



# STATE OF INDIANA

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Emily Hopkins, Data Reporter  
The Indianapolis Star  
130 South Meridian Street  
Indianapolis, IN 46225

Via email @: emily.hopkins@indystar.com

**Re: Informal opinion; 20-INF-08; Hospital executive salary information**

Dear Emily,

This informal opinion is in response to your inquiry regarding hospital executive salary information. In accordance with Indiana Code section 5-14-4-10(6), I issue the following informal opinion.

## BACKGROUND

During June 2020, you submitted public records requests to 22 hospital systems in Indiana seeking records regarding the compensation for executive level staff. At the time of your inquiry to this office, 19 of the hospitals denied your requests based on Indiana Code section 16-22-3-12(e), which gives the discretion to hospitals to withhold or release the records.

You raise a series of questions in your inquiry. First, you seek clarification on whether hospitals must withhold the salary information as confidential or if the nondisclosure is discretionary on their part.

Second, you ask whether the law, passed in 2016, is retroactive to historical salaries, some of which are still available on the State Board of Accounts' website. If not, you want to know if the hospitals are required to release pre-2016 data.

Finally, you ask what are the ramifications if an agency denies disclosure of information that is readily available elsewhere, be it historical data or information collected by another entity that publishes the data in another location.

### 1. The Access to Public Records Act (APRA)

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official

acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1.

The Access to Public Records Act (APRA) says “(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.” *Id.*

There is no dispute that Indiana county hospitals are public agencies for the purposes of the APRA; and thus, subject to the law’s disclosure requirements. Ind. Code § 5-14-3-2(q)(6). Therefore, unless otherwise provided by statute, any person may inspect and copy the hospital’s disclosable public records during regular business hours. *See* Ind. Code § 5-14-3-3(a). Even so, APRA contains both mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)–(b).

This case involves the application of APRA’s discretionary exceptions vis-à-vis another statute in the Indiana Code.

## **1.2 Hospital executive salary data**

In 2016, the Indiana General Assembly amended Indiana Code section 16-22-3-12.<sup>1</sup> The legislature added subsection (e), which provides the following:

Any information concerning the specific salaries paid to individual employees of a hospital may be withheld by the hospital from disclosure under IC 5-14-3. However, the information must be provided to the state board of accounts upon request. The state board of accounts shall maintain the confidentiality of the information as required under IC 5-14-3-6.5.

Ind. Code § 16-22-3-12(e). In effect, this subsection broadens the types of information listed in Indiana Code section 5-14-3-4(b) as the kinds of documents which may be released at the discretion of the agency.

Neither statute makes the information confidential or nondisclosable, it simply gives the hospital the choice whether to disclose or release the salaries. Notably, this is in contrast to another provision of APRA that requires a public agency to disclose employee compensation information. *See* Ind. Code § 5-14-3-4(b)(8)(A).

The word “may” implies that discretion, while “shall” would have made it confidential. The absence of shall preserves that discretion and a hospital can release the information if it chooses. Interestingly enough, the plain language of the statute appears to attach confidentiality to the state board of accounts upon the predicate of transmission of the information to them. This does not erode the discretionary portion of the former section of the statute.

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<sup>1</sup> P.L.208-2016, SEC.5, eff. July 1, 2016

### **1.3 Historical data and alternative availability**

You also inquire about access to historical salary information. The statute is written in the present tense and should be considered a snapshot at the time of a public records request for the salary information. Indiana Code section 16-22-3-12(e) is silent as to present or historical data and can be interpreted as all salary data, irrespective of temporal considerations.

At the same time, statutes are typically prospective in their application rather than retroactive. Although it is not clear what conclusion a court would reach, there is at least an argument that the 2016 amendment does not extend retroactively to cover the salary records originating before the amendment took effect.

Additionally, it does not matter if the information is available elsewhere from another source. The statute grants an unqualified discretion to county hospitals to withhold the records and can reasonably be read in a vacuum. Confidentiality only attaches to the receipt by the State Board of Accounts, but no other agency, which presumably may publish as they wish. For the hospital's part, however, regardless of publication elsewhere, hospitals retain discretion to disclose or withhold.

Please do not hesitate to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt  
Public Access Counselor