
OPINION OF THE PUBLIC ACCESS COUNSELOR

KARA KENNEY,
Complainant,

v.

INDIANA STATE DEPARTMENT OF HEALTH,
Respondent.

Formal Complaint No.
20-FC-62(b)

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana State Department of Health violated the Access to Public Records Act.¹ General Counsel Kelly MacKinnon filed a response on behalf of ISDH. 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 the access to records containing statistics on the number of COVID-19 cases and deaths at licensed long-term care facilities in the state.

On April 24, 2020, Kara Kenney, investigative reporter for WRTV-6, submitted a written request to the Indiana State Department of Health (ISDH) and the state's Joint Information Center seeking the number of COVID-19 cases at a single long-term care facility. The state informed Kenney that it was not providing totals by individual facilities due to privacy concerns, but ISDH was evaluating the matter. On April 30, the agency informed Kenney that only aggregate totals were being provided.

Kenney filed her formal complaint on May 4, 2020.

ISDH argues that the records Kenney requests do not exist in the form she requested them and does not have a document that tracks facility-level data.

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 Indiana State Department of Health (ISDH) 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 ISDH’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. Kenney’s Request

Kenney argues, as a basis for her complaint, the public deserves to know the information on a facility-by-facility basis. She emphasized that she was not seeking any specific patient-related data.

3. ISDH's Response

ISDH maintains it does not synthesize the nursing home data in a manner that would be responsive to the request. It relies on facilities to self-report. This has been evidenced by several announcements and press releases. And while ISDH may have information at a specific point and time for an individual facility, it does not keep aggregate data for all Indiana nursing homes either in collective form or on a rolling basis all in one place.²

This office also understands and appreciates the newsworthiness of the request and its importance to Hoosiers. Obtaining information regarding outbreaks among vulnerable populations allows families to make better decisions about their loved ones in those facilities. From my discussions with ISDH, those goals are not mutually exclusive with the agency - they simply do not have a running tally, database or spreadsheet with that information. They address those concerns in alternative ways.

This is not semantics or a technicality; the Access to Public Records Act simply does not require the creation of documents to satisfy a request. This office is unaware of any other statute or regulation requiring them to maintain a working document with updated facility-level data.

² A similar complaint was filed against the Governor's office who provided a similar response that his office does not collect the data independent of ISDH.

CONCLUSION

Based on the foregoing, it is the opinion of the public access counselor that the Indiana State Department of Health did not violate the Access to Public Records Act if it does not maintain the documents sought.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

Luke H. Britt
Public Access Counselor