



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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September 17, 2012

Marquita F. Berry
7102 A Kensington Drive
Indianapolis, Indiana 46226

Re: Formal Complaint 12-FC-262; Alleged Violation of the Access to Public Records Act by the Indiana State Department of Health

Dear Ms. Berry:

This advisory opinion is in response to your formal complaint alleging the Indiana State Department of Health ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Hilari A. Sautbine, Attorney, responded on behalf of the Department. Her response is enclosed for your reference. As you have indicated that you intend to bring a legal action in the circuit and/or superior court and the records were requested for the purpose of presentation in a proceeding to be conducted by another public agency, I have granted your complaint priority status pursuant to 62 Indiana Administrative Code 1-1-3(1), (3).

BACKGROUND

In your formal complaint, you allege that you submitted State Form 49607 to the Department via U.S. Mail, along with the proper identification and fees. You specifically requested two copies of your Long Form Birth Certificate ("Long Form"). In response, the Department provided you with two standard copies of your birth certificate and a written denial of your request for the Long Form. The Department stated that you could not receive a copy of your original Long Form because a paternity affidavit had been filed.

You thereafter contacted the Department via telephone to inquire about your denial. You were first instructed to order a paternity affidavit, via State Form 54763. Mary Keltner then advised you that you could not obtain a copy of the Long Form because changes had been made to the record when a paternity affidavit was processed. You allege that Ms. Keltner advised that you did not have a right to see your personal record and that once a birth record has been changed, the original is negated. Ms. Keltner was unable to cite to any law, statute, or rule that supported the denial of your request.



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Soon thereafter, you spoke with Ms. Rosalie Conley regarding your request for a copy of the Long Form. You provide Ms. Conley refused to provide the rule that stated that you would not be able to obtain or view the Long Form. You then spoke to Ms. Keltner, who again advised that the record would not be provided. You were then informed that a judge had sealed the records of your original birth certificate. You then requested access to the court record and/or order that sealed the records and under what authority, which you were not provided with any further information.

In response to your formal complaint, Ms. Sautbine advised that your request was not submitted pursuant to the APRA; rather it was a request to create a document pursuant to I.C. 16-37. The Department has provided a standard-sized certified birth certificate in response to your request and is the correct document responsive to your application.

The Department issues certified copies of birth certificates pursuant to the requirements set forth in I.C. 16-37, in particular the limitations for disclosure as set forth in I.C. 16-37-1-10. The Department created State Form 49607 in accordance with I.C. § 16-37-1-3, for prescribing the information to be contained in an application for vital statistics information, and the Division of Vital Records ("Vital Records") has created internal procedures to process requests in compliance with I.C. 16-37. The state form references I.C. 16-37 throughout the record, indicating that the requests are processed pursuant to I.C. 16-37, rather than the APRA. The Department notifies the applicant that they may not be able to receive a Long Form in the application. If Vital Records is unable to issue a Long Form, it sends a certified copy of the standard size form and a letter to those applicants indicating why they may not receive a Long Form.

An original birth record is maintained by the Department. However, a certified copy of a birth certificate is only generated upon request once an application is filled under State Form 49607. As of 2007, all births in the state of Indiana must be registered via the Indiana birth registration system. Prior to 2007, births were first recorded on the Long Form in paper format and then submitted to the Department and local health department. The paper version was retained for two years until transferred to microfilm per the applicable records retention schedule. If information was changed after the long form was created, the original record could not be altered because only the microfilm version survived. When the Long Form is no longer accurate, the Department generates a standard size document which is considered to be the birth certificate. Thus, the standard size birth certificate is the only document responsive to a request for a certified copy of the birth record. A request made under I.C. 16-37 is one to generate a certified document, not to provide a record under the APRA. Even if the APRA is applicable, the



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Department does not maintain a certified birth certificate in response to your request and is not required to create a record under the APRA. The record does not exist until the Department generates the record on security paper and it is stamped with the state seal. The agency has provided all records that were responsive to your request.

When the Department receives an application for search and certified copy of the birth record, it verifies all information is completed on State Form 49607, ensures that proper identification has been provided, that payment is received, and the application is qualified to receive a copy of the certificate pursuant to I.C. 16-37-1-10 and 410 IAC 18-3-1. If all requirements are met, then Vital Records will commence a search for the birth record. If the record is found, Vital Records will issue a certified copy of the birth record on security paper bearing the state seal and the registrar's stamped seal. If the applicant has requested a Long Form, Vital Records will determine whether information in the original Long Form has changed. If no information has changed, Vital Records will issue a certified copy of the Long Form as requested. If information on the Long Form has changed for a birth occurring prior to 2007, Vital Records will issue a standard size form, along with a letter explaining that a Long Form could not be issued.

