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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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EMILY HOPKINS,  
*Complainant,*

v.

IND. STATE DEPT. OF HEALTH; OFFICE OF THE  
GOVERNOR,<sup>1</sup>  
*Respondent.*

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Formal Complaint No.  
20-FC-62(c)

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana State Department of Health and the Office of the Governor violated the Access to Public Records Act.<sup>2</sup> General Counsel Kelly MacKinnon filed a response on

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<sup>1</sup> A contemporaneous complaint was filed against the Marion County Health and Hospital Corporation. That complaint will be addressed in a separate cause number.

<sup>2</sup> Ind. Code § 5-14-3-1-10.

behalf of ISDH and General Counsel Joseph R. Heerens responded on behalf of the governor. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on May 13, 2020.

### **BACKGROUND**

This case involves a dispute over the access to records containing statistics on the number of COVID-19 cases and deaths at licensed long-term care facilities in the state.

On April 8, 2020, State Health Commissioner Dr. Kristina Box ordered long-term care facilities to report positive COVID-19 cases and deaths to the Indiana State Department of Health (ISDH) on an ongoing basis.<sup>3</sup>

On April 30, 2020, Emily Hopkins, a reporter with the *Indianapolis Star*, filed a public records request for the following data:

A document listing of long-term care facilities/nursing homes where there have been positive cases of COVID-19 reported to the state, including:

- the name of the facility
- the facility's address
- the number of residents who have tested positive for COVID-19
- the number of residents who have died for COVID-19

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<sup>3</sup> State Health Commissioner's Order: Requirements for Reporting COVID-19 Information to the State Department of Health (4/8/2020 renewed June 1, 2020). See [www.coronavirus.in.gov](http://www.coronavirus.in.gov).

- the number of staff who have tested positive for COVID-19
- the number of staff who have died of COVID-19

Twelve days later Hopkins filed a formal complaint with this office. In essence, Hopkins contends the data should have been released in a reasonable amount of time in accordance with the Access to Public Records Act (APRA). In addition to the timeliness issue, Hopkins also cites policy reasons as to why the data is critical to the health and safety of the public.

While Hopkins' complaint was pending, a request was made upon ISDH for the following on May 13, 2020:

- Data describing the cumulative number of cases and deaths related to COVID-19 by the patient's zip code as of the most recent date possible.
- Data describing the number of cases and deaths related to COVID-19 by the patient's zip code for each day starting March 6 to present.

Although not part of the original complaint, both sets of requests will be addressed herein.

ISDH argues that the records Hopkins requested do not exist in the form she requested them and the agency does not have a record that tracks data by facility or zip code. It breaks down statistical data by county but not any other geographical area. Furthermore, in its denial, ISDH cites Indi-

ana Code 16-41-8-1, specific to communicable disease privacy considerations, as justification for withholding the records even if they existed.

For its part, the Governor's Office maintains that it simply does not have a document responsive to the request but takes exception to the complaint being filed before the Governor's Office had an adequate opportunity to respond within a reasonable time.

## 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 State Department of Health (ISDH) and the Office of the Governor (Governor) are public agencies for purposes of APRA; and therefore, subject to its 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 ISDH's public records during regular business hours. Ind. Code § 5-14-3-3(a).

APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure

at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

## **2. Hopkins' Requests**

Hopkins argues, as a basis for her complaint and similar to two contemporaneous complaints, the public deserves to know the information on a facility-by-facility basis. She emphasized that she was not seeking any specific patient-related data.

### **2.1 Reasonable Time**

APRA requires a public agency to provide public records to a requester within a reasonable time after receiving a request. Ind. Code § 5-14-3-3(b). Notably, APRA does not define the term “reasonable time.”

Here, parties disagree about whether the state complied with APRA’s reasonable time standard.

The determination of what is a reasonable time for production of records depends on the public records requested and circumstances surrounding the request. Undoubtedly, certain types of records are easier than others to produce, review, and disclose. As a result, this office evaluates these issues case by case.

It goes without saying the State of Indiana is in the throes of a pandemic and has been since March. While matters are improving, this office knows first-hand that state personnel, including the Respondents, have been working around the clock to address the COVID-19 events. By the same token,

I echo some of Governor Holcomb’s recent comments regarding the effort and diligence dedicated by a tireless local media to keep the community informed.

And while public access has not taken a back seat during this crisis, the timeline in which responses are generated by agencies – both State and local – look different than they would in non-emergent circumstances. Agencies have competing priorities.

The Indiana General Assembly recognizes that, even in the best of times, in the context of public records requests, an agency must “regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees.” *See* Ind. Code § 5-14-3-7(a).

Therefore insofar as the timeliness issue is concerned, I agree with ISDH and the Governor’s Office that the complaint was premature.

For the foreseeable future, requesters may have to exercise a bit of additional patience with agencies as they work through backlogs, bring back personnel, and continue to address the ongoing pandemic. This office will continue to encourage efficiency, but also will recognize the extra-ordinary circumstances temporarily altering the definition of “reasonable”.

### **3. Facility and Zip Code-Level Data**

ISDH and the Governor’s Office maintains it does not synthesize the nursing home data in a manner that would be responsive to the request. It stands to reason ISDH would be the agency charged with custody of those records if they

did exist, therefore this opinion will focus on ISDH from this point forward.

ISDH relies on facilities to self-report to the department as a regulatory body and to families of its clients for health and safety reasons. This has been evidenced by several announcements and press releases. And while ISDH may have information at a specific point and time for an individual facility, it does not keep aggregate data for all Indiana nursing homes either in collective form or on a rolling basis all in one place. My understanding is that this is the case for zip codes as well.

As I have written previously in the contemporaneous opinions, this office also understands and appreciates the newsworthiness of the request and its importance to Hoosiers. Obtaining information regarding outbreaks among vulnerable populations allows families to make better decisions about their loved ones in those facilities. From my discussions with ISDH, those goals are not mutually exclusive with the agency - they simply do not have a running tally, database, or spreadsheet with that information. They address those concerns in alternative ways.

This is not semantics or a technicality; the Access to Public Records Act simply does not require the creation of documents to satisfy a request. This office is unaware of any other statute or regulation requiring the agency to maintain a working document with updated facility-level or zip code-specific data.

Hopkins' point is well taken that APRA requires "reasonable efforts" to make electronically stored data available.<sup>4</sup> ISDH claims in order to do so, it would require manual data entry as opposed to a simple query or database sort or search algorithm. If this is the case, manual entry would not be considered reasonable and is akin to creating a new record.

As a final aside, if facility and zip code level data does eventually exist in a manner that is reasonable to search, sort, and produce, it is my understanding that ISDH takes its cues from the Centers for Medicaid and Medicare Services (CMS) regarding privacy considerations and how it applies to Indiana code.<sup>5</sup> Given that these arguments were not introduced until well into this process, a deep dive will not be taken in this opinion. While CMS seemingly has released some data of its own on the facility level, how the Indiana Code intersects with release of comparable data are discussions for another day. ISDH has not yet been asked to submit an argument regarding these considerations.

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<sup>4</sup> Ind. Code § 5-14-3-3(d)

<sup>5</sup> Ind. Code § 16-41-8-1(b)(1) states "Release may be made of medical or epidemiologic information for statistical purposes if done in a manner that does not identify an individual".



## **CONCLUSION**

Based on the foregoing, it is the opinion of the public access counselor that the Indiana State Department of Health did not violate the Access to Public Records Act if it does not maintain the documents sought.

In the same manner, the Office of the Governor has not violated the Access to Public Records Act.

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

**Luke H. Britt**  
Public Access Counselor