

# PART III: CONTROLLING AND PROVIDING INFORMATION IN A PANDEMIC

## Access to Public Records and the Role of the News Media in Providing Information About COVID-19

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### INTRODUCTION

The response to the COVID-19 pandemic has affected all facets of society in the United States, but especially the ways in which we work. Reporters and members of the news media have been confronted with special legal and practical challenges over the last months, from trying to determine whether they are “essential” and therefore exempt from mandatory shelter-in-place orders, to covering court proceedings that have moved to phone or video conferencing. Moreover, some of the most crucial tools reporters use to gather information—public records and open meetings laws—have also seen significant and worrying disruptions. These laws, which serve as vital avenues for ensuring the free flow of information about what the government is doing, have suffered greatly during the course of the public health crisis.

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This article surveys and analyzes the impacts of the pandemic on public access to government records and meetings in the United States. As we show, many government entities have impaired key fixtures of transparency by weakening or suspending public records and open meetings laws, as well as their compliance with them, at a time when doing so stands both to threaten basic institutions of open government and exacerbate the public health crisis. We also focus on the special role of the news media in disseminating information about COVID-19, arguing that this function has important consequences for efforts to curb the spread of the disease, as well as for government accountability.

Part I begins with an examination of how access to public records at the federal level under the federal Freedom of Information Act has fared, with particular focus on the Federal Bureau of Investigation and the Department of State, which have taken extreme measures in response to the pandemic. Part I also contains a survey of access to public records and meetings at the state and local level, highlighting examples of jurisdictions that have significantly undermined or essentially suspended their open government laws, and contrasts those with states and localities that have upheld the public's right to know.

Part II focuses on the unique role of the news media during the pandemic in securing access to and disseminating vital information about COVID-19. In filing public records requests, suing for access after facing delays and denials, and pressuring government agencies to be more transparent with respect to data about the spread of the virus, the press has played an indispensable role in keeping the public informed and holding government actors accountable. Part II explores the role of the press in filling information gaps by independently making available data that have not always been timely (or accurately) distributed by governments. Given the crucial function that members of the news media serve in disseminating information to the public, Part II argues that entities subject to HIPAA's "Privacy Rule" should recognize members of the news media as "reasonably able to prevent or lessen" a threat to public health for the purpose of disclosures of certain protected health information.

The restrictions that have been imposed on open government laws during the course of the pandemic, and the resultant mechanisms that the press have employed to adapt and fight for access in spite of such modifications, are varied and nuanced. Much of the information herein was collected as part of the authors' work at the Reporters Committee for Freedom of the Press, where they focus on public records litigation and education. This article is intended to provide an overview of the landscape of open government during the public health crisis at a particular point in time—and of the news media's role in that landscape—and is by no means exhaustive. As governments' responses continue to evolve during this pandemic, we encourage the reader to reflect on how the lessons of COVID-19 can be leveraged to protect the public's right to know in future disruptions.

## I. HOW OPEN GOVERNMENT LAWS IN THE UNITED STATES HAVE BEEN AFFECTED BY THE PANDEMIC

### A. *The Federal Freedom of Information Act*

The Freedom of Information Act (“FOIA”), codified at 5 U.S.C. §552, provides a right of access to records of federal, executive branch agencies, subject to nine discrete exemptions enumerated in the statute. Under FOIA, there is a strong presumption in favor of disclosure, which the public and the press can leverage to gain access to a vast universe of federal records. Over its more than 50-year history, journalists have successfully used FOIA to investigate matters of public interest and used the resulting documents to support countless news stories. FOIA’s importance for reporters is especially crucial in the context of the current administration, when other sources of information about the federal government have been eliminated or curtailed.<sup>1</sup> It is unsurprising, therefore, that there has been an extraordinary level of public interest in using FOIA to gather records about the federal government’s awareness of, discussions about, and responses to the current public health crisis.<sup>2</sup> Yet, the federal government’s responses to this substantial interest have not always lived up to the spirit—or even the letter—of the law.

FOIA generally provides that a substantive “determination” must be made with respect to a request within 20 days (excluding weekends and holidays).<sup>3</sup> While an agency can invoke a short extension of that deadline in certain circumstances, Congress has been clear that it expects prompt responses, including by authorizing suits against agencies that fail to comply.<sup>4</sup> And unlike some state legislatures, discussed below, Congress did not change any of FOIA’s deadlines in response to COVID-19. Accordingly, as the Department of Justice’s Office of Information Policy correctly noted, “[a]ll of the FOIA’s statutory response timeframes continue to apply during workforce adjustments such as maximum telework or building closures.”<sup>5</sup>

Notwithstanding that there has been no change to FOIA, federal agencies have exhibited a wide array of responses to requests during the pandemic. On the one hand, many agencies have, helpfully, encouraged electronic submission of FOIA requests in an effort to more timely acknowledge and respond to requests at a time when their personnel are not physically reporting to agency offices.

