April 8, 2005 Response to Query of City of Indianapolis Regarding Disclosure of Drug Test Results of Individual Public Safety Officers

April 8, 2005

Sent Via Facsimile and U.S. Mail

Kobi M. Wright
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City of Indianapolis
1601 City County Building
200 East Washington Street
Indianapolis, IN 46204

Re: Informal Inquiry Response; Disclosure of Test Results Naming Specific Public Safety Officers

Dear Mr. Wright:

You have requested an informal opinion from the Office of the Public Access Counselor, by letter dated February 10, 2005. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request. You are requesting guidance on behalf of the City of Indianapolis and its Department of Public Safety (collectively, "the City").

Specifically, you have asked: "Are public records that identify, by name, public safety officers who have tested positive in a drug and/or alcohol test administered by a public agency pursuant to its policies and procedures, either

- required to be withheld from disclosure on the basis that they are confidential under the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, the Americans with Disabilities Act of 1990, Pub. L. 336, or other federal or state law regarding the confidentiality of records, or

- subject to being withheld from disclosure on the basis of IC 5-14-3-4 or other state law?

When I spoke to you by telephone after receiving your letter, I learned the following information. The Indianapolis Police Department and Indianapolis Fire Department (collectively, "Departments") have policies prohibiting their public safety officers' use of illegal drugs or alcohol. For public safety officers of the Indianapolis Police Department ("IPD"), an officer is suspended pending termination if evidence has shown that the officer has used illegal drugs or alcohol in violation of the IPD's policies. For public safety officers of the Indianapolis Fire Department ("IFD"), an officer who has violated the IFD's policies for the first time may be given the opportunity to submit to treatment but would not necessarily be dismissed. Both Departments require their officers to submit to random testing as a means of determining compliance with the policies. Also, prior to promotion of the officer or when the Departments have reasonable suspicion of illegal use, an officer may be targeted specifically for testing.[1]

When a test is performed, Methodist Occupational Health Centers, Inc. collects the sample. The sample is analyzed by an independent laboratory, which sends a report to the IPD or IFD. The officer who submits to a test executes an authorization and limited release to allow the laboratory to conduct the test and report the results to the IPD or IFD.

After receiving your informal inquiry, I received a February 22, 2005 letter from Michael Wilkins, an attorney representing WTHR. In his letter, Mr. Wilkins states that on January 11, 2005, WTHR requested from the City of Indianapolis the disciplinary records of all employees of the IPD and IFD who failed their department's respective drug or alcohol testing policies from 2002-2004. The Department of Public Safety first denied the request, then provided the records of five such employees after WTHR "clarified" the request. When on February 3, 2005, WTHR expanded its request to include the time period from January 1997 to December 2002, the Department of Public Safety refused to produce the records and asked me for guidance.

Mr. Wilkins contends that neither HIPAA nor the ADA would be a bar to disclosure of the disciplinary records of public safety officers who failed drug or alcohol tests. This is true, he maintains, because the records sought are not medical records but rather are disciplinary records; HIPAA does not apply to the City and the ADA does not apply to drug testing; and any medical information within the disciplinary records must be redacted in accordance with the APRA. Further, Mr. Wilkins contends that the City has waived any objection to WTHR's request because the City had disclosed previously the same information but for different time periods.

In my opinion, the City, in its discretion, may decide not to disclose the names of public safety officers who have tested positive in a drug or alcohol test. This information is subject to nondisclosure under Ind. Code 5-14-3-4(b)(8), and is not specifically required to be disclosed under the mandatory disclosure subsections of section 4(b)(8)(B) or (C). Also, as a practical matter, this information is not required to be disclosed because a public agency is not required to disclose personnel file information without the request being particularized by name. IC 5-14-3-4(b)(8).

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[1] Nothing in this opinion is meant to expand any employment-related rights or benefits conferred by the City to its public safety officers.

To my knowledge, no other state or federal law protects information that reveals the fact that a public employee failed a drug or alcohol test when the record is maintained by a public agency as an employer.

General APRA Provisions

The legislature has declared that the public policy of the State is "that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." IC 5-14-3-1. The APRA 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. IC 5-14-3-1.

