OPINION OF THE PUBLIC ACCESS COUNSELOR

INDIANAPOLIS STAR,
Complainant,

v.

PUTNAM COUNTY HOSPITAL,
Respondent.

Formal Complaint No.
20-FC-38

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Putnam County Hospital violated the Access to Public Records Act.[1] Attorney Timothy W. Kennedy responded on behalf of the hospital. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on April 26, 2020.

[1] Ind. Code § 5-14-3-1–10.

BACKGROUND

This case involves a dispute over access to county hospital data.

In November 2019, Indianapolis Star reporter Tony Cook submitted a written request to various county hospitals, including Putnam County Hospital, seeking the following:

1. Records showing the number of nursing homes owned in each year since 2003.
2. Records showing all supplemental Medicaid nursing home payments received in each year since 2003.
3. Records showing how much of those supplemental Medicaid nursing home payments received each year since 2003 were returned to the nursing homes, and for what purpose.
4. Records showing how much of those supplemental Medicaid nursing home payments received each year since 2003 were used for non-nursing home purposes, and for what purpose.

According to Cook, this request foisted some amount of consternation on county hospitals who expressed their collective concern through attorney Timothy W. Kennedy. Kennedy also serves as attorney for the Indiana Hospital Association. The Star then clarified its request by seeking a summary of the information in a spreadsheet or table with the information. Some hospitals complied.

A second Star reporter, Emily Hopkins, submitted another records request seeking the following:

> 1. Copies of the most recent management or operating agreements between (the county hospitals) and any company with which it currently has an agreement to manage or operate its nursing homes. Please include any attachments, exhibits, or amendments to such agreements.
> 2. Any agreements or other records describing how such operators or managers split any supplemental Medicaid (UPL) with (the county hospitals)[2]

On February 27, 2020, Kennedy responded on behalf of the Hospital and denied Cook's request arguing it was not reasonably particular as required by the Access to Public Records Act (APRA). The denial referred Cook to an Indiana Family and Social Service's contractor's website for information about how many nursing homes are operated by county hospitals and the amounts of the hospitals' supplemental payments.

Additionally, the Hospital argued that in order to completely fulfill the request, it would need to create documents that do not already exist, something the APRA – and the public access counselor – does not require.

As to the supplemental Medicaid payments, the Hospital argued that information is propriety information and

[2] UPL is an acronym for Upper Payment Limits as it relates to Indiana's Medicaid Program.

protected by Indiana Code sections 16-22-2.5-2 and 16-22-3-28(e), which provide county hospitals with broad authority to protect, as confidential, information considered to be proprietary and competitive information. Moreover, the Hospital invoked APRA's trade secret exemption in accordance with Indiana Code section 5-14-3-4(a)(4).

The Hospital applied similar arguments to deny Hopkins' request as well.

The Indianapolis Star takes exception to these denials and subsequently filed its formal complaint on March 11, 2020 arguing these exemptions to disclosure did not apply. It contends that other hospitals were able to interpret and supply information without resorting to a reasonable particularity argument. Still, without soliciting clarification, the Hospital denied the request outright.

Ultimately, the Star argues the Hospital arbitrarily and unnecessarily applied the proprietary information and trade secrets exemptions. The Star contends this is especially true given the Hospital is a public entity distributing public monies to its subsidiaries and is not in the competitive marketplace in this regard.

In the end, the Star is interested in knowing where the money goes – is it devoted entirely or partially to subsidiary nursing homes and what amount is used for non-long-term-care Hospital purposes.

For its part, the Hospital provided separate, albeit similar, complaint responses for the Cook and Hopkins requests.

As to Cook's request, the Hospital contends it satisfied the first portion by referring him to the FSSA contractor site,

which has the information therein. The second request – all supplemental Medicaid payments since 2003 – was considered vague under APRA's reasonable particularity standard. Even though the Hospital has only operated long term care facilities since 2012, it argues to satisfy this request, the Hospital would need to provide any and all notes, meeting minutes, ledger entries, etc. for the eight years Putnam County Hospital has operated those facilities.

The other two portions of Cook's request, the Hospital argues, involve proprietary information and trade secrets. Simply put, they seek funding structures for the Medicaid disbursements and how they are allocated internally. The Hospital argues this is the type of information that could put it at a competitive disadvantage. The Hospital relies heavily on a prior opinion from this office[3] as authority to categorize much of the Hospital's pay structure – nursing home operator agreements in particular – as confidential and shielded by Indiana Code section 16-22-2.5-2. It posits that competitors could poach lower-paid nursing home managers if their salaries were made public. It applies similar logic to the breakdown of supplement and UPL payments.

