



STATE OF INDIANA

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December 29, 2016

Ms. Lauren Cross, Staff Writer
The Times Media Company
601 West 45th Avenue
Munster, Indiana 46321

Re: Informal Inquiry 16-INF-33; Disclosure of records by Indiana State Department of Health

Dear Ms. Cross:

This is in response to your informal inquiry regarding whether certain records are disclosable under the Health Insurance Portability and Accountability Act ("HIPAA") §164.502. Ms. Kelly MacKinnon, Transactions Chief for the Indiana State Department of Health has responded on behalf of the agency. Her response is enclosed for your review. Pursuant to Indiana Code § 5-14-10 et. al., I issue the following informal inquiry response.

BACKGROUND

You seek a determination as to whether your denial by the Indiana State Health Department is lawful, as well as a statutory explanation for denial.

On or about September 19, 2016, you requested a number of records from the Indiana State Department of Health ("ISDH"). Primarily, you sought data associated with environmental health inspections regarding lead hazards. You sought the number of open cases of elevated blood levels for a specified timeframe. You additionally sought communication and correspondence associated with the investigations.

ISDH acknowledged your request within seven (7) days, and then denied access to the records on the basis a portion of the records sought do not exist. As for individual blood lead level results performed within the timeframe, the agency denied disclosure of the records as they contain protected health information ("PHI") which prohibits ISDH from releasing those records pursuant to the Indiana Code § 5-14-3-4(a)(3) and the Health Insurance Portability and Accountability Act ("HIPAA").

You take exception to this denial for a number of reasons. The first issue is you contend it matters not from what entity an agency receives information – in this case a local health department or a provider – once a record is received by a public agency, it should be subject to disclosure.

Secondly, you contend medical records containing PHI can be redacted and therefore should not be withheld in their entirety. Finally, you question the efficacy of ISDH tracking software.

ISDH responded to your complaint by stating your complaint to this Office clarified at least one request and has provided you with the number of unconfirmed open cases in East Chicago, Indiana, and the associated criteria for opening or closing a case. ISDH argues 'health records' are limited to certain requestors and can be withheld in their entirety if they contain PHI. Finally, ISDH argues Federal Regulations limit geographical data within a state to prohibit the release of identified confirmed cases within an area smaller than a state. It also identifies the software used to track data and its limitations.

ANALYSIS

Both State and Local Health Departments are historically careful about what data to release, and rightfully so. There is an expectation on the part of the public regarding the government's use of personally identifiable health records. There is a myriad of state and federal statutes and regulations protecting this privacy. Balanced against these considerations is the public interest in ensuring their investigating agencies are protecting public health appropriately. As the Blood Lead Program at ISDH is a testing provider, it is covered by HIPAA privacy considerations.

It appears as if ISDH has identified the number of open unconfirmed cases currently being investigated in the geographic area you seek. It has distinguished the investigations from the results, which ISDH considers health records. Health records particular to an individual may only be requested by certain authorized individuals. *See Indiana Code § 16-39-1-3*. While the Access to Public Records Act states information in a public record should be redacted if it contains both disclosable and non-disclosable records, (*see. Indiana Code § 5-14-3-6*) there is a condition precedent that the requestor must first be authorized to request the records in the first place. That list is exclusive and cannot be released by a HIPAA covered entity without consent. So, unlike most other public records that may be redacted and the remainder released, health records are an outlier.

After a case has been confirmed as having an elevated blood level, a public health agency will conduct an environmental inspection as a follow-up for case management purposes. You have asked for environmental reports by specific housing tracts. However, ISDH does not track data by census tracts, but, I believe it does have data by city. ISDH has interpreted the Code of Federal Regulations to prohibit the release of environmental reports by geographical area as prohibited. The records are not health records, but they do contain PHI. The Federal Standard is as follows: Health information which does not identify an individual and with respect to which there is no reasonable basis to believe the information can be used to identify an individual is not individually identifiable health information. *See 45 CFR 164.514(a)*. If de-identified data can be used to extrapolate an individual's identity, it should not be disclosed. The reasonable basis criteria is defined in that regulation as a set of 18 different identifiers (including geographical subdivisions smaller than a state), or a determination by a learned professional the risk of individual identification is too small.

My recommendation is that, if possible, ISDH reconsider whether the data set is so small as to identify an individual using the suggested methodology in subsection (b)(1):

A person with appropriate knowledge of and experience with generally accepted statistical and scientific principles and methods for rendering information not individually identifiable:

(i) Applying such principles and methods, determines that the risk is very small that the information could be used, alone or in combination with other reasonably available information, by an anticipated recipient to identify an individual who is a subject of the information; and

(ii) Documents the methods and results of the analysis that justify such determination; or

This standard seems less arbitrary and most accurately reflects the balance between an expectation of privacy and the public's right to know the activities of their public health officials.

Please do not hesitate to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Ms. Kelly MacKinnon, Esq.