



# STATE OF INDIANA

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March 25, 2010

Mr. Brian M. Culp  
*The Reporter-Times*  
60 S. Jefferson St.  
Martinsville, IN 46151

*Re: Formal Complaint 10-FC-49; Alleged Violation of the Access to Public Records Act by the Morgan County Hospital and Medical Center*

Dear Mr. Culp:

This advisory opinion is in response to your formal complaint alleging Morgan County Hospital and Medical Center (the "Hospital") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* I have enclosed the response from Mr. Peter R. Foley, attorney for the Hospital.

## BACKGROUND

According to your complaint, you requested access to several records of the Hospital. The Hospital promptly responded to your request and provided some responsive records. However, the Hospital refused to provide you with salary information for its employees and, specifically, the salary information and employment contract for Chief Executive Officer and President Tom Laux.

In response to your complaint, Mr. Foley acknowledges that the Hospital is a public agency but argues that the withheld information is confidential under I.C. § 16-22-2.5-2, which provides:

Sec. 2. All proprietary and competitive information concerning the county hospital is confidential. A member of a governing board may not disclose confidential information concerning the county hospital to any person not authorized to receive this information.

*Id.* Mr. Foley argues that this section "indicates a clear policy determination by the Legislature that while a county hospital is a public entity, county hospitals operate in a

competitive environment and must be afforded a limited exception to disclosure under the APRA.” He claims that salary information is competitive information that, if released, would subject the Hospital to a competitive disadvantage relative to several competing hospitals. Moreover, the Hospital maintains the confidentiality of its salary information via a confidentiality clause in the contracts of its doctors and other professional staff. Employees who fail to maintain the confidentiality of such information are subject to discipline. Mr. Foley also argues that the withheld records constitute trade secrets under I.C. § 5-14-3-4(a)(4).

## 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. The Hospital acknowledges that it is a “public agency” under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Hospital’s public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The Hospital maintains that I.C. § 16-22-2.5-2<sup>1</sup> provides it with the authority to withhold employee salary information and Mr. Laux’s employment contract. The APRA requires a public agency to maintain the confidentiality of any information that is classified as confidential under a state statute. *See* I.C. § 5-14-3-4(a)(1). Thus, if the Hospital withheld information that is “proprietary and confidential” under I.C. § 16-22-2.5-2, the Hospital did not violate the APRA. Under the APRA, the burden of proof for nondisclosure lies with the public agency that would deny access to the record and not to the person seeking to inspect and copy the record. I.C. § 5-14-3-1.

In my opinion, the Hospital has sustained its burden of proof with regard to the salary information. Based on the Hospital’s description of its competition and the probable effect that the release of salary information would have on the Hospital’s business operations, it appears that the Hospital’s salary information is the type of information that the General Assembly intended to protect from disclosure when it enacted I.C. § 16-22-2.5-2.

With regard to Mr. Laux’s contract, I hesitate to say whether the *entire* contract is proprietary or confidential information under I.C. § 16-22-2.5-2. That is not to say that the entire contract is not -- or could not be -- confidential under that section. Indeed, the salary information contained therein appears to have been properly withheld. However, I am mindful of section 6 of the APRA, which requires public agencies to redact public records that contain both disclosable and nondisclosable information and to make the nondisclosable information available for inspection and copying. I.C. § 5-14-3-6(a).

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<sup>1</sup> In my opinion, I.C. § 16-22-2.5-2 provides the Hospital with a more liberal standard to apply when determining what information may -- or must -- be withheld than does the trade secrets exception to the APRA. I.C. § 5-14-3-4(a)(4). Consequently, it is unnecessary to address the latter in detail here.

Again, the Hospital bears the burden of proof to sustain its denial of access. If Mr. Laux's contract contains information that is neither proprietary nor competitive information, the Hospital should redact the confidential portions of the contract and produce the remaining portions.

I also note that when a records request is made in writing and the agency denies the request, the agency must deny the request in writing and must include in the denial "a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record. . . ." I.C. § 5-14-3-9(c)(2). Here, it does not appear that the Hospital cited an applicable statutory exception in its response in violation of section 9 of the APRA.

### CONCLUSION

For the foregoing reasons, it is my opinion that the Hospital failed to comply with section 9 of the APRA, which requires public agencies to cite a specific exemption authorizing the withholding of requested records in response to a written request for such records. However, the Hospital did not otherwise violate the APRA because Indiana law requires that the Hospital maintain the confidentiality of its proprietary and competitive information.

Best regards,



Andrew J. Kossack  
Public Access Counselor

Cc: Peter R. Foley