



STATE OF INDIANA

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December 4, 2012

Ms. Gwen S. Rodenberger
Herald Journal
114 S. Main St.
Monticello, Indiana 47960

Re: Formal Complaint 12-FC-335; Alleged Violation of the Access to Public Records Act by the IU Health White Memorial Hospital

Dear Ms. Rodenberger:

This advisory opinion is in response to your formal complaint alleging that IU-Health, the custodian of the records for the White County Memorial Hospital ("Hospital"), violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Jerome Kelly, Assistant General Counsel, responded on behalf of the IU-Health. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request to IU-Health to receive copies of the Hospital's financial records for the years Paul Cardwell served as CEO, with a special interest in all financial paperwork involving Plake and Associates and Mr. Cardwell's consulting for the Hospital after he retired from the position. You note that the Hospital was owned by the County until July 1, 2011, at which time it was acquired by IU-Health. You have not sought copies of any documents from the time or since IU-Health's acquisition of the Hospital.

In response to your request, the Hospital denied your request in writing stating that the records may be subject of a criminal investigation and it would not provide the records without authorization from the appropriate law enforcement officials. You understand that a similar situation occurred involving the Lake County Prosecutor and the Hoosier State Press Association, to which the records were subsequently released. You provide that you have contacted the Federal Bureau of Investigation ("FBI") regarding the alleged investigation. You were informed by the FBI that it did not care whether you received copies of the records and that it had no authority to stop you from receiving the records. After providing this information to the Hospital, your request was still denied.

In response to your formal complaint, Mr. Kelly advised that while IU-Health is not a public agency, it does maintain custody of records previously held by the Hospital, a public agency under the APRA. Mr. Kelly provided that IU-Health would be able to deny your request pursuant to the investigatory records exception found under I.C. § 5-14-3-4(b)(1) for all records that have been disclosed by IU-Health to the FBI. Although IU-Health is not a law enforcement agency, Mr. Kelly would argue that you should not be able to obtain investigatory records in the possession of IU-Health that you would not be able to obtain from the law enforcement agency itself. IU-Health and the Hospital have been victims of a crime and the investigation is on-going. If IU-Health is compelled to release the investigatory records in its possession, such disclosure would endanger the criminal investigation and any future prosecution. Mr. Kelly maintains that the very reason that investigatory records are exempt from public disclosure is to protect the integrity of criminal investigations and prosecutions. At some point in the future, the records will come to light in the course of the prosecution or will no longer be part of an active criminal investigation. Until such time, the record should not be subject to disclosure.

As to your request for the consulting agreement entered into between the Hospital and Mr. Cardwell, such an agreement was part of Mr. Cardwell's personnel file and your request may be denied pursuant to I.C. § 5-14-3-4(b)(8).

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. There is no dispute amongst the parties that the Hospital was a public agency for the purposes of the APRA prior to IU-Health's acquisition. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Hospital'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).

A request for records may be oral or written. *See* I.C. § 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* I.C. § 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* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). In response to your original request, IU-Health advised that your request was denied as the records may be subject to a criminal investigation and would not be provided without authorization from the appropriate law enforcement officials. Accordingly, it is my

opinion that IU-Health acted contrary to section 9(c) of the APRA in response to your request by failing to cite to the specific exemption or exemptions that would authorize the withholding of the records in question.

The APRA provides that a law enforcement agency retains the discretion to disclose its investigatory records. *See* I.C. § 5-14-3-4(b)(1). An investigatory record is defined as “information compiled in the course of the investigation of a crime.” *See* I.C. § 5-14-3-2(h). The investigatory records exception does not apply only to records of ongoing or current investigations; rather, it applies regardless of whether a crime was charged or even committed. The exception applies to all records compiled during the course of the investigation, even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. *See Opinion of the Public Access Counselor 09-FC-157*. The exception specifically provides that the disclosure of “investigatory records of law enforcement agencies” is discretionary. IU-Health is not a law enforcement agency. Further, the request that was submitted was not for all investigatory records of the Hospital or all records submitted by IU-Health to law enforcement; rather it was for the Hospital’s financial records for the years Mr. Cardwell was CEO, specifically in regards to financial paperwork involving Plake and Associates and Cardwell’s consulting for the Hospital after he retired. As such, it is my opinion that IU-Health may not deny your request for records of the Hospital that remain in its possession pursuant to the investigatory records exception found under I.C. § 5-14-3-4(b)(1).

The APRA provides that certain personnel records may be withheld from disclosure at the discretion of the agency. The statute provides:

“(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).”

As to IU-Health’s denial of the consulting agreement for Mr. Cardwell, it is my opinion that your request may not be denied pursuant to I.C. § 5-14-3-4(b)(8) as the agreement did not concern Mr. Caldwell’s status or duties as an employee of the Hospital nor would the agreement be related to the work he performed as an employee. Mr. Caldwell entered into a consulting agreement with the Hospital at the conclusion of his employment; thus he would have been an independent contractor who entered into an agreement with the agency to provide certain services. I.C. § 5-14-3-4(b)(8) specifically applies to “personnel files of public employees.” As the consulting agreement requested was a contractual agreement entered into by a public agency and an independent contractor, it is my opinion that IU-Health may not deny your request pursuant to I.C. § 5-14-3-4(b)(8).

CONCLUSION

For the foregoing reasons, it is my opinion that IU-Health acted contrary to section 9(c) of the APRA in response to your original request by failing to cite to the specific exemption or exemptions that would authorize the withholding of the records in question. It is my opinion that IU-Health may not cite to I.C. § 5-14-3-4(b)(1) to deny your request for records that it has previously provided to law enforcement. Lastly, it is my opinion that IU-Health may not deny your request for the consulting agreement entered into between the Hospital and Mr. Caldwell pursuant to I.C. § 5-14-3-4(b)(8).

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: Stephanie Long, Jerome Kelly