The response to Hopkin's request is substantially similar as to not be repeated here.

[3] *Opinion of the Public Access Counselor*, 10-FC-49 (2010).

ANALYSIS

1. The Access to Public Records Act

The Access to Public Records Act (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." Ind. Code § 5-14-3-1. The Putnam County Hospital (Hospital) is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q).

As a result, unless an exception applies, any person has the right to inspect and copy the Hospital's public records during regular business hours. Ind. Code § 5-14-3-3(a).

APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

2. The Star's requests

As an initial matter, it is worth noting that The Indianapolis Star submitted similar requests to multiple county hospitals and not exclusively to respondent Putnam County Hospital. Some of those requests were fulfilled and some were not.

Regardless of the nature of the underlying information, the Star's request does fall into a common trap: the information request. That is not to say the information should not be sought – indeed it should be – but in order to qualify as a legitimate public records request, it must be seeking a tangible, existing document.

For the sake of readability, this opinion will address each request in turn. We'll begin with Cook's requests:

> 1. Records showing the number of nursing homes owned in each year since 2003.

We now know, based on the Hospital's response, that number is 18 nursing homes owned since 2012. Putnam County Hospital may very well have a document in its administration with the number 18 on it. And if it does, it must produce it. Alternatively, it could just answer the question, or, point to source with the information, which it appears the Hospital did – the FSSA contractor website. So long as the source has that information readily available, the Hospital has fulfilled its request.

> 2. Records showing all supplemental Medicaid nursing home payments received in each year since 2003.

This request for Putnam County would only go back to 2012, but even still, it is unclear what this document would look like. For sure, a database or spreadsheet with all of this information at the ready would be handy and convenient, but the Hospital's point is well-taken that the information would likely have to be aggregated and sorted into a digestible document. Otherwise it would be a data dump of

random documents and sources that cannot be pinpointed as one particular document.

Again, there is no problem asking for the information, but a request cannot dictate the format or document creation. The responsibility is to disclose what exists at the time of the request.

That written, it does not appear as if the Hospital has been particularly helpful in seeking to narrow the scope of the request. An unspecific request should not be summarily denied, but an agency should work with a requester, to a reasonable extent, to reach the point in which an agency can undertake a search.

We should not forget throughout the course of this analysis that Putnam County Hospital is still a public agency and still reliant, at least in part, on taxpayer money to operate. Toward that end, transparency should be the end game and not semantic or technocratic arguments.

> 3. Records showing how much of those supplemental Medicaid nursing home payments received each year since 2003 were returned to the nursing homes, and for what purpose.
> 4. Records showing how much of those supplemental Medicaid nursing home payments received each year since 2003 were used for non-nursing home purposes, and for what purpose.

To a degree, the same arguments exist for the latter portions of Cook's request. There may be a tidy chart with all of this information, or not, but the Hospital's main concern appears to be one based on the proprietary nature of the information.

The above missive regarding transparency holds true here as well and an agency should be mindful of being too territorial about their operations.

There is, however, an added layer of secrecy instilled for certain hospital information.

Indiana law recognizes the value of protecting proprietary information and trade secrets. APRA authorizes redaction in accordance with Indiana Code section 5-14-3-4(a)(4), which exempts trade secrets from disclosure. Similarly, proprietary and competitive information of county hospitals are not subject to disclosure based upon Indiana Code section 16-22-2.5-2 and 16-22-3-28(e).

Interestingly enough, I disagree to an extent with previous guidance from this office that the Title 16 provisions are to be construed more liberally toward non-disclosure than the APRA.

> Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . . "[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. App., 1995) [Citations omitted], quoting *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E. 2d 726, 729 (Ind. App., 1982) [Citations omitted]. As a general rule, the words of a statute will be construed in their plain, ordinary,

and usual sense, and it is only where such construction will manifestly result in the defeat of the legislative intent that they will not be so construed. *See Pennsylvania Company v. Mosher*, 94 N.E. 1033 (Ind. Ct. App.1911).

The following statutes only apply to public records requests vis-à-vis Indiana Code section 5-14-3-4(a)(1), thereby inextricably tying it to APRA and the requirement to interpret its exceptions narrowly.

Indiana Code section 16-22-2.5-2 states:

> 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.

