

**Legal & Ethical Considerations Regarding
Privacy of COVID-19 Exposure**
Sector Pandemic Planning Initiative (SPPI)
June 22, 2020

Topic

Considerations in Light of Public Health Postings of Group Homes Where Individuals are COVID-19 Positive and Protection of Privacy and Reduction of Stigma for Individuals Supported

Overview

Different privacy concerns have arisen for Developmental Services agencies (DS agencies) as the pandemic has increasing impact on the residents and staff supporting group homes and other congregate settings managed by DS agencies.

Public Health, under the [Health Protection and Promotion Act](#), is required to disclose the location of any outbreaks of communicable diseases, including the address and nature of the outbreak (e.g., COVID-19 related). Each local Public Health office may operate differently, but in most cases, the home would be recorded on the area's Public Health website and a sign would appear on the site's doorway.

At the same time, **agencies seek to be transparent** with stakeholders on their COVID-19 actions and impact. Most agencies have been sharing the street name related to any of their impacted sites and the number of staff and people supported being tested and testing positive at each site. This is shared in communications with staff, families and other agencies.

In this document, **Occupational Health considerations** were provided by Jeanette MacLean, the Senior Consultant, Health and Safety for Community Living Toronto. **Ethical considerations** were provided by Professor James Sikkema of McMaster University. **Legal considerations** were provided by PooranLaw.

Staff also have a desire for privacy or protection from stigma should they be infected with COVID-19. However, some staff may value their privacy higher than the safety of others, such as an asymptomatic staff who has defied agency policy and maintained employment at two agencies where one is in outbreak.

Key Questions

Agencies share a sense of discomfort in the Public Health posting of impacted locations as well as any signage added to the group home. There is a feeling of this adding stigma to group homes and people who have developmental disabilities, in general, and in specific at this address. There is a concern that this may have **possible long-term implications on the residents' success in experiencing full inclusion in their neighbourhood.**

At the same time, agencies are sharing anonymous COVID-19 status information with stakeholders (for example, street name of location, # of probable and confirmed for staff, as well as for people supported). **Is this exceeding what's required to reduce the spread of COVID-19?**

In terms of the privacy interests of employees, DS agencies should identify and address barriers preventing employees from disclosing personal health information and secondary employment obligations. DS agencies should have established processes to protect the privacy of such information and only disclose what is necessary to protect others in the environment.

Occupational Health

Full disclosure of pertinent medical information is protected under the Personal Health Information Protection Act (PHIPA). Communicable diseases such as COVID-19 are reportable to public health by the treating or ordering practitioner. Public health responds and provides the information necessary to any individuals (including the employer) who have had contact with the infected individual in the previous 14 days. An employer would not be provided the diagnosis unless it was necessary to inform measures needed to protect others. This is why the relationship with public health is so important. Public health can disclose the medical information to another healthcare practitioner such as an occupational health nurse.

An employer can ask that employees not report to work if they are ill. Also, an employer can put in place an immunization and medical screening protocol to ensure that workers who provide services to vulnerable populations are immunized against disease and participate in regular health surveillance. This is usually carried out by Occupational health staffed by certified occupational health nurses who function as custodians of personal health information, enabling the sharing of information necessary to inform the employer whether the employee is safe to be at work. In the absence of an Occupational health nurse, the employer must rely on public health and/or the treating practitioner. This is not always the most reliable as we experienced with COVID-19.

Legal Obligations and Considerations

Privacy interests of workers (and the legal risks of disclosing employee information or mandating disclosure) must be balanced against the health and safety risks of operating without relevant information. An employer has the right to require an employee to disclose information that is reasonably necessary to ensure the worker can safely perform their work and that they don't present a risk to people supported by the employer who are medically vulnerable, or to otherwise address risk to health and safety in the workplace. Arguably that may include information about the employee's off-duty activities, including whether and where they are working, and their exposure to people and settings that pose a heightened risk of COVID-19 infection.

The greater the health and safety risk, the greater the ability to disclose or require the disclosure of private employee information.

In all cases, best practices include:

- a) Express or implied consent to disclose personal information should be obtained before disclosing personal information (which may not be necessary, required or practically possible when it comes to employee information);
- b) requirements related to disclosure of personal information should be minimally invasive (minimum amount of information required to assess and address risk to people supported and other workers);
- c) any information disclosed should be used exclusively for the purpose of assessing and addressing COVID-19 related risks;
- d) the information should be accessed only by a minimum number of people who need to know;
- e) information must be maintained in a confidential manner; and
- f) information must be immediately destroyed when the pandemic is over or when the information is no longer reasonably required for health and safety purposes.

Privacy

For employers in the Developmental Services Sector (employed by provincially regulated employers) **there is not legislation governing how an employer manages personal employee information** (such as information about other employers, information about an employee's personal marital, family or household status).

However, employee health and medical information may be subject to the Personal Health Information and Protection Act (*PHIPA*). At the same time, personal information and an employer's treatment of personal information (including in relation to their relationship with other employers) may be impacted by developments related to the Tort of Intrusion upon Seclusion. This area of the law is not well developed.

