



The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
250 Washington Street, Boston, MA 02108-4619

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May 7, 2020

VIA ELECTRONIC MAIL

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

Re: Public Record Request OGC 2020-64

Dear Ms. Rose and Mr. Greenwald:

This letter is in regard to the above referenced public record request received by the Department of Public Health (the Department or DPH) via telephone on April 2, 2020. This request has been assigned a tracking number: **OGC 2020-64**.

Related to the March 18, 2020 Order requiring local boards of health to disclose to the official with the responsibility for administering the response to emergency calls in their jurisdiction the addresses of people living in their jurisdiction who have tested positive for COVID-19, you requested:

“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.

“...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 you related in your letter, you also requested:

“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.”

On April 17, 2020, I spoke to your colleague, Kade Crockford of the ACLU of Massachusetts, who agreed to an extension until Friday, May 1, 2020, for the response. On April 30, 2020, my colleague Rebecca Rodman again spoke to Kade Crockford, who agreed to an extension until Wednesday, May 6, 2020, for the Department to respond to your requests related to the March 18, 2020, Order. The response to your PPE request was sent to you on May 1, 2020.

Regarding your requests related to the March 18, 2020, Order requiring local boards of health to disclose to the official with the responsibility for administering the response to emergency calls in their jurisdiction the addresses of people living in their jurisdiction who have tested positive for COVID-19, enclosed are the records (85 pages) responsive to your request. Certain information has been redacted from these records. Telephone numbers and passcodes used to access conference lines have been redacted pursuant to G.L. c. 4, §7(26)(b), which applies to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding. It is necessary for the Department to know who is listening when engaging in teleconferences related to the work of the Department.

In addition, certain responsive records were redacted on the basis of the attorney-client privilege. *See Suffolk Construction Co., Inc. v. Div. of Capital Asset Management*, 449 Mass. 444, 448-52 (2007). In accordance with 950 CMR 32.06(3)(d), the Department has redacted the text of the privileged communications but did not redact the To, From, CC, and Subject fields. These documents constitute attorney-client communications and there has been no waiver of that privilege. The communications include those among Department attorneys (Margret Cooke, Elizabeth Scurria-Morgan, Lynn Squillace, and Rebecca Rodman) and Department staff. In addition, the communications include those among Department attorneys and attorneys from the Executive Office of Health and Human Services (EOHHS) and the Governor’s Legal Office, discussing the development and issuance of the Order. EOHHS supervises and manages the business affairs of the departments, commissions, offices, boards, divisions and other entities within the executive office to improve administrative efficiency, program effectiveness and to preserve fiscal resources. *See* G.L. c. 6A, § 16.¹ Accordingly, EOHHS’ attorneys are not only

¹ M.G.L. c. 6A, § 16 provides in pertinent part: The executive office of health and human services shall serve as the principal agency of the executive department for the following purposes: (a) developing, coordinating, administering and managing the health, welfare and human services operations, policies and programs; (b) supervising and managing the organization and conduct of the business affairs of the departments, commissions, offices, boards, divisions, institutions and other entities within the executive office to improve administrative efficiency and program effectiveness and to preserve fiscal resources; (c) developing and implementing effective policies, regulations and programs to assure the coordination and quality of services provided by the secretary and all of the departments, agencies, commissions, offices, boards, and divisions; (d) acting as the single state agency under section 1902(a)(5) of the Social Security Act authorized to supervise and administer the state programs under title XIX, for the

authorized but required to provide legal advice to its constituent agencies; the Department being one of them. Hence, these withheld records between attorneys from the Department and attorneys from EOHHS squarely fall under the common law attorney-client privilege and were rightfully withheld. Similarly, communications between the Department's attorneys and the attorneys within the Governor's Legal Office were also appropriately withheld under the attorney-client privilege. The Executive Offices and their constituent agencies serve at the behest of and report to the Governor. *See* G.L. c. 6A, §§ 2 and 4. With respect to the application of the attorney-client privilege, the Governor's attorneys provide legal advice to all Executive Offices' General Counsels in order to promote and execute the Governor's agenda. Such communications create a direct attorney-client relationship between the Governor's Legal Office and his Secretariats' General Counsels and their constituent agencies' General Counsels. As such, the Governor's attorneys' legal advice is necessarily confidential and protected for the Governor and his administration to carrying out the business of the governing.

Further, both the Governor and EOHHS' Secretary have the authority to, among other acts, coordinate and supervise the administration of the executive offices and their agencies to promote efficiency and improve the delivery of government services. By and through their respective legal offices, both entity's execute instruments necessary for carrying out the business of governing under broad authority, including, but not limited to discussing legal matters as well as sharing confidential legal advice and strategies; as both have a legitimate interest in working together as a unit to serve the goals of government. *See Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc.*, 339 Mass. 612. The common interest doctrine enables each entity to share confidential attorney-client privileged materials and communications without destroying or waiving the attorney-client privilege. *Id.* at 617-18; *Inception, LLC v. Com. ex rel. Div. of Capital Asset Management and Maintenance*, 26 Mass. L. Rptr. 551, slip op. at *2 (Mass. Super. Ct. Mar. 23, 2010). As such, each shares a common legal interest with the other to ensure the delivery of human services in accordance with applicable policies, laws and regulation. *Id.* at 609.

DPH reserves the right to retrieve any exempted, privileged, or otherwise protected materials inadvertently included in this production. Any such production is not, and shall not be considered or deemed, a waiver of any applicable privileges or protections from disclosure.

DPH now considers this public record request closed. If you wish to challenge this response, and your request was received in writing, you may appeal to the Supervisor of Records following the procedure set forth in 950 CMR 32.08, a copy of which is attached. Pursuant to G.L. c. 66, § 10A, you may also seek judicial review by commencing a civil action in Suffolk Superior Court.

Please contact me with any questions. In any communication regarding this request, please reference the assigned tracking number **OGC 2020-64**.

programs under titles IV (A), IV (B), IV (E), XX and XXI of the Social Security Act, and for the programs under the Rehabilitation Act; and (e) maximizing federal financial participation for all agencies, departments, offices, divisions and commissions within the executive office.

Sincerely,

A handwritten signature in blue ink, appearing to be 'HRL', written in a cursive style.

Helen Rush-Lloyd
Records Access Officer