Any person may inspect and copy the public records of a public agency during the agency's regular business hours, except as provided in section 4 of the Access to Public Records Act. IC 5-14-3-3(a). In order for the City to deny the records sought by WTHR, it must state, in writing, the specific exemption or exemptions authorizing the withholding of all or part of the public record; and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

Section 4 of the APRA contains two categories of records that would allow an agency to not disclose a public record. Under section 4(a), an agency may not disclose certain types of records because they are confidential. Under section 4(b), an agency may determine whether it will disclose certain records in the agency's discretion. If a record falls into just one of these categories, the agency is authorized to withhold the record unless a more specific law supersedes the general provisions of the APRA.

HIPAA

Records required to be kept confidential by federal law are exempted from disclosure under the APRA. IC 5-14-3-4(a)(3). Under the Health Insurance Portability and Accountability Act, the United States Health and Human Services (HHS) has adopted Standards for Privacy of Individually Identifiable Health Information, 45 CFR Parts 160 and 164 ("HIPAA" or "Privacy Rule"). Under HIPAA, covered entities are required to conform to the Standards for Privacy. In summary, a covered entity must not disclose protected health information without a valid authorization from the subject of the health information, except as provided in the Privacy Rule. 45 CFR §164.502. A covered entity under HIPAA is a health care clearinghouse, a health plan, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by the subchapter. 45 CFR §160.103. Protected health information excludes employment records held by a covered entity in its role as employer. *See* 45 CFR §164.501.

In the commentary to the final Privacy Rule, HHS stated that employers are not covered entities. In addition, once protected health information leaves the purview of one of the covered entities, the information is no longer afforded protection under the Privacy Rule. The results of drug or alcohol testing created by a laboratory that is a HIPAA-covered entity would be

protected health information because the information relates to the present physical or mental health or condition of an individual, and identifies the individual. *See* 45 CFR §160.103 (definition of "individually identifiable health information").

To my knowledge and belief, neither the Department of Public Safety, its divisions, nor the City qualify as a covered entity, as those are defined in the Privacy Rule. Further, even if the City, Department of Public Safety, IPD or IFD were covered entities, the information regarding the results of testing would not constitute protected health information in the custody of the City, because employment records held by a covered entity in its role as employer are not protected health information. Employers are not covered entities under HIPAA. Finally, even if the laboratory that discloses the drug test results is a covered entity (in this case it may or may not be), the drug test results are no longer protected by HIPAA once disclosed to the City under a valid authorization. The City may not, on the basis of HIPAA, deny a record containing the name of the safety officer and whether he tested positive for drugs or alcohol.

Americans with Disabilities Act ("ADA")

Regulations under the ADA contain confidentiality provisions that require an employer to protect information related to a medical examination of an employee. 29 CFR §1630.14(b)(2) and (3). However, the confidentiality provisions explicitly do not cover information resulting from a drug test that discloses whether the person is currently engaging in the illegal use of drugs or alcohol. 29 CFR §1630.16(c). The City may not, on the basis of the ADA, deny a record containing the name of the safety officer and whether he tested positive for drugs or alcohol.

Other Federal Laws or State Law

You have asked me whether the record may be withheld from disclosure on the basis of any other state or federal law regarding the confidentiality of records, or by any provision of the APRA.

Other Federal Laws

I also considered whether the record must be withheld under 42 CFR Part 2 ("Part 2"). Part 2 protects all information about any person who has applied for or been given diagnosis or treatment for alcohol or drug abuse at a federally assisted program. *See* 42 CFR §2.12. The regulations place restrictions on disclosures of information that would identify a patient as an alcohol or drug abuser. 42 CFR §2.12. Under these specific facts, Part 2 does not apply because the record regarding a person's having failed a drug test is not information about alcohol and drug abuse patients obtained by a federally-assisted program. *See* 42 CFR §2.11 for definitions of "patient," "program," and "records."

Nevertheless, the City's inquiry is not limited to the set of facts provided by WTHR, so I write to bring Part 2 to the City's attention. The City could conceivably receive a record that is covered by Part 2, where a public safety officer employed by IFD may be receiving treatment from a federally qualified program as a condition of continued employment after failing a drug test. The restrictions on disclosure of drug and alcohol treatment information apply to persons

who receive patient records directly from a federally assisted alcohol or drug abuse program and who are notified of the restrictions on redisclosure of the records in accordance with §2.32 of the regulations. 42 CFR §2.12(d)(2)(iii). In contrast with HIPAA under which disclosure pursuant to an authorization deprives the information of its character as protected health information, recipients of information covered by Part 2 are prohibited from redisclosing the information without specific written consent of the patient. 42 CFR §2.32.

