



STATE OF INDIANA

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February 15, 2011

Mr. Warren A. Auxier
P.O. Box 215
Hanover, IN 47243

Re: Formal Complaint 11-FC-31; Alleged Violation of the Access to Public Records Act by the Jennings County Commissioners

Dear Mr. Auxier:

This advisory opinion is in response to your formal complaint alleging the Jennings County Commissioners (“Commissioners”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.*

BACKGROUND

In your complaint, you allege that the Commissioners violated the APRA by denying your request for access to “audit and review records for the years 2008, 2009, and 2010 that are required by Indiana Administrative Code IAC [sic] 1-1-6.¹ I am requesting the records that contain the following information[:] the criteria used to select the audited runs, problem identification and resolution, date of the reviews, attendance at the reviews, and the summary of discussion at the reviews.” Following several unsuccessful efforts by you to obtain the records from both the Commissioners and the Jennings County EMS (“EMS”), to which you were referred by the Commissioners’ attorney, Shawn Loudon, Mr. Loudon ultimately denied your request on the basis that the audit and review records “contain confidential medical information about many, many people.” Mr. Loudon cited to Ind. Code § 5-14-3-4(a)(9), which excepts from disclosure “[p]atient medical records and charts created by a provider, unless the patient gives written consent under IC 16-39.”

¹ This citation does not exist. However, 836 Ind. Admin. Code 1-1-6, which applies to emergency medical services, sets forth audit and review requirements applicable to emergency medical service providers. I assume that this was the citation to which you intended to refer.

ANALYSIS

The public policy of the APRA states that “(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 Commissioners are 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 the Commissioners’ public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Initially, I note that you appear to have requested the audit and review records from both EMS and the Commissioners on several occasions. You state in your complaint that you named the Commissioners as the respondent in this matter due to the Commissioners’ statement at a December 13, 2010, public meeting. At that meeting, the Commissioners instructed Mr. Loudon to “provide [you] with the requested information that is public record.” You argue that such a statement “made it clear that [the Commissioners] were the agency that was deciding what records would or would not be made available to [you].” Upon review of the applicable Indiana Administrative Code (“IAC”) sections, however, it appears that the IAC requires only that emergency medical service providers comply with several audit and review requirements. 836 I.A.C. 1-1-6. No mention is made of county commissioners. *Id.* Among other things, the IAC requires such providers to create documentation for the audit and review of the quality of patient care. 836 I.A.C. 1-1-6(3). The documentation shall include the criteria used to select audited runs, problem identification and resolution, date of review, attendance at the review, and a summary of discussion at the review. 836 I.A.C. 1-1-6(3)(A)-(E). The relevant section is as follows:

836 IAC 1-1-6 Audit and review

Sec. 6. Each emergency medical service provider organization shall conduct audit and review at least quarterly to assess, monitor, and evaluate the quality of patient care as follows:

- (1) The audit shall evaluate patient care and personnel performance.
- (2) The results of the audit shall be reviewed with the emergency medical service personnel.
- (3) Documentation for the audit and review shall include the following:
 - (A) The criteria used to select audited runs.
 - (B) Problem identification and resolution.
 - (C) Date of review.
 - (D) Attendance at the review.
 - (E) A summary of the discussion at the review.
- (4) The audit and review shall be conducted under the direction of one
 - (1) of the following:
 - (A) The emergency medical services provider organization medical director.
 - (B) An emergency department committee that is supervised by a medical director. An emergency medical service provider organization representative shall serve as a member on the committee.

- (C) A committee established by the emergency medical service provider organization and under the direction of the medical director or medical director designee. The medical director designee must:
 - (i) be a physician with an unlimited license to practice medicine in Indiana;
 - (ii) have an active role in the delivery of emergency care; and
 - (iii) have been designated in writing by the medical director as the medical director designee.
- (5) A method of identifying needs to staff development programs, basic training, in-service, and orientation.
- (6) The audit shall include all levels of care by emergency medical service personnel.

Id. The custodian of public records is responsible for providing them upon request. If a public agency does not maintain records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*. Thus, if the Commissioners are not the custodian of the audit and review records, the Commissioners did not violate the APRA by failing to produce them.

That said, I offer the following analysis regarding the substance of your request to EMS and Mr. Louden’s position that the audit and review records are confidential. Mr. Louden cites to Indiana Code § 5-14-3-4(a)(9), which provides that a public agency may not disclose patient “medical records and charts created by a provider, unless the patient gives written consent under Indiana Code 16-39.” I am not persuaded, however, that audit and review records are “medical records and charts” within the meaning of that exception. Rather, the audit and review records appear to be derivative records created based on information in patient records. As used in the APRA exception, “provider” has the meaning set forth in Ind. Code § 16-18-2-295(a). I.C. § 5-14-3-2(k). Employers of a certified emergency medical technician, certified emergency medical technicians, and a certified paramedics are among the health care professionals described as “providers” in I.C. § 16-18-2-295. “Patient” has the meaning set out in Ind. Code § 16-18-2-272(d). I.C. § 5-14-3-2(i). “Patient” means an individual who has received health care services from a provider for the examination, treatment, diagnosis, or prevention of a physical or mental condition. I.C. § 16-18-2-272(d). “Medical record” is defined along with “health record” and “hospital record” as “written or printed information possessed by a provider . . . concerning any diagnosis, treatment, or prognosis of the patient, unless otherwise defined.” I.C. § 1-1-4-5. Most of the information required to be included in the audit and review records does not pertain to particular patients or their medical conditions. 836 I.A.C. 1-1-6(3)(A)-(E). Rather, the information focuses on the performance of EMS responses to calls for assistance. Consequently, I see no reason why all such information would be confidential or nondisclosable as a “medical record” under subsection 4(a)(9) of the APRA.

However, EMS is subject to HIPAA, as I would expect it to be as a provider of emergency medical services, and the audit and review records contain protected health

information² (as defined by HIPAA), the EMS would act appropriately by refusing to disclose *that portion* of the audit and review records. However, in my opinion EMS has not shown why the *entire records* should be exempt from disclosure under the APRA. 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).

CONCLUSION

For the foregoing reasons, it is my opinion that the Commissioners did not violate the APRA by failing to produce the audit and review records if the Commissioners are not the custodian of such records. Further, it is my opinion that EMS should disclose the records upon request after redacting any personally identifiable health information in accordance with HIPAA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Shawn K. Loudon

² 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.