



STATE OF INDIANA

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October 5, 2009

Mr. Mark Ater
413 SW 5th Street
Richmond, IN 47374

Re: Formal Complaint 09-FC-203; Alleged Violation of the Access to Public Records Act by Randolph County 911 Emergency Communications

Dear Mr. Ater:

This advisory opinion is in response to your formal complaint alleging Randolph County Emergency Communications ("RCEC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to recordings of 9-1-1 emergency calls (hereinafter "911 tapes"). For the following reasons, my opinion is that RCEC has not shown that it can sustain its burden of proof regarding the denial of your request. Thus, based on the limited information before me, it appears that RCEC violated the APRA by withholding the records you seek.

BACKGROUND

In your complaint, you allege that you requested access to "a copy of a [sic] 911 and land line conversations from a suicidal subject" that RCEC has in its possession. According to your complaint, RCEC failed to respond to your request "within 24 working hours." You do not specify whether you requested the records in person or via a written request. You further allege that another individual requested the 911 conversation and the land line conversations pertaining to the call. In response to that unidentified individual's request, the RCEC argued that releasing the conversations would violate the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

My office forwarded a copy of your complaint to RCEC. As of the date of this opinion, the RCEC has not responded to your allegations.

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. RCEC does not dispute that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy RCEC's

public records during regular business hours unless the public records are exempt from disclosure as confidential or otherwise nondisclosable under the APRA. 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 twenty-four (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. Here, you allege that RCEC failed to respond to your request within twenty-four (24) hours, but you do not state whether your request was made in person or in writing. If you made your request in person, the APRA requires the RCEC to respond within twenty-four (24) hours. In that case, the RCEC's failure to respond would be a denial under section 9 of the APRA.

As to the substance of your complaint, the APRA places the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record. I.C. § 5-14-3-1. In a court action challenging the denial of a record, the court determines the matter *de novo*, with the burden of proof on the public agency to sustain its denial.

In a previous opinion, Counselor Davis opined that a 911 tape is "a disclosable public record upon creation." *Opinion of the Public Access Counselor 06-FC-206* at 2. Notwithstanding this general rule, 911 tapes may be exempt -- in whole or in part, depending on the exemption and the tape's content -- from disclosure if any of the section 4 exceptions in the APRA applies. For example, Counselor Neal noted in a recent opinion that the APRA granted a police department the discretion to withhold a 911 tape from disclosure because the tape was exempt pursuant to the "investigatory records" exception of the APRA. *See PAC Opinion 08-FC-64*; I.C. § 5-14-3-4(b)(1).

Because the RCEC has not responded to your complaint, I have only limited information with which to form an advisory opinion regarding the 911 tapes you seek. In your complaint, you note that the RCEC cited HIPAA when it denied a similar request from another individual. If the RCEC is indeed subject to HIPAA and the desired 911 tapes contain protected health information¹ (as defined by HIPAA), the RCEC may have correctly refused to disclose *that portion* of the tapes. Regardless, the RCEC has still not shown why the *entire tape* should be exempt from disclosure under the APRA.

¹ Under HIPAA, "Protected health information" means individually identifiable health information:

(1) Except as provided in paragraph (2) of this definition, that is:

- (i) Transmitted by electronic media;
- (ii) Maintained in electronic media; or
- (iii) Transmitted or maintained in any other form or medium.

(2) Protected health information excludes individually identifiable health information in:

- (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g;
- (ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv); and
- (iii) Employment records held by a covered entity in its role as employer

45 C.F.R. § 160.103.

Generally, the APRA requires public agencies to separate and/or redact the nondisclosable information in public records in order to make the disclosable information available for inspection and copying. I.C. §5-14-3-6(a). The RCEC has offered no explanation as to whether the tape could be produced with the purportedly confidential information redacted. Thus, because the APRA places the burden of proof for denial of access on public agencies, it is my opinion that the RCEC has not shown that it complied with the APRA as to your request.

CONCLUSION

Based on the limited information before me, my opinion is that the RCEC has not demonstrated that it will be able to sustain its burden of proof regarding the denial of your request. Thus, it appears the RCEC violated the APRA when it withheld the 911 tapes. I urge the RCEC to either produce the tapes or cite an applicable exception to the APRA that justifies withholding them.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

Cc: Cynthia Acree, Randolph County 911 Emergency Communications