Hence, in response to your question whether public records that identify a public safety officer who has tested positive in a drug and/or alcohol test are required to be withheld from disclosure under any federal law, the response is "yes, if the records are subject to Part 2." On the set of facts presented by WTHR, however, these records may not be withheld on the basis of Part 2.

State Law

Generally. Under the APRA, a public agency must not disclose a record that is declared confidential by state statute. IC 5-14-3-4(a)(1). I was unable to find any state statute that makes this type of record or information confidential. To the extent that the City can identify such a statute, the City may withhold the record under IC 5-14-3-4(a)(1).[2]

Patient Medical Records under the APRA. A public agency must not disclose "patient medical records and charts created by a provider, unless the patient gives written consent under Indiana Code 16-39." IC 5-14-3-4(a)(9). "Provider" has the meaning set out in Indiana Code 16-18-2-295(a). IC 5-14-3-2 (defining "provider"). Although IC 16-39 sets limitations on <u>providers'</u> disclosing health records and mental health records, I do not read the prohibition on disclosure at IC 5-14-3-4(a)(9) so narrowly as to apply only to public agencies that are providers. In my opinion, a public agency that receives a patient medical record or chart *created by a provider* must not disclose it. The issue, then, is whether the information sought is a medical record or chart created by a provider, the latter term defined in IC 16-18-2-295(a).

The medical record was created by a laboratory. Ind. Code 16-18-2-295(a) contains a list of providers. Section 295(a)(1) is a list of individual providers, such as physicians, dentists, and optometrists. None of the types of providers listed in section 295(a)(1) applies to a laboratory. Section 295(a)(2) through (6) cover types of facilities such as hospitals, health facilities, and home health agencies. Laboratories are not among the types of providers listed in section 295(a)(2) through (6). I must conclude that a report created by a laboratory is not a medical record or chart created by a provider under IC 5-14-3-4(a)(9), because a laboratory is not a provider under IC 16-18-2-295(a).[3] Consequently, the City may not deny the record containing the name of the safety officer and whether he tested positive for drugs or alcohol on the basis of IC 5-14-3-4(a)(9).

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[2] IC 16-39 concerns confidentiality of health records, including mental health records and alcohol and drug abuse records. IC 16-39 states the conditions under which providers can use and disclose health records. These provisions do not apply here where the public agency maintaining the record (the City) is not a provider under IC 16-39.

[3] My conclusion that the record is not confidential under IC 5-14-3-4(a)(9) would change if a hospital-based laboratory performed the drug test, since the laboratory would be a department of a hospital, which is included in the list of providers under IC 16-18-2-295(a)(2). The drug test report would arguably be a medical record created by a provider.

Personnel Files of Public Employees. Personnel files of public employees may be excepted from disclosure at the discretion of a public agency. IC 5-14-3-4(b)(8). This exception to disclosure contains "an exception within the exception." Certain information must be made available:

> (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.

A public agency is not required to disclose the above information generally on all employees or for groups of employees without the request being particularized by employee name. IC 5-14-3-4(b)(8).

While Indiana Code 5-14-3-4(b)(8) sets forth what information must be disclosed from a personnel file, the exception does not specify what documents or records are considered part of the personnel file. Of course, a public agency may not cloak a record in confidentiality merely by placing it in a personnel file. The City has the burden of showing that the drug test results in question are part of the personnel file for a public safety officer in order to claim the exemption. I note that the City has not stated that it considers the record to be part of its officers' personnel files, and I do not assume that it so contends. At the same time, I do not doubt that the City could meet its burden, where it has averred that the test results are used to determine an individual officer's compliance with the Department of Public Safety's personnel policies, and a failed test would lead to severe disciplinary action against the officer. Also, WTHR seems to concede the employment-related character of the records, because WTHR calls the records it seeks "disciplinary records."

Therefore, except for the information that must be disclosed, and to the extent that the City considers the record part of the officer's personnel file, the City may withhold the record in its discretion, pursuant to IC 5-14-3-4(b)(8).

However, as stated earlier, some information must be disclosed even though contained in a personnel file of a public employee. WTHR has asked for disciplinary records of IPD and IFD employees who failed their department's drug or alcohol testing policies from 1997 to 2002. At the outset, I note that the City is not obligated to provide any personnel file information on all employees or a group of employees (those who failed drug tests) without the requester particularizing the request by name. *See Opinion of the Public Access Counselor* 01-FC-70.

