



18 March 2020

## **ADVISORY OPINION**

Reference No. DPO 20-06

FOR : [REDACTED]  
SUBJECT : **Privacy Issues on contact tracing of  
COVID-19-positive individuals**

Dear [REDACTED]:

We respond to your inquiries on how tracing can be conducted to those who came in contact with those who tested positive with COVID-19 in line with data privacy principles.

## **FACTS**

Among the functions of the UP Diliman [REDACTED] is to conduct contact tracing of COVID-19-positive individuals (referred here as “patients”).

However, data privacy prohibitions limit the [REDACTED] from disclosing the names of patients, rendering contact tracing difficult in some cases.

## **INQUIRIES**

The following concerns have been validly raised:

- a) Who should contact staff, faculty, students? What is the role of the college head in this situation?
- b) In confirmed cases, would it be more helpful to identify the patient to avoid speculation and fear? It is acknowledged that there are ethical issues about this, but we have to think of the effect of anonymized contact-tracing. People cannot provide clear answers anyway because they don't know who exactly is the person being referred to. It also strikes fear in people.
- c) In small colleges, it is hard to hide identities. It is just a short process of elimination. How do we maintain transparency while keeping to ethical principles?

## Advisory Opinion

Contact tracing and data gathering may only be conducted by [REDACTED] members with the duty to do so. Academic unit heads may only facilitate locating people but not have access to gathered data and identities.

The general rule is that unless there is *prior consent* from the patient, the disclosure of patient identity is **prohibited**. However, the contact tracing may be exempted from this prohibition if a document is promulgated to establish that the *legitimate purpose* of contact tracing is to protect the life and health of the patient (*i.e.* how long since the virus was contracted) and the life and health of others (*i.e.* if they are also infected or are carriers).

As much as practicable, patient and PUI identities should be undisclosed. The default stance of the [REDACTED] should be to anonymize identities if not necessary in the conduct of tracing.

Global best practices should be used as guidelines in determining when to disclose the identity of a particular patient or PUI. It should be determined "*whether the harms can be avoided or benefits gained without breaching the patient's privacy or, if not, what is the minimum intrusion*".

The privacy principle of *proportionality* should be applied in contact tracing:

- (1) Only the fact that the patient is infected with COVID-19 should be disclosed. Other information such as current health status is not necessary to trace who have been in contact with the patient; and
- (2) Only those who were probably have been in contact with the patient should be asked. Releasing a public announcement is disproportionate and excessive to the legitimate purpose of tracing.

A balance should be calibrated between identity anonymization and disclosure to manage unfounded community assumptions and fears.

Since it is not certain whether or not PUIs have actually been infected or if they are actually carriers, the *preference* should be to keep the identities of PUIs private.

Transparency applies both ways: to the patient and the community.

For the patient, he/she has a *right to be informed* that his/her identity may be disclosed during contact tracing to preserve his/her life and health as well as the life and health of others. If medical isolation renders it impractical to inform the patient, then the ethical thing to do is inform relatives. In case the patient unfortunately becomes deceased, then the his/her right to be informed is transmitted to patient's lawful heirs.

For the community, it is ethical that they are informed of the medical risks they face. The community may know a patient's identity if the patient granted his/her prior consent. Otherwise, any announcement to the community should fall short of allowing peers to reasonably and directly ascertain or deduce the identity of the patient.

## **DISCUSSION**

### ***a) Who should contact staff, faculty, students? What is the role of the college head in this situation?***

Only [REDACTED] members identified to have the duty may contact people

The [REDACTED] must contact staff, faculty, and students since it is their team with the *mandate*<sup>1</sup> conduct the tracing and data gathering. To establish *organizational security measures*,<sup>2</sup> the [REDACTED] should:

- (1) Identify which members have the duty to contact and gather data from staff, faculty, and students;
- (2) Have a clear statement of the duties of its members. This includes defining what specific data interviewers need to gather from people;

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<sup>1</sup> Data Privacy Act, Section 12. *Criteria for Lawful Processing of Personal Information. x x x (e)* The processing is necessary in order to respond to national emergency, to comply with the requirements of public order and safety, or to fulfill functions of public authority which necessarily includes the processing of personal data for the fulfillment of its **mandate**;

<sup>2</sup> Implementing Rules and Regulations of the Data Privacy Act, Section 26. *Organizational Security Measures.*

- (3) Identify which *other* members of the ██████████ will process the data gathered; and
- (4) Trace the *data life cycle*<sup>3</sup> of personal information within the ██████████ to ensure minimally necessary processing of personal information.

The head of the academic unit may only facilitate to reach out to people

The head should only facilitate the ██████████ in reaching out and introducing the ██████████ to his/her academic unit. The head should not have access to gathered data, including identities of patients and Persons Under Investigation (PUI). The reasons for this limited involvement are:

- (1) The head is not mandated to perform the functions of the ██████████; and
- (2) Gathered data should be centralized with the ██████████ and not shared to multiple academic unit heads.<sup>4</sup>

***b) In confirmed cases, would it be more helpful to identify the patient to avoid speculation and fear?***

On a case-to-case basis, patient identity may be disclosed as needed. However, the disclosure of identity should:

- (1) Be in proportion to legitimate purpose of the contact tracing; and
- (2) Minimally intrude the patient's privacy.