This statute lacks defined terms and there is no case law interpreting it. That written, the statute itself reads like a nondisclosure clause for internal governance and less like a barrier to access. Nonetheless, Indiana Code section 16-22-3-28(e) also provides some measure of illumination as to the intent of the legislature:

> (e) A hospital organized or operated under this article may hold confidential, until the information contained in the records is announced to the public, records of a proprietary nature that if revealed would place the hospital at a competitive disadvantage, such as the following:
>
> (1) Terms and conditions of preferred provider arrangements.
>
> (2) Health care provider recruitment plans.

> (3) Competitive marketing strategies regarding new services and locations.

This is not an exhaustive list, but is helpful for our purposes.

These can be reasonably considered "trade secrets" in context. Although "trade secret" is not defined under Title 16, the term is statutorily defined to mean:

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ind. Code § 24-2-3-2. Based on this statutory definition, Indiana courts have long held that a trade secret has four general characteristics: 1) it is information; 2) that derives independent economic value; 3) from not being generally known, or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and 4) that is the subject of efforts, reasonable under the circumstances, to maintain its secrecy. *See Ackerman v. Kimball Int'l, Inc.*, 634 N.E.2d 778, 783 (Ind. Ct. App. 1994), *vacated in part, adopted in part*, 652 N.E.2d 507 (Ind. 1995); *See also Bridgestone Americas Holding, Inc. v. Mayberry*, 878 N.E.2d 189, 192 (Ind. 2007) (stating that "[u]nlike other assets, the value of a trade secret hinges on its secrecy. As more people or organizations learn the secret, [its] value quickly diminishes").

Indiana courts acknowledge trade secrets to be "one of the most elusive and difficult concepts in law to define." *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (Ind. 1993). Moreover, the courts recognize information is not a trade secret if it "is not secret in the first place--if it is 'readily ascertainable' by other proper means." *Id.* at 916.

In *Franke v. Honeywell, Inc.*, 516 N.E.2d 1090, 1093 (Ind.Ct.App.1987), *trans. denied.*, the court held: "The threshold factors to be considered are the extent to which the information is known by others and the ease by which the information could be duplicated by legitimate means." Id. What is clear is the courts will scrutinize a trade secret claim by its individual uniqueness and proprietary exclusivity. Arguably, this would extend to the Title 16 provisions as well.

The Hospital argues that if the Medicaid funding distributions in Cook's request are revealed, it would place the Hospital at a competitive disadvantage. It is unclear why. The Hospital seemingly lays the burden of proof at the feet of The Star to demonstrate why it is not proprietary information instead of arguing why it is. The burden on non-disclosure is always on the public agency to sustain its denial. This holds true both in these proceedings and at the trial court level.[4] It is not enough to simply rely on a conclusory statement that an exemption applies.

Thus, without more, this office remains unconvinced that the Hospital's Medicaid and UPL information is proprietary under APRA or Title 16. While this does not cure the

[4] Ind. Code §§ 5-14-3-1 and 5-14-3-9(f).

particularity issue, if the information is documented, it should be disclosable.

Turning to Hopkin's requests, the proprietary and trade secret argument is stronger.

> 1. Copies of the most recent management or operating agreements between (the county hospitals) and any company with which it currently has an agreement to manage or operate its nursing homes. Please include any attachments, exhibits, or amendments to such agreements.
> 2. Any agreements or other records describing how such operators or managers split any supplemental Medicaid (UPL) with (the county hospitals)

As to request number 1, many long term care facilities contract with management companies. This includes agreements with executive directors and administrators who are not public employees, but contractors carrying out the management and marketing functions of the facilities. In my opinion, the terms – or at least a portion thereof – are the types of information covered by the Title 16 provisions.

While it is true that this office generally frowns on public agency's contracts containing non-disclosure clauses, the legislature has seemingly allowed the practice in Title 16. To that degree, this opinion is consistent with prior PAC opinions ratifying nondisclosure of certain elements of a county hospital's operations. Yet also consistent with those opinions, if a 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.

Since there are a confirmed finite amount of those agreements – only 18 – this should not be an impossible task.

The final prong of the request, particularity issues aside, explicitly requests information that would fall into the same category as some of Cook's requests. Any records indicating the "split," divvying up, appropriations, line items, or budget entries of UPL money is most likely fair game for disclosure.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the parties should revisit the requests in question consistent with this opinion.

Luke H. Britt
Public Access Counselor