

February 2, 2005

Sent Via Facsimile and U.S. Mail

Ms. Julie Wheeland
502 Eagle Ct.
Valparaiso, IN 46383

Re: Formal Complaint 05-FC-2; Alleged Violation of the Access to Public Records Act by Porter, a County Hospital

Dear Ms. Wheeland:

This is in response to your formal complaint alleging that Porter violated the Access to Public Records Act ("APRA") by failing to timely and adequately produce records.

BACKGROUND

In early January, you submitted three formal complaints, which I have consolidated under 05-FC-2. You have submitted various requests for documents from Porter, formerly Porter Memorial Hospital, since October 2002. Your complaints result from only a portion of the requests that you have made in the last two years. Some of the documents that you requested were outstanding at the time that you filed your complaints, and others were fulfilled prior to the filing of the complaints.

Although you filed three formal complaints, for purposes of analysis, I have grouped the three complaints into two major sections. The first concerns the timeliness of production and adequacy of denial of certain attorney billing records. The second concerns nine separate document requests that occurred on September 7, 2004, September 17, 2004, and October 21, 2004 ("*the Fall 2004 requests*"). Again, your complaint regarding these requests concerns the timeliness of the production of the records. Along with this latter section, I have grouped the discussion regarding your third complaint, which concerns the generic response of Porter that other documents are either confidential or that your requests are not reasonably particular.

I sent Porter copies of your complaints. Porter, through its attorney Gregg Wallander, sent me a written response dated January 19, 2005. I enclose a copy of the response for your reference.

Other pertinent facts will be developed later in this advisory opinion.

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." Ind. Code 5-14-3-1. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." IC 5-14-3-1. Porter was organized under IC 16-22 as a county hospital. As such, Porter is clearly a public agency for the purposes of the APRA. IC 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of Porter during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. IC 5-14-3-3(a).

I begin my analysis of your complaints by providing general guidance of the requirements of the APRA that apply to your complaints. I will then undertake discussion of the specific issues raised in your complaints.

As you know, a public agency is required to send a response to a request for records within certain timeframes under the APRA. Many of your requests were hand-delivered to Porter. In that event, the APRA requires that the public agency respond to the request within 24 business hours of its receipt of the request. IC 5-14-3-9(a). Also, a response does not require that the public agency produce the records within those timeframes. Rather, a response may entail the public agency acknowledging receipt of the request and explaining how it intends to comply. Your complaints do not raise any issue with respect to timely response to your requests. In fact, it appears that Porter has always timely responded to your requests.

The APRA does not contain any specific deadline for production of documents. Past opinions of this office have stated that the agency must produce responsive documents within a reasonable time. The factors that must be evaluated when determining reasonableness of the timeliness of production include the number of documents in the request, whether the documents are stored offsite, and whether the documents contain partially disclosable and nondisclosable information. Other factors include whether the requested documents require review by counsel to avoid disclosure of confidential material. *See Opinion of the Public Access Counselor 04-FC-141; Opinion of the Public Access Counselor 04-FC-129.* In any case, this office has held that the public agency has the burden of showing that the time for production was reasonable.

While providing information is an essential function of government, the APRA also provides that a public agency shall regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. IC 5-14-3-7(a). However,

this limitation does not operate to deny any person the rights secured under the APRA. IC 5-14-3-7(c). This means that while a public agency must balance its obligations under APRA with its regular duties, the public agency may not outright deny a record.

With these general requirements as a backdrop, I now proceed to a discussion of the two main issues presented in your complaints.

Attorney Billing Records

You requested on August 27, 2004 seven items, including “itemized invoices submitted by Gregg Wallander and all other attorneys and other personnel with Hall Render Killian Heath & Lyman for services rendered to Porter...for the following years: 2001, 2002, 2003 and 2004 YTD.” You asked for the same information with respect to attorney Robert Welsh of Harris Welsh & Lukmann. In your complaint, you have stated that while you have received the attorney billing records, Porter sent them to you on November 22, nearly four months after you requested them.

In support of its burden to show that the four-month time to produce the attorney billing records was reasonable, Porter points to the following factors:

- The records were voluminous, exceeding 600 pages and involving four years of billing records. Hall Render Killian Heath & Lyman serves as legal counsel to Porter.
- There were two law firms’ records located off-site.
- Porter sought outside counsel to review the records and to consider ethical issues and relevant caselaw regarding attorney-work product.
- The actual redaction of the records was time-consuming.

First I note that you have not raised any issue with respect to the need to redact or remove from attorney billing statements any privileged information, in accordance with the public agency’s discretion to not disclose attorney work product. IC 5-14-3-4(b)(2). In reviewing previous opinions of this office on timeliness of record production, I found that the facts and circumstances peculiar to a particular complaint do not allow for easy comparison with the circumstances in the present case. I conclude that the factors above, as well as the entire file before me which shows that Porter was reviewing and preparing other, non-legal documents at the same time, convince me that there was nothing unreasonable about the four month time frame in which to produce the attorney billing records. A public agency that is careful in its consideration of the extent to which attorney work product information is redacted will take the time and develop necessary expertise to perform the redaction judiciously. This ultimately benefits the requester who would like to see as much disclosable information as possible.¹

Also, I generally counsel public agencies to release records to the requester as soon as they are identified and analyzed rather than waiting until all records are identified and analyzed.

