

STATE OF INDIANA)	IN THE MARION SUPERIOR COURT
)	SS: CIVIL DIVISION, ROOM _____
MARION COUNTY)	CAUSE NO. _____

CAITLIN BERNARD, M.D.; and)
CAROLINE ROUSE, M.D.,)
)
Plaintiffs,)
v.)
)
INDIANA STATE HEALTH)
COMMISSIONER, in the officer’s official)
capacity; and VOICES FOR LIFE, INC.,)
)
Defendants.)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’ MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs respectfully submit this memorandum of law in support of their motion for a temporary restraining order and preliminary injunction.

Plaintiffs are Indiana physicians who filed this declaratory judgment action to establish that terminated pregnancy reports (“TPRs”), which contain detailed information about their patients’ demographics, medical history, and medical care, are exempt from the general disclosure requirement in Indiana’s Access to Public Records Act (“APRA”), Ind. Code §§ 5-14-3-1 to 5-14-3-10. Earlier this week, the Indiana Department of Health (“IDOH”) and Indiana State Health Commissioner (“Health Commissioner”) reached a settlement with Voices for Life, Inc. (“VFL”), in a related case, agreeing to no longer designate TPRs as confidential medical records that are exempt from public records requests. *See infra* at 6. Plaintiffs are seeking a temporary restraining order and preliminary injunction to prevent the imminent release of confidential medical records about abortion patients in the form of the TPRs by IDOH, and to require VFL to return, delete, or destroy all copies of any TPR already provided to it pursuant to the settlement agreement.

A judge of this Court has already concluded that TPRs are exempt from APRA’s disclosure requirement. Jack Decl. Ex. C at 2 (*Voices for Life, Inc. v. Ind. Dep’t of Health*, No. 49D02-2405-MI-019876, slip op. at 2 (Ind. Super. Ct. Sept. 9, 2024)). So has Indiana’s Public Access Counselor. *See infra* at 7. Moreover, the Medical Licensing Board of Indiana (“Medical Board”) has concluded that at least some of the information contained in TPRs is protected by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 110 Stat. 1936 (1996). Nevertheless, absent immediate relief from this Court, IDOH will release troves of TPRs containing abortion patients’ confidential medical records to VFL, which will be free to publicize them further, including by posting them on the internet.

STATEMENT OF FACTS

I. Plaintiffs’ Obligation to Submit Terminated Pregnancy Reports to the Indiana Department of Health

Plaintiff Caitlin Bernard, M.D., is a board-certified obstetrician-gynecologist who is fellowship trained in complex family planning and licensed to practice medicine in Indiana. Bernard Decl. ¶¶ 2-3. Plaintiff Caroline Rouse, M.D., is a board-certified obstetrician-gynecologist who is fellowship trained in maternal-fetal medicine and licensed to practice medicine in Indiana. Rouse Decl. ¶¶ 2-3. Plaintiffs both serve on the faculty of the Indiana University School of Medicine, and they both provide clinical care, including abortion care, in the Indiana University Health system. Bernard Decl. ¶ 4; Rouse Decl. ¶ 4.

Indiana law requires physicians, including Plaintiffs, to submit a TPR to IDOH in connection with every abortion they provide. Ind. Code § 16-34-2-5; *see* Bernard Decl. ¶ 5; Rouse Decl. ¶ 5. The TPR must include the following thirty-one data points about each abortion patient:

1. The age of the patient.

2. Whether a waiver of consent under section 4 of this chapter was obtained.
3. Whether a waiver of notification under section 4 of this chapter was obtained.
4. The date and location, including the facility name and city or town, where the: (A) pregnant woman (i) provided consent; and (ii) received all information required under section 1.1 of this chapter; and (B) abortion was performed or the abortion inducing drug was provided, prescribed, administered, or dispensed.
5. The health care provider's full name and address, including the name of the physicians performing the abortion or providing, prescribing, administering, or dispensing the abortion inducing drug.
6. The city and county where the pregnancy termination occurred.
7. The age of the father, or the approximate age of the father if the father's age is unknown.
8. The patient's county and state of residence.
9. The marital status of the patient.
10. The educational level of the patient.
11. The race of the patient.
12. The ethnicity of the patient.
13. The number of the patient's previous live births.
14. The number of the patient's deceased children.
15. The number of the patient's spontaneous pregnancy terminations.
16. The number of the patient's previous induced terminations.
17. The date of the patient's last menses.
18. The physician's determination of the gestation of the fetus in weeks.
19. The reason for the abortion.
20. Whether the patient indicated that the patient was seeking an abortion as a result of being: (A) abused; (B) coerced; (C) harassed; or (D) trafficked.
21. The following information concerning the abortion or the provision, prescribing, administration, or dispensing of the abortion inducing drug: (A) The postfertilization age of the fetus (in weeks); (B) The manner in which the

- postfertilization age was determined; (C) The gender of the fetus, if detectable; (D) Whether the fetus has been diagnosed with or has a potential diagnosis of having Down syndrome or any other disability; (E) If after the earlier of the time the fetus obtains viability or the time the postfertilization age of the fetus is at least twenty (20) weeks, the medical reason for the performance of the abortion.
22. For a surgical abortion, the medical procedure used for the abortion and, if the fetus had a postfertilization age of at least twenty (20) weeks: (A) whether the procedure, in the reasonable judgment of the health care provider, gave the fetus the best opportunity to survive; (B) the basis for the determination that the pregnant woman had a condition described in this chapter that required the abortion to avert the death of or serious impairment to the pregnant woman; and (C) the name of the second doctor present, as required under IC 16-34-2-3(a)(3).
 23. For a nonsurgical abortion, the precise drugs provided, prescribed, administered, or dispensed, and the means of delivery of the drugs to the patient.
 24. For a nonsurgical abortion, that the manufacturer's instructions were provided to the patient and that the patient signed the patient agreement.
 25. For an abortion performed before twenty (20) weeks of postfertilization age of the fetus, the medical indication by diagnosis code for the fetus and the mother.
 26. The mother's obstetrical history, including dates of other abortions, if any.
 27. Any preexisting medical conditions of the patient that may complicate the abortion.
 28. The results of pathological examinations if performed.
 29. For a surgical abortion, whether the fetus was delivered alive, and if so, how long the fetus lived.
 30. Records of all maternal deaths occurring at the location where the abortion was performed or the abortion inducing drug was provided, prescribed, administered, or dispensed.
 31. The date the form was transmitted to the state department and, if applicable, separately to the department of child services.

Ind. Code § 16-34-2-5(a). IDOH must compile a public report on a quarterly basis summarizing aggregate data contained in the TPRs without including any patient identifying information. *Id.* § 16-34-2-5(e)-(f).

“Each failure to complete or timely transmit a form . . . for each abortion performed or abortion inducing drug that was provided, prescribed, administered, or dispensed, is a Class B misdemeanor.” *Id.* § 16-34-2-5(d). In addition, the Medical Board “may revoke the license of a physician if, after appropriate notice and an opportunity for a hearing, the attorney general proves by a preponderance of the evidence that the physician failed to transmit the form to the Indiana department of health as described in [Ind. Code § 16-34-2-5(b)].” Ind. Code § 25-22.5-8-6(b)(1).

II. VFL’s Requests for Public Disclosure of Terminated Pregnancy Reports

APRA generally requires public agencies to provide members of the public with access to public records in their possession. *See* Ind. Code § 5-14-3-3. The statute exempts certain public records from its disclosure requirement, however. Ind. Code § 5-14-3-4. These include records “required to be kept confidential by federal law” and “[p]atient medical records and charts created by a provider, unless the patient gives written consent” in accordance with Indiana law. Ind. Code § 5-14-3-4(a)(3), (9).

