



STATE OF INDIANA

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April 20, 2012

Barbara L. Coggins
Porter County Sheriff's Department
2755 State Road 49
Valparaiso, IN 46383

Re: Informal Inquiry 12-INF-16; Mental Commitment Reports

Dear Ms. Coggins:

This is in response to your informal inquiry regarding mental commitment incident reports ("Reports") created by the Porter County Sheriff's Department ("Department"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Your inquiry specifically seeks an opinion whether the Reports created by the Department are confidential pursuant to the Health Information Portability and Accountability Act ("HIPAA").

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. Accordingly, any person has the right to inspect and copy a public agency's 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. I.C. §5-14-3-3(a); §5-14-3-9(c). 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. I.C. § 5-14-3-9(b). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. § 5-14-3-9(a). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

An agency may not disclose a record declared confidential by state or federal law pursuant to a request received via the APRA. HIPAA provides that protected health information may not be used or disclosed except as permitted or required by the Privacy

Rule. 45 CFR § 164.502(a). The HIPAA Privacy Rule only applies to certain covered entities. Health care clearinghouses, health plans, or health care providers who transmit any health information in electronic form in connection with a covered transaction are considered to be covered entities. *See* 45 CFR §160.103. HIPAA also provides an exemption for public agencies that maintain medical information, where the public agency is not a HIPAA covered entity, but is otherwise covered by the privacy regulations as a business associate. A business associate is a person who on behalf of the covered entity performs a function or activity that involves the use or disclosure of protected health information. This type of arrangement is often for claims, processing, actuarial services, utilization review, billing, and benefit management. 45 § CFR 160.103. The Department may in certain instances be considered a business associate if it transported individuals on the hospital's or covered entity's behalf. However, from what has been provided and after reviewing the Report, it is my opinion that the Department does not meet the requirements of a "covered entity" nor "business associate" as defined in HIPAA. Accordingly, the Department may not cite to a provision found HIPAA to deny a request for records.

Although your specific inquiry sought whether HIPAA is applicable to the Department, it is also important to look at various provisions in the Indiana Code and the APRA that may be applicable. A public agency may not disclose a "patient medical record and chart created by a provider, unless the patient gives written consent under Indiana Code 16-39." I.C. § 5-14-3-4(a)(9). As used in the APRA exception, "provider" has the meaning set forth in I.C. § 16-18-2-295(a). I.C. § 5-14-3-2(k). "Provider" includes various health care practitioners including a physician, a psychotherapist, dentist, registered and licensed practical nurse, psychologist, etc. It also includes a hospital, health facility, home health agency, certified emergency medical technicians, and employees of state and local health departments. A law enforcement agency, such as the Department, is not included in the definition of a "Provider". "Patient" is defined as 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). "Medical record" is defined along with "health record" and "hospital record" as "written or printed information possessed by a provider...concerning any diagnosis, treatment, or prognosis of the patient, unless otherwise defined." I.C. § 1-1-4-5. Mental health records are defined, in relevant part, as "recorded or nonrecorded information concerning the diagnosis, treatment, or prognosis of a patient receiving mental health services." I.C. § 16-18-2-226. In the Report that has been provided, I do not believe that it could be considered a "Medical", "Health", or "Hospital" Record as it is a writing created by the Department, and does not provide a diagnosis, treatment, or prognosis of the individual. Since the Department would not be considered a "provider" pursuant to I.C. § 16-18-2-295(a) nor the Report generated by the Department to be a "Medical Record", it is my opinion that the Department could not cite to I.C. § 5-14-3-4(a)(9) to deny a request for such a record.