As much as practicable, patient and PUI identities should be anonymized

The default stance of the ██████████ should be to anonymize and not disclose the identity of patients and PUIs. Not all acts of tracing present the predicament of whether or not an identity should be disclosed.

Anonymization may be done in instances when the patient's identity is not relevant to trace persons he/she may have infected. For example, if the patient attended a small closed-door meeting, it may not be necessary to disclose the patient's identity to know who he/she may have may have been in contact with.

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<sup>3</sup> National Privacy Commission, Privacy Toolkit (3<sup>rd</sup> edition, 2018), p.84.

<sup>4</sup> NPC Circular 16-03. Section 15. *Security Clearance*. A government agency shall strictly regulate access to personal data under its control or custody. It shall grant access to agency personnel, through the issuance of a security clearance by the head of agency, only when the performance of official functions or the provision of a public service directly depends on such access or cannot otherwise be performed without such access.

The [REDACTED] should establish the legitimate purpose of contact tracing to justify processing of health information

The fact that a person is or possibly COVID-19-positive is health information which is classified as *sensitive* personal information.<sup>5</sup> The general rule is that the processing and disclosure of sensitive personal information is prohibited save for specific exceptions under the Data Privacy Act of 2012.<sup>6</sup> Of these exceptions,<sup>7</sup> the following is applicable to the situation at hand:

SEC. 13. *Sensitive Personal Information and Privileged Information.* – The processing of sensitive personal information and privileged information shall be prohibited, except in the following cases:

x x x

(c) The processing is necessary to protect the life and health of the data subject or another person, and the data subject is not legally or physically able to express his or her consent prior to the processing;

The foremost step is to obtain the *prior consent*<sup>8</sup> of the COVID-19-positive patient. However, it is most likely that due to medical isolation, the patient will not be physically able to express consent to the [REDACTED].

If prior consent of the patient cannot be obtained, Section 13 (c) above still allows the processing of sensitive personal information (including disclosure of health information) *if* the *purpose* is to protect the life or health of the patient or another.

Hence, the key is for the [REDACTED] is for an official document to be promulgated in favor of the [REDACTED]. This document should definitively establish that the *purposes* of contact tracing are:

- (1) Protect the life and health of the patient (*i.e.* how long since the virus was contracted);  
and
- (2) Protect the life and health of those who were in contact with him or her (*i.e.* identify those who may have acquired or carriers of the virus).

With the above formally established, the [REDACTED]'s *purposes* to disclose a patient's identity can each be classified as a "legitimate purpose" under the law.<sup>9</sup>

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<sup>5</sup> Data Privacy Act, Section 3(l)(2).

<sup>6</sup> Data Privacy Act, Section 13.

<sup>7</sup> Another exception to the prohibition against processing of personal information is Section 13(e): "*The processing is necessary for purposes of medical treatment, is carried out by a medical practitioner or a medical treatment institution, and an adequate level of protection of personal information is ensured;*" However, this is limited to treatment of the patient himself/herself carried out by a medical practitioner.

<sup>8</sup> Data Privacy Act, Section 13(a).

<sup>9</sup> Implementing Rules and Regulations of the Data Privacy Act, Section 18(b).

Only the identity of the patient should be disclosed only to those who may probably have been in contact with the patient

In the 10 March 2020 statement of Commissioner Raymund Liboro on the Declaration of Public Health Emergency in Relation to COVID-19, the Commissioner stated:

“Only pertinent information necessary in facilitating contact tracing should be collected, such as but not limited to: travel history, and frequented locations. Likewise, the only information required to enable contact tracing shall be disclosed to the public.”<sup>10</sup>

Although the statement above contemplates the acts of the Department of Health (DOH), it may still be used as guide since the legitimate purpose of the [REDACTED] is aligned with that of the DOH.

The afore-quoted statement of Commissioner Liboro mentioned that the United Kingdom’s General Medical Council (GMC) espouses global best practices. The GMC’s ethical guidance on *Disclosing information about serious communicable diseases* provides good guidance when disclosure of a patient’s identity is proper, it states:

“67. Before deciding whether disclosure would be justified in the public interest you should consider whether it is practicable or appropriate to seek consent. You should not ask for consent if you have already decided to disclose information in the public interest but you should tell the patient about your intention to disclose personal information, unless it is not safe or practicable to do so. If the patient objects to the disclosure you should consider any reasons they give for objecting.

