

# **Protected Health Information During a Pandemic: Is it Still Protected by HIPAA?**

March 2020

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**Author’s note:** This document provides basic information about the Health Insurance Portability and Accountability Act (“HIPAA”)<sup>1</sup> and is intended for the general public, although it contains regulations and information that may be considered legal jargon to the layperson. Nothing in this document is to be construed as legal advice directed at any individual or covered entity. If the reader needs legal advice, he or she should contact an attorney.

**Foreword:** In December 2019, a virus known as COVID-19, or “Coronavirus,” was detected in Wuhan, China. COVID-19 is a potentially fatal virus which has up to a two-week incubation period and is highly contagious, spreading through communities easily.<sup>2</sup> Since December, COVID-19 has been detected in at least 106 countries, which led the World Health Organization (“WHO”) to declare COVID-19 a global pandemic on March 11, 2020. Beginning in late February, individuals in the continental United States started testing positive for COVID-19, which has led to a general sense of anxiety throughout the country. Many healthcare providers, legal scholars, and individuals are concerned not only about how this virus will spread, but also if their personal health information will be safeguarded. This paper attempts to address some of the broader concerns of the public and explain the responsibilities of healthcare providers and the local, state, and federal governments during a pandemic. This paper will also discuss some of the Texas privacy laws and the obligations of covered entities and public health authorities.

## **Background About HIPAA**

HIPAA is a federal law that was enacted in 1996 with the goal of protecting the health information of individuals while allowing for a flow of health information.<sup>3</sup> Under the federal regulation, HIPAA applies to “covered entities” which include healthcare providers, health plans, and the business associates of these providers and plans, along with other similar groups of people and entities. In Texas, the term “covered entities” has been expanded and includes any person (or entity) who “for commercial, financial,

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<sup>1</sup> Codified as 45 C.F.R. Parts 160 and 164

<sup>2</sup> <https://www.cdc.gov/coronavirus/2019-ncov/about/transmission.html>, accessed March 12, 2020

<sup>3</sup> <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html>, accessed March 12, 2020

or professional gain... engages... in the practice of... using, evaluating, storing, or transmitting protected health information.”<sup>4</sup> Covered entities in Texas include not only the categories listed in the federal regulations, but also schools, governmental units, and various other groups, including some attorneys.<sup>5</sup> For the purposes of this paper, the term “covered entity” includes both the definitions in HIPAA and Texas law.

HIPAA protects certain information, known as “protected health information,” or “PHI” and prevents covered entities from disclosing this information to others. There are some exceptions where a covered entity can disclose this information without consent of the patient, such as for treatment (getting a consultation from a specialist), payment (billing the insurance company), for public health activities (such as COVID-19 infection) or for compliance with a court order. This paper will address a covered entity’s obligation to protect or disclose PHI under the public health activities exception of HIPAA.<sup>6</sup>

### **Information protected by HIPAA**

Protected Health Information (“PHI”) is defined as “individually identifiable health information”,<sup>7</sup> which means any health information that could identify an individual. This information is not limited to an individual’s name or social security number, but *any* information that could identify them. This may include:

- (1) Written, verbal, or electronic health information;
  - (2) An address or location;
  - (3) Information regarding a patient over age 90;
  - (4) Information that identifies an individual based on a specific characteristic;
- or
- (5) Any information in a health record such as:
    - Lab results, including test results,
    - Billing information,
    - Medical Chart information, and
    - Photographs of before and after surgery.

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<sup>4</sup> Texas Health and Safety Code §181.001(b), available at <https://statutes.capitol.texas.gov/Docs/HS/pdf/HS.181.pdf>

<sup>5</sup> Texas Health and Safety Code §181.001(b)(2), available at <https://statutes.capitol.texas.gov/Docs/HS/pdf/HS.181.pdf>

<sup>6</sup> 45 C.F.R §164.512(b)(1)(i), available at <https://www.law.cornell.edu/cfr/text/45/164.512>

<sup>7</sup> 45 C.F.R §160.103, available at <https://www.law.cornell.edu/cfr/text/45/160.103>

Examples of PHI include:

- (1) Mr. Smith went to see Dr. Jones;
- (2) Someone with a face tattoo that reads “My mom is awesome” was treated for COVID-19;
- (3) I used to be the dental hygienist for our manager and she had enamel erosion;
- (4) A man on Hialeah Rd. has tuberculosis (and only 3 people live on Hialeah Rd.);  
or
- (5) Mrs. Williams had a staph infection on her leg.

