

May 14, 2008

Ron Shawgo
The Journal Gazette
600 West Main Street
Fort Wayne, Indiana 46802

Re: Formal Complaint 08-FC-98; Alleged Violation of the Access to Public Records Act by the City of Fort Wayne

Dear Mr. Shawgo:

This advisory opinion is in response to your formal complaint alleging the City of Fort Wayne (“City”) violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3) by denying you access to a record. I have enclosed a copy of the City’s response to your complaint for your reference. It is my opinion the City has not violated the APRA.

BACKGROUND

In your complaint you allege that at a March 19, 2008 meeting, Fort Wayne City Attorney Carol Taylor, speaking on behalf of the Fort Wayne Fire Department (“Department”) told *The Journal Gazette* it would no longer release names of victims treated by its employees who act as first responders. You allege that this meeting was the culmination of more than six months of discussions between the City and *The Journal Gazette* regarding the issue. You allege that Ms. Taylor did not provide the specific statutory authority excepting the records from disclosure and did not return telephone calls on April 9 and 10 asking her to cite the applicable authority.

You allege that although the City has not provided its reason for denial, you assume the City is basing the denial on I.C. § 5-14-3-4(a)(9). You contend that even if this is the basis for denial, I.C. § 5-14-3-5(c)(3)(B) requires the release of the victim’s name, age and description of injuries if an incident involves an alleged crime or infraction. You further contend nothing prevents the release of all victims’ names and general condition, regardless of whether a crime has occurred.

You indicate the newspaper is seeking casualty names listed on the National Fire Incident Reporting System reports the department is required to file with the state fire marshal. You mailed this complaint on April 15, and I received it on April 21.

The City responded to the complaint by letter dated May 7 from Ms. Taylor. The City contends that the newspaper's complaint is a general complaint and does not relate to a specific denial of access to records. Ms. Taylor contends that you have "mistakenly stated the facts" in your complaint and that you were not in attendance at the March 19 meeting. Ms. Taylor contends she specifically articulated the information would not be released based on I.C. § 5-14-3-4(a)(9). But Ms. Taylor contends a specific denial is only required when there is a specific request, and there was no such request here.

Regarding your contention that a building code violation would trigger the disclosure requirements of I.C. § 5-14-3-5, Ms. Taylor contends that a building code violation is a civil ordinance violation rather than a crime or infraction, and as such the statute is inapplicable. Ms. Taylor contends that I.C. § 5-14-3-4(a)(9) contains a strict prohibition against disclosure of patient medical records and charts created by a provider. She further contends this prohibition takes precedence over the general provisions of I.C. § 5-14-3-5, especially given the ramifications of the unauthorized disclosure of confidential information.

Ms. Taylor contends that I.C. § 16-18-2-295(5) makes all first responders providers under the definition, and as such patients who receive medical care from them should have their information protected. Finally, Ms. Taylor cites an advisory opinion issued by former Public Access Counselor Karen Davis in January 2005 which is directly on point. Counselor Davis reached the conclusion that the fire department at issue was a provider and did create medical records and charts as defined in I.C. § 1-1-4-5(6).

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 City is clearly 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 public records of the City during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). If the request is delivered by mail and the agency does not respond within seven days, the request is deemed denied. I.C. § 5-14-3-9(b). The request must identify with reasonable particularity the record being requested. I.C. § 5-14-3-3(a).

When the request is made in writing and the agency denies the request, the agency must deny the request in writing and must 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. I.C. § 5-14-3-9(c).

Here the City argues that you have made no specific request, and I see no evidence to indicate you have made a request. Instead, you have filed a complaint based on a practice established by the City. Because I.C. §5-14-3-6 allows a person who has been denied any right conferred by I.C. 5-14-3 to file a complaint and because I.C. 5-14-3 generally provides the right to access to public records, I will consider this valid grounds to file a complaint.

Having said that, I cannot find that the City violated the APRA by failing to deny access to the records in writing. Although I.C. §5-14-3-9(c) requires the City to deny a written request in writing and to state the specific exemptions authorizing the withholding of all or parts of the public record, there was no request here. It is my understanding the City and the newspaper were in discussions regarding how the records would be handled, but I do not understand that a written request was pending. As such, the City cannot have been required to respond in writing to a request that did not exist.

Regarding the specific records at issue, it is my understanding your complaint is that the City has denied access to victim information which you contend is required to be released. I.C. § 5-14-3-5(c) requires an agency to maintain a daily log or record that lists suspected crimes, accidents, and complaints. Certain information is required to be maintained and made available for inspection and copying, including the name and age of any victim and a general description of any injuries. Generally, the statute is straightforward and requires access to the listed information.

But a mandatory exception to disclosure exists for patient medical records and charts created by a provider, unless the patient gives written consent under I.C. 16-29. *See* I.C. § 5-14-3-4(a)(9). Provider has the meaning set out in I.C. § 16-18-2-295(b), which includes, among others, an employer of a certified emergency medical technician, a certified emergency medical technician-basic advanced, a certified emergency medical technician-intermediate, or a certified paramedic. *Id.*

Former Public Access Counselor Karen Davis issued an advisory opinion regarding this same issue, whether the patient records created and maintained by a fire department may be disclosed, in an opinion issued January 18, 2005. I agree with the opinion of Counselor Davis set out in that opinion, both on the issue of whether the department is a provider and whether the records are patient medical records and charts. Rather than reiterate the entire opinion here, I am enclosing a copy of the opinion for your reference. While I do not necessarily agree with Ms. Taylor that all first responders are providers under the statute, it is my opinion the Fort Wayne Fire Department is a provider under I.C. § 16-18-2-295(b) because the Department is an employer of a certified medical technician or a certified paramedic and as such may not release patient medical records unless consent is provided pursuant to I.C. 16-29.

While I.C. § 5-14-3-5 does require the daily log to contain certain information and requires an agency to make that information available for inspection and copying, I.C. § 5-14-3-5 is a statutory provision of general application. Because I.C. § 5-14-3-4(a)(9) specifically excludes the records at issue from disclosure and declares those records confidential and because I.C. § 5-14-3-10 provides that knowing or intentional disclosure of confidential information is a

Class A misdemeanor, it is my opinion the City may not disclose the patient medical records and charts.

CONCLUSION

For the foregoing reasons, it is my opinion the City has not violated the Access to Public Records Act and the Fire Department may not disclose patient medical records and charts absent the patient's written consent under I.C. 16-29.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Carol Taylor, Fort Wayne City Attorney