



**OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS**

MEMORANDUM

TO: State's Attorneys

FROM: Illinois Attorney General's Office

DATE: April 3, 2020

RE: Guidance re: Disclosing Addresses for Confirmed COVID-19 Cases to First Responders

The Attorney General's Office ("AGO") has been asked to provide guidance on whether first responders in Illinois may receive notification of the existence of a confirmed COVID-19 case at a particular address prior to responding to an emergency call for service at that address. The answer is yes – federal law and state law (which incorporates federal law in relevant part) permit this type of disclosure.¹ As recently noted by the Illinois Department of Public Health ("IDPH"), however, disclosure is permitted, but not required, under applicable federal law, and state and local public health departments retain discretion in deciding whether to make such disclosures.² The exercise of this discretion necessarily requires balancing individual privacy interests, which both federal and state law recognize are significant and critically important, with the public safety interest in protecting first responders and the public from the risk of COVID-19 transmission.

A. Federal Law Permits Disclosure

Federal regulations known collectively as the HIPAA Privacy Rule provide the governing legal standard. *See* 45 C.F.R. §§ 160 and 164, Subparts A and E. These regulations permit disclosure of protected health information "to avert a serious threat to health or safety" when the

¹ This guidance is being provided in the midst of a rapidly evolving situation and is based upon information and legal resources presently available to the AGO. This guidance may be supplemented, updated, or superseded by subsequent changes in federal law, regulation, or guidance, or in state law, regulation, or guidance.

² IDPH, *Guidance to Local Health Departments on Disclosure of Information Regarding Persons with Positive Tests for COVID-19 to Law Enforcement* (April 1, 2020) ("IDPH Guidance"), at 1. Please note that the scope of this memorandum is limited to addressing state and local public health departments that are "covered entities" under the HIPAA Privacy Rule. 45 C.F.R. §§ 164.104-105, 164.502(a). Not all public health departments in Illinois are covered entities; a particular department may also be a "hybrid entity," *id.* § 164.105, in which some components within the department are "covered entities" and others are not.

disclosure is: (i) “necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public,” and (ii) “to a person or persons reasonably able to prevent or lessen the threat,” 45 C.F.R. § 164.512(j)(1)(i). Any disclosure of protected health information under this provision must be “consistent with applicable law and standards of ethical conduct,” *id.*, and restricted to the “minimum necessary to accomplish the purpose for which the disclosure is being made, *id.* § 502(b). The limitation on the scope of the disclosure to the “minimum necessary” is a reflection of the profound privacy interest individuals have in their protected health information, which is an interest that receives substantial protection under both federal and state law. *See, e.g.*, 45 C.F.R. § 164.508; 20 ILCS 2305/2(h).

The Office for Civil Rights of the United States Department of Health and Human Services has issued guidance assessing whether federal regulations permit the disclosure of address information of a confirmed COVID-19 case to first responders responding to an emergency call for service at that address (“HHS OCR Guidance”). The HHS OCR Guidance includes the following example, which illustrates how federal law operates in the circumstances at issue:

Example: A covered entity, such as a hospital, may provide a list of the names and addresses of all individuals it knows to have tested positive, or received treatment, for COVID-19 to an EMS dispatch for use on a per-call basis. ***The EMS dispatch (even if it is a covered entity) would be allowed to use information on the list to inform EMS personnel who are responding to any particular emergency call so that they can take extra precautions or use personal protective equipment (PPE).***³

While this example addresses EMS personnel, federal regulations do not indicate that other categories of first responders, such as police and firefighters, responding to the same emergency call should be treated any differently in these circumstances.

Notably, IDPH has issued guidance addressing federal regulations and disclosures to first responders regarding confirmed COVID-19 cases. The IDPH Guidance, citing the federal regulations referenced above, acknowledges that federal law “includes provisions that permit, but do not require” disclosure.⁴ The IDPH Guidance also includes the following recommendation:

[P]roviding first responders and law enforcement with the identity of positive COVID-19 cases has limited epidemiologic and infection control value and therefore IDPH does not recommend notification to law enforcement of individuals who have tested positive for COVID-19. Rather, IDPH recommends that first responders and law enforcement take appropriate protective precautions when responding to all calls.⁵

³ HHS OCR Guidance, at 3.

⁴ IDPH Guidance, at 1; *see also* IDPH, *Updated – April 2, 2020: Guidance to Local Health Departments on Disclosure of Information Regarding Persons with Positive Tests for COVID-19 to Law Enforcement* (April 2, 2020) (“IDPH Updated Guidance”).

⁵ IDPH Guidance, at 1.

The IDPH Guidance is directed to local health departments to provide “legal and infection control guidance to inform” their decisions regarding disclosures to first responders.⁶

It is beyond the scope of this memorandum to address the recommendations in the IDPH Guidance that reflect scientific or epidemiological assessments. This memorandum addresses the applicable law, which, as the IDPH Guidance acknowledges, permits but does not require disclosure.

