Alaska Native Health Board

THE VOICE OF ALASKA TRIBAL HEALTH SINCE 1968

T 907.562.6006 F 907.563.2001 • 4000 Ambassador Drive, Suite 101 • Anchorage, Alaska 99508 • www.anhb.org

Guide to Exchanging COVID-19 Health Information

This guide is provided for informational purposes only and is not intended to serve as legal advice. Tribes and Tribal Health Organizations should always check with their own counsel if they have questions about use or disclosure of Protected Health Information.

ANHB was established in 1968 with the purpose of promoting the spiritual, physical, mental, social, and cultural well-being and pride of Alaska Native people. ANHB is the statewide voice on Alaska Native health issues and is the advocacy organization for the Alaska Tribal Health System (ATHS), which is comprised of tribal health programs that serve all of the 229 tribes and over 177,000 Alaska Natives and American Indians (AN/AI) throughout the state. As the statewide tribal health advocacy organization, ANHB helps Alaska's tribes and tribal programs achieve effective consultation and communication with state and federal agencies on matters of mutual concern.

The Health Insurance Portability and Accountability Act of 1996, as amended, protects individuals' medical records and other personal health information, and applies to health plans, health care clearinghouses, and health care providers (covered entities). It generally prohibits sharing of an individual's protected health information (PHI) without the individual's authorization, except in certain specific circumstances that are otherwise allowed or required by applicable law.

There is a need for health care providers to share PHI with State and tribal governments and other members of the community to help stop the spread of the COVID-19 and protect vulnerable Alaska Native communities. There is also a need for health care providers and tribal governments to obtain information from the State and federal government regarding COVID-19 testing and treatment.

For PHI that is relevant to the COVID-19 public health emergency, HIPAA already provides a lot of flexibility to allow health care providers and other covered entities to choose to share PHI, such as for treatment purposes, to lessen or prevent a serious and imminent threat to public health, and with public health authorities, though HIPAA does not require information to be shared for such purposes. HIPAA also does not require non-covered entities, such as certain State governmental programs that are not otherwise considered HIPAA covered entities, to share health information, including COVID-19 testing results.

This guide provides a brief summary of when information can be exchanged under existing HIPAA authorities, as well as under emergency measures approved by the U.S. Department of Health and Human Services (HHS) during the ongoing COVID-19

pandemic. This guide also addresses the disclosure of PHI to Public Health Authorities, including Tribal Public Health Authorities and Tribal Epi-Centers. While these authorities do not require State public health authorities to share information with tribal governments and tribal health organizations, they provide authority for the sharing of that information.

HHS has issued guidance on sharing of information between health care providers and other entities under HIPAA during the pandemic (https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-waiver-bulletin-508.pdf). This does not apply to substance use disorder treatment information, which is subject to higher levels of confidentiality under 42 C.F.R. Part 2.

HIPAA Authority to Disclose PHI for Treatment, to Prevent an Imminent Threat and other Permitted Uses:

Existing HIPAA authority allows HIPAA covered entities to share PHI for specific purposes and in specific circumstances, some of which are relevant to the COVID-19 public health emergency. For example, PHI may be used or disclosed for the following reasons:

- For treatment purposes of the patient or a different patient (including coordination or management of health care and related services among health care providers or between a health care provider an another entity);
- For public health activities, including to public health authorities authorized by law to collect or receive PHI (such as preventing or controlling disease or injury; conducting public health surveillance, investigations, interventions), as necessary for them to carry out their public health missions;
- Disclosures to family, friends and individuals involved in a patient's care, or to identify, locate, or notify anyone responsible for the patient's care of the patient's location, general condition, or death; and
- Disclosures to anyone in a position to prevent or lessen a serious and imminent threat to the health and safety of a person or the public.

These exceptions, which are all subject to the HIPAA minimum necessary requirement (only the minimum amount of PHI may be disclosed as necessary for the intended purpose), are described in greater detail in the HHS guidance. This guidance also further discusses serious and imminent threats and public health activities below.

HHS Emergency Waivers for Hospitals:

HHS has also exercised its right to waive enforcement of certain penalties against covered hospitals. Effective March 15, 2020, HHS waived penalties against covered hospitals that do not comply with the following provisions of the HIPAA Privacy Rule during the public health emergency:

- the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care. 45 C.F.R. 164.510(b).