On October 16, 2023, VFL submitted a request to IDOH under APRA for all TPRs submitted in August 2023. Compl. for Disclosure of Recs. Under the Ind. Access to Pub. Recs. Act Ex. 1, *Voices for Life, Inc. v. Ind. Dep’t of Health*, No. 49D02-2405-MI-019876 (Ind. Super. Ct. May 1, 2024) (“VFL Compl.”). That request encompasses TPRs submitted by the Plaintiffs. Bernard Decl. ¶ 6; Rouse Decl. ¶ 6. Citing an advisory opinion by the Public Access Counselor discussed below, IDOH denied VFL’s public records request on January 12, 2024. VFL Compl.

Ex. 5. Subsequently, on April 12, 2024, VFL requested that IDOH provide it with all TPRs from August 2023 through November 2023. *Id.* Ex. 17. A week later, it requested all TPRs from December 2023 through March 2024. *Id.* Ex. 19. Both of these requests encompass TPRs submitted by the Plaintiffs. Bernard Decl. ¶ 6; Rouse Decl. ¶ 6. IDOH denied each request on April 22, 2024. VFL Compl. Ex. 20.

VFL filed a lawsuit in this Court on May 1, 2024. VFL Compl. It asked the Court, among other things, to “[d]eclare that IDOH is required to satisfy public requests for TPRs under APRA”; and “[o]rder the IDOH to provide full and complete access to Plaintiff’s requests for TPRs.” *Id.* at 7.

On June 12, 2024, the Court granted a motion for intervention by Drs. Bernard and Rouse, who intervened as defendants. Jack Decl. Ex. B (*Voices for Life, Inc. v. Ind. Dep’t of Health*, No. 49D02-2405-MI-019876, slip op. at 2 (Ind. Super. Ct. June 12, 2024)). On September 9, 2024, the Court dismissed the lawsuit pursuant to Indiana Rule of Trial Procedure 12(B)(6). Jack Decl. Ex. C. On October 4, 2024, VFL filed a notice of appeal. Notice of Appeal, *Voices for Life, Inc. v. Ind. Dep’t of Health*, No. 24A-MI-02396 (Ind. Ct. App. Oct. 4, 2024). On February 4, 2025, VFL filed a motion to dismiss the appeal, Voluntary Mot. to Dismiss, *Voices for Life, Inc. v. Ind. Dep’t of Health*, No. 24A-MI-02396 (Ind. Ct. App. Feb. 4, 2025), and its lawyers issued a press release that linked to a settlement agreement between VFL, IDOH, and the Health Commissioner, Jack Decl. Ex. D. The agreement states that IDOH agrees to “[i]mmediately release terminated pregnancy reports as public records upon lawful request and not designate the reports as confidential medical records.” Jack Decl. Ex. E at 1. On February 6, 2025, the Court of Appeals dismissed the appeal.

III. The Public Access Counselor’s Opinion Against Disclosure of Terminated Pregnancy Reports

Indiana has a Public Access Counselor tasked with providing advice and assistance concerning the state’s public access laws to members of the public and government officials. *See* Ind. Code §§ 5-14-4-1 to 5-14-4-14; *Indiana Public Access Counselor*, IN.gov, <https://www.in.gov/pac/about-us/what-we-do/> (last visited February 4, 2025). While VFL’s public records request was pending, IDOH sought an informal advisory opinion from the Public Access Counselor on whether it is required to produce TPRs in response to requests made under APRA. The Public Access Counselor summarized IDOH’s inquiry as follows:

Your inquiry concerns the release of [the TPR] form in its entirety. Given that the report is populated with information that could be reverse engineered to identify patients—especially in smaller communities—you argue that the required quarterly reports should suffice in terms of satisfying any disclosure and transparency considerations.

Jack Ex. A at 2.

The Public Access Counselor concluded that IDOH is not required to produce TPRs under APRA for two reasons. First, TPRs constitute patient medical records, and APRA exempts patient medical records from disclosure. *Id.* at 2 (citing Ind. Code § 5-14-3-4(a)(9)). Second, insofar as the statute governing TPRs requires IDOH to produce a *public* report on a quarterly basis containing aggregate data, it implies that the individual TPRs are not intended to be made public. *Id.* The Public Access Counselor further explained that redaction is not a viable option for TPRs: “Courts will mandate separation when disclosable materials are not inextricably linked to confidential materials. Here, however, the entirety of the form is a medical record.” *Id.* (citing *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 914 (Ind. Ct. App. 2005)).