HIPAA requires covered entities to safeguard PHI, meaning that they are not permitted to disclose it to anyone without the consent of the patient, except in accordance with the law.<sup>8</sup> Confusion often arises when someone other than a healthcare provider discloses health information. If your neighbor tells you that Mrs. Williams had a staph infection and that neighbor is not a healthcare provider who treated Mrs. Williams and did not obtain that information in the course of her job, it’s not a violation under HIPAA or Texas law; it’s mere gossip.

### **The Public Health Activities Exception**

HIPAA allows<sup>9</sup> covered entities to disclose PHI for the purpose of public health activities, including a disclosure to a public health authority for the purpose of controlling disease; public health investigations and public health interventions, including the reporting of disease; and vital events such as death, child abuse, or to another individual who has been exposed to a communicable disease or may be at risk of contracting or spreading a disease, provided that the covered entity is authorized by law to notify that individual.<sup>10</sup>

Most people are familiar with the public health activities exception in the case of child abuse or when it comes to notifying a current or former sexual partner of a sexually transmitted disease. In the face of a pandemic such as COVID-19, the public health activities exception allows covered entities to disclose PHI to public health authorities

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<sup>8</sup> Disclosing to a public health authority is in accordance with the law. See 45 C.F.R §164.512(b)(1)(i), available at <https://www.law.cornell.edu/cfr/text/45/164.512>

<sup>9</sup> HIPAA states that the covered entity may disclose PHI without violating HIPAA, but the covered entity is not required to disclose it, unless there is a judicial action which compels them to do so.

<sup>10</sup> 45 C.F.R § 164.512(b), available at: <https://www.law.cornell.edu/cfr/text/45/164.512>

or other government actors so that they can analyze and control a communicable disease.

HIPAA *generally* requires that covered entities follow the “minimum necessary” standard,<sup>11</sup> which states:

Standard: Minimum necessary - Minimum necessary applies. When using or disclosing [PHI] ... a covered entity or business associate must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.<sup>12</sup>

One example of using the minimum necessary standard is when a provider calls to leave a message for someone on their answering machine. Instead of saying “Hi Mr. Carter, we got your test results back and you have syphilis,” the minimum necessary standard requires the provider to say “Mr. Carter, this is Sally from Dr. Holt’s office. Please give us a call at 555-1234,” instead. This is the minimum necessary amount of information to achieve the intended goal of communicating test results with the patient.

### **Texas Laws Related to Disclosure for Communicable Disease**

Under Texas law, certain covered entities are *required* to disclose information to a public health authority related to the existence of a communicable disease,<sup>13</sup> including the name, age, address, and occupation of the patient.<sup>14</sup> However, Texas mandates that these disclosures be kept confidential and that medical or epidemiological information be released only for the following purposes:

- for statistical purposes if released in a manner that prevents the identification of any person;
- to medical personnel treating the individual;
- to appropriate state agencies in this state or another state;
- to a health authority or local health department;
- under state or federal law that expressly authorizes the disclosure of this information;

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<sup>11</sup> The minimum necessary standard in 45 C.F.R. § 164.502 does not apply to disclosures of PHI for the purposes of treatment, to the patient, and other necessary means such as healthcare operations.

<sup>12</sup> 45 C.F.R. § 164.502(b) available at <https://www.law.cornell.edu/cfr/text/45/164.502>

<sup>13</sup> Note that this is different than HIPAA, meaning that Texas covered entities must disclose certain information to the public health authority

<sup>14</sup> Texas Health and Safety Code § 81.041 et seq., available at <https://statutes.capitol.texas.gov/Docs/HS/pdf/HS.81.pdf>

- to appropriate federal agencies, such as the Centers for Disease Control and Prevention; and
- to medical personnel to the extent necessary in a medical emergency to protect the health or life of the person identified in the information.

