

OKGC

O'HALLORAN KOSOFF
GEITNER & COOK, LLC

ATTORNEYS AT LAW

MEMORANDUM ON THE DISCLOSURE OF NAMES AND ADDRESSES OF PERSONS DIAGNOSED WITH COVID-19 TO FIRST RESPONDERS

To: ICRMT Members

From: O'Halloran Kosoff Geitner & Cook, LLC
Ben Jacobi (bjacobi@okgc.com)

Date: April 15, 2020

First responders, including law enforcement, fire safety, and emergency medical service providers, are at a uniquely high risk of exposure to COVID-19. Routine patrol and response to calls require interaction with the public, sometimes in their homes. Limited resources and access to personal protective equipment ("PPE") mean that first responders sometimes need to decide which calls warrant the use of PPE. Consequently, many local public entities have started requesting the names and addresses of individuals who have tested positive for COVID-19 from their local health care providers and local public health departments. If the local public entity knows that a specific person has tested positive for COVID-19, or that COVID-19 was diagnosed at a particular address, then they can allocate PPE and take other precautionary measures when responding to calls at those addresses or interacting with those individuals. Disclosure of the names and addresses of positive COVID-19 cases, though, implicates privacy and confidentiality concerns in federal statute, state statute, and state common law.

This memorandum reviews recent guidance issued by federal and state authorities on the disclosure of positive COVID-19 cases to first responders, and specifically addresses (1) the recent McHenry County circuit court ruling requiring disclosure of names and addresses of positive COVID-19 cases to local law enforcement through the Emergency Telephone System Board, (2) HHS guidance on whether such disclosures violate HIPAA, (3) Illinois Attorney General guidance on whether such disclosures violate state privacy law, and (4) IDPH guidance on whether disclosures violate the public policy favoring privacy of medical information.

I. The Circuit Court in McHenry County Ordered the Local Public Health Department to Disclose the Names and Addresses of Positive COVID-19 Cases.

On April 10, 2020, Judge Chmiel in the Circuit Court for the 22nd Judicial Circuit in McHenry County granted a motion for a temporary restraining order in favor of the McHenry County Sheriff, and the Chiefs of Police for the City of McHenry, the Village of Algonquin, the City of

This memorandum was prepared by O'Halloran Kosoff Geitner & Cook, LLC for ICRMT general informational purposes only. The discussion herein may be impacted by subsequent federal or state statutes, rules, regulations or guidelines as well as court decisions. It is not intended to provide legal advice to any public entity. Member entities and their officials and employees should consult their State's Attorney, Corporation Counsel, or other appropriate legal advisor on the subject matter of this memorandum before taking or refraining from taking any action or adopting any policy.

Woodstock, and the Village of Lake in the Hills, and against the McHenry County Health Department (“MCHD”). In *McHenry County Sheriff v. McHenry County Health Department*, case no. 20 MR 373, the court entered a temporary restraining order as follows:

1. That the MCHD must disclose the names and addresses of all individuals that reside in McHenry County and who tested positive for COVID-19 to the Director of the McHenry County Emergency Telephone System Board (“ETSB”) and no more than two designees of the Director.
2. The ETSB must enter those identifiers into the “Premise Alert Program” with the following notation, “Immediate PPE Alert,” for use by all police officers in McHenry County.
3. The identifiers must be purged from the ETSB within seven days of the MCHD determining that individual to be no longer contagious.
4. All COVID-19 information disclosed to any person pursuant to the court order shall be kept confidential. Any police officer who utilized the information authorized by the TRO must participate in in-house training regarding the appropriate use and disclosure of information obtained pursuant to the TRO as soon as possible.

In so ruling, the court balanced the need for disclosure of the names and addresses of individuals who tested positive of COVID-19 with the privacy interests of those individuals. The court observed the following:

Here, the Court finds police officers are not like everyone else, in that they are sworn to do certain things which others are not required to do. They are thrust into situations which often jeopardize their life and limb, and they are expected (required) to carry out their duties. And while police officers are well-admonished to treat everyone as if they are infected, common sense (expectation) dictates they will typically do what they need to do in a given situation. If they in fact know they are dealing with an infected person, they might be able to pursue an alternative, perhaps personally safer, course of action. While police officers could always pursue personally safer courses of action, if they at least know a person is not listed as infected, they might be more inclined to fully engage a situation, to save life, limb, or liberty, and use all available options and not just those which are personally safer. Here, the Court recognizes the Defendants caution against the reliability of a name not being on the list, in consideration of the challenges with testing, whether the same involve the availability of tests or the lack of perceived need for them. To the extent possible, however, the availability of the names at issue *best* enables police officers to do their job and protect the community to the fullest extent of their ability.

