
OPINION OF THE PUBLIC ACCESS COUNSELOR

ERIC W. BEERS
Complainant,

v.

INDIANA DEPARTMENT OF HEALTH,
Respondent.

Formal Complaint No.
21-FC-191

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Department of Health violated the Access to Public Records Act.¹ Attorney Kelly MacKinnon submitted statement on behalf of the agency. 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 November 15, 2021.

¹ Ind. Code § 5-14-3-1 to -10.

BACKGROUND

In this case we consider whether the Indiana Department of Health (IDOH) violated the Access to Public Records Act (APRA) regarding the production of public records.

On September 15, 2021, Eric Beers (Complainant), filed a public records request with the IDOH seeking the following:

The full results of the Indiana Department of Health's after action review (AAR) survey conducted in June and July 2021. This survey was announced to staff via email on June 29th with a closing date of Wednesday July 14th. The survey was administered using the Health Department Redcap account.

Six days later, IDOH acknowledged Beers' request by email. On October 26, 2021, IDOH denied Beers' request on grounds that the requested records constitute deliberative materials; and thus, could be withheld from disclosure in accordance with Indiana Code section 5-14-3-4(b)(6).

On November 15, 2021, Beers filed a formal complaint with this office. Beer argues that IDOH misapplied APRA's deliberative materials exception in this instance. Specifically, he asserts that the AAR survey results should not be classified as expressions of opinion, and they are not of a speculative nature. Beers cited the email sent by Health Commissioner Dr. Kris Box to all IDOH employees, which stated that the AAR survey was created to capture all details and lessons learned and to capture strengths and areas for improvement in all areas of response. Beers contends, based on the statements made in Dr. Box's email, that the information

collected via the AAR survey do not qualify as the speculations or opinions of the respondents.

On December 3, 2021, IDOH responded. IDOH maintains that the requested AAR survey documents meet all three elements of APRA's deliberative materials exception.² More specifically, IDOH argues the records are intra-agency materials because they were created and held by IDOH employees. Given that the survey respondents were sharing what they believe were strengths and need for improvement in the COVID-19 response, the results are expressions of opinion. Additionally, IDOH asserts that the information collected was used by agency decision makers to make changes to the ongoing response and to learn lessons for possible future responses.

IDOH contends that it properly applied APRA's deliberative materials exception when it denied Beers' request.

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 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

² Ind. Code § 5-14-3-4(b)(6).

copy IDOH's public records during regular business hours.
Ind. Code § 5-14-3-3(a).

2. Deliberative materials exception

Under APRA, a public agency has discretion to withhold deliberative material, which includes records that are:

intra-agency or interagency advisory...including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). Deliberative materials include information that reflects, for example, one's ideas, consideration, and recommendations on a subject or issue for use in a decision-making process. The Indiana Court of Appeals observed that the purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002).

Indiana Code does not place a qualification on what type of public record can contain deliberative material. Granted, most types of records contemplated involve emails or some type of direct communication. To my knowledge, a request for an internal survey has never been addressed by this office although we have considered surveys posited to extra-agency respondents.

In those instances, we have opined that because the materials were solicited from nonagency sources, it could not be considered deliberative. The material must be interagency or intra-agency communication.

Here, however, internal employees were surveyed, and their opinions solicited. This office has not reviewed the materials in question but materials like this seem to squarely fall into the type of information considered deliberative.

First, it is intra-agency communication between employees and the IDOH administration. Presumably the survey calls for subjective responses that are the opinions of the respondents. Moreover, the purpose of the survey is to craft an after-action report based, at least in part, on the survey answers given. The final product is not exclusively to consider past actions but is looking forward to future quality improvement decisions as well.

Although Beers' arguments are well taken and the deliberative materials exception is overused at times, this office does not consider it to be misapplied in this case.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Indiana Department of Health has not violated the Access to Public Records Act.

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor