



STATE OF INDIANA

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September 26, 2013

Ms. Virginia Black
225 W. Colfax Ave.
South Bend, IN 46226

Re: Formal Complaint 13-FC-254; Alleged Violation of the Access to Public Records Act by the Indiana Department of Child Services

Dear Ms. Black,

This advisory opinion is in response to your formal complaint alleging the Department of Child Services, (“DCS”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et. seq.* Mr. John Wood, Esq, Deputy Chief Counsel, responded on behalf of the Department. His response is enclosed for your reference. 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 September 26, 2013.

BACKGROUND

Your complaint alleges that the Indiana Department of Child Services violated the Access to Public Records Act by denying your request in violation of Ind. Code § 5-14-3-3(b).

You allege that on or about June 26, 2013, you submitted a public records request to the Indiana Department of Child Services for information regarding an infant whose alleged abuse was investigated and assessed by DCS. Ms. Sheila E. Kinney, Esq., DCS Chief Counsel, responded to your request on July 1, 2013 stating that DCS was unable to locate any records pursuant to your request. This denial was based upon the statutory requirement that DCS may only release documentation when the child in question is determined by physicians to be in a condition of “near fatality”. See Ind. Code § 31-33-18-1.5, *et.al.*

You submitted a subsequent request on or about July 25, 2013. Mr. John Wood responded to that request reiterating that the release of the records was protected by statutory confidentiality and privacy considerations.

Your formal complaint was received by this Office on August 27, 2013 and postmarked on August 24, 2013. The date of DCS' denial was July 25, 2013 and is outside the statutory timeframe for submitting a formal complaint. Although this is an untimely filing of the formal complaint and you do not have standing to request an advisory opinion (Ind. Code § 5-14-5-7(a)), the issues in the complaint are sufficiently unique to be addressed and therefore will be analyzed under the APRA.

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 Ind. Code § 5-14-3-1. The Indiana Department of Child Services 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 DCS' 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 that the request has been received and information regarding how or when the agency intends to comply. All of DCS' responses were timely under the APRA.

DCS asserts that information you seek is declared confidential under state statute citing Ind. Code § 31-33-18-1. DCS further maintains that there are no records in their possession that would fall under the exception in section 1.5 of that statute. Mr. Wood states that the treatment records were created by local hospitals and do not contain any reference to the child experiencing a near fatal event.¹

42 U.S.C. 5106a(b)(4)(A) defines near-fatality as “an act that, as certified by a physician, places the child in serious or critical condition”. This definition is the controlling meaning of the term. It is beyond the scope of this Office to determine if DCS has the authority to further expand and clarify the definition. Regardless, I have taken into consideration any DCS policy. The Federal definition is the controlling factor in this opinion.

¹ DCS has not provided the medical records in question to this Office. Although the assertion that the records are not to be released to the Office of the Public Records Counselor is subject to debate, I will rely on the accuracy of their statement that the records contain no reference to near fatality.

If, as stated in their response, DCS has no certified documentation that the child was placed in serious or critical condition, then the records are not subject to disclosure under Title 33 or the APRA. Even if the child was in fact placed in serious or critical condition it is reasonable that DCS would need certified documentation in order to release them. It is recognized that DCS has an obligation to keep personal health information obtained from a hospital confidential unless the records qualify under Ind. Code § 31-33-18-1.5.

In the absence of a physician's certification, there is no obligation on the part of DCS to release the records to you. The proper course of action would be to obtain that certification from the hospital(s) where the child was admitted and present it to DCS. If that were to happen and the proper documentation provided, then DCS should release the records you seek. The Public Access Counselor is not a finder of fact and cannot ascertain if the records contain any language as a qualifying statement under the disclosure statute. In the absence of said certification, DCS is correct in stating that the only remedy would be to obtain a court order or subpoena from a trial court mandating disclosure.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Office of the Public Access Counselor that the Indiana Department of Child Services did not violate the APRA in denying your request.

Regards,

A handwritten signature in black ink, appearing to read 'L. H. Britt', with a large, sweeping flourish underneath.

Luke H. Britt
Public Access Counselor

cc: John Wood