Still further, the Court notes police officers are required to enforce the law. As such, the Court is challenged to think of others who would be better-situated to protect the names at issue, especially with specific safeguards put in place to provide for the same.

Because this ruling was on a motion for a temporary restraining order, it is valid only for ten days unless extended by agreement of the parties. The court will need to hold a hearing on a preliminary injunction or otherwise extend the order. To our knowledge, a preliminary injunction hearing has not been set in the case yet, so the future of this order is uncertain. It is not a “final judgment.” However, it provides an excellent guidepost for protocols of disclosing and using personal identifier information of persons who have tested positive for COVID-19 to equip first responders.

II. HHS Guidance on HIPAA Implications in Disclosing Names and Addresses of Persons Who Tested Positive for COVID-19 to First Responders.

The United States Department of Health and Human Services issued a memorandum titled, “COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities,” that reviews HIPAA compliance in light of the COVID-19 pandemic. It can be found here: <https://www.hhs.gov/sites/default/files/covid-19-hipaa-and-first-responders-508.pdf>.

The memorandum opines that disclosure of personal identifiers to first responders may not violate HIPAA under certain circumstances, for example:

- When the disclosure is needed to provide treatment.
- When the disclosure is required by law.
- To notify a public health authority in order to prevent or control spread of disease.
- When first responders may be at risk of infection.
- When the disclosure of protected health information to first responders is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public.
- When responding to a request for protected health information by a correctional institution or law enforcement official having lawful custody of an inmate or other individual.

The memorandum emphasizes that where a disclosure is made, the covered entity “must make reasonable efforts to limit the information used or disclosed under any provision listed above to that which is the ‘minimum necessary’ to accomplish the purpose of the disclosure.”

The HHS memorandum uses the example of a hospital providing protected health information (names and addresses of patients) to an EMS call center, and the EMS call center disclosing that information to EMS personnel on a call-by-call basis so that EMS personnel can take additional precautions. The information is not shared publicly, but rather provided to responders on a call. According to its memorandum, HHS believes that such disclosure is authorized by HIPAA.

The HHS memorandum is consistent with an earlier bulletin issued by the HHS in February 2020 that observed that health care providers could share patient information without the patient’s

permission to anyone who is in a position to prevent or lessen a serious and imminent threat, like law enforcement. The bulletin also stated that the disclosure must be the “minimum necessary” to accomplish the purpose. The bulletin states, “Covered entities may rely on representations from a public health authority or other public official that the requested information is the minimum necessary for the purpose, when the reliance is reasonable under the circumstances.” The HHS bulletin can be found here: <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>.

III. Illinois Attorney General Guidance on State Law Implications in Disclosing Names and Addresses of Persons Who Tested Positive for COVID-19 to First Responders.

The Office of the Illinois Attorney General issued a memorandum to all State’s Attorneys on April 3, 2020 (“IL OAG Memo”), which stated that local public health departments have the discretion (but are not mandated) to provide the addresses of confirmed COVID-19 cases to first responders.

The IL OAG Memo analyzed the Illinois Department of Public Health Act, 20 ILCS 2305/1 et seq. (the “Act”), and found that the Act incorporates “federal law” in the context of protecting privacy and confidentiality. 20 ILCS 2305/2(h). Relying on the HHS memorandum discussed above, the IL OAG Memo states that since disclosure to prevent the spread of a dangerously contagious or infectious disease is permitted by federal law, it is also permitted by the Act, subject to “state law.”

In reviewing state law, the IL OAG Memo interpreted section 2.1 of the Act, 20 ILCS 2305/2.1, and found that section 2.1 also permits disclosures to law enforcement. Although section 2.1 speaks more specifically to health departments disclosing information to local law enforcement to effectuate criminal investigation and prosecution, the IL OAG Memo interprets section 2(h) as authorizing local public health departments to disclose information to law enforcement and other first responders for the purpose of preventing the spread of a dangerously contagious or infectious disease, which is not inconsistent with section 2.1.

