

January 7, 2005

*Sent Via Facsimile*  
Rodney A. Margison  
147 East Main Street  
Nashville, IN 47448

*Re: Formal Complaint 04-FC-226; Alleged Violation of the Access to Public Records Act by the Nashville Police Department*

Dear Mr. Margison:

This is in response to your formal complaint alleging that the Nashville Police Department (“Department”) violated the Access to Public Records Act (“APRA”) by denying you a copy of an incident report. I find that Nashville Police Department failed to maintain a police log as required by APRA and denied you a record on the basis of a federal law that does not apply to it.

#### BACKGROUND

You submitted a written request in person to the Nashville Police Department on October 29, 2004. You requested a copy of “an incident report from October 2004 related to the town marshal, Jack Dorsett, transporting an individual from Nashville to the Columbus Regional Hospital emergency department in his patrol car utilizing emergency lights and siren.” No response was given to this request. You submitted a second request on December 7, 2004, which included the date of the incident, October 17, 2004. You allege that you received no response to this second request. You filed your complaint with this office, which I received on December 8, 2004.

I sent the town marshal a copy of your complaint. Mr. Dorsett responded in writing to the complaint, which I enclose for your reference. Marshal Dorsett enclosed a copy of a letter he received from his attorney. He also supplied me with a copy of his December 20, 2004 letter addressed to you. In that letter, he stated that the Department is not required to create a record of the October 17 transport, because it was a medical emergency which he believes is not covered by Ind.Code 5-14-3-5(c). He also states that the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA) specifies that personally identifiable health information that is

held by a covered entity may not be disclosed without authorization from the patient. This was substantially the information that the attorney recites in his letter to Marshall Dorsett. In a telephone conversation with my office, Marshal Dorsett stated that he has no record of receiving your October 29 request, although he acknowledged receiving your December 7 request. He also stated that he was off-duty during the incident, and that no record or log of the incident exists.

## ANALYSIS

Any person may inspect and copy the public records of a public agency during the agency's regular business hours, unless the record is excepted from disclosure under section 4 of APRA. IC 5-14-3-3(a). An agency is required to respond to a request for records. When a person requests a record in writing, and delivers the request in person, the agency must respond in writing within 24 business hours of receipt of the request. IC 5-14-3-9(a). A public agency may deny a written request for a record if the denial is in writing and the denial includes: 1) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and 2) the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

The Department's failure to respond to your October 29 and December 7 written requests were in violation of the Access to Public Records Act. Although Marshal Dorsett states that he did not receive the earlier request, if you hand-delivered it to the Department, it was incumbent on the person receiving the request to refer it to someone who could respond appropriately and timely.

Having received a copy of the Department's December 20 substantive response to you, I have reviewed it, and it is my opinion that the denial of the record was not in conformance with the Access to Public Records Act.

IC 5-14-3-5(c) requires an agency to maintain a daily log or record that lists suspected crimes, accidents, or complaints, and the following information shall be made available for inspection and copying:

- (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 Indiana Code 35-42-4;
  - (C) the factual circumstances surrounding the incident; and
  - (D) a general description of any injuries, property, or weapons involved.

The record containing this information must be created not later than twenty-four (24) hours after the suspected crime, accident or complaint has been reported to the agency. The Department has taken the position that because the marshal transported a person to the hospital

in his police car, this was properly characterized as a “medical emergency” and the Department is not required to create a record of it. The Department maintains that because section 5(c) does not specifically list “medical emergency” among the three types of situations for which a log is required, the Department is not required to create a record of the October 17 incident.

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 the incident as one where the marshal utilized his patrol car with lights and siren activated. The marshal told this office that he was off-duty at the time the person was transported, although he did not state this fact in his letter to you. I express no opinion regarding whether the marshal’s transporting a person to a hospital when the marshal is off-duty is or is not within the scope of his duties as a member of the Nashville Police Department. However, in my opinion, 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.

The Department also has resisted disclosure on the basis of HIPAA. As stated earlier, HIPAA is a federal law. APRA requires an agency to deny records that are required to be kept confidential by federal law. IC 5-14-3-4(a)(3). In the attorney’s letter, he states that he has concern about the release of information revealing the identity of the person who was transported and the medical condition of the individual. With respect to this issue, I offer the following guidance. The log or record that is required to be created and maintained under IC 5-14-3-5(c) is limited to the specific types of information listed therein. Unless the incident is an alleged crime or infraction, the only information required to be created in the record 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, including in pertinent part the name and age of any victim, and a general description of any injuries. Therefore, the information that 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.

If the incident is an alleged crime or infraction, identifying information regarding a victim is required, including any injuries. This type of information would be considered protected health information under the *Standards for Privacy of Individually Identifiable Health*

*Information*, 45 CFR Parts 160 and 164 (the HIPAA Privacy Rule). However, the HIPAA Privacy Rule applies only to certain covered entities. The entities covered by the HIPAA Privacy Rule are health care provider who transmits electronically certain covered transactions, a health plan, or a health care clearinghouse. 45 CFR 160.102. A town police department does not fit into these types of entities, and the attorney for the Department acknowledges as much in his letter to the Department.

However, the attorney raises the theory that the Department is a “business associate” of some unspecified HIPAA-covered entity. Business associates are required to maintain the confidentiality of any protected health information received, created or maintained by the business associate in the scope of the relationship with the covered entity. 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, benefit management and the like. The business associate and the covered entity are required to enter into a formal agreement that contains specified provisions for the nondisclosure of protected health information of the covered entity. In the context of the transporting of the person to the hospital, for example, the Department may be a business associate of the hospital if it transported patients to the hospital on the hospital’s behalf. From the facts, it appears that the marshal transported the person for that person’s benefit, not on behalf of the hospital. The fact that the HIPAA Privacy Rule contemplates business associates is not sufficient to bring the Department within the ambit of the HIPAA Privacy Rule. Rather, the Department must fit the definition of a business associate and have executed a business associate agreement with a specific covered entity in order for the Department to deny a public record on the basis of the HIPAA Privacy Rule. From the information that I have, I do not believe that the Department is a HIPAA-covered entity or a business associate of a covered entity. Therefore, it may not deny a record based on HIPAA unless the Department is covered by the Privacy Rule. Because it is not covered by the Privacy Rule, the Department violated the Access to Public Records Act when it denied you the record based on this federal law.

#### CONCLUSION

For the foregoing reasons, I find that the Nashville Police Department violated the Access to Public Records Act, because it failed to timely respond to your request for records, failed to satisfy the requirements of IC 5-14-3-5(c) with respect to the October 17 incident, and improperly denied the record under the HIPAA Privacy Rule.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Jack Dorsett