



STATE OF INDIANA

JOSEPH E. KERNAN, Governor

Michael A. Hurst

PUBLIC ACCESS COUNSELOR

402 West Washington Street Room W074
Indianapolis Indiana 46204-2746
Telephone: (317) 234-0908
FAX (317) 233-3091
1-800-228-6013
www.IN.gov/pac

February 17, 2004

Mr. John Morse
McMains, Foster & Morse
20 North Meridian Street
Indianapolis, Indiana 46204-3024

Re: Informal Inquiry Response, Various Retirement Plans

Dear Mr. Morse:

This responds to your inquiry on behalf of WTHR, Channel 13, alleging that Craig Hartzler, the Executive Director of the Public Employees' Retirement Fund (PERF), denied your client access to the full records of five public employee retirement plans administered by the PERF Board of Trustees in violation of the Indiana Access to Public Records Act (APRA) (Ind. Code, §5-14-3-1 *et seq.*).¹ PERF submitted a response to your claims, and I have obtained copies of all of the correspondence referenced in your inquiry and in PERF's response and which are relative to your request.

On September 12, 2003, WTHR submitted a written request for records to PERF. The request sought to inspect and copy the "state's pension database" maintained by PERF. The request further sought all available information on both active and retired employees from five retirement plans administered by PERF. These retirement plans included the 1977 Police Officers' and Firefighters' Pension and Disability Fund (*see* IC 36-8-8); the Legislators' Retirement System (*see* IC 2-3-5-3); the Prosecuting Attorneys' Retirement Fund (*see* IC 33-14-9); the 1977 and 1985 Judges' Retirement Systems (*see* IC 33-13-8); and the Excise Police and Conservation Officers' Retirement Plan (*see* IC 5-10-5.5). PERF responded in writing the same day and asserted that state law prohibited the disclosure of the requested information. According to PERF, save member names and years of service, Indiana Code 5-10.2-2-17 declared the requested information confidential. *See* IC 5-10.2-2-17. PERF further noted that it did not maintain a record containing but limited to a list of members and years of service, and declined to create any such list in response to the records request. Finally, PERF asserted that information

¹ This matter was originally submitted as a formal complaint pursuant to Indiana Code 5-14-5. Because the alleged denial occurred more than 30 days prior to the date the complaint was filed, this office notified you that the matter would be taken under advisement as an informal inquiry.

Mr. John Morse
February 17, 2004
Page 2

regarding members' years of service was stored with nondisclosable information in PERF's computer system and that any disclosable information could not be separated without creating a new record and without incurring the cost of reprogramming the computer system.

On September 23, 2003, WTHR amended its record request. Based on the information before me, it appears that WTHR withdrew its request to inspect and copy the "state's pension database" maintained by PERF, and limited its request to all available information on both active and retired employees from the aforementioned five retirement plans administered by PERF. PERF again responded in writing on the same day, and again denied the request citing to the confidentiality provision in Indiana Code 5-10.2-2-17. PERF further reiterated its claim that it did not maintain a list containing but limited to disclosable information, and denied that it was required to create such a record from its computer database. However, PERF offered to create such a record containing member names and years of service upon receipt of the direct costs for reprogramming the agency's computer system to create that record.

WTHR responded on September 30, 2003. In response, WTHR asserted that Indiana Code 5-10.2-2-17 applied only to the member information of the Indiana State Teachers' Retirement Fund and the Public Employees' Retirement Fund, and not to the information contained in the five funds at issue here. WTHR therefore requested a date certain for production of the records. On October 15, 2003, PERF responded reiterating its prior denial. Your complaint and PERF's response followed.

It is my opinion that Indiana Code 5-10.2-2-17 does not prohibit PERF from disclosing the information requested from the five funds at issue. Accordingly, absent any other applicable exemptions, and none are now alleged, Indiana Code 5-14-3-3 requires that PERF disclose the requested information if it maintains public records that are responsive to the request.²

The APRA states:

[I]t is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing 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.

² PERF's submissions suggest that it may not maintain public records that are responsive to the request. Certainly PERF asserts the nonexistence of any record containing only member names and years of service. It is not clear whether PERF maintains this position and asserts the nonexistence of any responsive records assuming that Indiana Code 5-10.2-2-17 does not apply to preclude disclosure of the information sought. PERF's obligation to produce a responsive record is dependent upon the existence of a responsive record.