B. State Law Incorporates Federal Law

The HIPAA Privacy Rule and related federal regulations permit states to adopt “more stringent” standards relating to “the privacy of individually identifiable health information,” 45 C.F.R. § 160.203(b). As relevant here, however, Illinois law generally incorporates federal law regarding the privacy afforded to health information obtained by state and local health departments in the course of an infectious disease outbreak.

Section 2(h) of the Department of Public Health Act (“the Act”), 20 ILCS 2305/2(h), provides the governing standard under state law for the treatment of health information received by state and local health departments in the context of an infectious disease outbreak. Section 2(h) provides in pertinent part:

To prevent the spread of a dangerously contagious or infectious disease, the Department, local boards of health, and local public health authorities shall have emergency access to medical or health information or records or data upon the condition that the Department, local boards of health, and local public health authorities shall protect the privacy and confidentiality of any medical or health information or records or data obtained pursuant to this Section in accordance with federal and State law.

Id. The express purpose of Section 2(h) is to allow public health agencies to access “medical or health information” in order “[t]o prevent the spread of a dangerously contagious or infectious disease[.]” *Id.* Section 2(h) provides IDPH, local boards of health, and local public health authorities with this access on the condition that they “protect the privacy and confidentiality” of the information “in accordance with federal and State law.” When Section 2(h) was enacted as part of Public Act 93-829 in 2004, the HIPAA Privacy Rule established by federal regulation had been in effect since April 14, 2003. 67 Fed. Reg. 53,182-01, 53,183 (Aug. 14, 2002) (noting “compliance date” of April 14, 2003). In addition to incorporating federal law, including the HIPAA Privacy Rule, Section 2(h) also establishes state law privileges against discoverability and admissibility. In doing so, Section 2(h) anticipates that a “local public authority”⁷ may receive “access to or disclosure of” medical or health information and provides that such access

⁶ *Id.*

⁷ The Act does not define what constitutes a “local public authority,” though the plain text is sufficiently broad to include a local law enforcement agency, a local fire department, or another form of governmental first responder. Notably, Section 2(h) is the only place in the Act that references a “local public authority,” although there are multiple references in Sections 2(h) and 2.1 of the Act to “local public health authorities,” *id.* §§ 2(h) & 2.1.

or disclosure “shall not waive” protection from discoverability and admissibility. 20 ILCS 2305/2(h).

In short, on its face, Section 2(h) of the Act incorporates federal law. 20 ILCS 2305/2(h). As noted above, federal law permits first responders, including police, firefighters, and EMS personnel, to receive protected health information in accordance with the requirements of 45 C.F.R. § 164.512(j)(1)(i).

In addition to referencing federal law, Section 2(h) also requires state and local public health authorities to abide by “State law” regarding “the privacy and confidentiality of any medical or health information or records or data” obtained pursuant to the access it authorizes. In this regard, Section 2(h) includes a specific cross-reference to another provision in the Act, Section 2.1: “Nothing in this subsection shall prohibit the sharing of information as authorized in Section 2.1 of this Act.” 20 ILCS 2305/2(h).

C. Section 2.1 of the Department of Public Health Act

The AGO has been asked whether Section 2.1 of the Act prohibits disclosure of information about a confirmed COVID-19 case at a particular address to non-law-enforcement first responders, such as firefighters and emergency medical services (“EMS”) personnel. It does not. Section 2.1 regulates information sharing in a particular context and for a particular purpose: the investigation and prosecution of criminal conduct, such as an act of bioterrorism, that has “the potential to be the cause of or related to a public health emergency, as defined in [20 ILCS 3305/4],” 20 ILCS 2305/2.1. Section 2(h) of the Act, not Section 2.1, establishes the governing legal standard regarding disclosure of health and medical information by public health authorities to first responders during the COVID-19 pandemic.

Section 2.1 of the Act imposes mutual mandatory reporting requirements between state and local “law enforcement authorities,” on the one hand, and IDPH “or a local board of health or local public health authority,” on the other. *Id.* § 2.1. Section 2.1(a) imposes a duty upon “a State of local law enforcement authority” to notify the Illinois Emergency Management Agency (“IEMA”) as well as either IDPH or the relevant local health board or department whenever it “learns of a case of an illness, health condition, or unusual disease or symptom cluster” that has been deemed reportable by regulatory rule. In addition, Section 2.1(a) also requires this notification when it learns of “a suspicious event that may be the cause of or related to a public health emergency,” as defined in 20 ILCS 3305/4. In other words, Section 2.1(a) requires state and local law enforcement to alert IEMA and IDPH upon discovering a case of one of a specified set of diseases or a “suspicious event” that may be connected to a “public health emergency.” 20 ILCS 2305/2.1(a).⁸

