



STATE OF INDIANA

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January 14, 2015

Mr. Robert A. Gaddie
Plainfield Correctional Facility
727 Moon Road
Plainfield, IN 46168

Re: Formal Complaint 14-FC-310; Alleged Violation of the Access to Public Records Act ("APRA") by the Indianapolis Public Transportation Corporation

Dear Mr. Gaddie,

This advisory opinion is in response to your formal complaint alleging the Indianapolis Public Transportation Corporation ("IPTC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* Ms. Jill D. Russell, Esq., General Counsel, responded on behalf of the IPTC. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on December 11, 2014.

BACKGROUND

Your complaint dated December 5, 2014, alleges the Indianapolis Public Transportation Corporation violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On or about October 28, 2014, you submitted a public records request to the IPTC seeking information regarding an incident on May 3, 2013. You state you were denied these records in part pursuant to the Health Insurance Portability and Accountability Act ("HIPAA") and for internal investigation reasons.

The IPTC administers *Indy Go* public transportation vehicles. On May 3, 2013, you were arrested by the Indianapolis Metropolitan Police Department for allegedly assaulting one of the named individuals in your request – a driver of an *Indy Go* bus. You were riding the bus as the personal care attendant of one of the named individuals in your request. You are also the power of attorney for this individual and a notarized POA accompanied your request for documentation.

The IPTC responded to your complaint by arguing that the documentation sought falls into several categories of non-disclosure. First, the documentation generated by the bus driver (internal incident reports and statements), IPTC classifies as attorney-client communications for the purposes of risk mitigation. Secondly, much of the documentation generated from the incident is IMPD records and not IPTC's. Any video footage from the vehicle was destroyed after 5-7 days. Finally, IPTC asserts it cannot ascertain if your power of attorney you have over the named individual is valid in order to obtain her protected health information.

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 Ind. Code § 5-14-3-1. The Indianapolis Public Transportation Corporation is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the IPTC public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

Based on IPTC's representations, it appears as if there is documentation which exists of an incident report and a statement made by the operator of the vehicle. You seek this information. IPTC argues it is attorney-client communications as it is material prepared in anticipation of litigation.

Ind. Code § 34-46-3-1 provides a statutory privilege regarding attorney and client communications. Indiana courts have also recognized the confidentiality of such communications:

The privilege provides that when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as confidential. The privilege applies to all communications to an attorney for the purpose of obtaining professional legal advice or aid regarding the client's rights and liabilities.

Hueck v. State, 590 N.E.2d 581, 584 (Ind. Ct. App. 1992) (citations omitted).

Information subject to the attorney client privilege retains its privileged character until the client has consented to its disclosure.” *Mayberry v. State*, 670 N.E.2d 1262, 1267 (Ind. 1996), citing *Key v. State*, 132 N.E.2d 143, 145 (Ind. 1956). Moreover, the Indiana Court of Appeals has held that government agencies may rely on the attorney-client privilege when they communicate with their attorneys on business within the scope of the

attorney's profession. *Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley*, 580 N.E.2d 371 (Ind. Ct. App. 1991).

IPTC asserts the information collected by the driver meets the definition of attorney-client communication. If this is accurate, then the privilege may apply. If they are simply administrative documents, however, they do not become privileged simply because they are used by an attorney to prepare a case. The documentation must be expressly communicated for the purpose of obtaining legal advice. If the agency's procedure is to have witnesses prepare statements for their legal department in order to mitigate risk, then it is acceptable.

IPTC also argues that much of the documentation generated such as witness statements, testimony, etc. was provided to IMPD for their investigation and is not maintained by IPTC. If an agency does not have a public record pursuant to a request, it is not obligated to produce or create a record to satisfy a request.

The issue with the video footage is a bit concerning in light of the local government retention schedule found at http://www.in.gov/icpr/files/county_general.pdf. Routine surveillance video is to be kept for 30 days or longer if criminal activity is captured. By destroying or copying over the footage sooner, the IPTC is in violation of Ind. Code 5-14-3-7 and Ind. Code § 5-14-3-4(h).

Finally, I am not aware of any authority declaring an advanced directive invalid because the agent of the instrument is incarcerated. To the best of my knowledge, your power of attorney may be invoked until a court order says otherwise or the grantor rescinds the power. I am also unaware whether IPTC or any of its divisions is a HIPAA covered entity or a business associate thereof. Even assuming it is, your Power of Attorney (POA) should be honored absent some other authority.

CONCLUSION

It is the Opinion of the Public Access Counselor the Indianapolis Public Transportation Corporation has violated the Access to Public Records Act by destroying video footage in violation of the local government general retention schedule, but has not violated the APRA in any other way. However, I do encourage the IPTC to revisit its decision on the Power of Attorney issue, as well as the attorney-client communication issue in a light most favorable to transparency and access.

Regards,



Luke H. Britt
Public Access Counselor

Cc: Ms. Jill D. Russell, Esq.