



CENTER *for* HEALTH LAW
and POLICY INNOVATION
HARVARD LAW SCHOOL

April 2, 2020

Sent via email

Monica Bharel
Commissioner of Public Health
Massachusetts Department of Public Health
250 Washington Street
Boston, MA 02108

Re: Equity and privacy issues pertaining to the pandemic response.

Dear Commissioner Bharel,

On behalf of the ACLU of Massachusetts and the Harvard Law School Center for Health Law and Policy Innovation, we wish you and your family health and wellness as you grapple with the COVID-19 virus firsthand.

We write to offer our help as partners in responding to this crisis, and to lift up key concerns pertaining to equity and privacy. Too often in emergencies, equity and privacy concerns are cast aside. We believe that under your leadership, Massachusetts can lead the nation in protecting public health while also ensuring that our statewide response takes into account existing health care disparities and without needlessly sacrificing equitable access and patient privacy.

Ensuring an equitable response in Massachusetts

As you may have seen, earlier this week Senator Elizabeth Warren and Congresswoman Ayanna Pressley called on the federal Department of Health and Human Services to focus on racial equity in its COVID-19 response.¹ Senator Warren and Representative Pressley asked HHS Secretary Alex Azar to instruct state and local governments to collect data to make it possible to discern whether there are racial disparities in access to COVID-19 testing in communities nationwide.

We echo that request, and ask that Massachusetts take immediate steps to begin collecting this information. It's crucial that our state government do everything in its power to ensure equitable access to testing and treatment during this pandemic. Race and ethnicity data-collection to help understand who is getting tested and who is not getting tested is a key measure of an equitable response. We cannot manage what we do not measure.

Another key equity issue pertains to the distribution of personal protective equipment and ventilators across the state. As the Governor has stated, our state's hospitals and first responders

¹ <https://pressley.house.gov/media/press-releases/rep-pressley-lawmakers-urge-hhs-address-racial-disparities-access-testing-and>

lack the equipment they need to safely do their jobs. Given this lack of adequate resources, it is doubly important for the Baker administration to focus on equity when determining which hospitals and regions obtain equipment. Distributions must be based on regional need determined by a consistent, fair, and transparent process, not economic or any other social status. To the extent that regional need will be determined by testing, the administration must ensure that test kits are equitably distributed, taking into account the ability of people with limited English proficiency to advocate for themselves. People across the country have watched in horror as the wealthy and well connected have accessed testing in places where even our front line medical workers have been unable to obtain tests. Massachusetts must ensure that this unfairness—or even the perception of unfairness—does not extend to the distribution of limited quantities of life-saving equipment.

Patient privacy and public health needs

Finally, we are concerned that the March 18, 2020 DPH Order pertaining to patient privacy issues is misguided and could do more harm than good. As you know, the Order requires that local boards of health share with first responder agencies the home addresses of people who have tested positive for the virus.

We understand that emergencies require extraordinary measures, and we do not oppose limited infringements on patient privacy or freedom of movement if they are justified by public health necessity. In this case, however, public health requirements do not justify sharing patient addresses with first responders.

As you know, absent universal testing, we simply do not know who has the virus and who does not. Most people who carry the virus have not been tested, either because they cannot access a test or because they are asymptomatic. In this dire situation, we cannot give our first responders a false sense of security by providing a list of addresses. 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.

Seeking further information

Our conversations with public health experts indicate that there is a general consensus in the public health community that this universal approach is the correct one, and that sharing the address information of people who have tested positive runs counter to public health needs.

We therefore seek to understand how the Department came to the decision to mandate the sharing of patient address information. To that end, we request that your department provide us with records pertaining to the development of the Order, including but not limited to meeting agendas or minutes, notices, analyses, memos, and communications (including emails). Please also provide us with records pertaining to public health-related or other information describing the operational effectiveness of the Order.

We are also concerned about how the Order will be implemented. Therefore please provide records pertaining to its implementation, including but not limited to manuals, policies, procedures, and

training materials. Please also provide records reflecting instructions or guidelines pertaining to how patient address information will be shared, used, confidentially stored, and disposed once the Emergency finishes, if available.

Regarding the equity concerns, we additionally seek information relevant to the Department's plans for distributing equipment. Please provide us with any directives, guidance, or other records pertaining to how the Department will make determinations about which hospitals, regions, or people will receive personal protective equipment and ventilators.

If necessary, please consider this a public records request under state law (M.G.L. Chapter 66, Section 10).

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 Department's response to this crisis. We look forward to your response.

Sincerely,



Carol Rose
Executive Director
ACLU of Massachusetts



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