IV. The Attorney General’s Subsequent Opinion

Four months after the Public Access Counselor issued his opinion on TPRs, the Attorney General issued an opinion reaching the opposite conclusion. Attorney General, Opinion Letter 2024-2 on Nondisclosure of Terminated Pregnancy Reports, 1 (Apr. 11, 2024), <https://www.in.gov/attorneygeneral/about-the-office/advisory/opinions/>. The Attorney General maintained that TPRs do not constitute medical records within the meaning of APRA. *Id.* The Attorney General also maintained that denying public disclosure would frustrate the purpose of the TPR statute. *Id.* In his view, the legislature intended to rely on members of the public to act as private investigators and police potential violations of abortion law. *Id.* at 7-8.

V. The Medical Board’s Disciplinary Proceedings Against Dr. Bernard

In 2023, the Medical Board concluded that Dr. Bernard should be disciplined for disclosing certain information about an abortion patient to another physician and a reporter. Bernard Decl. Ex. A (Findings of Fact, Ultimate Findings of Fact, Conclusions of Law & Final Order, *In re Bernard*, No. 2022 MLB 0024 (Ind. Med. Licensing Bd. July 27, 2023). According to the Medical Board, Dr. Bernard disclosed: “(1) Patient had been referred to her on or about June 27, 2022; (2) Patient was ten years old; (3) Patient was from Ohio; (4) she would be providing abortion care to Patient; and (5) Patient was six weeks and three days pregnant.” *Id.* at 3. All of this information is included in the TPR concerning the patient at issue. *See* Ind. Code § 16-34-2-5(a); Bernard Decl. ¶ 10.

The Medical Board found that Dr. Bernard’s “disclosures to [the physician and reporter], when taken in their entirety, contained unique identifying characteristics regarding Patient,” and concluded that they violated Dr. Bernard’s obligations under HIPAA, 110 Stat. 1936 (1996), as amended, as well as related provisions of Indiana law. Bernard Decl. Ex. A at 6-8.

Consequently, the Medical Board issued a letter of reprimand to Dr. Bernard and directed her to pay a \$3,000 fine. *Id.* at 8-9. The letter of reprimand states, in part: “[Y]ou are expected to maintain the confidentiality of all knowledge and information regarding a patient and comply with all applicable elements of HIPAA and Indiana patient privacy protections afforded pursuant to 844 I.A.C. 5-2-2.” *Id.* at 11.

ARGUMENT

I. Standard for Granting Preliminary Injunctive Relief

Indiana Trial Rule 65 authorizes courts to enter preliminary injunctions and temporary restraining orders. Ind. R. Trial P. 65(A)-(B). To obtain a preliminary injunction, the movant must show by a preponderance of the evidence that: (1) the movant has a reasonable likelihood of success on the merits; (2) the remedies at law are inadequate and irreparable harm will occur while the case is pending; (3) the threatened injury to the movant from a denial of the injunction outweighs the potential harm to the nonmovant from granting the injunction; and (4) the public interest would not be disserved by granting the injunction. *Individual Members of Med. Licensing Bd. of Indiana v. Anonymous Plaintiff 1*, 233 N.E.3d 416, 448 (Ind. Ct. App.), *transfer denied*, 246 N.E.3d 271 (Ind. 2024).

The showing required for a temporary restraining order is the same, but unlike a preliminary injunction, a temporary restraining order may be granted without notice to the adverse parties if: “(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition;” and “(2) the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.”