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1. See, e.g., Oliver Milman, “*It’s a Ghost Page*”: EPA Site’s Climate Change Section May Be Gone for Good, *GUARDIAN* (Nov. 1, 2018), <https://perma.cc/952X-D98A>.

2. See, e.g., *Leopold v. Centers for Disease Control and Prevention*, No. 1:20-cv-00722 (D.D.C. filed Mar. 13, 2020) (showing that among the early lawsuits filed under FOIA during the pandemic for records about the government’s response to the novel coronavirus was one by Jason Leopold, investigative reporter at BuzzFeed News, seeking records discussing the novel coronavirus, including internal CDC coronavirus studies, guidance the CDC had received related to the coronavirus, and internal memos or letters that reference the coronavirus).

3. 5 U.S.C. §552(a)(6)(A)(i) (2018); see also *Determinations*, FOIA WIKI, <https://perma.cc/VZ3W-BCV2> (last updated June 4, 2020).

4. See 5 U.S.C. §552(a)(6)(C)(i) (2018).

5. DEP’T OF JUSTICE, GUIDANCE FOR AGENCY ADMINISTRATION IN LIGHT OF COVID-19 IMPACTS, <https://perma.cc/F9AE-ME2F> (last updated May 28, 2020).

Examples include the Centers for Disease Control and Prevention, the Department of the Interior, and the Consumer Product Safety Commission.<sup>6</sup> Some agencies have continued to make records productions pursuant to FOIA, including the Departments of Labor and Energy.<sup>7</sup>

Alternatively, agencies like the Federal Bureau of Investigation (“FBI”) and the State Department have severely limited or suspended their FOIA operations. On March 17, 2020—as communities across the country were beginning to enter a state of quarantine—the FBI for almost three weeks dismantled its electronic FOIA portal, perplexingly encouraging requesters to mail in paper copies of FOIA requests.<sup>8</sup> The FBI did not explain its decision, an operational change that stood in stark contrast to the vast majority of federal agencies that encouraged electronic submission and responses to FOIA requests at a time when significant percentages of federal employees were teleworking. Adding insult to injury, the FBI suspended its records management division for more than a month, stating that its records management personnel were “designated as not mission-critical.”<sup>9</sup>

The State Department, likewise, essentially suspended its FOIA operations, claiming a “96% reduction in ability to process FOIA requests.”<sup>10</sup> Like the FBI, the State Department cited a need to “[r]educe and re-prioritize non-mission-critical services[.]”<sup>11</sup> In addition to deeming FOIA “non-mission-critical,” the virtual halting of FOIA operations at both the State Department and the FBI reportedly resulted, in part, from the manner in which those agencies store their records. According to the FBI, the “vast majority of [its] work is performed on classified systems,” and the primary records system on which FBI’s FOIA operations rely—the Central Records System—is located on the FBI’s “SECRET-level classified enclave,” as is the FBI’s FOIA Document Processing System.<sup>12</sup> The State Department claimed similar problems. In one FOIA lawsuit, State moved to temporarily stay the case and explained that the unredacted versions of the records were stored and processed in a system that is operated exclusively on a

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6. The Reporters Committee for Freedom of the Press has published a chart that tracks agency FOIA offices’ and state and local records management offices’ responses to the pandemic; it includes the data discussed in this article. See REPORTERS COMM. FOR FREEDOM OF THE PRESS, PUBLIC RECORDS AND OPEN MEETINGS MEASURES RELATED TO COVID-19, <https://perma.cc/G42B-R2NL> (last visited May 11, 2020).

7. *Id.*

8. Jason Leopold, *The FBI Has Limited Public Records Requests During the Coronavirus Pandemic*, BUZZFEED NEWS (Mar. 17, 2020), <https://perma.cc/ZGE6-J8PF>.

9. See, e.g., Def’s Mot. for a Stay and Extension of the Processing, Production & Reporting Deadlines in Light of the COVID-19 Pandemic’s Effect on Federal Government Operations, Leopold v. Dep’t of Justice (D.D.C. Mar. 19, 2020) (No. 1:19-cv-01278-RBW).

10. Josh Gerstein, *State Department FOIA Work Crippled by Virus Precautions*, POLITICO (Mar. 27, 2020, 8:14 AM), <https://perma.cc/5A4P-7X5R>.

