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MEMORANDUM

DATE: February 28, 2020

TO: Nate Fogg, Emergency Manager, Office of Emergency Management

FROM: Erin L. Powers, Sr. Assistant County Attorney

SUBJECT: HIPAA & Public Health Emergencies

In an effort to plan and prepare for a potential current and/or future public health emergency, I was asked to look into what affect or implications HIPAA may have on the ability of local public health authorities to share information with law enforcement, and specifically with the Arapahoe County Sheriff's Office (ACSO) Office of Emergency Management.

Below is a discussion of several possible options and/or exceptions that could permit patient information to be shared under HIPAA. Ideally, these options would be discussed and incorporated into multi-agency, regional, and/or statewide emergency planning efforts prior to an actual incident, however, they can also be discussed with covered entities and public health agencies during an immediate or ongoing public health incident to help facilitate critical information sharing during prevention, investigation and response efforts.

1. Public Health Authorities Can and Should Seek Patient Authorization to Disclose PHI During Potential Public Health Emergencies.

HIPAA permits a covered entity to disclose PHI based on a valid patient authorization. *See* 45 CFR 164.508.

Given that information sharing is often critical during the early stages of an emerging public health crisis, such as a pandemic virus, the easiest and most straight-forward way to ensure information sharing can take place during the early stages of prevention, investigation and/or response, is to have public health authorities enact policies and practices that encourage or require them to seek patient authorizations during initial patient contacts. Such authorization should be designed to expressly permit disclosure of limited PHI to law enforcement and other first responders who could be negatively impacted by a failure to share information early on (i.e. through inadvertent exposure), which would have potential ripple effects on further preventative, investigative and response efforts.

Additionally, to ensure that information disclosed is limited to the minimum necessary to accomplish public health needs, covered entities and public health authorities could draft authorizations that limit the information permitted to be disclosed to disclosure of information obtained or received by the public health authority (1) as to specific conditions (such as the Coranavirus), (2) specific time frames, (3) specific patient information, or (4) to specific information, such as (i) name and address, (ii) date and place of birth, (iii) social security number, (iv) date and time of treatment/assessment, (v) status in terms of public health agency intervention/treatment (i.e. potential exposure, monitoring, voluntary quarantine in home, etc.).

Ultimately, this type of information sharing and proactive approach to disclosure issues would help to ensure that when public health agencies become involved in monitoring a possible, although possibly not yet confirmed exposure, that they can share such information with law enforcement and other first responders who may be called upon to respond to the patient's location during that period (i.e. such as during investigation or monitoring activities when a patient may voluntarily be asked to quarantine at home and a domestic violence or robbery occurs at the location generating a response from law enforcement or other first responders). Thus, law enforcement would be better equipped to take precautions, such as utilizing PPEs during a response to a patient's location. During a rapidly moving situation, like a potential pandemic, this could be critical to ensuring that law enforcement and other first responders are not rendered unavailable for future emergency response needs based on an early inadvertent exposure.

Additionally, in order to protect PHI, law enforcement agencies, including the ACSO, which receive such information pursuant to a valid authorization should also take precautions and set up internal procedures to ensure that such information is maintained confidentially and is only shared as needed to protect law enforcement and to carry out lawful functions related to the prevention, investigation and response to an emerging or ongoing public health emergency. This should likely include measures to ensure that such information is not generally available to the entire agency (i.e. limited access to dispatchers who could notify responding deputies only in the event of a call for service at the patient's location), unless a specific need to do so is established.

2. CDPHE Is Not a Covered Entity, Therefore, CDPHE May Disclose PHI As Long As Doing So Is Consistent With State Law.

The Colorado Department of Public Health and Environment is a public health authority that is authorized under HIPAA and state law to receive information for the purpose of preventing and controlling disease, injury, etc., and to conduct public health surveillance, public health investigations, and public health interventions. *See* CRS 25-1.5-102. As such, covered entities are permitted to disclose PHI to CDPHE without patient authorization. 45 CFR § 512(b).

CDPHE's website states that it is not a "covered entity" to which HIPAA directly applies, because CDPHE is not a health plan, provider billing electronically, nor a clearinghouse. *See* https://www.colorado.gov/pacific/cdphe/hipaa-status) Therefore, CDPHE is not bound by HIPAA and can release PHI to law enforcement so long as it doing so comports with state law. *See* 45 CFR, Part 164 (only applying privacy rule to "covered entities" as defined under

HIPAA); *see also* Morbidity and Mortality Weekly Report, Vol. 52, May 2, 2003, "HIPAA Privacy Rule and Public Health: Guidance from CDC and the U.S. Department of Health and Human Services." ("[A]fter PHI is disclosed to a public health authority pursuant to the Privacy Rule, the public health authority (if it is not a covered entity) may maintain, use, and disclose data consistent with the laws, regulations, and policies applicable to the public health authority.")

