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April 11, 2024

OFFICIAL OPINION 2024-2

The Honorable Andy Zay
Indiana Senate
200 West Washington Street
Indianapolis, Indiana 46204

RE: Nondisclosure of Terminated Pregnancy Reports

Dear Senator Zay:

You requested an opinion from the Office of the Indiana Attorney General (OAG) regarding whether Terminated Pregnancy Reports (TPRs) are confidential and subject to public disclosure.

QUESTION PRESENTED

Are TPRs disclosable pursuant to the Indiana Access to Public Records Act (APRA)?

BRIEF ANSWER

APRA presumptively provides for disclosure of public records. Its exception for "medical record" does not encompass TPRs. Although the term "medical record" is not defined, its ordinary meaning and context indicate that the term refers to confidential patient records maintained by providers for diagnosis, treatment, and prognosis. TPRs do not fall into that category. TPRs are reports submitted to a public agency for purposes of evaluating compliance with state statutes governing abortion. The purpose and intentions of the TPR statutes would be frustrated if the form was confidential and non-disclosable in its entirety. To the extent there may be any information that could reasonably identify a pregnant woman who received an abortion, the agency may redact that information and still disclose the record to fulfill the TPR's statutory purpose.

BACKGROUND

A TPR is a report that must be submitted by a health care provider to the Indiana Department of Health (IDOH) each time an abortion is performed. Ind. Code § 16-34-2-5. The purpose and function of TPRs are twofold: "the improvement of maternal health and life through

the compilation of relevant maternal life and health factors and data, and…**to monitor all abortions performed in Indiana to assure the abortions are done only under the authorized provisions of the law.**" Ind. Code § 16-34-2-5(a) (emphasis added). Subsection 5(a) continues by enumerating the specific information to be collected on the form. For many years, members of the public have requested copies of TPRs for various reasons, and the OAG has also requested them as part of its investigatory and licensing processes, including complaints about health care providers. To the best of the OAG's knowledge, IDOH has never expressed to this office or another requestor that the TPRs are confidential and must be withheld from disclosure.

This changed on December 19, 2023, when the Public Access Counselor (PAC), Luke Britt, at the request of the Chief Legal Counsel at IDOH, released an informal opinion to IDOH's Chief Legal Counsel declaring TPRs as medical records and therefore, opining that the agency could withhold them "in their entirety".[1] In other words, TPRs would no longer be available for public inspection. The PAC opinion, issued at the request of IDOH, appears to be an abrupt change in policy and practice by IDOH.

Relevant Statutes

Ind. Code § 5-14-3-1 reads in relevant part:

> [I]t is the public policy of the state 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. Providing persons with the information is an essential function of a representative government […] This chapter shall be liberally construed to implement this policy . . .

Ind. Code § 5-14-3-2(r) reads in relevant part:

> "Public record" means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-3(a) reads in relevant part:

> Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of this chapter. […]

[1] PAC Informal Opinion, 23-INF-15, Dec. 19, 2023, p.3; available at: https://www.in.gov/pac/files/informal/23-INF-15.pdf.

Ind. Code § 5-14-3-4(a) reads in relevant part:

> The following public records are excepted from section 3 of this chapter and may not be disclosed by a public agency, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery:
>
> (1) Those declared confidential by state statute.
>
> (2) Those declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute.
>
> (3) Those required to be kept confidential by federal law.
>
> […]
>
> (9) Patient medical records and charts created by a provider, unless the patient gives written consent under IC 16-39 or as provided under IC 16-41-8.

Ind. Code § 5-14-3-6(a) reads in relevant part:

> If a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed and make it available for inspection and copying.

Ind. Code § 16-18-2-168(a) reads in relevant part:

> "Health records", for purposes of IC 16-39, means written, electronic, or printed information possessed or maintained by a provider concerning any diagnosis, treatment, or prognosis of the patient, including such information possessed or maintained on microfiche, microfilm, or in a digital format. The term includes mental health records and alcohol and drug abuse records.

Ind. Code § 16-34-2-5(a) reads in relevant part:

> Every health care provider who performs a surgical abortion or provides, prescribes, administers, or dispenses an abortion inducing drug for the purposes of inducing an abortion shall report the performance of the abortion or the provision, prescribing, administration, or dispensing of an abortion inducing drug on a form drafted by the state department, the purpose and function of which shall be the improvement of maternal health and life through the compilation of relevant maternal life and health factors and data, and a further purpose and function shall be to monitor all abortions performed in Indiana to assure the abortions are done only under the authorized provisions of the law. […]

Ind. Code § 16-34-2-5(b) reads in relevant part:

> The health care provider shall complete the form provided for in subsection (a) and shall transmit the completed form to the state department, in the manner specified

> on the form, within thirty (30) days after the date of each abortion. However, if an abortion is for a female who is less than sixteen (16) years of age, the health care provider shall transmit the form to the state department and separately to the department of child services within three (3) days after the abortion is performed.