11. Declaration of Eric F. Stein, 100Reporters, v. Dep’t of State (D.D.C. Apr. 23, 2020) (No. 19-01753). Gunita Singh serves as co-counsel for the plaintiffs in this matter.

12. Second Declaration of David M. Hardy, Reporters Comm. for Freedom of the Press v. Federal Bureau of Investigation (No. 1:17-cv-01701) (D.D.C. May 13, 2020). Adam Marshall serves as co-counsel for the plaintiff in this matter.

classified computer network, ClassNet.<sup>13</sup> In another case, the agency stated that physical records could not be reviewed until its employees “are able to resume work in the building.”<sup>14</sup> With the combination of records systems that are accessible only from a department worksite, and the designation of FOIA services as “non-mission-critical,” FOIA operations at these agencies—as well as others in the defense and intelligence community—more or less ground to a halt. As of this writing in June 2020, the State Department and FBI have only begun limited FOIA operations.

As noted above, FOIA’s deadlines are not affected by the fact that agency personnel may be working from home. Accordingly, in response to agencies’ delays and denials, FOIA lawsuits have been commenced by members of the news media to compel disclosure of records that stand to shed light on the federal government’s response to the pandemic. In one such suit, *ProPublica* aims to obtain records from the Department of Health and Human Services about the Strategic National Stockpile—the emergency reservoir of drugs and medical supplies overseen by the Department.<sup>15</sup> In another, prolific FOIA requesters Jason Leopold and *Buzzfeed* have sued the Centers for Disease Control and the Federal Emergency Management Agency for records that would illuminate when the agencies first became aware of the pandemic and what steps were contemplated to mitigate it.<sup>16</sup> In the absence of such information being proactively disclosed, these and other FOIA lawsuits stand as the only mechanism to ensure that the public understands the past, present, and future plans of agencies.

### *B. State and Local Public Records and Open Meetings Laws*

#### 1. Public Records

Each state and the District of Columbia also have their own public records laws. Some of these public records laws were largely modeled on the federal FOIA, such as D.C.’s, while others are markedly different and can contain many more exemptions to withhold records, such as Tennessee’s.<sup>17</sup> Like federal agencies, state and local government agencies have demonstrated widely divergent approaches to transparency during the pandemic. Unfortunately, many jurisdictions have significantly curtailed the public’s right to know. As of this writing, in *more than half* of the states plus the District of Columbia we have witnessed one or more of the following:

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13. Declaration of Eric F. Stein, *supra* note 11.

14. Joint Status Report, *Bird v. Dep’t of State* (D.D.C. Apr. 24, 2020) (No. 19-cv-2860). Adam Marshall serves as co-counsel for the plaintiffs in this matter.

15. Complaint, *ProPublica v. Dep’t of Health and Human Servs.*, No. 1:20-cv-04092 (S.D.N.Y. May 28, 2020).

16. See *Leopold*, No. 1:20-cv-00722.

17. For a compilation of all 50 states’ and the District of Columbia’s public records laws, see REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE, <https://perma.cc/7XK8-2V6J> (last visited July 30, 2020).

- State legislative bodies have voted to suspend portions of their public records laws;
- Governors have issued proclamations or executive orders to suspend public records laws or portions thereof; and/or
- Specific agencies and/or localities *within* states have limited or cut off access to public records.<sup>18</sup>

Particularly egregious affronts to transparency have taken place in Delaware, the District of Columbia, Hawaii, New Jersey, Pennsylvania, and Rhode Island. In Delaware, Governor Carney declared that the “statutory time periods for responses to requests for public records . . . are hereby extended until 15 business days following the termination of any active Declaration of a State of Emergency.”<sup>19</sup> Similar action was taken in Rhode Island, where Governor Raimondo issued an executive order suspending the statutory timeframes for responding to Access to Public Records Act requests.<sup>20</sup> In Hawaii, Governor Ige, via proclamation, suspended the Uniform Information Practices Act in its entirety with no explanation.<sup>21</sup> Some states’ laws have provisions that may lend support for these actions. In Connecticut for example, during a public health emergency, the governor “may modify or suspend in whole or in part . . . any statute, regulation or requirement” that he or she finds to be “in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health.”<sup>22</sup> In other jurisdictions, however, the legal authority for relaxation of the usual transparency rules is less clear, and questions remain as to how long such rules may be abridged. Given the uncertainty surrounding when its state of emergency will end, for example, the purported indefinite suspension of Delaware FOIA’s statutory deadlines is deeply concerning.