In *Opinion of the Public Access Counselor 04-FC-226*, Counselor Davis addressed a similar issue. The Nashville Police Department ("Police") failed to create

and provide access to a record where the Police provided transport of an individual to medical facility for medical care. There, Counselor Davis opined :

The APRA does not define “crime,” “accident,” or “complaint.” The medical emergency response provided by the Department would not be a crime (defined as a felony or misdemeanor, at IC 35-41-1-6), but the plain meaning of the terms “accident” and “complaint” can be supplied by the dictionary definitions. “Accident” is defined as “an unforeseen and unplanned event or circumstance.” “Complaint” is defined as “an expression of grief, pain or dissatisfaction.” *Webster’s Ninth New Collegiate Dictionary*. Further assisting me in my interpretation is the appearance of the phrase “requests for assistance,” which appears in two subsections of section 5(c). It appears the legislature endeavored to describe generally the types of assistance that may be rendered by an agency that responds to calls for assistance. In describing the types of incidents as suspected crimes, accidents, and complaints, the legislature did not intend to exclude a call for assistance that results in rendering medical care or transporting a person to a hospital. In my opinion, section 5(c) covers a “medical emergency” without the necessity of specifically naming it in the law. You have described an incident as one where the marshal utilized his patrol care with lights and siren activated...his response to a request for assistance comes within the ambit of section 5(c) of APRA, and a record of this incident should have been created within 24 hours of the incident and should have been available for inspection and copying. *See Opinion of the Public Access Counselor 04-FC-226.*

Because the facts here are somewhat analogous, I concur with Counselor Davis’ reasoning in that such records, while labeled mental commitment calls, are really incident reports that outline the Department’s response to a request for assistance. As such, the Department reports, which focus primarily on the assistance provided by the Department (i.e. transport to health facility), are disclosable under section 5(c) of APRA, absent any exception.

In respect to concerns about the release of information revealing the identity of the person transported and the medical condition of the individual pursuant to section 5(c) of the APRA, Counselor Davis’s offered the following guidance:

Unless the incident involves an alleged crime or infraction, the only information required to be created and accessed is the time, substance and location of the request for assistance, and the time and nature of the agency’s response to the complaint. If the incident involves an alleged crime or infraction, additional information is required, included the name and age of any victim, and a general description of injuries. Therefore, the information you are seeking, if it does not involve an alleged crime or infraction, would not

include any health information at all. In that case, any concerns about HIPAA are not warranted. *See Opinion of the Public Access Counselor 04-FC-226.*

In the sample Report provided with your informal inquiry, it appears the report was completed by law enforcement officers after an incident has been reported to the Department. Most of the information included in the report focuses on the Department's response to the call for assistance and the Department's resolution of the matter. The report in no way provides that the Department was called to the scene in response to an alleged crime. As opposed to the sample Report where no criminal allegations are alleged, there may be times where a law enforcement agency is called to respond to a crime or alleged crime and upon arrival determine that the individual requires to be transported to a mental health facility. In those situations, the Department may exercise its discretionary power to provide such a report pursuant to I.C. § 5-14-3-4(b)(1).

The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. An investigatory record is "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.* "Generally, a police report or incident report is an investigatory record and as such may be excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(1)." *Id.* As applicable here, if a Department were to respond to call regarding a crime or alleged crime, it would be required to provide the information as required by I. C. § 5-14-3-5 in its daily log. Any records beyond that what is required under section 5, if the record would be considered an "investigatory" record, as many incident reports are, then the Department would have discretion to deny the request pursuant to I.C. § 5-14-3-4(b)(1).

As a reminder, the APRA requires that certain law enforcement records be made available for inspection and copying. *See* I.C. § 5-14-3-5. Specifically, the APRA obligates law enforcement agencies to maintain a daily log that lists suspected crimes, accidents, or complaints. *See* I.C. § 5-14-3-5(c). The record containing the information must be created not later than twenty-four hours after the incident has been reported to the agency, and the information must be made available for inspection and copying. *Id.* The following information must be maintained in the daily log:

- (1) The time, substance, and location of all complaints or requests for assistance received by the agency.
- (2) The time and nature of the agency's response to all complaints or requests for assistance.
- (3) If the incident involves an alleged crime or infraction:
 - (A) the time, date, and location of occurrence;

- (B) the name and age of any victim, unless the victim is a victim of a crime under IC 35-42-4;
- (C) the factual circumstances surrounding the incident; and
- (D) a general description of any injuries, property, or weapons involved. I.C. § 5-14-3-5(c).

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor