



# STATE OF INDIANA

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**Re: Informal opinion 20-INF-6; Facility-level COVID-19 data**

This opinion is in response to several complaints and inquiries regarding access to long-term care facility-level data. While responses were solicited from health departments for some, not all required responses as some complaints were identical. This will also serve as satisfaction of Indiana code section 5-14-3-9(i) for those who have sought formal advisory opinions.

In April and May 2020, during the initial surge of the COVID-19 outbreak, concerned citizens and media became increasingly interested in obtaining facility-level data from county health departments and the Indiana State Department of Health (ISDH). For its part, the state initially declined to provide this data and claimed they did not have it in the format sought by the majority of the requests.<sup>1</sup>

Even so, messaging during the governor's press conference indicated it would not be released even if the data did take shape in the form of a database or spreadsheet. Some counties chose to release data it had while others deferred to the State for guidance, who generally inferred discretion was with local health departments. Indiana Code section 16-41-8-1 was cited to shield confidential individual information, however, that statute does allow for the release of aggregate data.

Accordingly, throughout the pandemic this office has encouraged health departments, county attorneys and the State to conduct an analysis of the law to determine if facility-level data was able to be disclosed. It has exercised its capacity under Indiana Code section 5-14-5-10 to provide interpretations to the access laws consistent with transparency. After input from various sources, the end determination was: yes, it can be disclosed. Nothing in Indiana or Federal law prohibited the release of the de-identified data.

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<sup>1</sup> See also Formal Opinions of the Public Access Counselor 62(a); 62(b) and 62(c).

To that end, the ISDH began to solicit information from facilities in a new manner in order to develop a new dashboard of granular data focused on long-term care facilities. A preliminary set of data from March through July has been released with more robust information to come.<sup>2</sup> While not all facilities have provided the data—and there are penalties for not reporting—the vast majority has done so.

That leaves the question of how to dispose of the formal complaints.

As the public and media are aware, this outbreak is a novel one in every respect. Government efforts to handle the crisis are also unprecedented. This does not mean that public access should be de-prioritized, but simply that requests (and request acknowledgements) may take longer. A large majority of the complaints filed in April and May were based on the timeliness of the responses and not hard denials. This office doesn't carry the water of any agency, but does recognize the legal and political complexity agencies have wrestled with in making these decisions.

Therefore instead of re-litigating decisions made at the height of the initial surge and all the uncertainty that came with it, this opinion will serve to address any complaint filed against a health department or county during that time and also to provide guidance going forward.

First, there was not a complaint filed in which an agency was unreasonably responsive. Governor Holcomb's Executive Order 20-09 suspended the seven day requirement for an acknowledgment and changed the deadline for receipt of a request to a reasonable time. This order was in place at the time of the complaints and presently is extended through at least August 3, 2020.

That is not to say requests can simply be placed on the back burner even during a public health emergency, it only implies that some deadlines are not as attainable due to the present circumstances. A reasonable time is very much context specific.

Second, turning to the content of the data, it is, and has been, the interpretation of this office that Indiana or federal code does not preclude the release of facility-level data so long as none of the information identifies a particular resident or individual.

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<sup>2</sup> <https://hub.mph.in.gov/dataset/covid-19-case-and-death-reporting-in-ltc-facilities>

Therefore while the ISDH may be putting together its dashboard for aggregate data and may be the repository and collector, county health departments have been in custody of this data on an ongoing basis in many cases. This is especially so for those departments having direct oversight of long term care facilities such as the Marion County Health Department vis-à-vis Marion County Health and Hospital Corporation.

Simply put, there has not been a compelling legal argument presented to this office as to why county-held, facility-level COVID-19 data should not be made available.

That said, as public access counselor, I simply have no interest in calling out an agency for grappling with legitimately sensitive issues. A declaration of non-compliance at this point serves no purpose other than to inadvertently cause an agency to contract and double-down on nondisclosure. That is a consequence we should all seek to avoid.

Even still, should public records requests be made from county health departments going forward, it should provide the records in a reasonable time and not defer to ISDH. Likewise, they should work to fulfill records requests which have already been submitted.

As a final note, an agency should not frustrate access by keeping this data in a manner which makes it impossible for a requester to guess exact data points or fields. The requests presented to this office have not been unduly obscure or byzantine. Responses and production of data should be equally straight-forward. Agencies should likewise be mindful that in the cases of personally identifiable data, measures should be taken to separate the disclosable from non-disclosable, such as removing names from databases, etc.<sup>3</sup>

Please do not hesitate to contact me with any questions.

Best regards,



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<sup>3</sup> Ind. Code § 5-14-3-6