

June 23, 2005

*Sent Via Facsimile*

Krista J. Stockman  
c/o *Journal Gazette*  
600 W. Main Street  
Fort Wayne, IN 46802

*Re: Formal Complaint 05-FC-104; Alleged Violation of the Access to Public Records Act by the Fort Wayne-Allen County Department of Health*

Dear Ms. Stockman:

This is in response to your formal complaint alleging that the Fort Wayne-Allen County Department of Health (“Department”) violated the Access to Public Records Act (“APRA”) by refusing to disclose that part of its records showing the name of a day care facility that experienced an outbreak of E. coli.

#### BACKGROUND

You wrote a letter to the Department on April 18, 2005 in which you sought “copies of all correspondence between the Fort Wayne-Allen County Department of Health and any day care facility in Allen County regarding E. coli for the month of May 2005, and any other documentation regarding E. coli at a day care facility during that time period...”

The Department wrote the next day in response to your request. Mindy Waldron, Director of Communications for the Department cited Ind. Code 16-41-8-1 to deny “any epidemiological information (including the name of the facility) with regard to our ongoing investigation with the day care.” However, Ms. Waldron disclosed two items: 1) a form letter to the day care center from the health department guiding the day care center in preventing further infection; and 2) a form notification letter to parents with children at the day care center, notifying them of the outbreak and advising them of proper procedures for detecting the resulting illness and the means to prevent illness. Neither record disclosed the name of the day care facility.

You have filed this formal complaint because you are seeking the name of the day care center that experienced the incidence of E. coli. Further, you believe the application of IC 16-41-8-1 is in error.

I sent a copy of your complaint to the Department. In response, Ms. Waldron reiterated that IC 16-41-8-1 protects information identifying the day care center from disclosure. In addition, she states that the Health Insurance Portability and Accountability Act (HIPAA) at 45 CFR 164.502 [hereinafter, "the Privacy Rule"] prohibits disclosure of "individually identifiable health information." In further discussion, Ms. Waldron explains that after consultation on the matter with the state health department, the following facts were taken into account, which I summarize as follows:

- (1) All day care attendees and their families were notified about the outbreak;
- (2) The facility was not a public venue where continuing spread of the disease was a threat;
- (3) Public health measures designed to contain the disease were in effect;
- (4) The facility was small, and the reported cases involved a high percentage of the total attendance at the facility. Naming the facility was tantamount to naming individuals who were exposed to the disease. If the day care facility became known to the public, persons who knew children who attended the facility would know the child had been exposed to the infection.

I have enclosed a copy of the response letter for your reference.

#### ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). A public agency may deny a request made in writing if the denial is in writing and the denial includes: 1) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and 2) the name and the title or position of the person responsible for the denial. The burden of proof for the nondisclosure of a record is on the public agency that would deny access to the record, not on the person seeking to inspect and copy the record. IC 5-14-3-1.

Under IC 5-14-3-4(a)(1), records declared confidential by state statute may not be disclosed by a public agency. In addition, records required to be kept confidential by federal statute are nondisclosable. IC 5-14-3-4(a)(3). The Department relied solely on IC 16-41-8-1 in its denial letter to you. The issue is whether this statute makes confidential a record, such as actual copies of correspondence, that identify the name of the day care facility in Fort Wayne.

The following provision is at issue:

- (a) Except as provided in subsections (d) and (e) and IC 16-41-39.4-4, a person may not disclose or be compelled to disclose medical or epidemiological information involving a communicable disease or other disease that is a danger to health (as defined under rules adopted under IC 16-41-2-1). This information may

not be released or made public upon subpoena or otherwise, except under the following circumstances:

- (1) Release may be made of medical or epidemiologic information for statistical purposes if done in a manner that does not identify an individual.
  - (2) Release may be made of medical or epidemiologic information with the written consent of all individuals identified in the information released.
  - (3) Release may be made of medical or epidemiologic information to the extent necessary to enforce public health laws, laws described in IC 31-37-19-4 through IC 31-37-19-6, IC 31-37-19-9 through IC 31-37-19-10, IC 31-37-19-12 through IC 31-37-19-23, IC 35-38-1-7.1, and IC 35-42-1-7, or to protect the health or life of a named party.
- (b) Except as provided in subsection (a), a person responsible for recording, reporting, or maintaining information required to be reported under IC 16-41-2 who recklessly, knowingly, or intentionally discloses or fails to protect medical or epidemiologic information classified as confidential under this section commits a Class A misdemeanor.
- (c) In addition to subsection (b), a public employee who violates this section is subject to discharge or other disciplinary action under the personnel rules of the agency that employs the employee.

