

January 17, 2006

Sent Via Facsimile

Julie Wheeland
502 Eagle Court
Valparaiso, IN 46383

Re: Formal Complaint 05-FC-259; Alleged Violation of the Access to Public Records Act by Porter (A County Hospital)

Dear Ms. Wheeland:

This is in response to your formal complaint alleging that Porter, a county hospital in Valparaiso, has violated the Access to Public Records Act ("APRA") by failing to disclose records of its wholly-owned subsidiary, Porter Health Services, Inc. ("PHS" or "PHS, Inc."). I find that the burden to show that PHS is a public agency is on the party seeking records, and your complaint fails to sustain the burden to show that PHS is a public agency.

BACKGROUND

You allege that your requests for records of PHS were denied because Porter asserts that PHS, Porter's wholly-owned subsidiary, is not a public agency subject to the Access to Public Records Act. Specifically, you have requested financial audits of PHS, any rental, lease, or purchase agreement or other contract for office space that PHS occupies, the 2004 Form 100R for PHS, and minutes of the last meeting of the governing body of PHS.

You requested these records via electronic mail to Porter's legal counsel, Gregg Wallander. You expressly sought to determine whether Porter would claim that Porter is not required to produce the records because PHS is a 501(c)(3) entity and not covered by the Indiana Access to Public Records Act.

You filed your formal complaint against Porter with the Office of the Public Access Counselor on December 15, 2005. I sent a copy of your complaint to Porter for response. Porter

sent a letter dated January 10, 2006, a copy of which I have enclosed for your reference. Porter contends that: 1) it has satisfied your request for PHS audits; 2) with respect to other record requests, PHS is not a public entity subject to the Access to Public Records Act; and 3) if PHS is a public entity, the records you requested are confidential under IC 16-22-3-28(e).

Porter stated that PHS is a not-for-profit corporation, and a wholly-owned subsidiary of Porter. PHS does not provide hospital services, is not licensed as a hospital, and was created to provide professional physician health care services to patients in Porter's service area. PHS provides services to Porter, including recruitment of new physicians, employment of physicians, and provision of group purchasing or other services for PHS-employed physicians. No public funds are provided or used to operate or maintain PHS. PHS provides professional physician services and receives payment for those services within a private practice service model.

ANALYSIS

It is the public policy of the state 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. Ind. Code 5-14-3-1. Providing persons with the 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. *Id.* Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the APRA. IC 5-14-3-3(a).

Under the APRA, a party seeking records has the burden of proving that the party with the records is a public agency within the meaning of the APRA. *Indianapolis Convention and Visitors Ass'n., Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991) ("ICVA"); *Perry County Development Corporation v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999). If the non-moving party is determined to be a "public agency," then it bears the burden of establishing that a requested record is included within one of the categories of records that are exempt under the APRA. *ICVA at 212.*

As a preliminary matter, I note that the parties have addressed the issue in this complaint solely as whether PHS is a "public agency." However, I note that your requests for records were sent to Porter and your complaint is against Porter. Porter, as a public agency, is required to allow inspection and copying of its public records. A "public record" means any writing, paper, report, or other material that is created, received, retained, maintained, or filed by or with a public agency. IC 5-14-3-2(m). The mere fact that the records *concern* PHS does not necessarily mean that the records are not public records of Porter. The succeeding discussion assumes that no records that you have requested of Porter are "created, received, retained, maintained, or filed by or with" Porter. If this assumption is false, Porter is required to either disclose the records or assert one or more exemptions that apply to the records.

Public Agency

A "public agency" means, in relevant part, any instrumentality or authority of a county, or any entity or office that is subject to an audit by the state board of accounts. IC 5-14-3-2(l).

Porter as a county hospital is a public agency. IC 5-14-3-2(1)(2)(A). Although you set out a 14-part set of facts that you proffer as evidence that PHS is a public agency, you do not relate those facts to any part of the definition of “public agency” set out in the APRA. Therefore, my review of your complaint is somewhat constrained by the absence of argumentation that shows how the facts satisfy the legal definition of “public agency.” As you may be aware, it is not my office to evaluate the facts you present to determine whether PHS *ought* to be a public agency subject to the APRA. Rather, I am guided by the legislature’s policy as embodied in the APRA to determine whether PHS meets the statutory definition of a public agency.

I summarize your contentions regarding the public agency status of PHS as follows:

- Porter has acted to change certain things about its relationship to PHS after Porter has received public records requests from you. These changes include adding community members to PHS’s board which had previously been comprised of members of the Board of Trustees of Porter, removing Porter-employed physicians from the Form 100R (an employee report filed with Indiana State Board of Accounts), and “running” physician contracts through PHS, Inc.
- PHS, Inc. receives support services from Porter, such as advertising and marketing services, and “possibly other” services such as legal services. Porter absorbs PHS’s losses.
- PHS is included in the financial audits of Porter as a “blended component unit.”
- The governing boards are nearly the same, except that several members of the community serve on the PHS board in addition to the members that are common to Porter’s Board.
- PHS, Inc. is a wholly-owned subsidiary of Porter. This should make PHS subject to the APRA.