68. When deciding whether the public interest in disclosing information outweighs the patient’s and the public interest in keeping the information confidential, you must consider:

- a. the potential harm or distress to the patient arising from the disclosure – for example, in terms of their future engagement with treatment and their overall health
- b. the potential harm to trust in doctors generally – for example, if it is widely perceived that doctors will readily disclose information about patients without consent
- c. the potential harm to others (whether to a specific person or people, or to the public more broadly) if the information is not disclosed
- d. the potential benefits to an individual or to society arising from the release of the information

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<sup>10</sup> Statement of Commissioner Raymund Enriquez Liboro Declaration of Public Health Emergency in Relation to COVID-19, <https://www.privacy.gov.ph/2020/03/statement-by-privacy-commissioner-raymund-enriquez-liboro-on-the-declaration-of-public-health-emergency-in-relation-to-covid-19/>, accessed 16 March 2020.

- e. the nature of the information to be disclosed, and any views expressed by the patient
- f. whether the harms can be avoided or benefits gained without breaching the patient's privacy or, if not, what is the minimum intrusion.

If you consider that failure to disclose the information would leave individuals or society exposed to a risk so serious that it outweighs the patient's and the public interest in maintaining confidentiality, you should disclose relevant information promptly to an appropriate person or authority.”<sup>11</sup>

Notable in the above is the suggestion to achieve purposes “without breaching the patient's privacy or, if not, what is the minimum intrusion.” This is in line with the privacy principle of *proportionality*<sup>12</sup> wherein the information to be disclosed should be “not excessive” to the legitimate purpose.

Applied to contact tracing, the privacy principle of proportionality requires:

- (1) Only the fact that the patient is infected with COVID-19 should be disclosed. Other information such as current health status is not necessary to trace who have been in contact with the patient;
- (2) Only those who were probably have been in contact with the patient should be asked. Releasing a public announcement is disproportionate and excessive to the legitimate purpose of tracing.

A balance should be calibrated between identity anonymization and disclosure to manage unfounded community assumptions and fears

Anonymizing the patient should be the default stance. However, the GMC guidelines above also considers “the potential harm to others (whether to a specific person or people, or to the public more broadly) if the information is not disclosed”. The members of the ██████████ conducting the tracing must be mindful if not disclosing the patient's identity is already leading to baseless unfounded assumptions and fears. While easier said than done, the ██████████ should delicately balance and calibrate between anonymization and disclosure of the patient's identity through the GMC guidelines and the aforementioned application to contact tracing of the privacy principle of proportionality.

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<sup>11</sup> United Kingdom General Medical Council, *Disclosing information about serious communicable diseases*, <https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/confidentiality---disclosing-information-about-serious-communicable-diseases/disclosing-information-about-serious-communicable-diseases>, accessed 16 March 2020.

<sup>12</sup> Implementing Rules and Regulations of the Data Privacy Act, Section 18(c).

There should be preference to keep the identities of PUIs private

Additional care should be exercised in disclosing identities of PUI. Since it is not certain whether or not they have actually been infected or if they are actually carriers, the GMC's guidelines and the application of proportionality to contact tracing above should be construed to favor more the PUI's privacy.

**c) *In small colleges, it is hard to hide identities. How do we maintain transparency while keeping to ethical principles?***

Transparency applies both ways: transparency to the patient (that his/her identity will be disclosed) and transparency to members of the community (that they may have been exposed to the virus).

Transparency to the patient

The patient has the *right to be informed*<sup>13</sup> that his or her personal information may be limitedly disclosed during contact tracing for the legitimate purposes of protecting the life and health of the patients (*i.e.* how long since the virus was contracted) and the life and health of those who may have been in contact with him/her (*i.e.* if they are also infected or are carriers).

However, the medical isolation of the patient may render informing the patient impracticable. The ethical matter to conduct is to be transparent to the relatives of the patient by informing them of the possible disclosures.

In case the patient unfortunately becomes deceased, then the his/her *right to be informed* is transmitted to patient's *lawful heirs*.<sup>14</sup>

Transparency to the community

Except on matters related to Freedom of Information (*i.e.* government records),<sup>15</sup> the community has no legal right to the data processed by the ██████████.

However, beyond legalities, the *ethical* sensitivities on lack of transparency (or a perception thereof) should be considered. The community must be informed of the medical risks they face.

Similar to contact tracing, the foremost step before disclosing patient identity is to obtain the prior consent of the patient.<sup>16</sup> If this is impractical, the ethical thing to do is to ask for the consent of the patient's relatives.

If consent is not obtained or if there is reason to believe that the consent of the relatives may not reflect the intent of the patient, then the announcements or notices to the community must

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<sup>13</sup> Implementing Rules and Regulations of the Data Privacy Act, Section 34(a).

<sup>14</sup> Data Privacy Act, Section 17.

<sup>15</sup> Executive Order No. 2, series of 2016.

<sup>16</sup> Data Privacy Act, Section 13(a).



not include the patient's identity. Announcements should fall short of providing information that will identify or allow peers to reasonably and directly ascertain or deduce the identity of the patient.<sup>17</sup> This is to strike a balance between being ethically transparent to the community while respecting the privacy of the patient.

Please feel free to reach out for questions or further concerns.

Yours,

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<sup>17</sup> Data Privacy Act, Section 3(g).