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By: **Analyzed by**
David Porreca
Analyzed by
Abbey Moffitt
Reviewed by
Stan Zegel

Lisa Madigan
ATTORNEY GENERAL

February 8, 2013

Abstract APPROVED
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Ms. Darlene Linxwiler, FOIA Officer
Illinois Dept. of Public Health
525-535 West Jefferson Street
Springfield, Illinois 62761-0001

RE: FOIA Request for Review – 2011 PAC 11644

Dear [REDACTED] and Ms. Linxwiler:

Pursuant to section 9.5(a) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(a) (West 2010), as amended by Public Act 97-579, effective August 26, 2011), the Public Access Bureau has received a Request for Review of the response by the Illinois Department of Public Health (Department) to a FOIA request submitted by [REDACTED]. We have considered the Department's response to the allegations in the Request for Review; [REDACTED] did not reply.

On December 22, 2010, [REDACTED] requested from the Department copies of all records "in any way referring to a lead poisoning investigation of a private residence located at 217 North Linden, Oak Park, Illinois."¹ The Department denied [REDACTED] request in its entirety pursuant to section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2010)), which exempts "[i]nformation specifically prohibited from disclosure by federal or State law or rules and

¹Letter from [REDACTED] to Illinois Department of Public Health (December 22, 2010).

Ms. Darlene Linxwiler
February 8, 2013
Page 2

regulations implementing federal or State law." The Department based its assertion of 7(1)(a) of FOIA on section 7 of the Lead Poisoning Prevention Act (LPPA) (410 ILCS 45/7 (West 2010)) and sections 8-2101 and 8-2102 of the Code of Civil Procedure (735 ILCS 5/8-2101, 8-2102 (West 2010)).

DETERMINATION

All public records in the possession or custody of a public body are "presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2010); *see also Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2010).

Section 7 of LPPA provides, in pertinent part:

Every physician who diagnoses, or a nurse, hospital administrator or public health officer who has verified information of the existence of any person found or suspected to have a level of lead in the blood in excess of the permissible limits set forth in regulations adopted by the Department, within 48 hours of receipt of verification, *shall report to the Department the name, address, laboratory results, date of birth, and any other information about the person deemed essential by the Department. * * * All reports shall be treated in the same manner as information subject to the provisions of Part 21 of Article VIII of the Code of Civil Procedure. (Emphasis added.)*

The cited provision, section 8-2101 of the Code of Civil Procedure, which is also known as section 8-2101 of the Medical Studies Act (MSA) (735 ILCS 5/8-2101 (West 2010)),² provides, in pertinent part:

All information, interviews, reports, statements, memoranda, recommendations, letters of reference or other third party confidential assessments of a health care practitioner's professional competence, or other data of the Illinois Department of Public Health, * * * used in the course of internal quality control or of

²The Department also cites to section 8-2102 of the Code of Civil Procedure in its denial letter, but does not elaborate on its assertion that this provision exempts the records at issue from disclosure under FOIA. Because this provision pertains to the admissibility of records in evidence in civil proceedings, we determine that it does not present a credible basis to support the Department's FOIA claim.

Ms. Darlene Linxwiler

February 8, 2013

Page 3

medical study for the purpose of reducing morbidity or mortality, or for improving patient care or increasing organ and tissue donation, shall be privileged, strictly confidential and shall be used only for medical research, increasing organ and tissue donation, the evaluation and improvement of quality care, or granting, limiting or revoking staff privileges or agreements for services, except that in any health maintenance organization proceeding to decide upon a physician's services or any hospital or ambulatory surgical treatment center proceeding to decide upon a physician's staff privileges, or in any judicial review of either, the claim of confidentiality shall not be invoked to deny such physician access to or use of data upon which such a decision was based.

Laboratory Test Results

The records in question include laboratory test results of blood samples submitted to the Department which the Public Access Bureau has previously determined are exempt pursuant to section 7(1)(a) of FOIA based on section 7 of the LPPA and section 8-2105 of the Code of Civil Procedure. Ill. Att'y Gen. PAC Req. Rev. Ltr. 17224, issued February 6, 2012; Ill. Att'y Gen. PAC Req. Rev. Ltr. 15292, issued September 22, 2011.

Remaining Records

However, the remaining records withheld by the Department relate to property inspections resulting from reports of lead poisoning, records relating to the remediation plan, licensing and certifications of companies and individuals contracted to perform projects deemed necessary to implement that plan, and copies of statutes and regulations related to the Department's investigative authority. The plain language of section 7 of LPPA limits the confidentiality provisions of section 8-2101 of the Code of Civil Procedure to "reports" of lead poisoning submitted to the Department by doctors, nurses, hospital administrators and public health officers. These records are outside the scope of section 7 of the LPPA.

Section 8-2101 of MSA is intended to "ensure the effectiveness of professional self-evaluation, by members of the medical profession, in the interest of improving the quality of health care." *Roach v. Springfield Clinic*, 157 Ill. 2d 29, 40 (1993). The privilege is limited to records used in the course of medical research, *Doe v. Illinois Masonic Medical Center*, 297 Ill. App. 3d 240, 243 (1st Dist. 1998), and records related to "peer review or self-evaluation by members of the medical profession or employees of the Department [of Public Health]." *May v. Central Illinois Public Service Co.*, 260 Ill. App. 3d 41, 48 (5th Dist. 1994); see also *Anderson v. Rush-Copley Medical Center*, 385 Ill. App. 3d 167, 174 (2nd Dist. 2008) ("Information generated

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Ms. Darlene Linxwiler,

February 8, 2013

Page 4

prior to the commencement of a peer-review process but later disclosed to a peer-review committee is not privileged under the Act").

Adopting the Department's interpretation of section 8-2101 of MSA would expand the scope of the privilege far beyond its intended purpose of enhancing the quality of health care by promoting self-evaluation by medical professionals. The Public Access Bureau has previously determined that the plain language of section 7 of LPPA limits the confidentiality provisions of section 8-2101 of MSA to "reports" of lead poisoning submitted to the Department by doctors, nurses, hospital administrators and public health officers. Ill. Att'y Gen. PAC Req. Rev. Ltr. 17224, issued February 6, 2012. Conspicuously absent from the remaining sections of LPPA is any reference to section 8-2101 of MSA. Indeed, section 8(2) of LPPA (410 ILCS 45/8(2) (West 2010)) expressly requires that the Department or its delegate agency "provide a copy of the inspection report to the property owner and to the occupants of the dwelling unit." The Department's assertion that all non-medical records related to lead poisoning investigations and enforcement efforts are privileged under section 7 of LPPA and section 8-2101 of MSA cannot be reconciled with the clear obligation to provide inspection reports to property owners and occupants of dwelling units under section 8(2) of LPPA. *Accord* Ill. Att'y Gen. PAC Req. Rev. Ltr. 18019, issued June 5, 2012. Accordingly, we conclude that the Department has not sustained its burden of demonstrating by clear and convincing evidence that any records provided for our review, other than those which expressly reference laboratory test results of blood samples submitted to the Department, are exempt from disclosure pursuant to section 7(1)(a) of FOIA based on section 7 of LPPA and/or section 8-2101 of MSA.

In accordance with the conclusions expressed in this letter, we request that the Department disclose records responsive to ██████████ FOIA request. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (217) 782-9078. This letter shall serve to close this matter.

Very truly yours,

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MATTHEW M. SEBEK
Assistant Attorney General
Public Access Bureau

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