### **What the Public Health Authority Does with Your Information**

If a covered entity discloses information to a public health authority for the purpose of controlling the spread of a communicable disease, the information will likely include the name, age, gender, and occupation of the patient, along with health information. This is the minimum necessary information that allows the public health authority in the area to gather relevant information for the public, monitor the spread of disease, and create measures to control it.<sup>15</sup> The covered entity may disclose more information than the above, if relevant, without violating HIPAA or Texas law. It is important to understand that a federal public health authority has an obligation to safeguard PHI to the same extent as a covered entity by not disclosing it to any individual or entity that is not on a “need to know” basis. In Texas, a governmental unit, including a public health authority is considered a covered entity and also has the obligation to comply with HIPAA.<sup>16</sup>

Typically, the public health authority will gather PHI from covered entities and provide aggregated data by geographic region, age, or other information that is helpful to determine those who may be most affected by a pandemic. The purpose of this aggregated data is to assist the public in understanding which individuals may be most vulnerable and how to prevent the infection from spreading to others.<sup>17</sup> This aggregated data does not identify an individual, so it is not considered PHI.

The public health activities exception under HIPAA does not expressly contemplate that the public health authority will re-disclose the information to an individual or entity uninvolved in the public health activity of controlling the spread of a communicable disease. The public health authority may, however, choose to disclose

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<sup>15</sup> <https://www.cdc.gov/publichealthgateway/publichealthservices/essentialhealthservices.html>

<sup>16</sup> Texas Health and Safety Code §181.001(b), available at <https://statutes.capitol.texas.gov/Docs/HS/pdf/HS.181.pdf>

<sup>17</sup> <https://www.cdc.gov/eis/field-epi-manual/chapters/collecting-data.html>

the minimum necessary information to the media for the purpose of informing and educating the public.<sup>18</sup> The reason for this is to control the spread of the disease by informing the general public of a risk to their health and safety as it relates to a communicable disease in their geographical location or in areas where they have traveled. This information may be presented in a statement such as “Health Clinic in Forrest County tested 14 patients for COVID-19 this week and 7 tested positive. Two of these patients, ages 57 and 62 years old, have been hospitalized.” There may be instances when giving information to the media could identify an individual, such as “a 45-year-old female has tested positive for COVID-19 in Loving County, Texas.” Loving County has a population of 134 people, so it would be easy to identify which individual in that county was ill. In the case of Loving County, the information may be limited to simply the fact that an individual in the tri-county area tested positive in order to safeguard the identity of the patient.

### **When the Minimum Necessary Standard Does Not Apply**

As of this writing, the Centers for Disease Control and Prevention (“CDC”)<sup>19</sup> and the state of Texas have not declared COVID-19 to be a “high consequence communicable disease”<sup>20</sup> -- but this could change. In the event Texas does declare COVID-19 to be a high consequence communicable disease, the following “medical or epidemiological information... may be released to an appropriate federal agency:

- (1) the name, address, sex, race, and occupation of the person;
- (2) the date of the onset of the health condition;
- (3) the probable source of infection or exposure; and
- (4) other requested information relating to the case or suspected case of the infection.”<sup>21</sup>

As it relates to a disclosure for this purpose, the patient’s PHI is still not being given to the general public but solely to a federal agency for the purposes of public health activities.

