STATE OF INDIANA

MARION COUNTY

IN THE MARION COUNTY SUPERIOR COURT 13

CAITLIN BERNARD, M.D.; and CAROLINE ROUSE, M.D.,	)	
Plaintiffs,	)	Cause No. 49D13-2502-PL-006359
vs.	)	
INDIANA STATE HEALTH COMMISSIONER, in the officer's official Capacity; and VOICES FOR LIFE INC.,	)	
Defendants	)	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Defendant, Voices for Life (VFL), urges the Court to deny the Plaintiffs' motion for a temporary restraining order because it lacks factual and legal support. The Termination of Pregnancy Report (TPR) required by Ind. Code 16-34-2-5 is not a patient medical record. VFL's agreement with the IDOH allows the redaction of personal health information to protect patient privacy. The Plaintiffs' expressed fear that the IDOH's release of TPRs will compromise patient privacy is unsupported by evidence and based on sheer speculation.

ARGUMENT

The Plaintiffs have not made the showing required to obtain preliminary relief under Indiana Trial Rule 65 as explained briefly below.

I. The Plaintiffs Have Not Established A Reasonable Likelihood of Success.

The Plaintiffs cannot show a reasonable likelihood of success on their claim. The TPR is not a patient medical record for reasons the Plaintiffs have explained at length. See Exhibit 1. If the TPR were a patient record, one would be able to look at the TPR and determine the identity of

the patient. This cannot be done because the TPR does not identify the patient; it is not a patient medical record.

The gravamen of the Plaintiffs' argument is that information contained in a TPR might be combined with extraneous information in such a way as create a composite of information equivalent to a patient medical record. Of course, this argument shows that the TPR itself is not a patient medical record. If the TPR were a patient medical record, one would not need to combine it with information from extraneous sources to create the composite of information contained in a patient medical record.

And the argument that the information contained in the TPR might be combined with other information in a way that could lead to a violation of patient privacy is based on sheer speculation. The TPR requirement has been a feature of Indiana law for decades. There is no evidence that the public release of TPRs has actually allowed anyone to identify a patient. There is no evidence it is even possible to use the unredacted TPR to identify the patient. And there is certainly no evidence that the IDOH's release of redacted TPRs will enable anyone to identify a patient.

The Plaintiffs try to address the lack of factual support for their claim based on Dr. Bernard's unfortunate case. See Plaintiffs' Memo at 8. But Dr. Bernard was not disciplined for fulfilling her statutory duty to complete a TPR. Dr. Bernard was disciplined for disclosing specific facts about a highly unusual case to a news reporter who, in turn, broadcast that information in such a way that the reporter effectively crowd-sourced the effort to identify Dr. Bernard's patient. See Exhibit 2. Dr. Bernard's egregious conduct provides no basis for classifying the TPR, which is a report, as a patient medical record, which it is not.

II. The Plaintiffs Do Not Show Irreparable Harm.

The Plaintiffs fail to establish any risk of irreparable harm. The claim that the release of TPRs will lead to harassment of doctors and patients is factually unsupported. The argument that the Medical Board will sanction the Plaintiffs for performing the statutory duty imposed by Ind. Code 16-34-2-5 is unsupported and insupportable.

III. The Balance of Equities.

VFL enjoys a statutory right to access public records and TPRs as public records. See Exhibit 1. The Plaintiffs have proven any real harm or even risk of harm. The Plaintiffs have not shown that the balance of equities justifies violation of VFL's statutory right.

IV. The Plaintiffs Have Not Shown That Granting A TRO Would Not Disserve The Public Interest.

Plaintiffs fail to show how the public interest would be served by granting a temporary restraining order. In fact, such a ruling would be inconsistent with APRA and the liberal interpretation it imposes on state actors in determining whether a public agency or official may withhold publicly accessible information:

> [I]t is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the 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. See also, Exhibit 1 at Sec. II A. Indeed, when a state agency withholds information under APRA, the burden of non-disclosure is on the state, not the person or party seeking access to information. *Id.* In determining whether the public interest is disserved, the trial

court must consider "whether a greater injury would be done by granting the injunction than would result from a refusal to do." *State ex rel. Atty. Gen. v. Lake Superior Court*, 820 N..E.2d 1240, 1255 (Ind. 2005). If the public interest is disserved from issuance of a temporary restraining order, the Court should not take this extraordinary remedy, just as it should not if any other of the other three necessary elements fail.

Here, the very nature of Voices For Life as an organization is to serve a public watch-dog function in helping further the enforcement of Indiana's abortion laws. The state agency – the Indiana Department of Health (IDOH) – has chosen to release these reports as public records, and no longer takes a public position of nondisclosure. It has taken several measures to ensure the essence of Plaintiffs' argument – the protection of individual's medical privacy—is not jeopardized through production of these reports. VFL's settlement agreement with the IDOH requires withholding of pieces of information which may create any possibility that an individual could be identified, through the process of redaction.[1] Plaintiffs have provided no evidence which supports the "reverse-engineering argument" stated in the Public Access Counselor's Advisory Opinion, rather provide an example of disclosure of patient medical records which was voluntarily disclosed by the provider herself in communications with a third-party. Preventing the release of records which a state agency has voluntarily disclosed, with proper measures taken to protect legitimate privacy interests, would violate the basic public interest served by the APRA statute and weighs against the issuance of a temporary restraining order.

CONCLUSION

[1] Redaction of information which may be used to identify an individual in violation of state or federal law, in a public record, is a sufficient tool to ensure compliance with state and federal privacy laws. See *Indiana Newspapers v. Indiana University,* 787 N.E.2d 893 (Ind. Court App. 2003).

WHEREFORE, based on the foregoing, Defendant respectfully asks this Court to deny Plaintiffs' Motion for a Temporary Restraining Order, and grant such other relief it may deem just, proper, and equitable.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served this February 11th, 2025, using the Indiana E-Filing System. I also certify that on February 11th, 2025, the following persons were electronically served with the foregoing document and its exhibits:

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