



Assisting Massachusetts Boards of Health through training, technical assistance and legal education

**MASSACHUSETTS ASSOCIATION OF HEALTH BOARDS
COVID-19
HIPAA, Local Boards of Health and Sharing Information
April 11, 2020**

Public health professionals, especially local health departments and boards of health, are facing many questions from local public officials, residents, parents, health care providers, and others about COVID-19. MAHB’s series of documents are meant to provide answers and guidance to health departments and boards of health. **This document is provided *for educational purposes only* and is not to be construed as legal advice. For legal advice, please contact your city or town attorney.**

QUESTION: How does the “Health Insurance Portability Accountability Act” (HIPAA) affect local boards of health during the COVID-19 pandemic?

ANSWER: HIPPA does not apply to local boards of health (LBOH) and the sharing of critical information with first responders. HIPPA applies to “covered entities,” including public and private health insurance, health care providers, and hospitals transmitting health information electronically.¹

The only time HIPPA applies to LBOHs is when they provide vaccination clinics, sexually transmitted infection screening, or other such functions, and need to submit claims to health insurance programs electronically. This includes those

¹ 45 CFR § 160.103.

instances where a LBOH provides Medicaid or Children’s Health Insurance Program services that are reimbursable.

Infectious, communicable disease surveillance programs like the COVID-19 pandemic are not part of the healthcare delivery function of a LBOH, and therefore, are not subject to HIPAA.

DISCUSSION:

Since the onset of COVID-19, there has been much confusion about the role of HIPAA as it applies LBOHs. The confusion is understandable because since Federal and State Health Emergencies were declared, there have been a couple of Orders that affect the transmission of critical medical information and the application of HIPAA. This guidance will explore the effect, if any, of the Orders on LBOH’s disclosure requirements.

On March 18, 2020, Commissioner of Public Health, Monica Bharel, issued an Order stating that effective immediately,

“Local boards of health shall disclose to the official with the responsibility for administering the response to emergency calls in their jurisdiction (Receiving Entity) the address of persons living in their jurisdiction who the local board of health has been informed have tested positive for COVID-19. The disclosure of information shall be limited to the address, and shall not include any other identifying information, including name.

Any information disclosed pursuant to this Order shall only be used as necessary for responding to emergency calls and not for any other purpose. The Receiving Entity is ordered to ensure that the information is maintained confidentially, and is made available only to those who need to know in order to operate emergency response services.”²

² DEPARTMENT OF PUBLIC HEALTH, Order of the Commissioner of Public Health Regarding the Sharing of Critical Information with First Responders, available at <https://www.mass.gov/doc/order-of-the-commissioner-of-public-health-regarding-the-sharing-of-critical-information-with/download>.³ DEPARTMENT OF HEALTH & HUMAN SERVICES, COVID-19 & HIPAA Bulletin Limited Waiver of HIPAA Sanctions and Penalties During a Nationwide Public Health

Also, on the effective date of March 15, 2020, the United States Secretary of Health and Human Services, Alex M. Azar, exercised his legal authority—under a declaration of a public health emergency—to waive certain provisions of HIPAA, including exempting *covered entities* some disclosure-restriction provisions of HIPAA.³ In the HHS HIPAA Bulletin, Secretary Azar waived certain sanctions and penalties against hospitals that do not comply with HIPAA rules, including but not limited to:

- the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care;⁴
- the requirement to honor a request to opt out of the facility directory;⁵
- the requirement to distribute a notice of privacy practices;⁶
- the patient's right to request privacy restrictions;⁷ and
- the patient's right to request confidential communications.⁸

This waiver only applies to “covered hospitals,” and then only under very specific circumstances.⁹ Had LBOHs or other “local health authorities” been included in this provision, LBOH would have been allowed to disseminate the name, age, and other identifying information to receiving entities, over and above the narrowly

Emergency, available at <https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-waiver-bulletin-508.pdf> (hereinafter referred to as the “HHS HIPAA Bulletin”).

