



## MEMORANDUM

**TO:** The Pennsylvania House of Representatives

**FROM:** Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

**DATE:** October 19, 2020

**RE: OPPOSITION\* TO SENATE BILL 1110 P.N. 1702 (K. WARD)**

*\*Should the House adopt A07484 (Frankel), the ACLU-PA's position would change to **NEUTRAL***

[Senate Bill 1110](#) (P.N. 1702) proposes a change in content and scope to Pennsylvania's [Disease Prevention and Control Law of 1955](#) (35 P. S. §§ 521.1–521.21), which prohibits state and local health authorities from disclosing reports of diseases or records pertaining to diseases to anyone outside those agencies, “except where necessary to carry out the purposes of this act.”

SB 1110 would require the disclosure of a person's residence who tested positive for a communicable disease that is the subject of a disaster declaration. This new provision would:

- Apply to *any* communicable disease, not just diseases contracted through airborne transmission;
- Expand the entities with whom private information is shared (beyond state and local health authorities) to include 911 centers, law enforcement, fire department and emergency medical services personnel, medical examiners, and coroners;
- Share this data with *each* of those entities within 24-hours after confirming a positive case; and
- Restrict the use — but not the sharing — of data to personnel responding to a call at a residence.

The Pennsylvania Constitution places a high value on individual privacy, including medical privacy.<sup>1</sup> But the right to privacy, like all constitutional rights, is not absolute. When an individual's right to privacy is implicated, courts will use a balancing test to determine whether the invasion of privacy is outweighed by a compelling state interest.<sup>2</sup> Certainly significant state interests are at stake here, given the grave public health risk posed by COVID-19. But even in the midst of extraordinary circumstances, fundamental rights can — and must — be protected against unnecessary government intrusion.

**On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 1110 for the following reasons:**

### **SB 1110 will apply to all communicable diseases, not just COVID-19**

SB 1110's provisions are cabined such that the governor must first declare an emergency based on a communicable disease. But SB 1110 would require disclosure of information for **all** communicable diseases that become the subject of a disaster emergency, even if the nature of the disease does not lend itself to first responders benefitting from such information. The least intrusive way to achieve the state's goal of protecting first responders is to limit the bill to COVID-19, and if not, it should at least be limited to airborne diseases.

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<sup>1</sup> Article 1, Section 1 of the Pennsylvania Constitution provides even “more rigorous and explicit protection for a person's right to privacy” than the federal constitution. *In re B*, 394 A.2d 419, 425 (Pa. 1978). The right to privacy, for Pennsylvanians, is considered “as much property of the individual as the land to which he holds title and the clothing he wears on his back.” See also *Stenger v. Lehigh Valley Hosp. Ctr.*, 609 A.2d 796, 800-801 (Pa. 1992) (finding privacy interest not to be offended by disclosure of HIV status *because* disclosure of information was anonymous).

<sup>2</sup> An individual's right to privacy is weighed against a countervailing state interest. *Denoncourt v. Commonwealth, State Ethics Comm'n*, 470 A.2d 945, 948 (Pa. 1983). An intrusion into a person's private affairs is only justifiable “when the government's interests are significant and there is no alternate reasonable method of lesser intrusiveness to accomplish the government's purpose.” *Id.* at 949. “Whether there is a significant state interest will depend, in part, on whether the state's intrusion will affect its purpose; for if the intrusion does not affect the state's purpose, it is a gratuitous intrusion, not a purposeful one.” *Id.*

## SB 1110 risks over-sharing data at the expense of public health and confidence

When balancing public health and privacy interests, the ACLU relies on medical expertise to identify and assess the health interests at hand. Protecting the health of first responders is clearly an important priority for the state. However, [public health experts](#)<sup>3</sup> have noted that disclosing addresses of those testing positive for COVID-19 does not ensure a first responder would be safe from exposure. Many cases of COVID-19 are [asymptomatic](#),<sup>4</sup> present mild symptoms, or are undiagnosed due to [limited availability of tests](#).<sup>5</sup>

It is also important to recognize the critical role confidentiality plays in protecting public health. Even sharing the addresses ([particularly with law enforcement](#)) of those who test positive could deter some people from getting tested. There is a [long history of social stigma](#)<sup>6</sup> attached to communicable diseases; vulnerable populations such as unhoused or undocumented individuals, or people living in marginalized and over-policed communities may not be willing to get tested if they know their information will end up in the hands of government authorities other than those responsible for public health. Confidentiality laws are neither insignificant nor mere administrative burdens; in fact, they are integral to successful public health management.

## SB 1110 limits the use of private data, but shares it broadly and automatically with multiple entities

SB 1110 requires that the residence of anyone testing positive is disclosed to “public safety personnel” within 24 hours of confirming a positive case, including with 911 centers, law enforcement officers, fire department personnel, EMS personnel, medical examiners, and coroners. While the bill restricts the **use** of this information to the delivery of emergency notification services, death investigation services, and emergency support services, the data is **shared with each** of those entities regardless of whether that information is needed to perform essential job functions at an address. Most states that share addresses with confirmed positive COVID-19 cases only share that data with dispatch centers, who then flag that address for personnel if/when they respond to a call. Simply stated, SB 1110 puts private information in more hands than is necessary and hopes that the data is not only secure, but only used for its stated purposes.

## SB 1110 is silent about data security precautions, raising critical questions

SB 1110 puts an enormous burden on public safety personnel to maintain, manage, and protect private data.

- What is the mechanism used to share this data every 24 hours? Is the information protected by end-to-end encryption during transmission?
- Once the information is received by each of public safety entities, how is that data protected within each agency/department? What measures are in place by each entity to protect against a breach or hack?
- How many people can access the data, and who (at each entity) is providing oversight of that access?
- What kind of federal and state HIPAA / confidentiality compliance training is being provided to each receiving entity to ensure they comply with relevant privacy laws?
- Who is in charge, at each of the receiving entities, of making sure the information isn't being misused or abused?
- What is the liability exposure to each of these entities should there be unauthorized sharing of data or a data breach/hack?
- Who is responsible, at each agency/department, for tracking and destroying data after 45 days? What mechanism does the state have to confirm that the data is destroyed?

**For these reasons, we urge you to oppose SB 1110 (PN 1702) or adopt Amendment 07484 (Frankel), which would resolve many of the concerns raised above.**

<sup>3</sup> Greenwald, Robert. (2020 March 23). Applying Lessons Learned from the AIDS Epidemic to the Fight Against COVID-19. Harvard Center for Health Law and Policy Innovation. [chlp.org/applying-lessons-learned-from-the-aids-epidemic-to-the-fight-against-covid-19](http://chlp.org/applying-lessons-learned-from-the-aids-epidemic-to-the-fight-against-covid-19)

<sup>4</sup> The Centers for Disease Control, How COVID-19 Spreads. <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>

<sup>5</sup> U.S. FDA (2020, February 29). COVID-19 Update: FDA Issues New Policy to Help Expedite Availability of Diagnostics.

[fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-issues-new-policy-help-expedite-availability-diagnostics](https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-issues-new-policy-help-expedite-availability-diagnostics)

<sup>6</sup> Williams, J. L. (2011). Infectious diseases and social stigma. Applied Technologies and Innovations, 4(1), 58–70.

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