- the requirement to honor a request to opt out of the facility directory. 45 C.F.R. 164.510(a).
- the requirement to distribute a notice of privacy practices. 45 C.F.R. 164.520.
- the patient's right to request privacy restrictions. 45 C.F.R. 164.522(a).
- the patient's right to request confidential communications. 45 C.F.R. 164.522(b).

For limitations on these waivers, see the attached HHS guidance.

Disclosures For a Serious and Imminent Threat

During the COVID-19 pandemic, many health care providers have been relying on the "serious and imminent threat" provision in the HIPAA privacy regulations, which allow PHI to be shared with anyone who is reasonably able to prevent or lessen a serious and imminent threat to the public. A covered entity that uses or discloses PHI for such a purpose will be presumed to have acted in good faith, so long as the belief that disclosure is necessary is based on the covered entity's actual knowledge of the serious and imminent threat, or is made in reliance on a credible representation by a person with apparent knowledge or authority. *See* 45 C.F.R. § 164.512(j).

HHS Office of Civil Rights (OCR) has explained what it means by a "serious and imminent threat" as follows:

> HIPAA expressly defers to the professional judgment of health professionals in making determinations about the nature and severity of the threat to health or safety posed by a patient. OCR would not second guess a health professional's good faith belief that a patient poses a serious and imminent threat to the health or safety of the patient or others and that the situation requires the disclosure of patient information to prevent or lessen the threat. Health care providers may disclose the necessary protected health information to anyone who is in a position to prevent or lessen the threatened harm, including family, friends, caregivers, and law enforcement, without a patient's permission.

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 (last visited 6/12/20).

Thus, this existing authority under HIPAA can reasonably be read to allow health care providers to share information with tribes and tribal entities who are in a position to lessen the serious and imminent threat of COVID-19 in their communities. However, even though HIPAA allows the minimum necessary PHI to be discloses for these purposes, it does not require a health care provider to share the information.

One thing tribal governments can do to exercise their sovereign governmental authority, and help provide a basis (*i.e.,* a credible representation by someone in authority) for health care providers to release COVID-19 PHI to them, could be to declare COVID-19 a serious

and imminent threat to the health and safety of their communities, and declare the tribe or a department of the tribe as being in the position to lessen or prevent that threat. Having such a declaration in place, such as a tribal resolution, could help open the door for covered entities like a tribal health organization to share relevant COVID-19 test results, if they so choose. To be clear, however, covered entities may share COVID-19 PHI with tribes and tribal organizations for a serious and imminent threat, as described above, even if they do not have such a declaration in place.

Disclosures to Tribal Public Health Authorities and the Role of the Alaska Native Epi-Center

One of the exceptions recognized by the HIPAA Privacy Rule is that HIPAA covered entities are permitted to use and disclose the minimum necessary PHI for public health activities to a public health authority. The public health authority must be "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 a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority." 45 C.F.R. § 164.512(b)(1)(i). The HIPAA regulations define "public health authority" to recognize tribal public health authorities. 45 C.F.R. § 164.50.

While tribes can exercise their sovereign rights to create a public health authority, a public health authority's primary tasks likely involve exercise of civil jurisdictional authority, which could be complicated to implement in Alaska. A simpler approach for tribal governments to receive COVID-19 testing results and other PHI would be for them to issue a declaration of serious and imminent to public health and safety, as discussed above. Such a declaration could be made available to any HIPAA covered entity to help make them more comfortable sharing information with the Tribe. Depending on where information is maintained at the State level, though, the State entity may or may not be a HIPAA covered entity.

To obtain epidemiological information from a State entity that is not subject to HIPAA, or a covered entity which chooses not to disclose PHI under the serious and imminent threat exception, one approach could be to access the needed data through existing authorities for Tribal Epi-Centers. The Indian Health Care Improvement Act (IHCIA) deems Tribal Epi-Centers to be Public Health Authorities for purposes of HIPAA. 25 U.S.C. § 1621m(e). State entities should thus be in a position of sharing COVID-19 data with the Alaska Native Epi-Center, as they would with any public health authority, and health care providers and other covered entities are authorized by HIPAA to share PHI with the Epi-Centers as existing public health authorities. Furthermore, the IHCIA requires the Secretary of HHS to provide the Tribal-Epi Centers with access to use of the data, data sets, monitoring systems, delivery systems, and other PHI in the possession of the Secretary. As a result, Tribal Epi-Centers like the Alaska Native Epi-Center are already authorized by law to collect and receive PHI as a public health authority, and are entitled to receive relevant data from HHS.