Mr. John Morse
February 17, 2004
Page 3

IC 5-14-3-1. This preamble to the APRA contemplates that all of the provisions that follow will be interpreted in a manner that opens to public scrutiny the affairs of government and the acts of those who serve as public officials and employees of government. Because the public policy of the APRA requires a liberal construction in favor of disclosure (see IC 5-14-3-1), exemptions to disclosure must be construed narrowly. *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995).

Indiana Code 5-14-3-4(a)(1) provides that records that are declared confidential by state statute are exempted from disclosure under the APRA and may not be disclosed unless access to the records is specifically required by state or federal statute or unless ordered by a court. IC 5-14-3-4(a)(1). PERF understands state law to prohibit it from releasing member information from the funds at issue because state statute, specifically Indiana Code 5-10.2-2-17, declares that "[f]und records of individual members and membership information are confidential, except for the name and years of service of a fund member." IC 5-10.2-2-17.

PERF asserts that the confidentiality provision applies to all funds administered by the PERF Board. The plain language of the statute does not support this conclusion. Most significantly, the confidentiality provision at issue is expressly limited in scope to only two funds, neither of which are at issue here. The confidentiality provision is contained in Title 5, Article 10.2. Indiana Code 5-10.2-2-1 expressly limits the provisions within that Article to only the two funds referenced in that Article, specifically the Teachers' Retirement Fund and the Public Employee's Retirement Fund. IC 5-10.2-2-1 ("This article applies to the Indiana state teachers' retirement fund and the public employees' retirement fund"). Moreover, the definitions set forth within that Article expressly define "Fund" for purposes of the provisions therein to mean the Teachers' Retirement Fund and the Public Employees' Retirement Fund (IC 5-10.2-1-2), and "Member" to mean members of those two funds (IC 5-10.2-1-4).³ Thus, by the plain language governing the scope of the Article 10.2 provisions, the confidentiality provision applies only to the two funds referenced within that Article, to the "fund" records of only those two funds, and to the "member" information of members of those two funds.

That said, it seems counterintuitive to suggest that the General Assembly would protect the confidentiality of the records of the Teacher's Retirement Fund and the Public Employee's Retirement Fund while not also protecting the confidentiality of the other funds administered by PERF. Indeed, in each of the funds at issue the legislation establishing those funds refers to PERF administration under Article 10.3. See IC 33-13-8-25(b)(2); IC 2-3.5-3-4(b)(2); IC 33-14-9-10(b)(2); IC 36-8-8-5(a)(2), 5(c); IC 5-10-5.5-1(g), 1(h), 3. Given the statutory scheme, it may well be that placement of the confidentiality provision in Article 10.2 and the limitation of the scope of that provision by the express language of Article 10.2 to only the two funds created by that statute was a legislative oversight. However, unless and until the General Assembly takes action to protect the membership records of all of the funds administered by PERF, I am required

³ Article 10.3, governing the administration of those funds and the funds at issue here, separately and independently define both of these terms. See IC 5-10.3-1-3, 5-10.3-1-5.

Mr. John Morse
February 17, 2004
Page 4

to give force and effect to the plain language of the statutes, and to apply the statutory exemptions to disclosure narrowly.

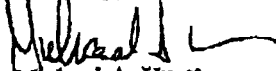
The plain language of the confidentiality provision does not prohibit disclosure of the requested information for the five funds at issue here, and does not therefore support the section 4(a)(1) exemption relied upon by PERF.

I offer the following additional comments to guide any further action by the parties. This opinion is advisory only. That said, should PERF elect to disclose the requested records in reliance on this opinion, and in the event the information disclosed is later determined to be confidential, PERF will be protected from any liability arising from that disclosure pursuant to Indiana Code 5-14-3-10(c). PERF may, of course, elect to continue to withhold the requested information subject to the exemption asserted and out of concern for the confidentiality provision it maintains mandates that it withhold disclosure. In that event you may bring an action in a court of competent jurisdiction pursuant to Indiana Code 5-14-3-9, and the parties may seek court intervention and a declaration of their respective rights and responsibilities under the APRA.

As a final matter, I note and appreciate the time that has passed since you brought your initial complaint to this office, and I regret that this matter was not brought to resolution in a more expedited fashion. Thank you for your patience and courtesy.

Please feel free to contact me if you have any questions or concerns.

Sincerely,


Michael A. Hurst
Public Access Counselor

cc: Mr. Craig Hartzler, Public Employees' Retirement Fund