Essay
Casualties of a Pandemic: Truth, Trust and Transparency

Frank LoMonte, J.D., Publisher, University of Florida

MICHELLE MARTIN: How important is accurate public information even though it might be frightening?

STANLEY MCCHRISTAL: I think it's critical because if you think about it, what we don't know leaves a vacuum in our mind, and we fill it with the most terrifying ideas. And so I think it's much better for us to get the best information we can, give transparency as best we can. People can handle bad news or frightening news if it's put into context for them and they believe it's accurate.1

In an April 1 interview with NPR’s “Morning Edition,” retired U.S. Army Gen. Stanley A. McChrystal, former commander of U.S. forces in Iraq, explained that, in a crisis situation, accurate information from government authorities can be crucial in reassuring the public – and in the absence of accurate information, speculation and rumor will proliferate. Joni Mitchell, who’s probably never before appeared in the same paragraph with Stanley McChrystal, might have put it a touch more poetically: “Don’t it always seem to go; That you don't know what you’ve got ’til it’s gone.”2

The outbreak of the coronavirus strain COVID-19, which prompted the U.S. Department of Health and Human Services to declare a public health emergency on Jan. 31, 2020,3 is introducing Americans to a newfound world of austerity and loss. Professional haircuts, sit-down restaurant meals and recreational plane flights increasingly seem like memories from a bygone golden age (small inconveniences, to be sure, alongside the suffering of thousands who’ve died and the families they’ve left behind).

2 Joni Mitchell, Big Yellow Taxi, on LADIES OF THE CANYON (Reprise Records 1970).
Access to information from government agencies, too, is adapting to a mail-order, drive-through society. As public-health authorities reached consensus that the spread of COVID-19 could be contained only by eliminating non-essential travel and group gatherings, strict adherence to open-meeting and public-records laws became a casualty alongside salad bars and theme-park rides. Governors and legislatures relaxed, or entirely waived, compliance with statutes that require agencies to open their meetings to in-person public attendance and promptly fulfill requests for documents.  

As with all other areas of public life, some sacrifices in open-government formalities are unavoidable. With agencies down to a sustenance-level crew of essential workers, it’s unrealistic to expect that decades-old paper documents will be speedily located and produced. And it’s unsafe to invite people to congregate at public hearings to address their elected officials. But the public shouldn’t be alone in the sacrifice.

Public officials can expedite fulfillment of requests for public records by relaxing some of their own review procedures. A not-insubstantial part of the delay that requesters experience when awaiting fulfillment of freedom-of-information requests is attributable to agencies parsing through dozens of non-mandatory exemptions to see how much can discretionarily be withheld. For instance, nearly two dozen states mirror the federal Freedom of Information Act in allowing, but not requiring, agencies to discretionarily withhold “pre-decisional” records that reflect deliberations within the agency, the so-called “deliberative process” exemption. Nothing requires agencies to conceal that category of records from the public. Concealment is a luxury option, not a necessity. Reviewing records to see which of them may – not must – be withheld from public disclosure is a textbook “non-essential” government function. Like other non-essential functions, it should be suspended as long as the state of emergency exists, so that the public receives everything but the records that, by law, cannot be disclosed.

The power of public data

It’s said that crisis brings out the best and the worst in people. COVID-19 has shown us unforgottably selfless acts of valor alongside ruthless price-gouging and retaliatory discharges of whistleblowers. The same might be said of government transparency.

We are witnessing the power of state and municipal “open data” portals to provide valuable datasets to an audience hungry for up-to-date, trustworthy facts. In recent years, more and more states and cities have created data dashboards that make high-value datasets accessible to the public.

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4 For a rundown of the initial wave of state reactions, see Rachael Jones, Open government in a WFH world: How public-records and open-meeting requirements are adapting to the COVID-19 threat, MEDIUM.COM, https://medium.com/@UFbrechnercenter/open-government-in-a-wfh-world-how-public-records-and-open-meeting-requirements-are-adapting-to-7d9c566db7ef.

5 For an explanation of the distinction between a mandatory versus discretionary public-records exemption, see Courtney Abshire, Public Business is the Public’s Business: Koch’s Implications for Indiana’s Access to Public Records Act, 52 IND. L. REV. 455, 457-58 (2019).

6 5 U.S.C. § 552(b)(5) (allowing agencies to withhold “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency”).


public, California’s Department of Health and Human Services maintains an online dashboard enabling visitors to see positive and suspected COVID-19 cases by county and by hospital location, as well as how many people are hospitalized in intensive care.\(^9\) One of the most detailed is in Michigan, where the state provides a daily breakdown of cases by age, race and ethnicity, as well as the number of positive and negative test results.\(^10\)

Journalists can add real value when they’re given access to the same data the government is working with. In Florida, reporters detected irregularities in the county-by-county tallies of COVID-19 cases, suggesting that the state health department may not be getting full and accurate reports from the counties.\(^11\) *The New York Times* built an interactive worldwide map, updated daily, that helps people understand the spread of the pandemic and which countries have the most acute known problems.\(^12\) This is the best of what technology, plus transparency, makes possible.

At the same time, we are witnessing the collapse of antiquated public-records systems in agencies from the FBI to Pennsylvania’s Department of Community and Economic Development to the San Diego health department, where officials have thrown up their hands and quit even trying to keep up with requests.\(^13\) Agencies habitually shortchange spending on public-records compliance even in the flushest of times, creating slowdowns that are now becoming outright stoppages.

Since 1996, federal agencies have been required to affirmatively produce high-interest records in online “FOIA reading rooms” without requiring requesters to keep asking for them.\(^14\) This isn’t, to be sure, a cure-all. Agency compliance is spotty; in 2015, the nonprofit National Security Archive looked at E-FOIA compliance at 165 federal agencies and found only 67 with updated online libraries.\(^15\) And authorities can’t be trusted to disclose scandalous, self-incriminating records without being forced to. But it’s a start, and it’s better than what most state laws require.

Few states have matched E-FOIA’s affirmative-disclosure requirements, but the pandemic provides both an opportunity and a need to play catch-up. Agencies know, or should know, what records requesters most commonly ask for, and that’s doubly predictable today with Coronavirus-related stories monopolizing the news cycle. Research by the nonprofit Sunlight Foundation demonstrates that agencies can realize net savings by voluntarily posting documents online instead

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\(^14\) See 5 U.S.C. § 552(a)(2)(D) (requiring federal agencies to publish any previously disclosed records that have been requested three or more times and are deemed likely to be the subject of future requests).

of incurring fulfillment costs to respond to repetitive freedom-of-information requests.\footnote{16 Alena Stern, \textit{Research: Cities can save time on records requests by doing open data right}, \textit{SUNLIGHT FOUNDATION}, Oct. 9, 2018, \url{https://sunlightfoundation.com/2018/10/09/research-cities-save-time-on-records-requests-by-doing-open-data-right/}.} Never in modern history has it been more essential for agencies to allocate staffing resources economically, so voluntarily publishing plans, assessments, memos and correspondence relating to CORVID-19 is not just good public policy; it’s good business management.

The myth of ‘private statistics’

We’re also reaping the consequences of badly drafted privacy statutes and regulations, as well as some fundamental “statistical illiteracy,” that has resulted in some states, counties and cities withholding vital statistics about who’s getting sick and where.

HIPAA, the Health Insurance Portability and Affordability Act of 1996, requires healthcare providers or insurers who transmit claims electronically for federal reimbursement to keep patients’ identifiable medical records confidential.\footnote{17 \textit{42 U.S.C. § 1320d–6(a)(3)}.} Note all of the qualifiers in that definition: it applies to the release of identifiable patient information, gathered by a medical provider or insurer that does business with Medicare or Medicaid. Most significantly, once personal identifiers are removed from medical data, the data no longer qualifies as “protected health information” for HIPAA purposes.\footnote{18 \textit{See U.S. Dep’t of Health & Human Serv., OCR Privacy Brief, Summary of the HIPAA Privacy Rule}, \url{https://www.hhs.gov/sites/default/files/privacysummary.pdf} at 4 (“There are no restrictions on the use or disclosure of de-identified health information.”).} That means, if the information is in a document or database that is subject to state public-records law, it must be disclosed on request.


The federal Department of Health and Human Services, which administers and enforces HIPAA, did the public no favors in issuing recent interpretive guidance responding to questions about COVID-19.\footnote{23 U.S. Dept. of Health & Human Serv., Ofc. for Civil Rights, \textit{HIPAA Privacy and Novel Coronavirus}, Feb. 2020, \url{https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf}.} In a February 2020 bulletin, HHS described the permissible contexts in which covered entities may disclose patients’ confidential records – such as when sharing them with public-health agencies when necessary for public safety – but said nothing about what constitutes...
an individually identifiable record, or what must be done to make a record sufficiently de-
identifiable to be made public. By failing to address that issue, HHS missed the opportunity to
reassure state and county health departments that there will be no penalty for disclosing
anonymized patient statistics and demographics.

Lacking authoritative federal guidance, state and local governments have reached
diverging and irreconcilable interpretations of what data is and is not releasable. Florida Gov. Ron
DeSantis cited patient privacy in refusing to name the nursing homes at which patients have tested
positive for the virus; instead, the state is reporting aggregate numbers of confirmed infections and
deaths in nursing homes statewide, a practice one advocate compared to a deadly game of Russian
Roulette.24 The same is true in Georgia, where the state Department of Public Health declined to
identify the elder care homes where more than 50 CORVID-19 cases were reported as of the start
of April 2020, leaving journalists to piece the picture together by calling around to the owners of
the facilities.25 Other states, including Illinois and Maryland, have made the names of the
institutions public.26 In Massachusetts, the state has instructed municipalities to withhold the
number of positive tests and deaths on privacy grounds,27 even though neighboring Connecticut
made the same information available online.28 These states all are governed by the same federal
privacy law. It cannot mean two different things.

Withholding statistics on privacy grounds is, at best, illogical. Confirmation that one, two,
or twelve people in Brockton, Massachusetts, are hospitalized with Coronavirus does not enable
anyone not already familiar with a patient’s condition to deduce the patient’s name. A person who
suspects that her co-worker or neighbor might be sick with Coronavirus is no more able to confirm
her suspicion from a numeral than she was without the numeral. That so many regulators in
positions of authority are convinced otherwise speaks to a widespread cultural problem of “data
illiteracy.”

As many commentators have observed since the start of the COVID-19 outbreak,
over-compliance with privacy laws is no longer just an inconvenient annoyance for journalists; it puts
people at greater risk of harm. The editors of Raleigh’s News & Observer took their state to task
for being slow to reveal demographic information about COVID-19 patients, explaining that
disclosure “can help improve understanding of the virus and its spread among North Carolinians,

and it can accentuate issues and dispel myths that contribute to that spread.”29 The Baltimore Sun called for tracking and publishing CORVID-19 deaths by race, as Michigan has begun doing, so public-health professionals can more intelligently target prevention and response efforts to those most in need.30

When federal regulators become aware that privacy laws are causing confusion, they should act to dispel the confusion -- and when the information is a time-urgent as the number and location of life-threatening infectious diseases, they should act with urgency. Federal privacy laws do not take adequate account of the public interest in access to information embodied in the 50 state open-records statutes. Exceptions to disclosure are always supposed to be construed narrowly with a presumption in favor of public access,31 and HIPAA is no different. If state and local authorities find HIPAA’s privacy constraints too confining and too confusing, Congress can act with the same dispatch that saw $2 trillion in relief aid approved in a matter of days.32

Conclusion

At a time when prompt access to accurate information could literally mean the difference between life and death, the laws mandating disclosure of information to the public are being relaxed in the name of government efficiency, while those mandating secrecy are being applied rigidly (and at times, inaccurately over-applied). This isn’t just a problem for journalists and researchers. As Harvard University health-law professor I. Glenn Cohen told The New York Times: “Public health depends a lot on public trust. If the public feels as though they are being misled or misinformed their willingness to make sacrifices – in this case social distancing – is reduced.”33 Perhaps the lasting legacy of the COVID-19 pandemic – and it will be a relief to speak of the pandemic in the past tense – will be a generational recommitment to restore custody of critical health-and-safety information to its rightful public owners.

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* Please send correspondence about this article to Frank LoMonte, Brechner Center for Freedom of Information, School of Communication & Journalism, University of Florida, flomonte@ufl.edu. This work is licensed under the Creative Commons Attribution-NonCommercial 3.0 United States License. To view a copy of this license, visit http://creativecommons.org/licenses/by-nc/3.0/us/ or send a letter to Creative Commons, PO Box 1866 Mountain View, CA 94042, USA.