



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Facility South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

September 4, 2008

Debra Dial
Indiana Protection and Advocacy Services
4701 North Keystone Avenue, Suite 222
Indianapolis, Indiana 46205

Re: Formal Complaint 08-FC-192; Alleged Violation of the Access to Public Records Act by Larue D. Carter Memorial Hospital

Dear Ms. Dial:

This advisory opinion is in response to your formal complaint alleging Larue D. Carter Memorial Hospital ("Hospital") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. The Hospital is administered by the Indiana Family and Social Services Administration ("FSSA") Division of Mental Health and Addiction. A copy of FSSA's response to the complaint is enclosed for your reference. It is my opinion that I am precluded from issuing an advisory opinion in this specific substantive matter. The following advisory opinion addresses the procedural matter.

BACKGROUND

You filed the present complaint on August 8, 2008, alleging the Hospital violated the APRA by denying Indiana Protection and Advocacy Services ("IPAS") access to records related to an internal investigation following an allegation of abuse of a patient by a Hospital staff member. You allege that you first requested the records on February 21, 2008 and that the Hospital provided neither the records nor a reason for nondisclosure. You submitted a subsequent request for access to the records on July 3, 2008.

You further allege that the Hospital denied you access to the records relating to the investigation, citing the deliberative materials exception to disclosure. You provide a copy of a July 11, 2008 electronic mail message from the interim superintendent of the Hospital wherein the superintendent cites the exception.

You contend federal and state law grant IPAS access to the records of the internal investigation. You contend the patient involved in the incident consented to the release of the records to IPAS. You contend the Hospital cannot deny IPAS access to the records

because federal law requires disclosure, and this requirement supersedes the deliberative materials exception.

Finally, you include a copy of a recent decision in the federal district court case *Indiana Protection and Advocacy Services v. Indiana Family and Social Services Administration, et al.* You contend the case is not the same matter as the instant complaint because the records requested are different. As such, you contend I am not precluded by Ind. Code § 5-14-4-10(6) from issuing an opinion in the present matter.

FSSA responded to your complaint by letter dated August 22 from Katherine Gregory. FSSA first contends that I am precluded from issuing an opinion in this matter, pursuant to I.C. § 5-14-4-10(6). FSSA contends that while the patients are different in this matter versus in the federal lawsuit, the records at issue are the same type of records, those related to the Hospital's investigations. As such, FSSA contends the "specific matter" is the same. Further, FSSA contends that while the federal lawsuit was not brought under I.C. 5-14-1.5 or I.C. 5-14-3, the intent of I.C. § 5-14-4-10(6) is to prevent forum shopping and therefore prevent IPAS from seeking an opinion from this office on the issue IPAS has brought to federal court.

Further, FSSA contends that if I.C. § 5-14-4-10(6) does not preclude me from issuing an opinion in this matter, the investigation records you requested are nondisclosable at the discretion of the agency pursuant to the deliberative materials exception found at I.C. § 5-14-3-4(b)(6). FSSA concedes that I.C. § 5-14-3-4(a) denies an agency the use of the deliberative materials exception to the extent access is required by state or federal law. But FSSA contends The Protection and Advocacy for Individuals with Mental Illness Act of 1986 ("PAIMI"), the federal law upon which you rely, does not specifically require access to investigation reports of a state hospital. FSSA contends that while it is clear incident reports are accessible records, the "steps taken to investigate an incident" is not the same as the investigation report itself.

FSSA explains that an incident report is a printed form completed by the facility when there is an allegation of abuse or neglect. The form includes only objective facts surrounding the incident. IPAS has access to all incident reports, and IPAS may conduct its own investigations. FSSA contends, though, that the investigation report may be a long narrative report that represents an internal communication expressing opinions regarding suggested discipline for a staff member. The investigation report IPAS currently seeks consists of an Incident Panel Review which conducted an extensive investigation of alleged abuse, made specific findings, and made specific recommendations regarding employee discipline. The superintendent then considered the opinions and recommendations before making a final determination. FSSA contends "this internal communication of sometimes conflicting opinions for decision making purposes is precisely what the General Assembly sought to protect in IC 5-14-3-4(b)(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 Hospital 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 Hospital 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).

The first issue here is whether I.C. § 5-14-4-10(6) precludes me from issuing an advisory opinion in this matter. The General Assembly has given the public access counselor the duty "[t]o issue advisory opinions to interpret the public access laws upon the request of a person or a public agency. However, the counselor may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under IC 5-14-1.5 or IC 5-14-3." I.C. § 5-14-4-10(6).

FSSA contends the existence of the still pending federal district court case filed by IPAS prohibits me from issuing an advisory opinion in the present matter. FSSA asserts the present complaint involves the same "specific matter" as the federal case because both cases include disputes over documents related to internal investigations of abuse allegations. You argue the present issue is not the same "specific matter" because it involves different people, incidents, and documents.

The statute does not define the phrase "specific matter," and I could not find any Indiana case law construing the phrase in a manner relevant to this issue. "Non-technical, undefined words are to be defined by their ordinary and accepted dictionary meaning." *Opinion of the Public Access Counselor 06-FC-88* (citing *Bulkomatic Transport v. Department of Revenue*, 629 N.E.2d 955, 957 (Ind. Tax 1994)).

Black's Law Dictionary defines "specific" as "[o]f, relating to, or designating a particular or defined thing; explicit." *Black's Law Dictionary* (8th ed. 2004). I believe "matter," as used in this context, is the following: "2. Something that is to be tried or proved; an allegation forming the basis of a claim or defense." *Black's Law Dictionary* (8th ed. 2004). Here, the "particular" "thing" to be "tried or proved" is whether federal law requires disclosure of investigation reports created by the Hospital, notwithstanding any exception to disclosure the Hospital asserts. It is my understanding this is precisely an issue presented in the still pending federal case. Specifically, IPAS contended in the federal district court case complaint that the Hospital denied IPAS to the Hospital's "records, reports, and investigations of abuse, neglect or injury and the information used to generate that report, complete with personally identifiable information of individuals with disabilities." In my opinion, this is the specific matter addressed by the present complaint filed with this office, notwithstanding the fact that the individual patients and employees that are subject of the investigations differ in the two matters.

Further, it is my opinion that even though the federal district court case does not specifically address the APRA, I am still precluded from issuing an opinion. I agree with FSSA that I.C. § 5-14-4-10(6) prevents forum shopping by precluding this office from issuing an advisory opinion when a lawsuit has been filed concerning a specific matter. Since I have concluded that the specific matter to be determined is the same in the federal case as that presented here, it is my opinion the intent of I.C. § 5-14-4-10(6) would be frustrated if I issued an opinion in the matter while the federal case is still pending.

CONCLUSION

For the foregoing reasons, it is my opinion that I am precluded by I.C. § 5-14-4-10(6) from issuing an advisory opinion on the substantive issue presented here.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Katherine Gregory, Indiana Family and Social Services Administration