The Department has promulgated a rule that names E. coli as a communicable disease under this statute. 410 IAC 1-2.3-47. Therefore, a person may not disclose medical or epidemiological information involving E. coli. It seems apparent that the prohibition on disclosure applies to information involving E. coli that identifies, or concerns, an individual. I infer this from subsections (a)(1) and (2), where exception is made for statistical purposes if the information does not identify an individual, and where consent is obtained from all the individuals identified in the information released.

From the Department's response, it concedes that no individual is named in the records you seek. However, the Department contends that naming the day care facility involved will lead to identification of individuals affected or exposed to the communicable disease. I do not take issue with the Department's contention that naming the day care facility could allow easy identification of children exposed to E. coli. The only question is whether the statute may be construed to prohibit release of information from which a person's identity may be derived or deduced. The statute has not been construed by a court. Courts and, by extension, administrative adjudicatory agencies, must give considerable deference to an agency's interpretation of the statute it is charged with enforcing. *Indiana-Kentucky Electric Corporation v. Commissioner*, 820 N.E.2d 771 (Ind. Ct. App. 2005), citing [\*Peabody Coal Company v. IDNR\*, 606 N.E.2d 1306 \(Ind. App. 1992\)](#); [\*Jones v. Review Bd. of Indiana Employment Sec. Div.\* 508 N.E.2d 1322 \(Ind. App. 1987\)](#). (An agency's interpretation of the statute are to be afforded great weight and are not to be disturbed so long as they have a rational basis.)

Although the Department did not cite or refer to federal law in its denial letter of May 19, Ms. Waldron argues that HIPAA would prevent the Department's disclosure of "individually identifiable health information." Ms. Waldron has not provided my office with information regarding whether the Fort Wayne-Allen County health department is a covered entity under

HIPAA. I note that HIPAA is often cited by many public agencies that are not HIPAA-covered entities, in the mistaken belief that HIPAA covers everyone and anyone that has health information, including public agencies that are subject to the APRA. In fact, only certain covered entities are subject to the Privacy Rule.

However, here, the local health department may well be a HIPAA-covered entity. The state health department has advised me that some of the local health departments conduct covered transactions that would make the local health department a HIPAA-covered health care provider.<sup>1</sup> I was unable to learn whether the Fort Wayne-Allen County health department is a covered health care provider, but I believe this information is readily ascertainable from the state health department. If the Department is covered by the Privacy Rule, then the Department is prohibited from disclosing “protected health information” without authorization from the individual or individuals who are the subject of the information. 45 CFR 164.508.

A HIPAA-covered entity may release health information that is “de-identified” in accordance with the provisions of 45 CFR 164.514. Certain identifiers of an individual or of relatives, employers, or household members of the individual must be removed in order to be considered “de-identified.” I do not believe that any of the named identifiers of the individual or any of the other persons would be disclosed to you by virtue of your having the name of the day care facility. However, even with the identifiers removed, a covered entity may determine that health information is not individually identifiable health information only if the covered entity does not have actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information. 45 CFR 164.514(b)(2)(ii)(Emphasis added). The Department’s complaint response letter indicates its belief that the name of the day care facility could be used in combination with other information to deduce the identity of a person.

The Department has the burden to show that it has a basis for withholding the record. IC 5-14-3-1. In order to sustain its burden of proof under the APRA, the Department will have to:

1) show that it is a HIPAA-covered health care provider, and that the name of the day care facility in connection with the incidence of E. coli is individually identifiable health information under the Privacy Rule; or

2) show that its interpretation of IC 16-41-8-1 is entitled to deference; in other words, it has a rational basis.

If the Department can carry its burden on just one of these issues, the Department’s denial of the record was not a violation of the Access to Public Records Act.

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<sup>1</sup> 45 CFR 160.103 defines “covered entity” as a health care provider who transmits any health information in connection with a transaction covered by the Privacy Rule.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Mindy Waldron