On the other end of the spectrum, New Mexico’s Attorney General, Hector Balderas, issued guidance instructing state agencies to continue to comply with the Inspection of Public Records Act (“IPRA”) by fulfilling requests electronically where possible, and directing that all IPRA deadlines “should still be

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18. See REPORTERS COMM. FOR FREEDOM OF THE PRESS, PUBLIC RECORDS AND OPEN MEETINGS MEASURES RELATED TO COVID-19, *supra* note 6 (illustrating that, as of this writing, at least 31 states and the District of Columbia fall within one or more of the referenced categories).

19. State of Del., Exec. Dep’t, Fourth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat (Mar. 22, 2020), <https://perma.cc/EKT8-5US2>.

20. State of R.I., Third Supplemental Emergency Declaration—Public Meetings and Public Records Requests (Mar. 16, 2020), <https://perma.cc/YCP9-UBVX>.

21. State of Haw., Off. of the Governor, Supplementary Proclamation (Mar. 16, 2020), <https://perma.cc/P6UD-WK75>; *cf.* State of Haw., Off. of the Governor, Seventh Supplementary Proclamation Related to the COVID-19 Emergency (May 5, 2020), <https://perma.cc/K8ZB-9VCT> (stating that agencies’ deadlines to respond to requests are still suspended, but agencies should at least acknowledge receipt of new records requests).

22. CONN. GEN. STAT. ANN. §28-9(b)(1) (2018).

satisfied.”<sup>23</sup> Where the pandemic hampers an agency’s ability to respond, Balderas has urged the agency “to communicate promptly with the requester to make alternative arrangements to allow for the inspection of records, in keeping with the general spirit of the law.”<sup>24</sup> The emphasis placed on prompt, direct communication between agencies and the requester community during the course of the pandemic falls squarely in line with best practices issued by the Reporters Committee for Freedom of the Press.<sup>25</sup>

The University of Wisconsin published helpful guidance in which it reminded its employees that all communications and documents that relate to university business are subject to Wisconsin’s public records law, regardless of where employees are working.<sup>26</sup> Specifically, the University instructed its staff that records “created in [Microsoft] Teams such as chats, video and audio recordings, call histories, and transcriptions of voicemails,” as well as “[c]ommunications and documents created on other non-university platforms” like “Slack, WhatsApp, Snapchat, Facebook Messenger, Gmail, and text messaging on your personal device” are subject to Wisconsin’s public records law.<sup>27</sup> With critical masses of public employees working remotely during the pandemic—and with the rising prevalence of new forms of technology to conduct public business, regardless of the pandemic—the University’s guidance was timely, relevant, and welcomed by open government advocates.

Not all open government legislation proposed during the pandemic is detrimental to the public’s right to know. In Pennsylvania, where many executive departments have shelved their processing of public records requests during the pandemic,<sup>28</sup> a law was just passed that seeks to bar any avoidance of timely access to public records. The language of the new law is exceptionally clear: an “agency may not suspend the process by which [it] responds to a request for records during a disaster declaration[.]”<sup>29</sup> As a bill, it overwhelmingly passed the Pennsylvania State House by a vote of 202-0.<sup>30</sup> That it resoundingly passed

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23. Hector H. Balderas, Off. of the Att’y Gen. of N.M., *Open Government Division Advisory During COVID-19 State of Public Health Emergency* (Mar. 17, 2020), <https://perma.cc/H6E7-RL7T>.

24. *Id.*

25. REPORTERS COMM. FOR FREEDOM OF THE PRESS, PRESS FREEDOM AND GOVERNMENT TRANSPARENCY DURING COVID-19: OPEN MEETINGS AND PUBLIC RECORDS, <https://perma.cc/2JN7-D2U9> (last visited June 5, 2020).

26. UW-Milwaukee External Relations, Message to UWM Employees During COVID-19 Pandemic, Univ. of Wis. (n.d.), <https://perma.cc/4V5J-U3X4>.

27. *Id.*

28. Stephen Caruso & Elizabeth Hardison, *Gov. Tom Wolf Ran as a Champion of Government Transparency. The COVID-19 Pandemic Is Putting That to the Test.*, PA. CAPITAL-STAR (Harrisburg) (May 6, 2020), <https://perma.cc/QHL2-VL6Z>.

29. H.B. 2463, 204th Leg. (Pa. 2020), <https://perma.cc/93C3-KLMR>; Access to Public Records During Disaster Declaration, Pub. L. 702, No. 77 (July 27, 2020).

30. House Roll Calls, Regular Session 2019-2020: H. Bill 2463, Pa. H.R. (May 5, 2020), <https://perma.cc/PAL6-DURM>.

within a matter of days illustrates the pressing demand that people have for information during the pandemic.