³ DEPARTMENT OF HEALTH & HUMAN SERVICES, COVID-19 & HIPAA Bulletin Limited Waiver of HIPAA Sanctions and Penalties During a Nationwide Public Health Emergency, available at <https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-waiver-bulletin-508.pdf> (hereinafter referred to as the “HHS HIPAA Bulletin”).

The HHS HIPAA Bulletin specifically allows the Secretary to waive certain provisions under the Project Bioshield Act of 2004 (PL 108-276) and section 1135(b)(7) of the Social Security Act.

⁴ 45 CFR § 164.510(b).

⁵ 45 CFR § 164.510(a).

⁶ 45 CFR § 164.520.

⁷ 45 CFR § 164.522(a).

⁸ 45 CFR § 164.522(b).

⁹ HHS HIPAA Bulletin.

permitted information allowed by the Massachusetts Commissioner of Public Health. **However, this waiver does not apply to LBOHs.**

The HHS HIPAA Bulletin also describes specific, permitted situations where critical information can be shared:

- **Treatment:** *Covered entities* described above “may disclose, without a patient's authorization, protected health information about the patient **as necessary to treat the patient or to treat a different patient.**”¹⁰ For the purposes of the COVID-19 pandemic, LBOH activities are not deemed to be treatment. The only *treatment* provided by LBOHs are limited services like immunization clinics and other public health nursing services described above.
- **Public Health Activities:** HIPAA permits *covered entities* to disclose needed protected health information without individual authorization:
 - **To a public health authority,**¹¹ such as the LBOH, that is “authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury or disability.” This would include the reporting of disease and conducting public health surveillance, investigations, or interventions.¹²

¹⁰ HHS HIPAA Bulletin (emphasis added).

¹¹ Under 45 CFR § 164.501, a “public health authority” is defined as “an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate.”

¹² 45 CFR § 154.512(b)(1)(i). The entirety of this section from the federal regulations is as follows:

(b) Standard: Uses and disclosures for public health activities -

(1) Permitted uses and disclosures. A covered entity may use or disclose protected health information for the public health activities and purposes described in this paragraph to:

(i) A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of

- To persons at risk of contracting or spreading a disease or condition if authorized by state law or otherwise to carry out public health interventions or investigations.¹³
- **Disclosures to Prevent or Lessen a Serious and Imminent Threat:** This exception **does not apply to LBOH**. *Covered entities* described above may share patient information with anyone as “necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public”¹⁴—consistent with applicable law (such as state statutes, regulations, or case law) and the provider’s standards of ethical conduct. Thus, providers may disclose a patient’s health information to anyone who is able to prevent or lessen the serious and imminent threat, including family, friends, caregivers, and law enforcement without a patient’s permission; **this provision does not apply to LBOHs**. HIPAA expressly defers to the professional judgment of health professionals to make determinations about the nature and severity of a threat to health and safety posed by a patient.¹⁵

Conclusion: There are no permissible exceptions to the Commissioner’s Order regarding the sharing of identification information by LBOH with receiving entities, other than the address of persons living in their jurisdiction who the LBOH has been informed have tested positive for COVID-19.

City and town attorneys are solely responsible for providing legal advice to their clients and MAHB urges boards of health and other municipal officials to consult with them prior to issuing any emergency orders.

a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority;

¹³ 45 CFR § 164.512(b)(1)(iv).

¹⁴ 45 CFR § 164.512(j).

¹⁵ DEPARTMENT OF HEALTH & HUMAN SERVICES, Frequently Asked Questions (FAQ), available at <https://www.hhs.gov/hipaa/for-professionals/faq/3002/what-constitutes-serious-imminent-threat-that-would-permit-health-care-provider-disclose-phi-to-prevent-harm-patient-public-without-patients-authorization-permission/index.html>

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