

April 29, 2020

Commissioner Jan Malcolm
Minnesota Department of Health
625 N. Robert St.
Saint Paul, MN 55155-2538

COPY

Dear Commissioner Malcolm,

We are deeply concerned with your April 2 “Notification Letter” letter to Minnesota hospitals regarding “Situational Awareness.” Whether by accident or design, your Notification Letter falsely suggests that you have the authority to compel hospitals to provide MDH with all general population patient data, rather than limited, specific and authorized data necessary to support MDH’s COVID-19 surveillance efforts.

To the extent Minnesota hospitals have felt compelled by your letter to provide MDH with anything other than data that specifically relates to COVID-19, we believe you have abused your authority and infringed upon Minnesotans’ health privacy rights.

Your letter requests “total population” information and at the same time it tacitly acknowledges (by using the word “goal”) that you do not have any authority to compel any hospital to comply with your over-broad request: “MDH’s goal is to have 100% of Minnesota hospitals sending ADTs for the **total population of patients** receiving care in their facilities as soon as possible” [emphasis added]. We understand this to mean that data on all patients, whether COVID-19 or not, will be reported to MDH, including a list of required information on each patient. We find it egregious that MDH has used a legitimate crisis and legitimate public (and hospital) fear caused by that crisis as an opportunity to illegitimately invade hospital records and individuals’ medical data, and to set up a system to do it into the future.

We are particularly troubled by several items:

First, all patients will be reported to MDH whether they actually have COVID-19 or not. Minnesota Statute 144.05, the law you rely on in your Notification Letter, nowhere authorizes the state-compelled collection of all patient data. The statute authorizes MDH to passively “*conduct studies and investigations, collect and analyze health and vital data, and identify and describe health problems.*” Section 144.05 in no way empowers MDH to compel hospitals to provide MDH with access to all patient data and certainly does not empower MDH to use the fog of fear and panic caused by COVID-19 to grab powers not granted by the statute or the State legislature.

Second, MDH disingenuously claims hospitals are not required to get consent because the federal HIPAA rule does not require it. Here, you and MDH perform a statutory sleight of hand. In your Notification Letter you rely on Section 144.05 which gives you no police enforcement powers as noted above. Then, in MDH’s FAQ on its website,¹ it adds to this falsehood by inaccurately claiming that the federal HIPAA rule also authorizes its non-consensual power grab and audaciously cites Minnesota Statute 144.293, *the consent requirement section of the Minnesota Health Records Act*.

¹ <https://www.health.state.mn.us/diseases/coronavirus/hcp/syndromic.html#what1>

HIPAA empowers states to set their own privacy laws and specifically states that federal law does not and cannot pre-empt stronger state privacy laws (45 CFR 160.203(b) allows state law to trump federal law when “*State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter*”). **Section 144.293, subd. 2(2) is not pre-empted by any federal law, including HIPAA, and specifically requires patient consent for any sharing of data.** The fact that MDH has specifically cited Section 144.293 in its FAQ shows that MDH’s privacy violation is willful and knowing.

As further evidence of your department’s willful and knowing violation of the patient privacy and consent rights contained in Section 144.293, your agency has previously noted its understanding of the state pre-emption provision of HIPAA. As written in MDH’s 2013 “Minnesota Health Records Access Study”:²

- “**144.293** Patient must consent for each disclosure of their health information for any purpose, before health records can be shared.”
- “Minnesota Law is more restrictive and protective of individual privacy rights, pre-empting federal HIPAA privacy law as a result.”

Third, in your letter, you have attempted to deceive hospitals into complying with a request that will cause them to break the law, to violate patient’s consent and data privacy rights under 144.293, and will only create unnecessary risk and uncertainty for intimidated hospitals that comply with your baseless request. These hospitals may face lawsuits from patients whose medical privacy rights have been violated.

Fourth and finally, MDH is requiring every hospital to set up an electronic interface with an MDH contractor to facilitate sharing of “near real-time **pre-diagnostic data**”³ with state health officials by sometime in May. Again, MDH has signaled its intent to use the COVID-19 crisis to infringe on health care privacy and specifically to violate Section 144.293. In its online FAQ document (*Hospital Alerting for Syndromic Surveillance: COVID-19/SAR-COV-2*), MDH admits that it intends to use COVID-created data connections to peer into hospital data and private patient records after COVID-19: “*It may be possible to use this approach in the future for other related activities...Other conditions MDH might want to expand to after COVID-19 are...or other current or emerging public health threats.*” This regulatory demand to create a long-term direct link between the state government and private hospitals for the “near real-time” transfer of private patient data is an overreach and a violation of patient privacy and consent rights.

Therefore, in light of the foregoing, please immediately rescind the April 2 Notification Letter, and inform every recipient of the Notification Letter that no non-COVID-19 data may be shared with MDH without the express, written consent of the patient in compliance with Section 144.293.

Thank you.

Sincerely,



Twila Brase, RN, PHN
President and Co-founder

² <https://www.health.state.mn.us/facilities/ehealth/hras/docs/021913report.pdf>.

³ <https://www.health.state.mn.us/diseases/coronavirus/hcp/syndromic.html#what1>