ANALYSIS

TPRs are not patient medical records and are disclosable pursuant to APRA

APRA

Indiana's public policy is "that all persons are entitled to full and complete information regarding the affairs of government…" and APRA is "liberally construed to implement this policy." Ind. Code § 5-14-3-1. APRA is intended to "ensure Hoosiers have broad access to most government records" and courts "apply a presumption in favor of disclosure." *Evansville Courier & Press v. Vanderburgh County Health Dept.*, 17 N.E.3d 922, 928-29 (Ind. 2014). With the exceptions listed in section 4 of the chapter, APRA declares that "[a]ny person may inspect and copy the public records[2] of any public agency" during the agency's regular business hours. Ind. Code § 5-14-3-3(a). Such exceptions include records declared confidential by state or federal law, or a rule adopted by an agency with specific statutory authority to classify certain records as confidential, as well as "patient medical records and charts created by a provider" unless the patient provides written consent. Ind. Code § 5-14-3-4(a)(1), (2), (3), and (9). If a public record contains both disclosable and non-disclosable material, the public agency must "separate" the disclosable material and make it available for public inspection. Ind. Code § 5-14-3-6(a).

Patient medical records

As noted *supra*, the PAC's informal advisory opinion, 23-INF-15, summarily declared TPRs are medical records and because medical records are confidential under state law, this would mean that TPRs are no longer available for public inspection. This also means that the OAG cannot readily obtain TPRs for investigatory purposes.

The PAC reasons that because the TPR is created by a provider as a result of a medical service, the TPR is therefore clearly a patient medical record:

> 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.

[2] APRA broadly defines a public record as "any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics." Ind. Code § 5-14-3-2.

It follows that IDOH should treat the form with the same confidentiality considerations as any other patient medical record.[3]

The Indiana Code does not define the term "patient medical records and charts created by a provider." Ordinarily, however, the term "medical record" refers to records that contain a patient's medical information and are created for the purpose of providing treatment to that patient. For example, Merriam-Webster defines "medical record" as "a record of a patient's medical information (as medical history, care or treatments received, test results, diagnoses, and medications taken)."[4] The National Institutes of Health (NIH) declares that medical records "offer information on diagnoses, procedures, lab tests, and other services" and "used to track events and transactions between patients and health care providers."[5]

That understanding is consistent with the Indiana Code's use of similar terms. Even though the Indiana Code does not define "medical record," it does define the term "health records." The health records statutes are located at Ind. Code art. 16-39. Ind. Code § 16-18-2-168(a) defines a health record as "written, electronic, or printed information possessed or maintained by a provider concerning any diagnosis, treatment, or prognosis of the patient…", similar to the NIH definition, *supra*. Ind. Code § 16-18-2-272(d) defines a patient for purposes of Ind. Code art. 16-39 as "an individual who has received health care services from a provider for the examination, treatment, diagnosis, or prevention of a physical or mental condition."

The ordinary meaning of "medical record," however, does not encompass any document that might contain information about a person's health; simply because a record contains information relating to a medical procedure does not automatically mean it is a "patient medical record created by a provider." Reports containing aggregated data about health events (births, deaths, infections, etc.) and documents reflecting social inquiries after a person's health are not commonly understood to be "medical records."

TPRs, unlike patient medical records, do not belong to the patient; providers do not have to obtain a patient's informed consent before submitting a TPR. Nor are TPRs created by a provider for the purpose of tracking a patient's diagnosis, treatment, or prognosis. TPRs do not even identify a specific patient on which the abortion was performed. Rather, TPRs are created and submitted so that others can evaluate *the provider's* compliance with Indiana laws governing abortion. In a case regarding whether student-related information was an education record, the Indiana Court of Appeals noted that the United States Supreme Court had previously found that although peer-graded papers "contained information directly relating to a student and met the first requirement for an education record," they were not "maintained" by the school or someone acting on its behalf. *Unincorporated Operating Div. of Indiana Newspapers, Inc., Indiana Corp. d/b/a The Indianapolis Star v. The Trustees of Indiana University*, 787 N.E.2d 893, 905 (2003) (citing *Owasso Indep. Sch. Dist. v. Falvo,* 534 U.S. 426 (2002)).