II. Plaintiffs Satisfy the Requirements for Entry of a Preliminary Injunction

A. Plaintiffs Are Likely to Succeed on the Merits of Their Claim for a Declaratory Judgment

“Courts of record within their respective jurisdictions have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Ind. Code § 34-14-1-1. “The declaration may be either affirmative or negative in form and effect.” *Id.* Here, Plaintiffs seek the following declarations: that TPRs submitted to IDOH pursuant to Ind. Code § 16-34-2-5 are exempt from disclosure under APRA, Ind. Code §§ 5-14-3-1 to 5-14-3-10; and that APRA, Ind. Code §§ 5-14-3-1 to 5-14-3-10, does not authorize IDOH to grant members of the public access to TPRs it received pursuant to Ind. Code § 16-34-2-5. Compl. at 10. Plaintiffs are likely to succeed in securing these declarations because TPRs qualify for statutory exemptions from APRA’s disclosure requirement.

APRA expressly exempts certain public records from its disclosure requirement. Ind. Code § 5-14-3-4. These include records “required to be kept confidential by federal law” and “[p]atient medical records and charts created by a provider, unless the patient gives written consent” in accordance with Indiana law. Ind. Code § 5-14-3-4(a)(3), (9). The Medical Board previously determined that at least some of the information contained in TPRs is protected from disclosure by HIPAA, which is a federal law.¹ *See supra* at 8.

¹ HIPAA defines “individually identifiable health information” as:

any information, including demographic information collected from an individual, that—(A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and—(i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify

Further, the Public Access Counselor previously determined that TPRs constitute patient medical records, and his reasoning is persuasive. *See supra* at 7; Jack Decl. Ex. A. A TPR is created by a medical provider as the consequence of a medical service, and it contains highly sensitive information about a patient’s demographics, medical history, and medical care that was obtained by the provider in the course of treating the patient. *See* Ind. Code § 16-34-2-5(a). As the Public Access Counselor noted: “Without the provider-patient relationship, the form would not exist.” Jack Decl. Ex. A at 2. The language of the TPR statute also suggests that the legislature views TPRs as private medical records rather than public records subject to disclosure under APRA. *See id.* § 16-34-2-5(e)-(f). The statute directs IDOH to compile a “public report” based on data contained in the TPRs on a quarterly basis, suggesting that the TPRs themselves are not meant to be public. *Id.* § 16-34-2-5(e). And it further directs IDOH to ensure that “no identifying information of a pregnant woman is contained in the [public] report,” demonstrating a belief that the TPRs contain such identifying information in the first place. *Id.* § 16-34-2-5(f).

In addition, a judge of this Court has already concluded, based on the plain language of APRA, that TPRs are exempt from its disclosure requirement. Jack Decl. Ex. C at 2.

The Attorney General’s contention that the legislature intended to rely on private citizens to police abortion providers and investigate potential violations of abortion law, *see supra* at 7-8, is wholly unsupported by the TPR statute’s text. The statute says only that “a further purpose and function shall be to monitor all abortions performed in Indiana to assure the abortions are done only under the authorized provisions of the law.” Ind. Code § 16-34-2-5(a). There is no

the individual.

42 U.S.C. § 1320d(6). It is indisputable that the information contained in a TPR satisfies this definition.

mention of outsourcing enforcement of abortion laws to vigilantes, and such a method of law enforcement would be so unusual that it should not be inferred absent a clear manifestation of legislative intent. Given that the legislature directed physicians to submit TPRs to IDOH, *id.* § 16-34-2-5(b), a far more plausible interpretation of the statute is that the legislature intended IDOH to monitor abortion care as part of its general oversight of public health in Indiana, *see* Ind. Code § 16-19-3-1 (“The state department shall supervise the health and life of the citizens of Indiana and shall possess all powers necessary to fulfill the duties prescribed in the statutes and to bring action in the courts for the enforcement of health laws and health rules.”).

Accordingly, Plaintiffs are likely to succeed on the merits of their declaratory judgment claim.

B. Plaintiffs Will Suffer Irreparable Harm Absent Preliminary Injunctive Relief

Absent preliminary relief, IDOH will be free to disclose TPRs submitted by Plaintiffs to VFL and other members of the public during the pendency of this action, and VFL and others will, in turn, be free to publicize the TPRs further, including by posting them on the internet. That publicity puts both Plaintiffs and their abortion patients at risk of harassment by abortion opponents, and the deprivation of their privacy and threats to their safety cannot be adequately remedied through money damages. Bernard Decl. ¶¶ 12, 14, 16; Rouse Decl. ¶¶ 12, 15.

