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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 12, 2021

Representative Cedric Hayden
900 Court Street NE H383
Salem OR 97301

Re: House Bill 3057

Dear Representative Hayden:

You asked several questions about House Bill 3057. We have rephrased and consolidated some of your questions below.

1. How does Section 1 (2) intersect with the current ORS on infectious diseases (ORS 433.004) and what, if this bill were passed, would be the new, more permissive use of individualized data?

Section 1 (2) of HB 3057 permits the Oregon Health Authority (OHA) to disclose individually identifiable information related to COVID-19. ORS 433.008 already provides for the release of information related to reportable diseases to various persons:

> (2) The authority or a local public health administrator may release information obtained during an investigation of a reportable disease or disease outbreak to:
>
> (a) State, local or federal agencies authorized to receive the information under state or federal law;
>
> (b) Health care providers if necessary for the evaluation or treatment of a reportable disease;
>
> (c) Law enforcement officials to the extent necessary to carry out the authority granted to the Public Health Director and local public health administrators under ORS 433.121, 433.128, 433.131, 433.138 and 433.142;
>
> (d) A person who may have been exposed to a communicable disease;
>
> (e) A person with information necessary to assist the authority or local public health administrator in identifying an individual who may have been exposed to a communicable disease; and
>
> (f) The individual who is the subject of the information or the legal representative of that individual.

HB 3057 provides an enumerated list of “health care providers” who may receive individually identifiable information related to COVID-19, while ORS 433.008 refers to “health

care providers" generally. ORS 433.008 allows release of information to health care providers "if necessary for the evaluation or treatment of a reportable disease."[1] HB 3057, on the other hand, may allow health care providers to receive information that is not necessary for the evaluation or treatment of COVID-19, if OHA determines that the disclosure is necessary for "care coordination of individuals who have been tested for COVID-19 or individuals who have had a substantial exposure to COVID-19," or if OHA determines that it "is necessary for the state's COVID-19 response and recovery efforts."[2]

HB 3057 also authorizes disclosures of individually identifiable information to Indian tribes and persons providing care coordination services and administering health information technology systems. These disclosures may have been permissible under ORS 433.008 as disclosures to health care providers, or they may have been permissible as disclosures under ORS 433.008 (2)(e) "only if there is clear and convincing evidence that the release is necessary to avoid an immediate danger to other individuals or to the public."[3]

2. The terms "substantial exposure" and "necessary for the state's response" are not defined in the measure. How broadly can OHA define these terms in rule?

The Oregon Health Authority has the authority to define these terms in rule or to interpret these terms on a case-by-case basis, and could potentially define or interpret them broadly. If OHA defines or interprets these terms too broadly, a person could challenge OHA's definition or interpretation of these terms as outside the range of discretion delegated to the agency by law under ORS 183.400 (validity of rule), 183.482 (contested cases) or 183.484 (other than contested cases), as appropriate. The outcome would depend on the definition or interpretation and the circumstances of the case.

3. Does HIPAA prohibit disclosure of protected health information related to COVID-19 for purposes of contact tracing or other public health purposes?

The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA)[4] requires the Secretary of the United States Department of Health and Human Services to issue privacy regulations governing individually identifiable health information and to protect the privacy of personal medical records and information. The final regulations, called the HIPAA Privacy Rule,[5] became effective in October 2002, with a compliance date of April 2003.

The HIPAA Privacy Rule preempts conflicting provisions of state law, but does not preempt nonconflicting state laws enacted in areas in which the states have traditionally exercised authority, including the conduct of public health investigations and interventions.[6]

In particular, 45 CFR 164.512 contains exceptions allowing the disclosure of protected health information to a public health authority without authorization for many purposes related to communicable disease, including COVID-19, such as:

- preventing or controlling disease
- reporting of disease

[1] ORS 433.008 (2)(b).
[2] House Bill 3057, section 1 (2).
[3] ORS 433.008 (3).
[4] P.L. 104-191.
[5] 45 C.F.R. Part 160 and Part 164, Subparts A and E.
[6] 42 U.S.C. 1320d-7(b); 45 C.F.R. 160.203(c).

- public health surveillance
- public health investigations

45 CFR 164.512 also allows disclosure of protected health information to persons who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition, if the covered entity or public health authority is authorized by law to notify such person as necessary in the conduct of a public health intervention or investigation.[7]

Thus, disclosures to a public health authority or from one public health authority to another for contact tracing or other public health purposes related to preventing disease do not violate HIPAA.

4. Is there anything in the measure that creates sideboards and limiting factors to the breadth or depth of the personally identifying data collection on citizens that OHA can engage in collecting or distributing under this bill?

The bill only allows disclosures of "individually identifiable information related to COVID-19,"[8] which limits the type of information that can be disclosed.

Section 1 (3) of HB 3057 provides that "[t]he authority may disclose only the minimum amount of information necessary to carry out the purpose of a disclosure under subsection (2) of this section."

Section 1 (6) of the bill provides that information disclosed under the bill does not become a public record:

> (6) Information obtained under subsection (2) of this section that identifies an individual with COVID-19 or an individual with a substantial exposure to COVID-19, or that contains information that reasonably could lead to the identification of such an individual, is confidential and exempt from disclosure under ORS 192.311 to 192.478.

5. The bill specifically references data of people who have been tested for COVID-19. Does the measure then allow for transfer of COVID-19 test results (positive and negative)?

The bill allows disclosures necessary for evaluation, treatment or care coordination of individuals who have been tested for COVID-19. This appears to include individuals who have tested both positive and negative.

6. Does the sunset clause on the measure simply refer to OHA's ability to deliver upon data requests?

Section 1 will cease to be law on June 30, 2022. After that date, OHA will no longer be allowed to disclose information as permitted by HB 3057, although OHA could still disclose information under ORS 433.008.

[7] 45 CFR 164.512 (b)(1)(iv).
[8] HB 3057, section 1 (2).

7. Would the sunset clause limit the use of the data by someone who has already requested it before the sunset?

No, unless OHA entered into an agreement with the recipient providing otherwise.

8. Would the sunset clause require OHA to purge data collected after the sunset?

HB 3057 does not authorize OHA to collect data; it only authorizes OHA to disclose data to others. Thus, the sunset would not require any purging of data.

9. Could OHA create contractual agreements for use of that data that would allow one of the named entities/organizations/individuals who are requestors to use that data beyond the sunset clause?

Yes.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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