
OPINION OF THE PUBLIC ACCESS COUNSELOR

BOB SEGALL,
Complainant,

v.

INDIANA STATE DEPARTMENT OF HEALTH,
Respondent.

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

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, Bob Segall, senior investigative reporter for WTHR-13, submitted a written request to the Indiana State Department of Health (ISDH) and the state's Joint Information Center seeking the following:

The number of (1) Covid-19 cases, and (2) Covid-19 deaths, at each licensed long-term care facility in Indiana

Because of the imminent threat to health and safety posed by COVID-19, I am requesting that ISDH expedite the release of this information and release the statistical data no later than Friday, April 24. To be clear, WTHR is *not* requesting *all* records related to COVID-19 at these facilities. We are specifically limiting this request to statistical information collected by ISDH that details which facilities have COVID-19 cases/deaths and the corresponding statistics at each facility. This is not a request for aggregate data, but rather for location-specific data. Indiana's Public Access Counselor told me today he also believes this information is releasable under the Indiana Access to Public Records Act because it does not contain identifiable information about specific patients.

I am requesting that the statistical information you provide to WTHR be as current and up-to-date as possible *and that you continue to provide this information to WTHR at least once per week for as*

long as ISDH requires Indiana long-term care facilities to report this COVID-19 information to the Department.

(Emphasis supplied in original). Segall contends that WTHR requested the same information

Two days later, ISDH emailed Segall acknowledging the request. ISDH asserted that it was unable to provide information on Segall's proposed timeline because the agency's full focus on responding to the pandemic.

On April 26, Segall filed a formal complaint² on behalf of himself and WTHR alleging that ISDH violated the Access to Public Records Act (APRA) by failing to disclose records containing facility-specific data about the number of COVID-19 cases and deaths at long-term care facilities.

In essence, Segall argues the statistical records he requested are not exempt from disclosure under APRA. Segall was clear he requested aggregate statistical information collected by ISDH from Indiana nursing homes and a standing request for updates on a weekly basis so long as ISDH collected it. He was clear that he was not seeking patient-level data, but did seek individual facility data. By his understanding, other states had released this data. He also sought an opinion from Indiana's Long Term Care Ombudsman, who considered the release of facility-specific data to be appropriate in Indiana.

² Segall requested priority status in accordance with 62 IAC 1-1-3. As presented, the complaint does not meet the criteria under the administrative rule to receive priority status.

In response, ISDH argues that the records Segall requested do not exist in the form he requested them. ISDH first argues, however, that the complaint was premature because it did not have an opportunity to deny the request, but merely acknowledged it. Segall contends that the context surrounding the request – including real-time denials in press conferences by the Health Commissioner and Governor seemingly denied those requests.

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. Segall's Request

In context, the question and answer session of the Governor's daily press conferences set the table for Segall's complaint. His request was seemingly denied during those sessions. While useful as background information, they will not be expressly considered for this analysis because the public records request process was not formalized until submitted in writing by Segall on April 24. That written, technically ISDH is correct that Segall's complaint was premature, but based on the totality of the circumstances the complaint will not be considered deficient and will be addressed accordingly.

3. ISDH's Response

As for the substantive request, ISDH maintains it does not synthesize the nursing home data in a manner that would be responsive to Segall's request. The agency contends that 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.³

³ A similar complaint has been against the Governor, whose staff provided a similar response that the Office of the Governor does not collect the data independent of ISDH.

This office also understands and appreciates the newsworthiness of the request and its importance to Hoosiers. Obtaining information regarding outbreaks amongst vulnerable populations allows families to make better decisions about their loved ones in those facilities. From my discussions with ISDH, Segall's goals are not mutually exclusive from the agency's goals. ISDH asserts that they simply do not have a running tally, database, or spreadsheet with that information. The agency addresses 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 ISDH to maintain a working document with updated facility-level data. If a document had existed and subsequently denied, legal justification would be required from ISDH to shield its disclosure. A rebuttal to the position of the Long Term Care Ombudsman was not solicited in this process.

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 the agency 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