



STATE OF INDIANA

ERIC J. HOLCOMB, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room
W470

Indianapolis, Indiana 46204-2745

Telephone: (317)234-0906

Fax: (317)233-3091

1-800-228-6013

www.IN.gov/pac

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Kelly MacKinnon
Chief Legal Counsel
Indiana Department of Health
2 North Meridian Street
Indianapolis, IN 46204

VIA EMAIL: KMacKinnon@health.in.gov

RE: 23-INF-15; Terminated pregnancy reports

Dear Ms. MacKinnon,

This informal opinion addresses the issue of access to terminated pregnancy reports. Based on a statutory change in 2022, terminated pregnancy reports require more robust information than in prior iterations of the law. Toward that end, the Indiana Department of Health (IDOH) has concerns about confidentiality and whether the report should be withheld in their entirety under the Access to Public Records Act.

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 Department of Health is a public agency for purposes of APRA; and therefore, subject to the law's 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 IDOH's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Notably, APRA contains exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a), to -(b). This inquiry involves the intersection of APRA and statutes regarding medical records.

2. Terminated pregnancy reports

A special legislative session in 2022 outlawed abortion in Indiana except for in a few emergency circumstances.¹ For legal procedures, Indiana law requires a physician who provides an authorized abortion to file a form with IDOH.² This form calls for over 30 categories of information to be reported, including but not limited to, demographic data and patient medical history.

Your inquiry concerns the release of this form in its entirety. Given that the report is populated with information that could be reverse engineered to identify patients—especially in smaller communities—you argue that the required quarterly reports³ should suffice in terms of satisfying any disclosure and transparency considerations.

This office agrees.

APRA declares patient medical records created by a provider confidential. Ind. Code §5-14-3-4(a)(9). While the form is created by a provider pursuant to a statutory reporting requirement, there is no question that the information contained therein is part of a patient medical record. Stated differently, the creation of the form is an immediate consequence of a medical service. Without the provider-patient relationship, the form would not exist.

It follows that IDOH should treat the form with the same confidentiality considerations as any other patient medical record. Even if the report could be qualified as something other than a medical record (e.g., an administrative reporting document), the statute itself seems to imply that the form is non-public. Subsection (e) mandates IDOH “compile a *public* report” providing aggregate statistics on a quarterly basis. Implicitly, this suggests the individual forms are non-public.

Insofar as pinpoint redactions are concerned, it is true that APRA requires separation and release of disclosable versus non-disclosable material.⁴ This requires an agency to separate and withhold confidential information but disclose the remainder. This provision hinges on the practicality of the exercise. Courts will mandate separation when disclosable materials are not inextricably linked to confidential materials.⁵ Here, however, the entirety of the form is a medical record. Separation and redaction would defeat the statutory purpose of the confidentiality requirement declaring “patient medical records”

¹ Public Law 179-2022(ss)

² Ind. Code § 16-34-2-5.

³ Ind. Code § 16-34-2-5(d).

⁴ Ind. Code § 5-14-3-6.

⁵ *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893, 914 (Ind.Ct.App.2005).

non-disclosable. Medical records as monolithic documents can be withheld in their entirety.

This position is also consistent with the Indiana Medical Licensing Board's recent finding that disclosure of even partial and seemingly non-identifiable information by medical providers can lead to legal consequences.⁶

CONCLUSION

Based on the foregoing, it is the opinion of this office that terminated pregnancy forms submitted in accordance with Indiana Code section 16-34-2-5 should be withheld from disclosure in their entirety.



Luke H. Britt
Public Access Counselor

⁶ In the matter of the license of Caitlin Bernard, M.D., 2022 MLB 0024.