¹ Mr. Wallander has advised me that with respect to attorney work product issues, he anticipates having quicker response time in the future because the legal groundwork for analyzing these records has now been laid.

However, in this case, preparation of a number of attorney billing records that are otherwise protected from disclosure under IC 5-14-3-4(b)(2) would entail analysis of the whole group of bills rather than each bill in piecemeal fashion. I also encourage public agencies, when complying with voluminous requests for records, to stay in contact with the requester at regular intervals. From the copies of e-mails sent and received during this time, it appears that Mr. Wallander responded regularly with updates.

I do wish to offer an opinion regarding Mr. Wallander's cover letter of November 22 transmitting the attorney billing records. The letter omits any reference to the exemption for attorney work product that applied to the redaction of the attorney billing statements. In fact, he did not supply this required statement until November 30 after you asked him to follow-up with the citation to authority. The APRA requires that when denying a record that has been requested in writing, the agency must give a denial that contains the specific exemption or exemptions that allow the agency to withhold the record. IC 5-14-3-9(c). I note that Mr. Wallander had explained to you on September 28 that the records "involved serious legal and ethical issues to include attorney client confidentiality." Ultimately, it was incumbent on Porter to communicate the exemption that applied to the attorney billing records, including the citation to the statute that allows redaction of the record. You now have these citations to authority, and they appear to be complete and correct.

Timeliness of Fall 2004 Requests

You raise issues with respect to the timeliness of production of documents that you requested on each of these dates: September 7, September 17, and October 21, all in 2004. Mr. Wallander notes that Porter received other, discrete requests for documents that are not at issue in your complaint, also sent to Porter on those same dates. *On the whole*, consistent with the factors listed above, I do not regard the production time for these documents to be unreasonable. This is because these specific requests and others that you submitted on the same dates that are not part of this complaint are voluminous, involve general requests that would require that Porter determine whether it has responsive records, and involve analysis by counsel or others of specific exemptions that may apply to the records.

That said, I question whether the production time for a few of the records was unreasonable. I deal with specific records below.

September 7, Request #2. This request is actually one of three sent on the same date to Porter. There are six discrete documents requested. Only two of the items were not sent at the time that the complaint was filed; the others were responded to with denials concerning reasonable particularity, confidentiality, or "previously sent" to you. The two outstanding items were sent to you on January 19, 2005, according to Mr. Wallander. These were items numbered 1 and 3. My concern for the four month time period for production of these items is that the items appear to be contained in deferred compensation or pension plans (item #1), and disability insurance policies (item #2) with respect to Ronald C. Winger. Four months appears to be an unreasonable period of time to produce these records. I temper this determination with the observation that both items actually ask for more than just those documents. For example, for item #1, you also asked for "the division of contributions (including all attachments and

amendments to such document, whether formal or informal.)” This additional dimension may have taken additional time to locate any responsive documents. Again, I generally advise public agencies to attempt to locate records that are obviously responsive and disclose them as soon as possible, without holding them until all records are gathered.

For the other items requested, I cannot say that Porter’s response time was unreasonable, since the requests were general in nature and would require analysis with respect to whether the records were subject to laws allowing nondisclosure and whether they would be disclosed.

September 17, Request #1. There are seven items in this request. Mr. Wallander informed me that the disclosable records would be sent to you January 19, 2005. Most of the seven items contain language such as “Any and all documents concerning...” It is primarily due to the general nature of these requests that I believe that the four month response time was not at all unreasonable. Porter would have to review its records to determine whether and to what extent it had responsive documents. Also, many of the requests are for documents that are aged several years.

September 17, Request #2. There are six items in this request. You were apparently provided with some of the documents on January 7, and others were to have been sent January 19. Again, as in Request #1 of the same date, the items requested are broad and comprehensive in nature. I do not find that the three to four month timeframe in which documents were produced to be unreasonable.

September 17, Request #3. In this three-item request, you sought specific information concerning line item budget figures. According to Mr. Wallander, you had already received Porter’s budgets for the relevant time periods. Assuming that you already received this information, it was not incumbent on Porter to provide it to you again or show you where to find it in the budgets that you had received. In my opinion, Porter did not violate the APRA by failing to provide these records to you again, and therefore, their response was not untimely.