Therefore, assuming that state law would permit CDPHE to release certain PHI to law enforcement during a public health emergency, another way to circumvent HIPAA would be to develop an information sharing system whereby local covered entities (including local health agencies, if they qualify as covered entities) report information to CDPHE (as allowed under HIPAA and required under certain circumstances under state law), and then CDPHE could redisclose that information, as appropriate, to law enforcement, without being subject to HIPAA's Privacy Rule related to disclosure, and so long as doing so was authorized under state laws and regulations. [1] Notably, in interpreting the rule regarding disclosures for public health purposes, DHHS has previously stated that it interprets the phrase "authorized by law" to mean that a legal basis exists for the activity and includes both activities that are permitted and actions that are required by law. *See* Morbidity and Mortality Weekly Report, Vol. 52, May 2, 2003, *supra*, (*citing* 64 FR 59929, Nov. 3, 1999).

3. Valid HIPAA Exceptions Also Permit Disclosure of PHI to Law Enforcement Absent Patient Authorization.

HIPAA also includes several exceptions that permit a covered entity to disclose PHI directly to law enforcement without a patient authorization. *See* 45 CFR § 165.512. The following are the exceptions that could arguably apply during a public health emergency.

a. Uses and Disclosures to Avert a Serious Threat to Health or Safety. 45 CFR § 165.512(j).

Under this exception a health care provider/covered entity may, consistent with applicable laws and standards of ethical conduct, use or disclose PHI if it believes in good faith that (i) the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or public, and (ii) is to a person or persons reasonably able to prevent or lessen the threat.

In a February 2020 bulletin issued by the Office for Civil Rights, U.S. Dept. of Health and Human Services in relation to the Novel Coronavirus (2019-nCoV) outbreak, DHHS specifically stated that this means "providers may disclose PHI to anyone who is in a position to prevent or lesson the serious and imminent threat, including family, friends,

[1] The determination regarding what is disclosures may be permitted under state laws and regulations would likely need to involve a discussion with CDPHE. However, during a preliminary review I came across CRS 25-1-122, which states that reports and records resulting from the investigation of epidemic and communicable diseases, etc, shall be strictly confidential, except under certain circumstances, including that "Release may be made of medical and epidemiological information to the extent necessary for treatment, control, investigation, and prevention of diseases and conditions dangerous to the public health." It is qualified by the statement that every effort must still be made to limit disclosure of personal identifying information to the minimal amount necessary to accomplish the public health purpose.

caregivers, ***and law enforcement*** without a patient's permission." (emphasis added). DHHS further stated that HIPAA "expressly defers to the professional judgment of health professionals in making determinations about the nature and severity of the threat to health and safety." *Id.*

Consequently, this arguably leaves a great deal of discretion and flexibility for health professionals to justifiably determine, based on the unique characteristic of a particular outbreak (i.e. evidence of how quickly the specific virus is spreading in other territories, evidence that it is difficult to contain, modes of exposure, etc.) that the nature and severity of a threat to health and safety is sufficient to justify use and disclosure of PHI to law enforcement even absent a confirmed case of the virus in Colorado, particularly in a metro area such as Denver, which has an international airport and nearby or adjacent states that have confirmed cases of exposure.

b. Disclosures for Law Enforcement Purposes. 45 CFR § 165.512(f).

Under this exception a covered entity may disclose PHI for a law enforcement purpose to a law enforcement official in compliance with the requirements of an administrative request (including an administrative subpoena, summons, civil or authorized investigative demand, or similar process authorized under law), provided that (1) the information sought is relevant and material to a legitimate law enforcement inquiry; (2) the request is specific and limited in scope in light of the purpose for which the information is being sought, and (3) de-identified information could not reasonably be used.

Although not as compelling as other options discussed in this memo, law enforcement could seek to invoke this exception during the preparation, investigation or response to a public health emergency by making an administrative request for information and articulating how the information directly relates to authorized activities of law enforcement that directly relate to the prevention, investigation or response to the public health emergency. For instance, law enforcement is authorized to enforce public health orders and is also authorized to maintain law and order and to enforce the laws of the state, as is relates directly and indirectly to public health emergencies.

c. Uses and Disclosures Required By Law. 45 CFR § 165.512(a).

Under this exception, a covered entity may use or disclose PHI to the extent such use or disclosure is requirement by law and the use or disclosure complies with and is limited to the relevant requirements of such law.[2]

[2] 45 CFR § 165.512(a)(2) states that a covered entity must meet the requirements described in paragraph (c), (e) or (f) of that section for uses or disclosures by law. Therefore, arguably this section is limited to those specific circumstances, however, language in some CDC and DHHS gives the impression that this section is construed more broadly to encompass any reasonable situation where the disclosure is required by state law. Although this exception may not therefore be the most compelling option available, it is probably worthy of discussion with public health agencies and/or covered entities to assess whether it provides a valid basis for disclosure.

Therefore, depending on broadly this exception may be construed, this could arguably include state laws that requires the disclosure of PHI[3], and possibly state or federal emergency declarations that are authorized by law and which specifically require or articulate the need for such disclosures and information sharing in order to prevent, investigate or respond to a public health emergency.

[3] Such as potentially CRS 25-1-122, as discussed in fn. 1.