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[3] *Supra*, note 1, at p. 2.
[4] https://www.merriam-webster.com/medical/medical%20record (last accessed Mar. 26, 2024)
[5] NIH, *Course: Finding and Using Health Statistics*, https://www.nlm.nih.gov/oet/ed/stats/03-200.html (last accessed Mar. 26, 2024).

A similar parallel can be drawn to TPRs and the records at issue in the *Indianapolis Star* and *Falvo* cases. In other words, while TPRs may contain information related to medical care provided by a health care provider, that does not make it a patient medical record without more. The TPRs do not contain information directly identifying a patient. The receiving agency—IDOH—cannot directly determine a patient's identity from the TPR. In the *Falvo* case, the students were more identifiable than a pregnant woman on a TPR because the records were peer graded. However, they were not maintained by the school, so it was not an educational record for purposes of the Family Education Rights and Privacy Act (FERPA). Similarly, in *Evansville Courier & Press v. Vanderburgh County Health Dept.*, the Indiana Supreme Court held that death records, with the cause of death stated, were not confidential and were therefore open to public inspection. 17 N.E.3d 922 (Ind. 2014). There, the Court distinguished between a certificate of death registration, which was confidential, and the certificate of death, which was not. *Id.* at p. 930. One critical distinction was the purpose of the two records:

> As we read the statute, the General Assembly has drawn a distinction between a certificate of death, which is intended to record cause of death data for use by health officials, and a certification of death registration, which is intended to authenticate the death for the purpose of property disposition. The former is a public record, while the latter is confidential.

Id. The Court gave weight to the death certificate's purpose of recording cause of death data as a reason for it to be public record, while at the same time acknowledging the intensely personal information contained therein:

> In our society, death is an intimate and personal matter. We recognize that public disclosure of the details of a decedent's death may cause pain to his family and friends. We are also mindful of the importance of open and transparent government to the health of our body politic. Our General Assembly has considered these competing interests and, insofar as we can determine, concluded that the public interest outweighs the private.

Id. at pp. 930-31. Importantly, the Court found that transparency in government operations was paramount and that the General Assembly had weighed the benefits and risks of declaring the document open to public inspection. The same can be said for TPRs—one purpose is to monitor for compliance with laws. If the TPR is confidential and the IDOH refuses to disclose it, even to the OAG or other enforcement officials, then it becomes impossible to ensure that providers are complying with our state laws.

Other terms confirm that APRA's exclusion for medical records does not encompass every document reporting health-related information. Significantly, APRA requires records and charts to be "*patient* medical records and charts." Ind. Code § 5-14-3-4(a)(1), (2), (3), and (9) (emphasis added). Put another way, the record must belong to a patient. APRA's provision that otherwise medical records may be disclosed with a patient's informed consent reflects the statute's presumption that the records belong to the patient. Additionally, the exception requires the record to be "created by the provider." Records containing health-related information created by other persons do not satisfy the statutory exclusion for patient medical records.

To summarize, the statutory exclusion requires records to (1) be a specific patient's record, (2) be a medical record or chart, and (3) be created by the patient's provider.

TPRs

As noted *supra*, TPRs serve two statutory purposes, to monitor maternal health and ensure compliance with Indiana's pro-life laws:

> Every health care provider who performs a surgical abortion or provides, prescribes, administers, or dispenses an abortion inducing drug for the purposes of inducing an abortion shall report…on a form drafted by the state department, the purpose and function of which shall be the improvement of maternal health and life through the compilation of relevant maternal life and health factors and data, and a further purpose and function shall be to monitor all abortions performed in Indiana to assure the abortions are done only under the authorized provisions of the law

Ind. Code § 16-34-2-5(a). TPRs are submitted electronically to the IDOH, which then stores the individual records. Ind. Code § 16-34-2-5(e) requires the IDOH to compile a quarterly public report that includes statistics obtained from the TPRs for both the previous calendar quarter and the previous calendar years, with updated information for the calendar quarter that was submitted to the state department after the compilation of the statistics; it must also compile an annual report which is submitted to the federal Centers for Disease Control pursuant to subsection (f).