With those considerations in mind, the IL OAG Memo concludes, “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.”

The analysis in the IL OAG Memo is also consistent with related regulations in Illinois. Section 690.1405(a) of Title 77 of the Illinois Administrative Code states, “Whenever a certified local health department learns of a case of a reportable illness or health condition, an unusual cluster, or a suspicious event that may be the cause of a public health emergency as that term is defined in Section 4 of the Illinois Emergency Management Agency Act, it shall immediately notify the

Department, the Illinois Emergency Management Agency, and the appropriate State and local law enforcement authorities.” Section 690.1405(b) restricts disclosure “to information necessary for the treatment, control of, investigation of, containment of, and prevention of a public health emergency, as that term is defined in Section 4 of the Illinois Emergency Management Act, or for criminal investigation or criminal prosecution of or arising out of that matter.”

IV. State Law Public Policy Considerations

Illinois has a strong public policy in favor of privacy of medical information. That public policy was observed in *Coy v. Washington County Hosp. Dist.*, 372 Ill. App. 3d 1077 (5th Dist. 2007), which rejected a newspaper’s request for the disclosure of non-party patient names related to the settlement of a case brought by a doctor against a hospital arising from the suspension of his practice privileges. Specifically, in reviewing the public policy, the court found that there is an expectation of privacy with respect to the name of a patient. *Id.* at 1083.

The expectation of privacy of medical records and information is found throughout the Illinois Code. For example, the Medical Patient Rights Act states, “The following rights are hereby established: (a) The right of each patient . . . to privacy and confidentiality of records except as otherwise provided by law.” 410 ILCS 50/3(a). This memorandum does not endeavor to identify or analyze each provision of the Illinois Code memorializing a right to privacy for medical patients, but rather summarizes the latest guidance by federal and state authorities.

Specifically in response to law enforcement requests for identifiers of COVID-19 positive cases, the Illinois Department of Public Health issued a Guidance Memorandum on April 2, 2020 titled, “LHD Guidance Disclosure of COVID-19 Persons to Law Enforcement,” in response to the position in the IL OAG Memo, in which IDPH took a policy position based on its analysis of epidemiological data that, “Providing first responders and law enforcement with the identity of positive COVID-19 individuals has limited epidemiologic and infection control value, since there are likely a larger number of asymptomatic and cases that have not been confirmed by a laboratory in each community. Providing this information could also give first responders and law enforcement a false sense of security, as many people who are ill may not have been tested yet. Additionally, many who have tested positive are no longer contagious.” The IDPH recommends that first responders treat everyone as if they are positive for COVID-19. The IDPH Guidance Memorandum is available here:

<https://www.dph.illinois.gov/covid19/community-guidance/LHD-disclosure>.

V. Summary

This memorandum is not intended as a thorough analysis or legal opinion of all state and federal law potentially applicable or relevant to whether a local public health department or other medical health provider is permitted to disclose personal identifier information to first responders about positive COVID-19 cases. The disclosure of health information to law enforcement and first responders could implicate a number of other state statutes and concerns not addressed in

this memorandum. Individual local law enforcement agencies and first responders should consult with their legal counsel, including corporate municipal counsel and State's Attorneys, before taking any action.

This memorandum is intended to summarize recent information and guidance on the disclosure of positive COVID-19 cases to first responders, and relies on the guidance memoranda and policy statements issued by the HHS, the Illinois Office of the Attorney General, and the Illinois Department of Public Health. Although the memoranda of those agencies tend to agree that disclosure of addresses (and probably names) of positive COVID-19 cases to first responders probably is permitted for certain purposes, like for treatment, to stop the spread of the disease, and to protect first responders, it is probably not mandatory. The IDPH has raised policy concerns about whether the disclosure of such information is helpful to first responders, who should instead be approaching every case like it is a positive COVID-19 case.

Other than the *McHenry County Sheriff* case discussed above, which is an order granting a temporary restraining order and is not a "final order", we are not aware of any other courts ruling on the issue of whether disclosure of names or addresses of positive COVID-19 cases is permitted or mandatory. For those local public entities considering implementing a policy of disclosure, such policy should minimize the disclosure as much as reasonably possible, and further prohibit the first responder agency from disclosing the information to additional third parties. The *McHenry County Sheriff* order provides some helpful guideposts in that regard.