If WTHR requests the personnel file of a particular employee or employees, the City must comply by giving information relating to the status of any formal charges against the employee, and 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. IC 5-14-3-4(b)(8)(B) and (C). If no final action has been taken against the public safety officer in regards

to the disciplinary action, the City would not have to give any factual basis for a disciplinary action. Similarly, if final action had been taken but the employee was not either suspended, demoted, or discharged, no factual basis for lesser discipline would be required.

If the employee had been suspended, demoted, or discharged in a final disciplinary action, the factual basis for the action must be disclosed. What is contemplated with respect to the factual basis for the disciplinary action is: 1) the type of discipline lodged; 2) when the discipline was lodged, including the time period for discipline such as suspension; and 3) why the discipline was lodged, such as a description of the conduct and whether it was a violation of a personnel policy. In the context of this inquiry, the factual basis could be the fact that the public safety officer was discharged because she violated IPD's zero tolerance policy on illegal drug use, for example.

Waiver

WTHR has argued that because the City previously had complied with a request by WTHR seeking the same information for a different time period, the City has waived any objection. WTHR cites to *An Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893, 918-919 (Ind. Ct. App. 2003) in support of its waiver theory.

In *Indiana University*, the court held that holding public agencies to a common law standard of waiver would not frustrate the purposes of the APRA. Giving as an example an agency providing one party access to materials and then denying another party access to the same materials, the court opined that the agency may well have waived any exemptions it may have under the APRA. As well, the court observed that denying access to some and not others could be deemed an arbitrary and capricious exercise of discretion. *Id.* at 919. Ultimately, the court held that the university had not waived any APRA exceptions, because the information released was but a small portion of the record that the university sought to protect. *Id.* at 919-920.

As a general rule, public agencies may change past rulings or policies, but such change must be explained and reasons for the change must be articulated. *Community Care Centers, Inc. v. Indiana Department of Public Welfare*, 523 N.E.2d 448 (Ind. App. 1988). The APRA provides a standard for reviewing agency discretion, and in this case, that standard would be applied to any decision by the City to change its practice of disclosing the records concerning drug testing of employees.

Public agencies should endeavor to be consistent in their exercise of discretion to ensure that they are carrying out the APRA in a uniform manner. The legal standard under the APRA for reviewing public agencies' determinations that a public record falls within one of the exceptions to disclosure under IC 5-14-3-4(b) is whether the denial of access was arbitrary or capricious. IC 5-14-3-9(f)(2). The burden of proof that the denial was arbitrary or capricious lies with the person requesting access. *Id*. The public agency, however, must still meet an initial burden of proof—by proving that the public record falls within any one of the categories listed under IC 5-14-3-4(b) and establishing the contents with adequate specificity. IC 5-14-3-9(f).

Indiana courts have provided some guidance on discretion of public agencies and whether that discretion was exercised in an arbitrary or capricious manner. Arbitrary or capricious action on the part of a public agency means willful and unreasonable action, without consideration and in disregard of the facts or circumstances of the case; action taken without some basis which would lead a reasonable and honest man to such action. *Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1007 (Ind.1989); *Indiana High School Athletic Association , Inc. v. Carlberg*, 694 N.E.2d 222, 233 (Ind. 1998).

The City has discretion under the APRA to disclose, or not disclose, public records that qualify for the exception under IC 5-14-3-4(b)(8). Any change in that exercise of discretion, or the City's policy about such disclosures, may not be made in an arbitrary and capricious manner, as defined in the court cases cited above. If the City has some basis for taking this action, that is neither willful nor unreasonable in nature, and can articulate reasons to change its disclosure policy with respect to the public records in question, this change may withstand the standard of review under IC 5-14-3-9(f). Since I do not have the benefit of the City's rationale for any change in policy, I cannot and do not reach any conclusion about the City's exercise of discretion. I recommend that the City consider the authority cited above in making its determination whether to change its policy of disclosing the records concerning drug testing of employees.

I appreciate the opportunity to offer guidance on the Access to Public Records Act. Please feel free to contact me if you have any questions about my response.

Sincerely,

Karen Davis
Public Access Counselor

cc: Michael A. Wilkins