

September 29, 2004 Guidance to Health Professions Bureau Regarding Disclosure of Licensee Medical Information

September 29, 2004

Lisa Hayes  
Executive Director  
Health Professions Bureau  
402 West Washington Street W066  
Indianapolis, IN 46204

*Re: Request for Informal Inquiry Response*

Dear Ms. Hayes:

This is in response to your request for an informal inquiry response regarding whether you are required to disclose upon request certain medical or health related information maintained by the Health Professions Bureau (“HPB”). In my opinion, for the reasons set out below, patient medical records and charts created by a provider are confidential unless the patient gives consent for the Health Professions Bureau to disclose any part of the medical record or chart. However, to the extent that the Health Professions Bureau’s records contain health information that the Bureau that is not part of a medical record or chart created by a provider, that public record is disclosable unless it is confidential under some other law. I am not aware of any other law that would apply to such information.

#### BACKGROUND

The Health Professions Bureau performs administrative functions for various boards that license, certify, or register certain occupations, principally health professionals. IC 25-1-5-3. Among the functions that the HPB performs for boards is recordkeeping of all persons licensed, regulated, or certified by a board [hereinafter, “licensees”]. IC 25-1-5-4(a)(3). You stated that a board frequently asks licensees to submit supplemental information before a license is issued or renewed. The need for supplemental information may be evident from information supplied by

the licensee on his or her application for a new or renewed license. Medical information, information about substance or alcohol abuse treatment, or mental health treatment may be requested and submitted by a licensee prior to the board undertaking a determination of whether to issue or renew a license. The board would normally summon a licensee to appear before the board prior to making a determination on the license application. These “personal appearance” submissions could also include information such as prior convictions or the status of criminal charges pending against the licensee.

You have received a request for information maintained by the Health Professions Bureau with respect to an individual’s license application. You are seeking an opinion from my office with respect to whether some or all of this information is disclosable upon request of any person.

### ANALYSIS

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. IC 5-14-3-3(a). The Health Professions Bureau is a public agency. The requested record is a “public record” since the application and supporting documentation is a writing maintained, filed, received, and retained by the HPB. IC 5-14-3-2. The issue is whether any part of the record is excepted from disclosure under IC 5-14-3-4. In particular, you are concerned about the disclosure of medical or health related information. Such information may include laboratory test results, drug or alcohol abuse treatment information, and mental health records.

Excepted from disclosure under section 3 are records that may not be disclosed by a public agency because they are confidential. IC 5-14-3-4(a). Among those are “patient medical records and charts created by a provider, unless the patient gives written consent under Indiana Code 16-39.” This provision has not been construed by a court, and our formal advisory opinions appear to have only cited this provision in one opinion, 01-FC-49. That opinion dealt with someone requesting his own medical record.

Two components of this provision are defined in APRA itself. “Patient” is defined at IC 5-14-3-2 by reference to the definition of patient contained in IC 16-18-2-272(d). There, “patient” means “an individual who has received health care services from a provider for the examination, treatment, diagnosis, or prevention of a physical or mental condition.” “Provider” is defined in part at IC 5-14-3-2 in reference to IC 16-18-2-295(a); that definition includes various health care practitioners including a physician, psychotherapist, dentist, registered and licensed practical nurse, psychologist, etc. It also includes a hospital, health facility, home health agency, certified emergency medical technicians, and employees of state and local health departments.

Therefore, a “patient medical record or chart created by a provider” means a record or chart with respect to “an individual who has received health care services from a provider for examination, treatment, diagnosis, or prevention of a physical or mental condition” and is created by a practitioner listed in IC 16-18-2-295(a). If the record requested of HPB by a person

contains a record or chart meeting this definition, it would be subject to nondisclosure under IC 5-14-3-4(a)(9), unless the patient consented to disclosure under IC 16-39.

Although this interpretation appears at first glance to be the only possible interpretation of IC 5-14-3-4(a)(9), it was with considerable difficulty that I came to the above conclusion. This is because IC 16-39 concerns the requirements for release of “health records” to the patient and to others. “Health record” under IC 16-39 is defined as: “written, electronic, or printed information *possessed or maintained by a provider* concerning any diagnosis, treatment, or prognosis of the patient...” The term includes mental health records and alcohol and drug abuse records. Therefore, under IC 16-39, release of a health record assumes that the release is from a provider who possesses that record. The records maintained by HPB are not “health records” under IC 16-39. Hence, the difficulty concluding that the legislature did not intend to deem confidential only “health records” under IC 16-39 arose because of the reference to IC 16-39 in IC 5-14-3-4(a)(9). Construing IC 5-14-3-4(a)(9) to include only “health records” possessed by a provider did not render null subsection 4(a)(9) relating only to “public records,” because the state employs and operates numerous “providers” as that term is defined in IC 16-39 and IC 16-18.

However, I am fairly confident that IC 5-14-3-4(a)(9) includes medical records and charts created by a provider but not fitting the definition of “health record.” If the legislature had intended to make confidential the more narrow set of records under IC 16-39, it would have used the term “health records” in IC 5-14-3-4(a)(9). Rather, the legislature’s reference to IC 16-39 was solely for purposes of describing the way in which a patient may consent to disclosure. *See* IC 16-39-1-4.

It is my opinion that any “medical record and chart” created by a provider (as defined above) that is maintained by the HPB is confidential unless patient consent is given to the HPB for its release. This is true whether the medical record or chart was supplied to HPB directly by the licensee or by a provider pursuant to patient authorization. Note that IC 5-14-3-4(a)(9) would not cover medical information noted on the application form, for example, by the licensee, or any other medical information received in a form that was not created by a provider.

This opinion is advisory only, and a person seeking this information may file a lawsuit in superior court to compel your agency to permit the person to inspect and copy the medical record or chart created by a provider. In that case, IC 5-14-3-9(e) requires the HPB to notify a person who supplied any part of the public record at issue that a request for release of the record has been denied, and whether the denial was in compliance with an informal inquiry response or advisory opinion of the Public Access Counselor. That person is entitled to intervene in any litigation that results from the denial.

We also talked about other information of a sensitive nature contained in applications for license or license renewal, or which the licensee is requested to submit supporting documentation. The general rule of disclosure would prevail for this type of information unless it was covered by some other confidentiality provision contained in state or federal statute. This would include information concerning status of criminal charges, etc.

I hope this is helpful to you as you consider requests for records for licensee application information. Please do not hesitate to contact me if you have further questions or concerns.

Sincerely,

Karen Davis  
Public Access Counselor