



STATE OF INDIANA

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February 22, 2012

The Banner

Eric M. Cox, Owner and Publisher
24 N Washington
Knightstown, Indiana 46148

Re: Formal Complaint 12-FC-40; Alleged Violation of the Access to Public Records Act by the Knightstown Police Department

Dear Mr. Cox:

This advisory opinion is in response to your formal complaint alleging the Knightstown Police Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Captain Anthony Lorton, Public Information Officer, responded on behalf of the Department to your complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege on January 9, 2012, *The Banner* sent a reporter to the Department to inspect the Department's daily log or record containing information that is required pursuant to I.C. § 5-14-3-5(c). The reporter was informed by the dispatcher that due to Chief Danny Baker having already finished his shift that day, her request to inspect the log was denied.

On January 10, 2012, Chief Baker contacted the reporter regarding the request to inspect the daily log. Mr. Baker provided that he was not comfortable allowing anyone not employed by the Department to access its computers due to other investigatory records also being kept in the system. In light of Chief Baker's comments, *The Banner* requested hard copies of the daily log. Chief Baker provided that hard copies would be provided after he had an opportunity to review the records. Chief Baker advised *The Banner* that he was aware of the requirements of the Department pursuant to the APRA, but he did not have the personnel to fully comply.

On January 23, 2012, you and the previously mentioned reporter returned to the Department and asked to see the daily log for the previous week. Copies of the log had been printed out and made available. The records provided consisted of two different types: handwritten dispatcher notes ("Notes") as well as several incident reports

("Reports"). The Notes were provided in a spiral notebook and are entered not long after the original call came in. You allege that the Notes do not meet all requirements of I.C. 5-14-3-5(c) and were written with abbreviations and jargon that is not easily decipherable. The Reports are investigatory records created by the Department's officers who are handling, or have handled, those particular requests. As with the Notes, the Reports did not always contain all of the daily log information as required by I.C. § 5-14-3-5(c).

You allege that the Department has violated the APRC by failing to create and maintain the daily log as required by I.C. § 5-14-3-5(c). The Notes and Reports provided by the Department do not meet the requirements of section 5(c). In addition, you allege that the Department cannot meet the requirements of 5(c) by providing more than one record, each which lacks all of the information required by the APRA. Even if the two records combined met the requirements of 5(c), you do not believe that this is sufficient to meet the statute's requirements that an agency create and maintain a daily log.

In addition, several of the records provided by the Department contained improper redactions. While the Department did not list the reasons why the material was redacted, you believe that the instances addressed are not permissible under the APRA. You believe that the Department is operating under the mistaken assumption that certain information that had been redacted is subject to constraints of the Health Insurance Portability and Accountability Act (HIPPA). You do not believe that the Department is covered by HIPPA. Other information that appeared to be redacted included alleged descriptions of the incident(s) that occurred and date of births.

In response to your formal complaint, Captain Lorton stated that the Department, along with Henry County Sheriff Bruce Baker, have discovered a misunderstanding of how the Computer Aided Dispatch Software ("CAD") works in regards to meeting the requirements of I.C. § 5-14-3-5. The Department was advised that since the receipt of your formal complaint, a daily log in e-mail form is generated by the CAD and distributed to Central Indiana Media outlets. The Department was not aware of this fact when it received your original request. This factor, along with the recent renewal of *The Banner's* interest in creating a "Police Blotter" section in its weekly publication, led to the absence of the Department's daily log.

The Banner had previously obtained the information from the daily log in the past by sending a staff member to the Department once a week to obtain the information. This practice by *The Banner* had fallen out of practice, until it submitted its recent inquiry. This has not been common practice in Captain Lorton's tenure with the Department, nor was he aware of the requirements of I.C. § 5-14-3-5.

In order to rectify the issues, all officers have been issued a format to use in the narrative portion of the Report for media release. The daily news media log will be generated by the CAD. A large portion of the required information for the Report will be generated by the dispatcher at the time the call is started, including the nature of the call, date, time, location, responsible officer, and agency. The remaining required information

will be placed in the narrative of the Report. The Department will make every effort to comply with *The Banner's* request, however due to manpower shortages, major incidents, and illness; it has not been able to provide the information as quickly as requested.

As to the concerns regarding HIPPA, it is common dispatch practice that only general information is transmitted to EMS staff by dispatcher at the time of the call for service. This information is limited to the patient's gender, age, chief complaint, as well as the address. From this point on, the responders will only communicate pertinent information over the radio prior to a Paramedics arrival. Examples of such are: Is patient conscious and alert, is patient breathing, CPR being started, etc...It is the Department's current practice that if a family member or friend contacts the Department in regards to an individual's condition, the only information that is released is whether or not the patient was transported to the hospital. If more of a patient's person information is required under I.C. § 5-14-3-5, the Department will comply if advised to do so by the Public Access Counselor.