⁸ The 2004 amendments to the Act that added Sections 2(h) and 2.1 were based on the Model State Emergency Health Powers Act. *See* 93rd Ill. Gen. Assem., Senate Proceedings, May 11, 2004, at 46 (statements of Senator Obama). The initial draft of the model statute relied upon was released to the public on December 21, 2001 – months after the terrorist attacks of September 11, 2001 and the anthrax letter attacks directed at federal elected officials and members of the news media. Given the legislative context in which Section 2.1 was enacted, the type of “suspicious event” anticipated likely included receipt of a suspicious substance like that which was used to effectuate the 2001 anthrax letter attacks.

Applying the same triggering criteria as Section 2.1(a), Section 2.1(b) imposes a reporting obligation flowing in the other direction – from IDPH and local health boards and departments to: (i) IEMA, (ii) “the appropriate State and local law enforcement authorities,” (iii) “other appropriate State agencies,” and (iv) “federal health and law enforcement authorities,” *id.* § 2.1(b). Section 2.1(b) goes on to delineate additional requirements and restrictions applicable only to “law enforcement authorities” and “law enforcement.” Specifically, Section 2.1(b) states that following the required notification by IDPH or other public health authority, IDPH or the public health authority “shall provide law enforcement authorities with such other information as law enforcement authorities may request for the purpose of conducting a criminal investigation or a criminal prosecution of or arising out of that matter.” 20 ILCS 2305/2.1(b). In other words, the purpose of the disclosure to law enforcement required by Section 2.1(b) is to effectuate criminal investigation and prosecution. Consistent with this purpose, Section 2.1(b) prohibits “law enforcement” from “redisclos[ing]” information “containing the identity or tending to reveal the identity of any person” except “in a prosecution of that person for the commission of a crime.” 20 ILCS 2305/2.1(b).

After establishing a duty to report in Sections 2.1(a) and 2.1(b) of the Act, Section 2.1(c) of the Act imposes a limit on the amount of information that can be shared in the course of this mutual reporting process. In sharing information “between and among public health and law enforcement authorities” relating to the occurrences specified in the two prior subsections – “reportable illnesses, health conditions, unusual disease or symptom clusters or suspicious events” – these authorities may only share “the information necessary” to effectuate two specific purposes. *Id.* § 2.1(c). The information shared must be “necessary” for “the treatment in response to, control of, investigation of, and prevention of a public health emergency,” as defined in 20 ILCS 3305/4. Alternatively, in language that parallels the criminal investigative purpose referenced in Section 2.1(b), the information shared must be “necessary” for “criminal investigation or criminal prosecution of or arising out of that matter.” 20 ILCS 2305/2.1(c).

The AGO understands that some have interpreted Section 2.1 of the Act as a state law bar to disclosure of information about confirmed COVID-19 cases to non-law-enforcement first responders, such as firefighters and emergency medical services (“EMS”) personnel. This interpretation reads Section 2.1 as authorizing disclosure by public health departments of information about confirmed COVID-19 cases to “law enforcement,” 20 ILCS 2305/2.1, but not to other categories of first responders, such as firefighters and EMS personnel. According to this interpretation, because Section 2.1 refers to “law enforcement” but does not reference firefighters or EMS personnel, disclosure to firefighters or EMS personnel is prohibited. 20 ILCS 2305/2.1. Similarly, according to this view, the limitation in Section 2.1(c) confines the sharing of information about confirmed COVID-19 cases to “public health and law enforcement authorities,” to the exclusion of non-law-enforcement first responders. *Id.* § 2.1(c).

The AGO respectfully disagrees with this interpretation of Section 2.1 of the Act, because it is inconsistent with the text of the statute read as a whole and the legislative intent reflected in the legislative history. *See In re Detention of Lieberman*, 201 Ill.2d 300, 308 (Ill. 2002) (statutes must be read as a whole); *Krohe v. City of Bloomington*, 204 Ill.2d 392, 398 (Ill. 2003) (“a statute’s legislative history and debates are ‘valuable construction aids in interpreting an ambiguous statute’”) (quoting *Advincula v. United Blood Services*, 176 Ill.2d 1, 19 (Ill.

1996)). In addition, adopting this interpretation would lead to absurd results in that police and sheriffs would be authorized to receive information about confirmed COVID-19 cases when acting as first responders, but firefighters and EMS personnel, who could be providing medical treatment to infected persons, could not receive this information in the same circumstances. *See Slepicka v. Ill. Dep't of Pub. Health*, 2014 IL 116927, ¶ 15 (courts presume that the legislature did not intend absurdity, inconvenience, or injustice in enacting a statute).