October 21, Request #1 through #5. As with the previous requests, to the extent that these requests are for “Any and all documents concerning...” and/or are for multiple years, production of records for this eleven-week old request is not unreasonable, given the general nature of the requests, the volume of documents requested, and the fact that some documents are aged. That said, with respect to October 21 request #3 only, I noted that there are several requests for a current contract (or most recently expired contract if there is no current contract) between Porter and discrete departmental personnel, such as Emergency Department staff (item #2), or between Porter and Ambulance Service staff (item #3). Although it is possible that not all responsive documents could be located more quickly than eleven weeks, it would seem likely that at least some of these contracts could be located and copied more quickly. As I stated earlier, I advise that to the extent possible, public agencies attempt to provide easily obtained documents rather than holding them until all responsive records are located, analyzed, and copied.

Confidentiality and Reasonable Particularity. You have also asked me to opine regarding denials due to confidentiality and reasonable particularity. You do not raise specific

claims to having been denied improperly on the basis of “confidentiality” which I note were generally under IC 5-14-3-4(b)(6)—the “deliberative materials” exemption, and IC 5-14-3-4(b)(2)—the “attorney work product” exemption. Therefore, it would be difficult for me to offer an opinion without analyzing each and every such denial. However, a public agency may deny a record, and in some cases may be required to deny a record, under IC 5-14-3-4(a) or (b). Under APRA, records that are categorized in IC 5-14-3-4(b) may either be disclosed or not disclosed at the discretion of the agency. It appears that Porter is exercising its discretion to not disclose records relating to representation of Porter by legal counsel. It also appears that with respect to the deliberative materials exception, Porter is properly applying that exception. For example, in September 7 Request #2, item 2, Porter denied access to the “final recommendations of Mercer and Company with respect to associated direction of Employer Contribution to President’s Porter Memorial Hospital Retirement Savings 403(b)...Plan.” Based on your description of the request, this record would appear to fall within the definition of a deliberative record: “intraagency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.” IC 5-14-3-4(b)(6).

In a similar vein, you asked for my opinion with respect to the many denials stating: “Porter is not required to conduct research. Records must be requested with reasonable particularity.” This denial appears on several of the requests. Under the APRA, a request must identify with reasonable particularity the record being requested. IC 5-14-3-3(a). A request does not fail of this element merely because it is general in nature, or because it voluminous records are being requested. Rather, a request is not reasonably particular if its meaning or scope cannot be determined by the agency. In the event that a request is not reasonably particular, the agency is required to contact the requester for more information.

Generally, Porter did not claim that your general requests were not reasonably particular. Rather, the requests to which the response of “records must be requested with reasonable particularity” applied included requests such as the September 7, Request #2, item 6: “Any and all minutes of meetings of the Board of Trustees and/or board committees” at which specifically described action was taken. Mr. Wallander’s response included the phrase “Porter is not required to conduct research.” For this request and others that are similar, I find that Porter is not required to read through its minutes and locate only those minutes at which those discrete actions were taken. All Porter is required to do is make its records available for inspection and copying. To the extent that this request, and other similar requests, would require such research, it was necessary only for Porter to state that the minutes were available for inspection and copying. Hence, although the above request was stated with reasonable particularity, Porter was not required to locate and copy those records for you. Porter’s response should have indicated that you could inspect the minutes and copy those that you desired.

However, there were some denials for “reasonable particularity” that would require that Porter engage you in some discussion regarding the scope of your request. For example, in September 17 Request #1, item 7, where you request “any and all employment contracts for ‘management members...’”, Porter should ask that you specify what you mean by “management members” or suggest to you how Porter would define the term. For those types of requests,

Porter, in its December 7 e-mail responding to the Fall 2004 requests, should have invited you to clarify each such request.

You also raise an issue with respect to what you believe is Mr. Wallander's indiscriminately utilizing the "reasonably particular" and "confidential" bases for future record productions that come directly from Andrew Snyder, Porter's Vice President for Media & Public Relations. Mr. Wallander wrote to you in a January 6 e-mail: "Also, similar to document requests sent from my office, please note that any such requests delivered straight from Andrew Snyder are intended to reasonably respond to your request for public documents that have been identified with reasonable particularity and are not otherwise confidential under applicable law."

As I stated earlier, the APRA requires that a public agency respond to a request for records with a specific reason for denying a record, if the agency denies a record. The denial reasons must be stated for the record or class of records to which it applies. I cannot tell whether Mr. Wallander meant to state only his intention to fulfill your requests in good faith, or is stating in advance an anticipated denial for yet-identified records. You are correct that the latter interpretation would not be a proper denial under the Access to Public Records Act.

To summarize, it is my opinion that Porter has not, by and large, unreasonably delayed producing the records that you have sought. This conclusion is based on the number of requests, the general nature of the requests that necessitate identifying responsive records, the number of records actually identified as responsive, the need to analyze many of the records to determine whether they are nondisclosable in whole or in part, and the fact that many of the records are stored off-site. The few records that I cite as being overdue are the result of my impression that the records are easily identified, or at least more easily identified than the many others.

I advise both parties to work together to amicably resolve ongoing issues with respect to production of records. Also, the Office of the Public Access Counselor is available to help mediate specific disputes with respect to these ongoing record requests.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. Gregg Wallander