



STATE OF INDIANA

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March 5, 2009

Jennifer Bruner
Indiana State Department of Health
2 North Meridian Street
Indianapolis, Indiana 46204

Re: Informal Inquiry 09-INF-2

Dear Ms. Bruner:

This opinion is in response to your informal inquiry dated January 14, 2009. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

You write on behalf of the Indiana State Department of Health ("ISDH"). Pursuant to the Access to Public Records Act ("APRA") (Ind. Code 5-14-3), the ISDH is a public agency. I.C. § 5-14-3-2(m)(1). Your inquiry is whether the ISDH may withhold from public disclosure the names and locations of the Center for Disease Control and Prevention's Division of Select Agents and Toxins ("DSAT") registered entities.

Ind. Code § 5-14-3-3(a) provides that 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 APRA. Pursuant to I.C. § 5-14-3-4(b)(19), an agency has the discretion to withhold a record or part of a record which if disclosed would have the reasonable likelihood of threatening public safety:

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

...

(19) A record or a part of a record, the public disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack. A record described under this subdivision includes:

(A) a record assembled, prepared, or maintained to prevent, mitigate, or respond to an act of terrorism under *IC 35-47-12-1* or an act of agricultural terrorism under *IC 35-47-12-2*;

(B) vulnerability assessments;

(C) risk planning documents;

(D) needs assessments;

(E) threat assessments;

(F) intelligence assessments;

(G) domestic preparedness strategies;

(H) the location of community drinking water wells and surface water intakes;

(I) the emergency contact information of emergency responders and volunteers;

(J) infrastructure records that disclose the configuration of critical systems such as communication, electrical, ventilation, water, and wastewater systems; and

(K) detailed drawings or specifications of structural elements, floor plans, and operating, utility, or security systems, whether in paper or electronic form, of any building or facility located on an airport (as defined in *IC 8-21-1-1*) that is owned, occupied, leased, or maintained by a public agency. A record described in this clause may not be released for public inspection by any public agency without the prior approval of the public agency that owns, occupies, leases, or maintains the airport. The public agency that owns, occupies, leases, or maintains the airport:

(i) is responsible for determining whether the public disclosure of a record or a part of a record has a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack; and

(ii) must identify a record described under item (i) and clearly mark the record as "confidential and not subject to public disclosure under *IC 5-14-3-4(b)(19)(J)* without approval of (insert name of submitting public agency)".

This subdivision does not apply to a record or portion of a record pertaining to a location or structure owned or protected by a public agency in the event that an act of terrorism under *IC 35-47-12-1* or an act of agricultural terrorism under *IC 35-47-12-2* has occurred at that location or structure, unless release of the record or portion of the record would have a reasonable likelihood of threatening public safety by exposing a vulnerability of other locations or structures to terrorist attack.

I.C. § 5-14-3-4(b)(19).

You have provided some background regarding the records at issue here. As you indicate, select agents are biological agents and toxins that have the potential to pose a severe threat to public health and safety, animal or plant health, or animal or plant products. The DSAT registers entities that possess, use, or transfer such select agents. DSAT considers the name and location of these entities sensitive but desires to share the information with the ISDH for the purpose of emergency preparedness planning. DSAT

has determined that the unauthorized disclosure of this sensitive information could adversely affect the ability of the United States to protect critical systems, facilities, stockpiles, and other assets. You contend the information the ISDH would receive from DSAT is intended to be used for emergency preparedness planning purposes and the ISDH would maintain it only for those purposes. You inquire whether the records at issue may be withheld from public disclosure based on the I.C. § 5-14-3-4(b)(19) exception.

As you describe the records the ISDH will receive from DSAT, those records seem to fall under the section 4(b)(19) exception. You indicate the ISDH will use the records solely for emergency preparedness planning purposes. Section 4(b)(19) provides a list of the types of records which may be excepted from disclosure. I.C. § 5-14-3-4(b)(19)(A) excepts from disclosure a record assembled, prepared, or maintained to prevent, mitigate, or respond to an act of terrorism or agricultural terrorism. Further, I.C. § 5-14-3-4(b)(19)(B) through (G) excepts the following types of records: vulnerability assessments, risk planning documents, needs assessments, threat assessments, intelligence assessments, domestic preparedness strategies. As you describe the records, a number of these classifications may apply. It is my opinion the records the ISDH will obtain from DSAT fall squarely into this exception to disclosure and it is the preparation and sharing of this type of information that I.C. § 5-14-3-4(b)(19) is meant to allow.

Based on the foregoing reasons, it is my opinion the ISDH may withhold from disclosure at the discretion of the agency the records containing the names and locations of DSAT registered entities and individuals. These records are not confidential records, as confidentiality is only conferred by those methods listed in I.C. § 5-14-3-4(a). Confidential records are those which may not be disclosed by the agency unless access is specifically required by state or federal statute or order of a court under the rules of discovery. *Id.* The DSAT records fall under a discretionary exception found in I.C. § 5-14-3-4(b). So it is my opinion the ISDH *may* withhold the records from disclosure but is not *required* to withhold those records from disclosure. Further, because the ISDH has the discretion to withhold the records from public disclosure, it is my opinion the ISDH may enter into a memorandum of understanding with the DSAT wherein the ISDH agrees to withhold the records from public disclosure.

Please do not hesitate to contact me if I can provide any further assistance.

Best regards,



Heather Willis Neal
Public Access Counselor