As applicable here, Vital Records received your application for a search of your birth record and request for two copies of the Long Form, along with identification and payment. Vital Records processed the application as described *supra* and discovered a court-ordered determination of paternity had been filed. The order modified the information provided in the original Long Form by changing Ms. Berry's last name and adding a father's name. Thus, on August 9, 2012, Vital Records provided a copy of the standard sized birth certification along with a letter explaining that a certified copy of the Long Form could not be issued. The Department did not maintain a copy of the correspondence provided to Ms. Berry.

On September 6, 2012, Chris Allen, an employee in Vital Records, was contacted via telephone. Ms. Allen explained that because the information on your Long Form had been changed due to a paternity determination, the Long Form could not be issued. This was reiterated by Tiffany Bolden and Mary Keltner. In response to your statement that you had a right to such information pursuant to the Freedom of Information Act ("FOIA"), Ms. Keltner provided that FOIA is not applicable to vital records and that a Long Form could not be produced. You were advised that you were welcome to talk with the State Registrar, Erin Kellam.

On the same date, you appeared at the Department regarding your request. Ms. Conley spoke to Ms. Berry, and reiterated that the parties were not entitled to the Long



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Form. At that point, you asked to speak with a supervisor. You were informed that Ms. Keltner had just returned from lunch and you spoke to her by phone. Ms. Keltner again provided an overview of the reasons why a Long Form could not be provided. The Department does acknowledge that you were incorrectly informed that a court had sealed your records.

ANALYSIS

The public policy of the 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.” See I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. See I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. See I.C. § 5-14-3-3(a).

You submitted State Form 49607 to the Department for two copies of your Long Form. The form is titled “Application for Search and Certified Copy of Birth Record.” I would agree with the Department’s position that you have not made a request pursuant to the APRA; rather you made a request of the Department to conduct a search and provide a certified copy of your Long Form Birth Record pursuant to I.C. 16-37-1-10, as explicitly provided in the application that was submitted. Although a request for records does not require that the term “APRA” be invoked; in reviewing the application that you submitted to the Department, on multiple instances the application references the requirements of I.C. 16-37-1 *et seq.* and I cannot reasonably conclude that submitting such an application would qualify as a request for records as contemplated under the APRA.

I.C. 16-37-1-10 provides the following:

Sec. 10. (a) Except as provided in subsection (b), the records and files of the division of the state department concerning vital statistics are subject to this article and rules of the state department. Data contained in the records and files may be disclosed only as follows:

(1) The state registrar shall permit inspection of the records or issue a certified copy of a certificate or part of a certificate only if the state registrar is satisfied of the



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following:

(A) That the applicant has a direct interest in the matter recorded.

(B) That the information is necessary for the determination of personal or property rights or for compliance with state or federal law.

The state registrar's decision is subject to review by the state department or a court under this section.

(2) The state department may permit the use of data contained in vital statistical records for research purposes only, but no identifying use may be made of the data.

(3) In any extraordinary case that the state registrar determines is a direct tangible and legitimate public interest.

(b) The birth record of an adopted child remains subject to the confidentiality provisions of IC 31-19 regarding the release of adoption information.

The statute provides that the state registrar shall permit inspection of the records or issue a certified copy of a certificate or part of a certificate only if the state registrar is satisfied of certain conditions. Here, you have requested a Long Form, to which the state's registrar has denied. Specifically provided in I.C. 16-37-1-10(a)(1), the registrar's decision is subject to review by the Department or a court under this section; a process distinct from any action taken under the APRA. As you have received a denial from the state registrar, I would inquire with the Department regarding the appropriate procedure to request that the registrar's denial of your application be reviewed by the Department. If such review has already been conducted, the statute specifically provides that you may seek review of the registrar's decision by the trial court. As you have previously indicated in requesting priority status to your formal complaint that you intend to file a claim in the local circuit or superior court regarding the Department's denial, the Court would be able to make a determination whether the Department acted in compliance with I.C. 16-37 in denying your request, in addition to any determination whether the APRA was applicable and/or complied with.

Alternatively, even if your request could be interpreted as a request for records under the APRA, it is my opinion that the Department would not have acted contrary to the requirements of the law. Generally, 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



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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....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*. Further, a public agency is not required to conduct research in responding to a records request. See *Opinions of the Public Access Counselor 03-FC-146 and 05-FC-25*. Here, the Department advised that it does not maintain a certified copy of your Long Form. Specifically, the Department provided that certified copy of any certificate is only created upon request and issued pursuant to the limitations of state law (e.g. IC 16-37). Accordingly, if the APRA was applicable to your request, the Department would not have violated the law by failing to create a new record in response.

CONCLUSION

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

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Hilari A. Sautbine