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HARVARD LAW SCHOOL

June 10, 2020

Sent via email

Monica Bharel
Commissioner
Massachusetts Department of Public Health

Re: Following up on privacy issues pertaining to the pandemic response.

Dear Commissioner Bharel,

Thank you for providing responsive documents to our April 2, 2020 letter (“Re: Equity and privacy issues pertaining to the pandemic response”). We write again to follow-up regarding our patient privacy concerns in light of some of the communications included in those documents. Our goal remains, as always, to work with you and the other dedicated public servants at the Department of Public Health to help steer Massachusetts through this unprecedented crisis.

Clarifying the legal status of the March 18, 2020 DPH Order

We seek clarification about the legal status of the March 18 DPH Order concerning information-sharing between local boards of health and first responders, specifically the extent to which the Order preempts or displaces existing regulations concerning patient privacy.

Included in the documents DPH sent in response to our public records request is an April 1 memo prepared by John Sofis Scheft of John Sofis Scheft, Esq. & Law Enforcement Dimensions, LLC.¹ That memo apparently circulated among a number of police chiefs, who subsequently sought clarification as to its accuracy from DPH and other state agencies. The memo claims that under 105 CMR 300.120(A), local boards of health maintain the authority to share with first responders the names of individuals with confirmed COVID-19 diagnoses, despite the fact that the March 18 DPH Order explicitly limits information sharing to those individuals’ addresses. In other words, the memo asserts that 105 CMR 300.120(A) allows local jurisdictions to override DPH’s Order.

¹

<http://www.ledimensions.com/files/2020%20UPDATE03E%20CORONA%20HEALTH%20INFO%20DISPATCH.pdf>

It appears from guidance included in an email sent by Susan Terrey (Executive Office of Public Safety and Security) at 10:01 AM on April 8, 2020 (“Subject: critical information for first responders”) that state officials ultimately disagreed with Mr. Scheft’s legal interpretation.² Presumably they did so because the emergency authorization statute at issue (M.G.L.A. 17 § 2A) allows the March 18 DPH Order to temporarily supersede regulations like 105 CMR 300.120(A), so long as a duly declared emergency remains in effect. In relevant part, the April 8 EPS guidance reads: “The Order does not **require** the local boards of health to provide the names of individuals living at the address. While we have heard different points of view on this issue, we have again reviewed this matter and concluded that no additional information will be provided.”

Confusingly, however, Mr. Scheft’s April 1 memo claims that DPH agrees with his analysis. It notes:

“Some local health officials are confused by a memorandum from the DPH Commissioner on March 18, which mentions addresses only. However, the purpose of that memorandum was to establish a minimum disclosure requirement. *DPH officials acknowledge that local BOHs can disclose specific names and other information pursuant to 105 CMR 300.120(A).*”³

A footnote adds: “*The contents of this bulletin have been reviewed by DPH.*”⁴

Mr. Scheft is a private attorney and thus does not represent the State. Yet by claiming that DPH agrees with his interpretation and implying he has the agency’s sign-off, his memo (which remains publicly available on his website⁵) potentially offers misleading guidance at a critical moment. We worry that Mr. Scheft’s assertions, in combination with the use of the word “require” instead of “allow” in the EPS guidance document (see the fourth paragraph of this letter with the word “require” in bold), could inadvertently lead local authorities to mistakenly share with first responders the names of individuals who have been diagnosed with COVID-19, in contravention of DPH’s Order.

We respectfully request that DPH confirm to us the legal status of its March 18 Order, specifically as to whether it supersedes regulations like 105 CMR 300.120(A) and, if so, under what legal authority it does so. We read EPS’s April 8 guidance to reject Mr. Scheft’s legal interpretation. (If this is not the case, please inform us.) If this is the case, we urge DPH to ask Mr. Scheft to remove the suggestion in his memo that DPH approves of his analysis. We also recommend that DPH and EPS publicly post a clarification, perhaps along the lines of EPS’s April 8 guidance (though with some clarifying edits, as noted in the preceding paragraph).

² For easy reference, pp. 37–38 of a PDF of the responsive documents to our April 2 letter: <https://data.aclum.org/wp-content/uploads/2020/05/ACLU-responsive-docs-2.pdf>

³ Emphasis added.