Statistical information provides an overview of general trends by the "collection, analysis, interpretation, and presentation of masses of numerical data."[6] "Masses" of data compiled into a report gives the public an idea of the numbers of abortions and what types of abortions are performed in the state, but it provides no insight into whether providers are complying with abortion laws when performing such procedures. Information contained directly in the TPR itself can provide such insight, including reporting dates, the age of the fetus at the time of abortion, whether the pregnant woman sought the abortion as a result of abuse or trafficking, and the age of the pregnant woman (which may help indicate possible child sexual abuse). A quarterly or annual report will not provide information on an individual abortion procedure, so it would be impossible to monitor compliance with pro-life laws merely with one of those reports.

For example, in the quarterly TPR report for October 1-December 31, 2023, five (5) pregnancies were terminated when the fetus was at or over 21 weeks' gestational age, accounting for just under 11% of total abortions performed for that quarter; twenty-two (22), or just under 48%, were terminated when the fetus was between 14-20 weeks' gestational age.[7] Eleven (11) nonsurgical (medical) abortions were performed on pregnant women whose fetus's post-fertilization age was over eight (8) weeks, accounting for over half (52%) of the nonsurgical abortions in that quarter[8] and in contravention of state law:

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[6] Definition of "statistics", https://www.merriam-webster.com/dictionary/statistics (last accessed Jan. 18, 2024).
[7] *October 1-December 31, 2023, Terminated Pregnancy Report*, issued Feb. 29, 2024; available at: https://www.in.gov/health/vital-records/files/CY2023Q4-TPR-Report.pdf. (last accessed Apr. 4, 2024).
[8] *Id*.

> …under this article, an abortion inducing drug may not be dispensed, prescribed, administered, or otherwise given to a pregnant woman after eight (8) weeks of postfertilization age.

Ind. Code § 16-34-2-1(a)(1). While members of the public can see from the quarterly reports that multiple violations of Indiana's pro-life laws may have occurred, as of December 2023, no one can confirm whether such violations occurred and by whom. Ind. Code § 25-1-7-2 grants the OAG the authority to "receive, investigate, and prosecute complaints concerning regulated occupations." This includes physicians, which are regulated pursuant to Ind. Code art. 25-22.5. Ind. Code § 16-34-2-7 makes performing an unlawful abortion a criminal offense.

Classifying TPRs as patient medical records would make them contrary to their function and purpose under Indiana law

The inability to receive TPRs as a matter of course impedes the ability of the OAG to perform its statutory duties of investigating provider complaints. As previously stated, TPRs are not patient medical records for a multitude of reasons. Looking at the definition of a "health record" under Indiana law, the classification of a record as a "health record" appears dependent upon three distinct points: an individual sought medical care (a patient), someone provided such services (the provider), and the provider documented the service and maintains possession of such documentation (record). This classification is dependent upon the content of the record and the relationship of the patient to the individual possessing and maintaining the record, not upon how many documents of the same type may be in the possession of the provider or the receiving entity.

APRA requires the separation of confidential material from disclosable material if a record contains both, yet the PAC declares the TPRs to be patient medical records and as "monolithic documents" that "can be withheld in their entirety."[9] However, the PAC's own interpretation is not in the spirit of APRA, which leans in favor of disclosure and statutorily requires a state agency to separate out non-disclosable material:

> APRA permits redaction in that it specifically mandates separation of discloseable from non-discloseable information contained in public records containing both. I.C. § 5–14–3–6(a). Therefore, if a public record contains some information which qualifies under an exception to public disclosure, instead of denying access to the record as a whole, public agencies must redact or otherwise separate those portions of the record which would otherwise render it non-discloseable.

The Indianapolis Star, 787 N.E.2d at 907-08. In this case, the Trustees of Indiana University implored the court to make entire documents non-disclosable because some of the document contained confidential information. However, the court disagreed, noting APRA's requirements:

> The question remains as to what to do with this combination of factual matters and deliberative materials. The Trustees would have us declare an entire document non-discloseable based upon the fact that it contains some speculative material or

[9] *Supra*, note 1, at p.3.

> expressions of opinion. … However, section 6 of APRA requires a public agency to separate discloseable from non-discloseable *information* contained in public records. I.C. § 5–14–3–6(a). ***By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception***. … Instead, we agree with the reasoning of the United States Supreme Court in *Mink*...that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. Consistent with the mandate of APRA section 6, any factual information which can be thus separated from the non-discloseable matters must be made available for public access.