In general, **best practices that should be applied from a privacy perspective** to any information gathered during the Pandemic include:

- requirements related to disclosure of personal information should be minimally invasive (minimum amount of information required to assess and address risk to people supported and other workers);
- any information disclosed should be used exclusively for the purpose of assessing and addressing COVID-19 related risks and should be limited to only those that need to know, for such risks;
- the information should be accessed only by a minimum number of people who need to know to achieve that purpose;
- information must be maintained in a confidential manner; and information should be immediately destroyed when the pandemic is over or when the information is no longer reasonably required for health and safety purposes.

Ethical Considerations

Protecting privacy and maintaining confidentiality during the pandemic period is ultimately about knowing what legal obligations DS sector agencies have including what

exceptions and limitations exist in terms of collecting, using and disclosing personal health information of people supported, staff, and visitors. However, when considering these legal obligations discussed above, there are ethical and professional matters you may want to consider as well.

Ethical Considerations:

- Vulnerability and marginalization of people with disabilities and stigma around being COVID-19 positive
- Reasonable expectations of privacy
- Ensuring transparency and accountability to stakeholders
- Safety and wellbeing of staff and people supported
- Balancing privacy interests with health and safety obligations (i.e., need to prevent and reduce spread of COVID-19, duty to disclose information to Public Health officials)
- Ensuring compliance with consent obligations and privacy policies
- Acting in accordance with Public Health directives which may differ across regions/ authorities
- Ensuring staff and people supported are informed about applicable Agency policies regarding privacy testing positive for COVID-19, self-isolation, returning to work after testing positive for COVID-19 and self-monitoring and the Agency's ability to require and collect information regarding staff likely or actual exposure to COVID-19 or other health conditions that could affect ability to provide services

CONSIDERATIONS FOR COMMON PRIVACY CONCERNS

SITUATION #1: Public Health has posted a home on its outbreak page, as well as a sign on the home.

- While notifying others that there is an outbreak is justifiable, *indiscriminately* notifying the general public by posting an outbreak notice on a publicly accessible website or by displaying a notice of an outbreak on a home may not be. By disclosing private and sensitive health information to the general public, Public Health officials are making a disclosure to a maximum number of others who do not necessarily have a *need* to know.
- The general public has the right to know of an outbreak at a facility, but only *potentially*. That right becomes *actual* on the basis of *need* and ***need is determined on the basis of susceptibility to direct harm especially if that health information remains undisclosed.***
- **Argument:** The majority of group homes, upon which a sign might be posted, are not open to the public, and, at this time, may not be open to personal visitors, based on the group home's screening policy currently in place. Since the majority of people who could gain access to this information would not be coming into 'health-threatening contact' with the COVID-19 positive individual(s), they do not need to be made aware of an 'outbreak.'

- **Risk:** The result is that an already marginalized group, vulnerable to stigmatization, discrimination, and exclusion will reasonably and foreseeably realize further stigmatization, discrimination, and exclusion by means of this undue invasion of privacy – a harm in itself in normal conditions, but when perpetrated on a vulnerable group, the harm is compounded. People supported, and DS personnel would, then, be suffering a greater harm for this information being disclosed than others would, if it were to remain undisclosed.
- **The above argument could be presented by a DS agency to their local Public Health office** for their consideration to not post a sign on the home. One could also remind their local Public Health workers that signs are not always hung outside homes despite there being a positive case. There is likely no flexibility concerning the publishing of the home's address on the Public Health page.

SITUATION #2: Agencies are regularly communicating their COVID-19 statistics, including number of people who are COVID-19 positive or probable and the group home location

If the agency's communication of the outbreak is only to staff and family members with no disclosure of personal identifying information, then it meets the needs of the agency to be transparent with its stakeholders, while protecting the privacy of the individual residents and staff at the impacted home.

SITUATION #3: A staff returns to work after being COVID-19 positive and faces a chilly reception from colleagues and some requests to confirm they are COVID-19 negative.

- The fact that someone tested positive for COVID-19 in the past is irrelevant to their present status. Since they do not presently pose a potential health threat to anyone, they do not have an obligation to disclose information about their past medical conditions to anyone if they do not choose to do so. It goes without saying that they cannot be compelled, coerced and/or manipulated to do so. If Public Health officials, or anyone else, were made aware of this individual's past positive COVID-19 status, they would not be morally permitted to disclose this information to anyone else without the express consent of the individual. All of the responsibilities of confidentiality would apply, and any breach of them would be unethical.

While a DS agency should not disclose a person's health status, there is an obligation to inform others of the risks and hazards present in the environment. Staff, when providing support to someone who has a known communicable disease, should be notified to ensure appropriate precautions are taken to prevent transmission. DS agencies are required to provide staff with information about any actual or potential hazards in the environment. DS agencies should communicate to all staff policies and procedures related to COVID-19. For example, a staff member who has symptoms of COVID-19 or tests positive for COVID-19 is not permitted to work. DS agencies should follow testing and clearance guidance by Public Health agencies before a staff member can return to the workplace following a diagnosis of COVID-19.

Disclaimer

Legal input and feedback included in this policy were provided by [PooranLaw](#) lawyers as members/consultants of the Sector Pandemic Plan Initiative's Governance working group. However, the legal input and feedback included in this policy should not be construed as legal advice. Each agency's circumstances and legal rights may vary and there will also be nuances within each agency. The goal of the legal input and feedback included in this policy is to help present options and highlight risks and other considerations. Agencies may wish to seek legal advice once they have selected the options that meet the needs of their organization. Any reliance on this information is at your own risk. We do not make any representations as to the accuracy or current state of the information in this document.