<http://www.ledimensions.com/files/2020%20UPDATE03E%20CORONA%20HEALTH%20INFO%20DISPATCH.pdf>

⁴ Emphasis added.

⁵ <http://www.ledimensions.com/>

Privacy concerns moving forward

As you know from our previous letter, we remain concerned that even sharing the home addresses of individuals who have tested positive for the virus infringes on patient privacy without benefiting the public health. In fact, the policy may give first responders a false sense of security. Without universal testing, we cannot know who has the virus and who does not. And the pervasiveness of asymptomatic transmission means that many individuals who are capable of spreading the virus seem healthy and are unlikely to seek out testing. In short, our first responders must use all of the personal protective equipment that is available to them when interacting with members of the public, treating every person as if they are potentially infected.

Assuming DPH continues to require local boards of health to share the home addresses of those who have tested positive for the virus with first responders, we seek to understand how exactly that information will be used and for how long. Does first responder access to this sensitive information expire after a certain amount of time? For example, would first responders in June still have access to the addresses of people who received a COVID-19 diagnosis in March, even though we know those individuals are unlikely to pose a public health risk at that point? How and where is this sensitive information stored? Has DPH issued any guidance on this front, or is each locality responsible for creating its own protocols? We respectfully request any information you have on data retention, and storing practices as regards implementation of the March 18 DPH order, and are eager to work with you to safeguard patient privacy to the maximum extent possible moving forward.

Finally, we want to proactively raise an important concern that could arise in the coming months. The March 18 DPH Order only retains legal force as long as the Governor's emergency declaration is in effect. Were the governor, as part of the re-opening process over the next several weeks or months, to revoke that declaration, 105 CMR 300.120(A) might permit local boards to share a wider range of personal information with first responders than the current Order. Given the likelihood that the virus will continue to circulate for months, if not years, we request that DPH issue regulations that carveout ongoing protections for individuals who have or have had COVID-19 similar to the protections afforded to individuals living with HIV/AIDS in 105 CMR 300.120(B). We welcome the opportunity to discuss this request, along with other potential regulations or guidance, with DPH, as well as how the department could act to ensure patient privacy remains safeguarded throughout the duration of this crisis, even once a formal state of emergency lapses.

Seeking further information: public records request

If necessary, please consider this a public records request under state law (M.G.L. Chapter 66, Section 10). We have copied the Executive Office of Public Safety and Security on this letter, as we would like to include that office in our public records request as well.

- Given the confusion provoked by Mr. Scheft's memo in early April, we are concerned that some localities might have flouted the explicit information-sharing limits set by the March 18 DPH Order. Therefore, we request that your departments provide us with any records pertaining to reports, allegations or instances of local public health boards or other authorities providing first responders with the names, or any other personal

identifying information beyond the home addresses, of individuals with confirmed COVID-19 diagnoses, including but not limited to emails, video conference recordings and transcripts, and phone logs, meeting agendas or minutes, notices, analyses, memos and other communications. Please also provide us with records of any communications between your departments and local first responders or law enforcement officials relating to the EPS guidance (sent on, or around, April 8 and referenced on page 1 of this letter) about the March 18 DPH memo.

- We additionally request that your departments provide records and communications (including emails) reflecting instructions, guidance or protocols from state officials as to how patient address information should be shared, used, stored and disposed. Please also provide records and communications (including emails) concerning how local boards of health and first responders are sharing, using, storing and disposing of patient address information.

If you have questions or seek to discuss these matters, please contact us crose@aclum.org and rgreenwa@law.harvard.edu.

Thank you for your courageous public service and for your assistance in helping us and the public better understand the Departments' response to this crisis. We look forward to your response.

Sincerely,



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Clinical Professor of Law
Faculty Director, Center for Health Law and Policy Innovation
Harvard Law School



Carol Rose
Executive Director
ACLU of Massachusetts



Kade Crockford
Director, Technology for Liberty Program
American Civil Liberties Union of Massachusetts

cc: Thomas Turco, Secretary for the Executive Office of Public Safety and Security.