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<sup>18</sup> <https://www.cdc.gov/publichealthgateway/publichealthservices/essentialhealthservices.html>, Accessed March 12, 2020

<sup>19</sup> <https://www.cdc.gov/coronavirus/2019-ncov/summary.html> accessed March 12, 2020

<sup>20</sup> This is the standard set out by Chapter 81 of the Texas Health and Safety Code, available at <https://statutes.capitol.texas.gov/Docs/HS/pdf/HS.81.pdf>

<sup>21</sup> Texas Health and Safety Code § 81, available at <https://statutes.capitol.texas.gov/Docs/HS/pdf/HS.81.pdf>

## FAQs

**Q: My child's school district told us that a teacher test positive for COVID-19. Why is nobody telling me what school it was in or what grade that person taught?**

**A:** This information is PHI and the minimum necessary standard applies here. The school district is considered a covered entity in Texas and has to follow HIPAA. The district has informed your family that a teacher tested positive, which should be enough information for you to make decisions regarding the spread of the disease and your potential risk. While it is frustrating, telling you what grade the individual teaches could identify the teacher in violation of HIPAA.

**Q: I have HIV and am at risk of contracting COVID-19. Will people find out my HIV status through the news if I end up getting COVID-19?**

**A:** No. Under the minimum necessary standard, a public health authority may disclose to a media outlet that an immunocompromised individual tested positive, but should not indicate what condition caused the lowered immune system because that is not necessary information to prevent the control or spread of the disease. Stating that immunocompromised individuals are at a higher risk of infection or that those individuals may have more severe symptoms falls under information and education of the public.

**Q: What if I die? Will people find out I died of COVID-19?**

**A:** Maybe. Your PHI remains protected until fifty (50) years after your death,<sup>22</sup> so a covered entity (including a public health authority) cannot disclose your name to the public or any other individual who does not have authority to obtain the information while you are alive. A covered entity may, however, disclose your PHI to individuals you have given authority to, such as a personal representative or the executor of your estate.<sup>23</sup>

**Q: I am an attorney that falls under the definition of covered entity in Texas. If a client tests positive for COVID-19, do I have to give the public health authority my client information?**

**A:** No. You are not considered a covered entity required to report a communicable disease.<sup>24</sup>

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<sup>22</sup> 45 C.F.R. §160.103, definition of "Protected Health Information," available at: <https://www.law.cornell.edu/cfr/text/45/160.103>

<sup>23</sup> 45 C.F.R. §164.502(g)(4), available at <https://www.law.cornell.edu/cfr/text/45/164.502>

<sup>24</sup> Persons required to report are listed in the Texas Health and Safety Code § 81.042, Available at <https://statutes.capitol.texas.gov/Docs/HS/pdf/HS.81.pdf>

**Q: I am an immigration attorney. If I test positive for COVID-19, do I have to give the public health authority my client list? I am concerned that they may use that information to deport a client.**

**A:** No. In the event Texas later considers COVID-19 to be a “high consequence communicable disease,” the healthcare provider treating you may request “medical or epidemiological information... relating to the case or suspected case of the infection” as stated in Texas Health and Safety Code § 81(c-3).<sup>25</sup> Note that this does not include or exclude individuals with whom you may have been in close contact. However, you have a separate ethical obligation to safeguard client information, and those obligations are not automatically removed during a public health emergency. In the event you are asked to provide your client list, seek guidance from the State Bar of Texas Ethics Line.

**Q: How will I know what information about my health has been disclosed to a public health authority?**

**A:** You have a right under HIPAA to request what is called an “accounting of disclosures”<sup>26</sup> from your healthcare provider. This is a log of disclosures of your PHI to an individual or entity by your provider, what information was disclosed, when it was disclosed, to whom it was disclosed, and a brief description of the purpose for which it was disclosed.

**Q: I believe that my PHI was improperly disclosed in violation of HIPAA. I want to sue my healthcare provider for violating HIPAA.**

**A:** The law does not allow you to sue your provider for HIPAA violations. You may, however, file a complaint related to the violation with the Office of Civil Rights online at <https://www.hhs.gov/hipaa/filing-a-complaint/index.html>.

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<sup>25</sup> Available at <https://statutes.capitol.texas.gov/Docs/HS/pdf/HS.81.pdf>

<sup>26</sup> 45 C.F.R. § 164.528, available at: <https://www.law.cornell.edu/cfr/text/45/164.528>