(b)(1). Any records compiled during the investigation of a crime fall under this exception. The issue here, though, is how I.C. § 5-14-3-4(b)(1) and I.C. § 5-14-3-4(b)(8)(C) can be reconciled. The latter requires disclosure of the factual basis for a disciplinary action in which final action has

been taken and resulted in termination. You indicate the employee was terminated on March 13. Pursuant to I.C. § 5-14-3-4(b)(8)(C), the Prosecutor must disclose the factual basis for disciplinary action leading to termination if the Prosecutor maintains a record containing that information. Nothing in the APRA would require the Prosecutor to create a record containing the factual basis for termination if a record does not already exist. For a more detailed analysis of this issue, see *Opinion of the Public Access Counselor 08-FC-184*. Here, though, it is my understanding a record does exist containing that information.

The APRA provides that when a record contains both disclosable and nondisclosable information, the agency must separate the disclosable information and make it available for inspection and copying. I.C. § 5-14-3-6. Here, it is my understanding the Prosecutor maintains more than one record responsive to the request. I agree that for the most part those records are investigatory records and may be withheld from disclosure at the discretion of the agency on the basis of I.C. § 5-14-3-4(b)(1). To the extent a records contains the factual basis for termination, that portion of that record should be disclosed. In my opinion, I.C. § 5-14-3-4(b)(8) does not require an agency to allow inspection of all records related to a personnel action. For instance, I do not think the law would require disclosure of a detailed narrative of the events leading to the termination. Instead, the factual basis for termination must be disclosed. The agency has the discretion to provide more than that but is only required to disclose the portion of the record identifying the factual basis that lead to the termination.

For the foregoing reasons, it is my opinion the Prosecutor may exercise the discretion to withhold from disclosure most of the “related records” as well as any portion of the termination letter other than the factual basis for the termination.

Please do not hesitate to contact me if I can provide any further assistance.

Best regards,



Heather Willis Neal  
Public Access Counselor