



STATE OF INDIANA

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April 27, 2012

Kaitlin M. Crane
4205 Cromwell Drive
Evansville, Indiana 47725

Re: Formal Complaint 12-FC-87; Alleged Violation of the Access to Public Records Act by the Vanderburgh County Health Department

Dear Ms. Crane:

This advisory opinion is in response to your formal complaint alleging the Vanderburgh County Health Department (“Department”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* Joseph H. Harrison, Attorney, responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on March 23, 2012 you made an oral request of the Department to examine certain birth records. You were informed by an employee of the Department that birth records were not public records. In addition, you were provided with a form that you were required to fill out and provide identification prior to obtaining the records. The information provided by the Department related to birth certificates, which you informed the employee that you were seeking birth records, not a birth certificate. Again the employee denied your request.

A few hours later, you again inquired with the Department to clarify your request. You spoke with Erica, who provided similar guidance. You cited I.C. § 16-37-2-9, which states that the “permanent record shall be open to public inspection.” Erica provided to you that the Department followed Indiana law regarding the request and she could not give you the birth records due to your not having a relation to the person whose records you were seeking. You were informed that if the person was seventy-five (75) years or older, then records were open to the public; other than that, the records were not public.

Thereafter, you met with Gary Heck, Department Administrator. You specifically requested birth records of an individual, not the actual birth certificate. Mr. Heck provided that the Department did not have a copy of the birth record that you were seeking and advised that you go to the Willard Library to research their genealogy

department. He further advised that hospitals were responsible for maintaining birth records and encouraged you to contact various hospitals in the area.

In response to your formal complaint, Mr. Harrison advised that you appeared at the Department on March 23, 2012 and requested to see the birth certificate of Bill Bolin, the Evansville Chief of Police. At that time, you were informed that the requested birth certificate could not be provided pursuant to I.C. § 16-37-1-10. You then made a request for the birth record of Mr. Bolin. You were informed that the Department did not maintain a birth record for Mr. Bolin and encouraged to contact the Willard Library in Evansville as the birth record might be available there.

In 1993, Indiana adopted a permanent birth record statute pursuant to I.C. § 16-37-2-9. The statute provides that the local health officer shall make a permanent record of the following from a birth certificate: name, sex, date of birth, place of birth, name of parents, birthplace of parents, and date of filing of the certificate of birth. *See* I.C. 16-37-2-9. The permanent record shall be open to public inspection and the birth record of an adopted child remains subject to the confidentiality provisions of I.C. 31-19 regarding the release of adoption information. *See* I.C. § 16-37-2-9(b) and (c).

Since 1993, the Department has maintained a permanent record of all births which occurred in Vanderburgh County and the record is open to public inspection. A copy of said birth records are enclosed for your reference. As Mr. Bolin, the subject of your request, is older than nineteen year of age, the Department is not in possession of any records that would be responsive to your request. You were orally informed of this factor on the date of your request. Further, since 2004, more than half of all Vanderburgh County residents have been born at The Women's Hospital in Warrick County. Those birth records are located at the Warrick County Health Department in Boonville, Indiana.

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).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 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 days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or

exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Department orally acknowledged and responded to your oral requests on the date of their receipt. As such, it is my opinion that the Department complied with the requirements of section 9 of the APRA in responding to your request.

As added in General Assembly in 1993, I.C. § 16-37-2-9 provides the following:

Sec 9. (a) The local health officer shall make a permanent record of the following from a birth certificate:

- (1) Name
 - (2) Sex
 - (3) Date of birth
 - (4) Place of birth
 - (5) Name of the parents
 - (6) Birthplace of the parents
 - (7) The date of filing of the certificate of birth
- (b) Except as provided in subsection (c), the permanent record shall be open to public inspection.
- (c) The birth record of an adopted child remains subject to the confidentiality provisions of I.C. 31-19 regarding the release of adoption information.

Since the laws adoption, it has been amended in 1995, 1997, and 1998.

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 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*.

The Department has advised that the individual that you were seeking to inspect the birth record for was born prior to the enactment of I.C. § 16-37-2-9; accordingly the Department did not maintain a birth record that would be responsive to your request. It would seem that the Department’s response is premised on the notion that prior to the enactment of I.C. § 16-37-2-9 in 1993, the Department was under no obligation to keep a permanent birth record. However, I.C. § 16-1-16-6, enacted in 1949 and repealed in 1993 at the time of adoption of I.C. § 16-37-2-9, provided the following:

“The local health officer for such birth certificate shall make a permanent record of the name, sex, date of birth, place of birth, name and birthplace

of parents, and the date of filing of the certificate of birth which shall be open to public inspection. Provided, however, that records of the birth of children born illegitimately shall be kept in a separate record and shall not be open to public inspection. Disclosure of illegitimacy of birth or of information from which it can be ascertained may be made only upon order of a court or the judge thereof. "I.C. § 16-1-16-6; *State ex rel. Ely v. Allen Circuit Court*, 261 Ind. 419, 426 (Ind. 1973); *Evansville-Vanderburgh County Dep't of Health v. Evansville Printing Corp.*, 165 Ind. App. 437 (Ind. Ct. App. 1975).

The Recodification Derivation Table for Title 16 of the Indiana Code indicates that I.C. § 16-37-2-9 was derived from I.C. § 16-1-16-6. <http://www.in.gov/legislative/2405.htm>

The APRA places the burden of proof for the nondisclosure of a public record on the public agency. *See* I.C. § 5-14-3-1. I have nothing before me to indicate that I.C. § 16-1-16-6 would not have been applicable to the Department for birth records created prior to 1993. The APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(e). A public agency shall protect public records from loss, alteration, mutilation, or destruction. *See* I.C. § 5-14-3-7(a). If for example, the applicable retention schedule provided that the birth records are transferred to the State Archives or another public agency in Vanderburgh County after a certain period of time, the Department would have met its burden of nondisclosure. Alternatively, the Department could have met its burden of nondisclosure by establishing that I.C. § 16-1-16-6 was not applicable to your request. However, from what has been provided, it is my opinion that the Department has not met its burden of proof for nondisclosure and acted contrary to the APRA in denying your request for inspection.

CONCLUSION

Based on the foregoing, it is my opinion that the Department has not met its burden of proof for nondisclosure in denying your request for inspection and thus, acted contrary to the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Joseph H. Harrison