



STATE OF INDIANA

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July 31, 2008

Cory Hamel
City of Mishawaka
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Via electronic mail transmission

*Re: Informal Inquiry 08-INF-30 regarding medical records contained in the
factual basis for disciplinary action*

Dear Ms. Hamel:

This is in response to your informal inquiry dated July 24, 2008. You write on behalf of City of Mishawaka Board of Public Works ("Board") to inquire about records related to the factual basis for disciplinary action against a firefighter and whether the records are disclosable pursuant to the Access to Public Records Act ("APRA")(Ind. Code 5-14-3). Pursuant to I.C. § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

BACKGROUND

You indicate the Board recently suspended a firefighter following the procedure set out in I.C. § 36-8-3-4. You indicate the Board found the firefighter guilty of Incapacity, and as such suspended the firefighter pursuant to I.C. § 36-8-3-4(b)(2)(D). The Board published its findings of fact pursuant to I.C. § 36-8-3-4(e), which provides that "[t]he reasons for the suspension, demotion, or dismissal of a member of the police or fire department shall be entered as specific findings of fact upon the records of the safety board."

Your inquiry relates to two provisions of the APRA and how those two provisions work with the foregoing subsection. I.C. § 5-14-3-4(b)(8)(C) requires a public agency to provide access to "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." I.C. § 5-14-3-4(a)(9) requires an agency to withhold from disclosure patient medical records created by a provider. You indicate that in this matter, the factual basis for disciplinary action contains information which may be protected under I.C. § 5-14-3-4(a)(9). Specifically, the findings of fact refer to a letter written by the physician to the fire chief

detailing the suspended firefighter's condition (i.e. medications the firefighter took which the physician felt would impair the firefighter's ability to perform his job).

Your questions are the following:

1. Should the Board receive a request for records under I.C. § 5-14-3-4(b)(8)(C), may the Board disclose the findings of fact?
2. Is the letter from the physician to the chief a "medical record"?
3. May the Board post the minutes of the meeting online, or may the Board only disclose the records upon request?

ANALYSIS

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 Board 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 Board 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).

First I will address the issue whether the letter from the physician to the chief is a medical record. The APRA excepts from disclosure "patient medical records and charts created by a provider, unless the patient gives written consent under IC 16-39." I.C. § 5-14-3-4(a)(9). "'Patient' has the meaning set out in IC 16-18-2-272(d)." I.C. § 5-14-3-2(j). "'Provider' has the meaning set out in IC 16-18-2-295(b). . ." I.C. § 5-14-3-2(l).

Patient, as used in this instance, means "an individual who has received health care services from a provider for the examination, treatment, diagnosis, or prevention of a physical or mental condition." I.C. § 16-18-2-272(d). Provider, as used in this instance, means "[a]n individual (other than an individual who is an employee or a contractor of a hospital, a facility, or an agency described in subdivision (2) or (3)) who is licensed, registered, or certified as a health care professional, including the following: (A) A physician. I.C. § 16-18-2-295(b).

While neither the term "medical record" nor "patient medical record" are defined, a "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. § 5-14-3-2(n). Here, the record at issue is a letter from a provider to the public agency regarding an individual who has received health care services from the provider for examination, treatment, diagnosis, or prevention of a physical or mental health condition. Based on the statutory definitions of the key terms, it is my opinion the letter from the physician to the chief is a patient medical record created by a provider.

The APRA excepts from disclosure “patient medical records and charts created by a provider, unless the patient gives written consent under IC 16-39.” I.C. § 5-14-3-4(a)(9). This exception is a mandatory exception, which means the agency may not disclose the record unless access to the record is specifically required by a state or federal statute or is ordered by a court under the rules of discovery. *See* I.C. § 5-14-3-4(a). The next question, then, is whether access to this patient medical record is specifically required by a state or federal statute.

The firefighter was suspended based on the guidelines set forth in I.C. § 36-8-3-4. You indicate the firefighter was suspended on the basis of incapacity.

(b) Except as provided in subsection (m), a member of the police or fire department holds office or grade until the member is dismissed or demoted by the safety board. Except as provided in subsection (n), a member may be disciplined by demotion, dismissal, reprimand, forfeiture, or suspension upon either:

- (1) conviction in any court of any crime; or
- (2) a finding and decision of the safety board that the member has been or is guilty of any one (1) or more of the following:

...

(D) Incapacity.

...

I.C. § 36-8-3-4.

In this same section authorizing the suspension of the firefighter on the basis of capacity is a provision regarding the findings of fact:

The reasons for the suspension, demotion, or dismissal of a member of the police or fire department shall be entered as specific findings of fact upon the records of the safety board.

I.C. § 36-8-3-4(e).

While the statute requires that the reasons for suspension of the firefighter shall be entered as specific findings of fact upon the records of the safety board, I find nothing in I.C. 36-8 which specifically requires the Board to provide access to those records. While the Board’s findings of fact certainly constitute a public record pursuant to I.C. § 5-14-3-2(n), public records may be excepted from disclosure on a mandatory or discretionary basis as provided in I.C. § 5-14-3-4.

Pursuant to I.C. § 5-14-3-4(b)(8)(C), a public agency must provide access to the “factual basis for disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged” contained in the personnel file of an employee. Certainly the Board must, upon request, provide access to a record or records showing the factual basis for the suspension of the firefighter. But nothing in I.C. § 5-14-3-4(b)(8)(C) specifically requires the disclosure of the patient medical records. Since the Board’s finding of fact, that the firefighter was guilty of incapacity, is not a

patient medical record, it is my opinion the portion of the personnel file record which indicates this factual basis for the suspension must be provided upon request. Since nothing in I.C. 36-8 or in I.C. § 5-14-3-4(b)(8)(C) requires disclosure of the patient medical record, it is my opinion the letter from the physician to the chief must be withheld from disclosure, pursuant to I.C. § 5-14-3-4(a)(9).

To the extent the findings of fact contain specific medical information provided by the physician to the chief, it is my opinion that information included in the Board's findings of fact must be redacted. For example, if the physician's letter listed information regarding medications taken and that information was included in the findings of fact, the information about the medications must be redacted. I.C. § 5-14-3-6 requires an agency to separate disclosable from nondisclosable information when a request is received and provide access to only the disclosable information. Here, for instance, disclosable information would be the recitation of the Board's findings, including any general reference to the letter, with any specific information from the patient medical record redacted before disclosure.

Finally, you inquire whether the Board may make the disclosable materials available via the agency's website. Nothing in the APRA would prohibit the Board from making the disclosable portions of the records available via the agency's website. Nothing in the APRA indicates that an agency may only provide access to records upon request.

CONCLUSION

For the foregoing reasons, it is my opinion that to the extent the findings of fact contain specific medical information provided by the physician to the chief, it is my opinion that information included in the Board's findings of fact must be redacted.

Best regards,



Heather Willis Neal
Public Access Counselor