



STATE OF INDIANA

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June 7, 2013

Mr. John H. Shean
1114 N. College Avenue
Bloomington, Indiana 47404

Re: Informal Inquiry 13-INF-26; Worker's Compensation Board

Dear Mr. Shean:

This informal opinion is in response to your inquiry concerning your request for records that was submitted to the Indiana Worker's Compensation Board ("Board"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Linda Hamilton, Chairman, responded in writing to your inquiry. Her response is enclosed for your reference.

BACKGROUND

On February 12, 2013, you submitted a written request to the Board for copies of the Board's First Report of Injury ("First Report of Injury"), Notice of Denial of Benefits ("Notice of Denial"), and Notice of Inability to Determine Liability/Request for Additional Time ("Notice of Inability to Determine"). You believe that the records are transmitted from the insurance carrier to the Board. You request that if available, the records be provided in an electronic format, preferably Microsoft Word or Excel. Your request was submitted via certified mail and was received by the Board on February 13, 2013.

On March 19, 2013, Ms. Hamilton responded in writing to your request. She interpreted your request to be not the actual form, but those that had been completed and submitted to the Board. Mr. Hamilton advised that she has not provided the documentation requested to any attorney. The Board's staff is educated on how to direct injured workers who are interested in seeking legal advice to those attorneys who have voiced a desire to receive referrals. The Board's website is set up to address worker's requests and the Board has endeavored to create this service in a form acceptable to all trial lawyers. Further, the Board does not have a system in place which would easily make the information accessible without burdening Board staff. The Board has no future plan in place to create such a system. If such a system is created, the information will be equally accessible to all interested parties.

On March 25, 2013, you responded in writing to Ms. Hamilton's denial. You indicated that you appreciated the Board's efforts to improve the state's workers compensation system for the benefit of injured workers and that you maintained similar goals. It has been your experience that the insurance industry rarely informs injured workers about all their rights under the Worker's Compensation Act ("Act"), and on occasion, intentionally provides misleading information. Regardless, you asked that the Board reconsider your request in line with the requirements of the APRA. The Board received your request to reconsider on March 26, 2013. Since that time, you have yet to receive any further response from the Board.

In response to your inquiry, Ms. Hamilton provided that the records sought are declared confidential pursuant to I.C. § 22-3-4-3, which states in relevant part: "(a) . . . The accident reports and reports of attending physicians shall be private records of the board, which shall be open to inspection of the employer, the employee, and their legal representatives, but not the public unless, in the opinion of the Board, the public interest shall so require." The accident reports sought are maintained electronically by the Board, through its "Accident Tracking" system. During the period in which the three forms may be filed, the injured work, the employer, and the insurance carrier are continually working towards an informal resolution to the claim in accordance with the Act. Further, the Board's practice of grouping the forms requested as accident reports is supported by its state mandated retention and disposition schedule. The Board's Retention Schedule 83-804 regarding Accident Files provides that the files contain:

"Records of injuries sustained in the course of employment where the compensation agreement is not disputed. May include correspondence and related records from the Ombudsman's Office. Confidential, [IC 22-3-4-3, (1995 Supplement) Retention based on IC 22-3-3-8 and IC 22-3-3-3, (1993 Edition)."

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 Board 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 Board'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). 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, your original request for

records was submitted in writing and received by the Board on February 13, 2013. The Board did not respond in writing to the written request until March 19, 2013. Accordingly, it is my opinion that the Board violated section 9(b) of the APRA by failing to respond to a written request in writing within seven (7) days of receipt.

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either “establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit” *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47.*

The Board's initial denial of your request that was submitted on March 19, 2013 makes no citation to the specific statutory exemption that would allow the Board to withhold the records that had been requested. Further, the request makes no mention that the forms requested are confidential. Thus, it is my opinion that the Board's March 19, 2013 denial of your request was made in violation of section 9(c) of the APRA as it failed to cite to the specific statutory exemption that would allow it to withhold the records that had been sought.

As to the Board's response to the informal inquiry that was filed, it has now cited to I.C. § 22-3-4-3 as its authority to deny the requested records and/or information. I.C. § 22-3-4-3(a) provides:

“Sec. 3. (a) The board shall prepare and cause to be printed, and upon request furnish free of charge to any employer or employee, such blank forms and literature as it shall deem requisite to facilitate or promote the efficient administration of this chapter, IC 22-3-2 through IC 22-3-3, and IC 22-3-5 through IC 22-3-6. The accident reports and reports of attending physicians shall be the private records of the board, which shall be open to the inspection of the employer, the employee and their legal representatives, but not the public unless, in the opinion of the board, the public interest shall so require.” I.C. § 22-3-4-3(a).

The First Report of Injury form provides background information on the employee involved, the carrier/claims administrator, and the incident that has occurred, along with any treatment information. I am assuming that the First Report form is completed by either the employer’s representative or the insurance carrier; in some cases it could be completed or information taken from an attending physicians’ report. The Notice of Inability to Determine form is completed by the employer or insurance carrier and is used to request additional time in order for a decision to be made regarding liability of the employer. I am assuming the form was created by the Board in order to provide a more orderly and efficient process for employers to request an extension of time to respond. The Notice of Denial is a form that is completed by the employer or insurance carrier in those situations where the employer intends to deny benefits to the injured employee. The form contains contact information for the employer and employee and a brief factual basis for the denial. I am assuming that the form has been created by the Board to facilitate the process of providing or denying benefits under the Act.

It is my opinion that the three forms cited would qualify as “accident reports” as provided in I.C. § 22-3-4-3(a), and thus are only open to the employer, the employee and his or her legal representative, but not the public, unless in the Board’s opinion the public interest does not require disclosure. The three forms requested were created by the Board to promote the efficient administration of the Act. The Act does not specifically define “accident reports, but there is no doubt that the forms all relate to injuries/accident that have occurred at the workplace that require the Board’s involvement. The Board’s Retention Schedule 83-804 regarding Accident Files provides further support that the forms would be properly characterized as “accident reports” as noted in Ms. Hamilton’s response to your inquiry. The Board has made a determination that public interest does not require disclosure in response to your request; further, Ms. Hamilton has advised that the Board has not arbitrarily denied access to the completed forms, as all attorneys who have requested such information have been denied. Accordingly, unless you are the employer, the employee, or the employee’s legal representative, the Board may properly deny you request pursuant to I.C. § 22-3-4-3(a) for access to the completed forms.

Please let me know if I can be of any further assistance.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: Linda Hamilton