



STATE OF INDIANA

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June 5, 2014

Ms. Stacey Vail
4638 W. 180 S.
Russiaville, IN 46979

Re: Formal Complaint 14-FC-98; Alleged Violation of the Access to Public Records Act by the Howard County Health Department

Dear Ms. Vail,

This advisory opinion is in response to your formal complaint alleging the Howard County Health Department ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Department has not responded to your complaint despite being invited to on May 5, 2014. They have, however, provided you additional materials related to your request. This response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on May 1, 2014.

BACKGROUND

Your complaint alleges the Howard County Health Department violated the Access to Public Records Act by denying producing records responsive to your request.

On or about April 2, 2014, you made an in-person request for public records at the Department. You were seeking to inspect copies of records related to your grandfather and great-great-grandfather. You were attempting to clarify a discrepancy between previously obtained records by inspecting the Department's "actual death record" – a handwritten ledger containing certain death information.

You were denied the records on several grounds. First, the Department's vital records registrar mentioned a Howard County rule (later discovered to be Department policy). She also claimed the decision to allow you to view the record would be with the County Health Board. The registrar alleged the records were not public record and also cited the fragility of the records as justification for not allowing you to inspect the record.

ANALYSIS

The public policy of the APRA states that “a (p) roviding person 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 Ind. Code § 5-14-3-1. The Howard County Health Department is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Department’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

A request for records may be oral or written. See Ind. Code § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See Ind. Code § 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 (7) days of receipt, the request is deemed denied. See Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

First, it should be noted that a public record is defined by the APRA in Ind. Code § 5-14-3-2(o) as any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

If there is any doubt whether a document held by a governmental agency is a public record, it probably is. There are very few instances where a public agency would be in the custody of a record which is not a public record. The better question is whether it is a *disclosable* public record. Not all public records are disclosable and the Access to Public Records and Indiana Code generally carve out a significant number of exceptions to disclosure. All of the records you seek are public record.

Turning to the question of whether the Department is justified in denying inspection, the law is clear that any records greater than 75 years old shall be disclosed. See Ind. Code § 5-14-3-4(d). As the record you seek is not an adoption or patient medical record, any other exception would not apply. As the purpose of the APRA is to allow the public to inspect disclosable public records, you are entitled to view them.

The Department has cited the fragility of the records as a reason they would not let you personally touch or go through the death record book by yourself. I recognize the rationale behind this decision and I agree the Department should take great care in maintaining their records. This is reinforced by Ind. Code § 5-14-3-7(a) (a public agency shall protect public records from loss, alteration, mutilation, or destruction). Therefore it is within reason your inspection can be supervised and conducted by Department staff.

You suggest the Department may have transferred some of the records to microfilm. If this is the case, you are entitled to inspect these records as well.

I take exception with certain portions of the policy enacted on May 5, 2014. I have little doubt the Department promulgated this policy in response to your formal complaint (the policy “supersedes [a] verbal policy”). Departments may, of course, establish policies to govern the operation of their offices, however, the policy must be consistent with Indiana Code which supersedes local ordinances and policies. In particular, Item 6 of the policy states, “No photocopying...of the records are permitted.” The Department should be mindful of Ind. Code § 5-14-3-8(e)(2) – if the Department has the means to photocopy the record, a public agency must provide at least one (1) copy of the public record. This should also be balanced against the need to preserve the integrity of the record. Regardless of the condition of the record, if there are no means to copy the record, a request must be allowed, at a minimum, to inspect and/or manually transcribe the record.

The other section of the policy which is troublesome is the policy of allowing the Department to give themselves one year to respond to a public records request. I know of no other Indiana Code provision which would supersede Ind. Code § 5-14-3-3(b):

Within a reasonable time after the request is received by the agency,
the public agency shall either:

(1) provide the requested copies to the person making the request;

or

(2) allow the person to make copies:

(A) on the agency's equipment; or

(B) on the person's own equipment.

Emphasis added.

It is extremely unlikely a request made with reasonable particularity would take up to a year to satisfy. At the least, this policy openly controverts the intention of the Access to Public Records by suggesting production of public records is not a priority of the Department. As to the fees charged, it should be noted that Ind. Code § 16-20-1-27 allows county health departments to charge service fees in excess of what is permitted under Ind. Code § 5-14-3-8 generally, therefore the fees charged by the Department are appropriate. This is tied to actual cost, and as your inspection of these records would not incur cost on behalf of the Department, it may not be able to charge these fees under the local health department statute.

CONCLUSION

For the foregoing reasons, the Howard County Health Department has violated the Access to Public Records Act by not allowing you to inspect their records older than 75 years. Additionally, the Department should revise their public records policy consistent with Indiana law.

Regards,

A handwritten signature in black ink, appearing to be 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Ms. Karen Johnson