Porter, on behalf of PHS, counters that public funds are not used to operate or maintain PHS. In fact, PHS receives no public source monies, directly or indirectly, according to Porter. PHS is not subject to audit by the state board of accounts, which has been confirmed by the state board of accounts. Porter concedes that it shares members of its Board with those of PHS, but argues that this factor is neither dispositive nor relevant to the issue of whether PHS is a public agency. PHS receives payment from Porter in exchange for PHS’s provision of physician services to Porter. This is a classic *quid pro quo* that has been found to not constitute “public support” by appellate courts in Indiana. Finally, PHS does not do Porter’s bidding. Similarity between the goals of the two entities is not tantamount to PHS being compelled to do Porter’s bidding or working subject to Porter’s control.

On the basis of the information you have supplied to me, you have not sustained your burden to show that PHS is a public agency. First, composition of the board is not relevant to the question of whether an entity is a public agency where there is a fee-for-service arrangement. *See Perry County Development Corporation v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999);

ICVA at 354. This was true in *Perry County* even though twelve public agencies made up the fifteen-person board of directors of the not-for-profit corporation.

However, in my opinion, common board membership may affect whether PHS is an alter ego of Porter, an issue that was absent in the *ICVA* and *Perry County* cases. I take your assertion that PHS is a wholly-owned subsidiary of Porter to be a contention that PHS is an alter ego of Porter. However, Indiana courts have followed the general rule of corporate law that distinct corporations, even parent and subsidiary corporations, are presumed separate legal entities. *Greater Hammond Community Services, Inc. v. Mutka*, 735 N.E.2d 780 (Ind. 2000). To overcome this presumption, a plaintiff must show that one corporation dominated another to the extent that the subordinate was the mere instrumentality of the dominant corporation, that the dominant corporation employed the subordinate to perpetrate a fraud, or that the capital placed in the subordinate was “illusory or trifling compared to the business to be done and the risks of loss...” *Id. at 784.* Hence, if you intend to bring a court action against Porter or PHS to compel production of the records you request, you should be mindful of your burden to show that PHS is a public agency under the theory that PHS is the alter ego of Porter. Similarly, your assertions that Porter covers “losses” of PHS, and the auditors’ findings that PHS is a “blended component unit” of Porter, if sustainable by evidence, may have weight in determining whether PHS operates as the alter ego of Porter. Those factors are not relevant to whether PHS is subject to audit by the state board of accounts.

Citing *ICVA*, Porter avers that its relationship with PHS is a fee-for-service arrangement whereby Porter pays for physician services provided by PHS. Because Indiana’s Supreme Court has stated that such an arrangement, alone, does not satisfy the “subject to audit” language of the APRA, the entity providing services for a fee, even if the fee is derived from public funds, is not a public agency. *ICVA at 212.*

I am not persuaded by your argument that changes in the structure of the board, or in the way in which Porter has responded to your public records requests, demonstrates that there is a concerted effort to obscure the ties between the two entities, one governmental, the other, a private corporation. Perhaps more accurately, you fail again in your attempt to show that PHS is a public agency.

Public Records Exemptions

Because I have determined that your complaint does not satisfy your burden to show that PHS, Inc. is a public agency under the APRA, I also find that any records maintained by PHS are not “public records” subject to disclosure. Porter argues that even if PHS were a public agency (or in the event I so found), the Public Hospital Act contains exemptions for records that would apply to PHS. As I stated previously, where a public agency is asserting an exemption or exemptions to a records request, the public agency bears the burden of showing that a record falls within the stated exemption. IC 5-14-3-1; IC 5-14-3-9(f). This is true even if the exemption is set out under the Public Hospital Act, IC 16-22-3-28.¹ To summarize Porter’s

¹ Porter asserts that the exemptions provided under the Public Hospital Act must be liberally construed. However, the citation supporting this assertion requires that a hospital board’s powers be liberally construed. IC 16-22-3-30. I am not convinced that a hospital board’s powers include the record exemption provided at IC 16-22-3-28(e).

position, the records you requested are protected under IC 16-22-3-28, because revealing the records would place the hospital at a competitive disadvantage.

Under IC 16-22-3-28(e), a hospital organized or operated under [IC 16-22] may hold confidential, until the information contained in the records is announced to the public, records of a proprietary nature that if revealed would place the hospital at a competitive disadvantage, such as the following:

- (1) Terms and conditions of preferred provider arrangements.
- (2) Health care provider recruitment plans.
- (3) Competitive marketing strategies regarding new services and locations.

If a court found PHS is a public agency, PHS, in defense of its position that records are not disclosable under IC 16-22-3-28(e), would be required to show that the exemption, which applies on its face to a hospital organized under IC 16-22, applies equally to PHS, which is not a hospital organized or operated under IC 16-22.

With respect to the audits of PHS that you requested, Porter maintains that it has disclosed Porter's audit, showing PHS to be a blended component unit of Porter. According to Porter, this presentation of PHS's financials is mandated by auditing standards. With respect to the 100-R of PHS, Indiana law does not require PHS to file Form 100-R with the state board of accounts. Therefore, PHS has no document that satisfies your request for the Form 100-R. Where a public agency does not maintain a record and is not required to create a record, it is not a denial under the APRA to refuse to create the record in response to a public record request. Accordingly, even if a court were to conclude that PHS is a public agency, it is not a denial of a record where PHS is not required to create a record or maintain a record under Indiana law.

CONCLUSION

For the foregoing reasons, it is my opinion that Porter Health Services, Inc. is not a public agency under the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Shelley C. Koltnow