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." *See* I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Police Department's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). 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.

The APRA requires that certain law enforcement records be made available for inspection and copying. *See* I.C. § 5-14-3-5. Specifically, the APRA obligates law enforcement agencies to maintain a daily log that lists suspected crimes, accidents, or complaints. *See* I.C. § 5-14-3-5(c). The record containing the information must be created not later than twenty-four hours after the incident has been reported to the agency, and the information must be made available for inspection and copying. *Id.* The following information must be maintained in the daily log:

- (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 IC 35-42-4;
 - (C) the factual circumstances surrounding the incident; and
 - (D) a general description of any injuries, property, or weapons involved. I.C. § 5-14-3-5(c).

Counselor Neal issued an advisory opinion regarding a law enforcement agency's requirements pursuant to I.C. § 5-14-3-5(c):

In some instances, a law enforcement agency will not maintain a separate record titled "daily log" but will instead use the daily incident reports to substitute for the daily log. In that case, when the agency receives a request for the daily log information, the agency will generally provide copies of incident reports. In some cases, the agency will redact from the incident report any information not required to be maintained in a daily log. I have advised agencies this is acceptable so long as the daily log information is always available within twenty-four hours and so long as the agency provides at least the information which is required by I.C. § 5-14-3-5(c) to be made available for inspection and copying. *Opinion of the Public Access Counselor 09-FC-93.*

As applicable here, the Department is required to provide the information as detailed in I.C. § 5-14-3-5(c) and the record must be created not later than twenty-four hours after the suspected crime, accident, or complaint has been reported to the agency. Therefore, the Department violated the APRA when it failed to comply with the requirements of I.C. § 5-14-3-5(c) in response to *The Banner's* request for copies and/or inspection of the daily log. As to the records that were produced by the Department (i.e. Notes and Reports), I would agree with *The Banner's* assertion that in some areas the Notes were either indecipherable and the culmination of all information provided by the Notes and Reports still did not meet the requirements of 5(c). The Department has detailed that it has rectified the format/response it will provide to comply with 5(c); specifically a report will be generated by the CAD that will clearly provide the information that is required by law. I would note that I.C. § 5-14-3-5(c)(3) is only applicable if the incident involves an alleged crime or infraction. If the report generated by CAD provides all information that is required by 5(c) and it created within twenty-

four hours of the incident, the Department will be in compliance with the APRA. Should the new format/response detailed by the Department still fail to comply with 5(c), *The Banner* would be allowed to file an additional formal complaint regarding this issue.

As to the redactions used by the Department, when a record contains both disclosable and nondisclosable information and an agency receives a request for access to the record, the agency shall “separate the material that may be disclosed and make it available for inspection and copying.” *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1. As to the nondisclosable information that is redacted, the Department would be required to provide the specific exemption or exemptions authorizing the withholding pursuant to I.C. § 5-14-3-9(c). Here, the Department failed to cite to any applicable statutory code when it redacted information in the Notes and/or Reports that were provided pursuant to I.C. § 5-14-3-5(c). As such, it is my opinion that it violated the APRA when it failed to do so. As the Department did not cite to any applicable exception in redacting certain information, I will not speculate if any specific exceptions would have been applicable or if said redactions were proper based on any conceivable exception allowable under state or federal law.

For future reference, I would note that HIPAA provides that protected health information may not be used or disclosed except as permitted or required by the Privacy Rule. *See* 45 CFR § 164.502(a). HIPAA though is not applicable to every public agency and if the Department is going to redact information pursuant to a regulation found within HIPAA, it would need to ensure that it is a covered entity. Further, a public agency may not disclose a “patient medical record and chart created by a provider, unless the patient gives written consent under Indiana Code 16-39.” I.C. § 5-14-3-4(a)(9). “Provider” has the meaning set forth in I.C. § 16-18-2-295(a), which any agency would need to ensure it qualifies as before denying a request for records pursuant to I.C. § 5-14-3-4(a)(9). As to an incident report utilized by a law enforcement agency to comply with I.C. § 5-14-3-5(c), there may likely be information that goes beyond the requirements of 5(c) that the Department would retain discretion to disclose pursuant to I.C. § 5-14-3-4(b)(1).

CONCLUSION

For the foregoing reasons, it is my opinion that the Department violated the APRA when it failed to comply with the requirements of I.C. § 5-14-3-5(c) and when it failed to cite to an applicable exception when it redacted information from the records that were disclosed.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Captain Anthony Lorton