



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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December 9, 2009

Mr. Jason Chismar
DOC # 856264
5501 South 1100 West
Westville, IN 46391

Re: Formal Complaint 09-FC-265; Alleged Violation of the Access to Public Records Act by the Indiana Department of Health

Dear Mr. Chismar:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Health ("DOH") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* For the following reasons, it is my opinion that DOH did not violate the APRA.

BACKGROUND

In your complaint, you allege that DOH violated the APRA by failing to respond to your two requests for access to a certificate of death. You allege that you paid the fee and sent the proper paperwork to DOH, but did not receive a reply. After one month passed, you submitted a second request for the same record, but still did not receive a reply. You state that the record you seek relates to the death of your niece.

My office forwarded a copy of your complaint to the DOH. The response of Morgan McGill, staff attorney for DOH, is enclosed for your review. Ms. McGill states that the only request DOH has received from you is for a certified copy of a death certificate of a man named Tim Murdoch. DOH received that letter on September 19, 2009. Upon receiving that request, Cynthia Cassida of DOH noted that the statutorily required fee was not contained within the request and proper identification was missing from the request. DOH maintains that it returned that letter to you due with a request for additional items/information from you. Finally, Ms. McGill notes that DOH does not maintain copies of autopsy reports or autopsy photographs.

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. DOH does not dispute that it constitutes 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 DOH’s public records 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).

Here, DOH maintains that it did not receive a request from you regarding any death certificate for a female; Ms. McGill notes that the only request that DOH has received from you is the request related to Tim Murdoch. If DOH did not receive a request regarding your niece, it was not obligated to respond to it. As I am not a finder of fact, I express no opinion as to whether or not DOH received your request regarding your niece. I note that under the APRA, if a request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b). A public agency may deny a request if: (1) the denial is in writing or by facsimile; and (2) the denial includes: (A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (B) the name and the title or position of the person responsible for the denial. I.C. § 5-14-3-9(c). If DOH received your request and did not respond to it within these timeframes, DOH violated the APRA by failing to provide you with a response within seven (7) days that satisfied the requirements of section 9(c) of the APRA.

DOH claims that it does not maintain any autopsy records or photographs. If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [Agency] could not be required to produce a copy....”).

CONCLUSION

For the foregoing reasons, it is my opinion that DOH did not violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Morgan E. McGill