Id. at pp. 913-14 (emphasis added). The PAC reads this passage to declare that separation of documents "hinges on the practicality of the exercise. Courts will mandate separation when disclosable materials are not inextricably linked to confidential materials," citing the *Indianapolis Star* case as support. However, reading the passage in context indicates that the court actually requires disclosure of materials once the confidential material is separated, or redacted, from the document, unless the agency can demonstrate there is no "separable, factual information" in the document. *Env't Prot. Agency v. Mink*, 410 U.S. 73, 93 (1973). That is not the case with TPRs, which are not documents that identify a patient. Even if there were some fields that the agency has reasonable grounds to believe could be used to identify a patient through "reverse engineering," those fields could be redacted from the document and make the rest of the TPR disclosable. It is disingenuous at best to argue that there is no "separable, factual information" available in TPRs that can be separated from any data the IDOH alleges may be "reverse engineered" to identify a patient. *See The Indianapolis Star*, 787 N.E.2d at pp. 907-08 ("In other words, with all identifying information redacted from the student disciplinary records, they no longer "contain[ed] information directly related to a student" or "personally identifiable information" of a student."). Unlike the claims of the PAC and the IDOH, it seems that courts are loathe to withhold documents in their entirety if there is a possibility of redaction:

> Therefore, we instruct the trial court upon remand to review the Reed materials and redact or otherwise separate any portion of these documents which might contain information that could identify any present or former students in violation of the confidentiality mandated by FERPA. In such a way, the Star would have access, albeit limited by redaction, to the materials it seeks pursuant to APRA, and the Trustees would protect the privacy of student information in accordance with FERPA. The Trustees claim that such redaction is impossible, in that the interviews by their very nature will give away the identity of the students involved. However, as discussed above, there are several examples in the document log which belie this argument.

The Indianapolis Star, 787 N.E.2d at p. 909.

The IDOH is the state's public health agency, whose stated mission is "To promote, protect, and improve the health and safety of all Hoosiers."[10] However, even though it receives TPR submissions from providers, the IDOH does not monitor or enforce violations of TPR statutes, although Indiana law requires the agency to license and regulate hospitals. Ind. Code art. 16-21. There is no indication the agency routinely monitors the TPRs themselves to determine if a violation of Indiana's laws has occurred. Consequently, other enforcement agencies must augment and enforce those laws, and fulfill the IDOH's stated mission to "protect…Hoosiers." One statutory purpose of a TPR is to "monitor all abortions performed in Indiana to assure the abortions are done only under the authorized provisions of the law." Ind. Code § 16-34-2-5(a). Like annual death reports, quarterly and annual TPR reports do not provide the same level of detail as an actual death certificate or TPR. For instance, from July 1-September 30, 2023, there were seven (7) nonsurgical (medical) abortions performed on pregnant women whose fetus's post-fertilization age was over eight (8) weeks.[11] Individual TPRs obtained before their reclassification as patient medical records indicates that during that same time period, two (2) of the fetuses had a post-fertilization weeks age of eighteen (18) weeks (twenty (20) weeks gestational age) and one had a post-fertilization age of fifteen (15) weeks (seventeen (17) weeks gestational age); two of those were born alive and later died. Without individual TPRs, it is not possible to investigate the provider of such abortions to ascertain compliance with Indiana's laws.

Like death certificates, TPRs are public records open to public inspection for the purposes of government transparency. Like death certificates, the existence of annual reports based on information contained therein does not "implicitly…suggest the individual [TPR] forms are non-public."[12] The TPRs can be redacted to balance the privacy concern regarding the pregnant woman who received an abortion, the public's right to inspection of public records, and the need of enforcement agencies to review these documents to monitor compliance with laws or investigate complaints and allegations that such laws were violated.

CONCLUSION

Ind. Code § 16-18-2-168(a) defines a health record as "written, electronic, or printed information possessed or maintained by a provider concerning any diagnosis, treatment, or prognosis of the patient…" for purposes of Ind. Code art. 16-39. TPRs are not patient medical records; they are public records that are open to public inspection pursuant to APRA. Had the legislature intended to classify TPRs as confidential, it could have done so. It did not. To classify the TPR as otherwise would inhibit the statutory intentions of the form explicitly provided for in statute. To the extent there may be any information that could reasonably identify a pregnant woman who received an abortion, the agency can redact that information and still disclose the record to fulfill the TPR's statutory intention.

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[10] See IDOH website, available at: https://www.in.gov/health/directory/office-of-the-commissioner/about-the-agency/mission-and-vision/ (last accessed Mar. 27, 2024).

[11] *July 1-September 30, 2023, Terminated Pregnancy Report*, issued Dec. 29, 2023; available at: https://www.in.gov/health/vital-records/files/CY2023Q3-TPR-Report.pdf. (last accessed Apr. 4, 2024).

[12] *Supra*, note 1, at p.2.

Sincerely,

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