In addition, absent preliminary relief, Plaintiffs will be faced with an irreconcilable conflict of legal duties. Bernard Decl. ¶ 11; Rouse Decl. ¶ 11. The Medical Board has ruled that publicly disclosing even a fraction of the information contained in TPR forms is grounds for professional discipline. *See supra* at 8. At the same time, the TPR statute makes failure to submit a complete TPR form for every abortion a crime. Ind. Code § 16-34-2-5(d). If IDOH is able to disclose TPRs to members of the public on request, Plaintiffs will have to choose

between serving as a conduit of private patient health information to the public, contrary to the letter and spirit of the Medical Board's directive, or facing criminal penalties for failing to submit TPRs to IDOH. This Catch-22 also causes irreparable harm to Plaintiffs.

C. The Balance of Equities and Public Interest Favor Entry of a Preliminary Injunction

IDOH would face little harm, during the pendency of this lawsuit, from treating TPRs as confidential medical records, which the agency has done voluntarily for more than a year. *See supra* at 5-6. Likewise, VFL would face little harm because it would still have access to the public reports that IDOH produces on a quarterly basis summarizing TPR data. *See* Ind. Code § 16-34-2-5(e)-(f). Given the irreparable harm that Plaintiffs and their patients would face from public disclosure of TPRs, the balance of equities plainly weighs in favor of a preliminary injunction. Further, because Plaintiffs have demonstrated a likelihood of success on the merits—*i.e.*, a likelihood of establishing that IDOH is not authorized by APRA to disclose TPRs—the public interest would be served by enjoining IDOH from making such disclosures and requiring VFL to return, delete, or destroy all copies of any TPR so far provided to it pursuant to the settlement agreement. The purpose of the temporary restraining order is to preserve the status quo. In this case, to prevent the public release of the TPRs containing confidential medical records.

III. Plaintiffs Satisfy the Additional Requirements for Entry of a Temporary Restraining Order

The Court should enter a temporary restraining order without requiring notice to Defendants because time is of the essence. APRA does not require IDOH to notify Plaintiffs when someone makes a public records request for TPRs. *See* Ind. Code §§ 5-14-3-1 to 5-14-3-10. Notification is required only if the request is denied and litigation ensues. *See* Ind. Code §

5-14-3-9(e). Thus, VFL could request access to TPRs at any time—and may have already done so—and the terms of the settlement agreement between IDOH, the Health Commissioner, and VFL would require IDOH to “immediately release” them. As a result, Plaintiffs are likely to suffer “immediate and irreparable injury . . . before the adverse party or his attorney can be heard in opposition.” Ind. R. Trial P. 65(B)(1); *see* Bernard Decl. ¶¶ 11-16; Rouse Decl. ¶¶ 11-15.

IV. The Court Should Not Require Plaintiffs to Post Security

Indiana Trial Rule 65 generally requires parties seeking a temporary restraining order or preliminary injunction to post security “in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” Ind. R. Trial P. 65(c). A trial court may waive the security requirement, however, if it finds that an adverse party is not likely to suffer any pecuniary harm from the issuance of a temporary restraining order or preliminary injunction. *Kennedy v. Kennedy*, 616 N.E.2d 39, 44 (Ind. Ct. App. 1993) (“[T]he trial court did not abuse its discretion by refusing to require Kathleen to post security.”). Here, neither Defendant will suffer monetary costs or damages from an order preventing IDOH from disclosing TPRs to members of the public during the pendency of this action. Accordingly, the Court should not require Plaintiffs to post a bond or other security.

CONCLUSION

For the reasons set forth above, the Court should grant Plaintiffs’ motion for a preliminary injunction and enter a temporary restraining order to prevent IDOH from disclosing TPRs to VFL or any other member of the public while the preliminary injunction motion is being litigated.

Date: February 6, 2025

Respectfully submitted:

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