It is true that Section 2.1 of the Act does not reference firefighters or EMS personnel. But because Section 2.1 of the Act does not reference firefighters or EMS personnel, it also does not impose any express prohibition on their receipt of information. *See Whitaker v. Wedbush Securities, Inc.*, 2020 IL 124792 ¶ 16 (prohibiting “reading in exceptions, limitations, or conditions” into a statute that the legislature did not include). The language in Section 2.1 does not purport to establish an exhaustive list of governmental agencies that are eligible to receive information from the public health authorities. Instead, Section 2.1 imposes a mandatory reporting obligation on state and local law enforcement, and a reciprocal obligation on IDPH and local public health authorities. 20 ILCS 2305/2.1(a)-(b). The purpose of this reporting obligation is also apparent from Section 2.1(b): to enable “law enforcement authorities” to conduct criminal investigations and criminal prosecutions related to conduct that may “be the cause of or related to a public health emergency,” *id.* § (b). The specific prosecutorial focus of Section 2.1 is also consistent with the legislative history indicating that the purpose of the 2004 amendments to the Act, which added Section 2.1, was to provide for an “effective response to an incidence of bioterrorism.” 93rd Ill. Gen. Assem., Senate Proceedings, May 11, 2004, at 46 (statements of Senator Obama). Given the specific purpose of Section 2.1, with its focus on criminal prosecution and investigation of things like bioterrorism, it is therefore unsurprising and immaterial that there is no reference to other types of first responders aside from law enforcement.⁹

Notably, Section 2(h) of the Act articulates a different purpose that is more germane to the nature of the work first responders are performing in response to the COVID-19 pandemic. Section 2(h) facilitates access to medical and health information in order “[t]o prevent the spread of a dangerously contagious or infectious disease,” 20 ILCS 2305/2(h). It is consistent with this purpose to enable first responders to receive information about the existence of a confirmed COVID-19 case at a particular address so that they can “take extra precautions or use personal protective equipment (PPE).”¹⁰

⁹ In addition to referencing Section 2.1 of the Act, the IDPH Guidance includes a citation to the Illinois Control of Communicable Diseases Code, 77 Ill. Adm. Code 690 (“Communicable Diseases Code”). IDPH Guidance, at 2. The Communicable Diseases Code permits the Director of IDPH or other “authorized personnel” of IDPH to furnish “appropriate information to a physician or institution providing examination or treatment to a person suspected of or affected with a disease or condition, including carrier status, of public health interest, or to any person or institution when necessary for the protection of public health.” 77 Ill. Adm. Code 690.200(d)(5). In addition, the Communicable Diseases Code also incorporates federal HIPAA regulations regarding the sharing of “identifiable data”: “Identifiable data may be released to the extent necessary for the treatment, control, investigation or prevention of diseases and conditions dangerous to the public health. Identifiable data can be shared for conditions of public health significance, e.g., as permitted by HIPAA regulations, the Medical Studies Act, and the Health Statistics Act.” *Id.* § 690.200(g).

¹⁰ HHS OCR Guidance, at 3.

At the same time, it would be contrary to the express prophylactic purpose of the Act, reflected in Section 2(h), to interpret it in a manner that enables one type of first responder – police – to take protective measures but precludes other first responders – firefighters and EMS personnel – from doing so in responding to the same event. *See Township of Jubilee v. State of Illinois*, 2011 IL 111447, ¶ 36 (requiring statutes to be construed to avoid absurd, unreasonable, or unjust results). This logical inconsistency is compounded by the fact that EMS personnel are trained to provide medical care, whereas many law enforcement first responders are not. Indeed, EMS personnel are likely to be responding to an increasing number of emergency calls to provide care to individuals experiencing complications from COVID-19. In enacting Section 2.1, the General Assembly could not have intended for information about a COVID-19 diagnosis to be provided to a law enforcement first responder but simultaneously withheld from an EMS technician being called upon to treat the very condition at issue.¹¹

D. Conclusion

Federal law and state law permit, but do not require, first responders responding to an emergency call for service at a particular address to be notified of the existence of a confirmed COVID-19 case at that address. In addition to the legal considerations addressed in this memorandum, county and municipal agencies are encouraged to consult and consider the IDPH Guidance in assessing whether to provide such notifications.

¹¹ A separate provision in state law, 210 ILCS 85/6.08(a), expressly *requires* hospitals – which, like several state and local health departments, are subject to the HIPAA Privacy Rule – to notify “police officers, firefighters, emergency medical technicians, private emergency medical services providers, and ambulance personnel who have provided or are about to provide transport services, emergency care, or life support services to a patient who has been diagnosed as having a dangerous communicable or infectious disease.” This notification may not disclose the patient’s name. *Id.* This statute suggests that the General Assembly intends for first responders to know when they are at risk of contracting an infectious disease, such as COVID-19, in the course of their duties.