## 2. Open Meetings

Open meetings laws in each state require some degree of public *access* to governmental meetings where certain decisions are made. While violations during the pandemic have occurred,<sup>31</sup> states and municipalities have, by and large, attempted to leverage technology to facilitate the spirit animating these laws in recent months. The majority of states have either (1) enacted measures to allow for remote participation in public meetings or (2) taken advantage of existing provisions of state law that allow for electronically held meetings.<sup>32</sup> In jurisdictions where public *participation* is required, technology has been utilized as well.<sup>33</sup> Interestingly, even in some states that have restricted public records laws during this time, more robust policies for ensuring open meetings have been enacted. For example, in Delaware the governor declared that with respect to meetings held electronically, members of the public *must* “be permitted to electronically access presentation materials and submit questions or comments” to the public body.<sup>34</sup> However, in New Jersey, where the state legislature amended the state’s Open Public Records Act to strike its statutory time limits to respond to requests, the state also amended its open meetings law to provide for meetings held electronically, but made no mention of ensuring meaningful access or participation by members of the public.<sup>35</sup>

## 3. Looking Ahead

A public health crisis like the COVID-19 pandemic warrants more transparency—not less—to ensure that the public has access to information about the nature of the disease sweeping our nation and the government’s response to it. Measures that have weakened or paused public records laws are undermining their *raison d’être* at the precise time that those laws are needed most. For example, when the *Arkansas Democrat-Gazette* requested copies of emergency response plans pertaining to infectious disease outbreaks from several state and local agencies, the newspaper not only

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31. See, e.g., Laura Faith Kebede & Jacinthia Jones, *Behind (Virtual) Closed Doors: Memphis School Board Met Privately to Discuss Issues Related to the Coronavirus Closure*, CHALKBEAT (Mar. 31, 2020, 9:36 PM), <https://perma.cc/42YW-P3R9>; Scott Thistle, *Mills Administration Held Secret Meetings on Pandemic with State Lawmakers*, PORTLAND PRESS HERALD (Maine) (Apr. 16, 2020), <https://perma.cc/RW2W-C89V>; Bethany Rodgers, *Utah House Conference Call on COVID-19 Was Apparent Violation of Open Meetings Law*, SALT LAKE TRIB. (Apr. 6, 2020), <https://perma.cc/RR48-428C>. One of authors’ colleagues at the Reporters Committee is counsel of record for the plaintiffs in a related lawsuit.

32. See REPORTERS COMM. FOR FREEDOM OF THE PRESS, PUBLIC RECORDS AND OPEN MEETINGS MEASURES RELATED TO COVID-19, *supra* note 6.

33. See *id.* (showing that numerous municipalities allow for public comment at livestreamed meetings through email or videoconferencing software, including St. Louis, Missouri; Roseburg, Oregon; and Beaufort County, South Carolina).

34. See Fourth Modification of the Declaration of a State of Emergency, *supra* note 19.

35. N.J. A3850, 219th Leg. (N.J. 2020), <https://perma.cc/F95W-8TGD>.



experienced delays in receiving responses, but some of their requests were denied.<sup>36</sup> When the local publication *Maryland Matters* sought information from the Maryland Department of Public Safety and Correctional Services about the state's ability to protect incarcerated individuals from COVID-19, the agency simply responded by stating that it was suspending the processing of all public records requests until Maryland's state of emergency is lifted.<sup>37</sup> These delays and denials—particularly with respect to information about the protection of society's most vulnerable—are not only imprudent, they are harmful. As set forth in Section II, the news media are playing an essential, important role in distributing information about the pandemic, and they rely on public records in fulfilling that mission.

## II. HIPAA, PUBLIC RECORDS, AND THE NEWS MEDIA DURING COVID-19

In our interactions with reporters across the country during the pandemic, no topic has been raised more frequently than the Health Insurance Portability and Accountability Act (“HIPAA”).<sup>38</sup> State agencies and officials, as well as private entities such as nursing homes, have been quick to invoke HIPAA to bar disclosure of data related to COVID-19 and their response to it. Such denials of access to information have not only hampered public understanding and safety, but are, in many instances, legally unsound. Below, we argue that even if HIPAA and its privacy provisions apply, the news media should be granted access to information when doing so will lessen the threat of COVID-19 to the public. While HIPAA expressly recognizes such an exception, it has been tragically underutilized in the current pandemic.

Enacted in 1996, HIPAA is a federal law that required the Department of Health and Human Services to establish federal health privacy regulations. Commonly known as the “Privacy Rule,” these regulations are intended “to assure that individuals’ health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public’s health and well-being.”<sup>39</sup>

The scope of the Privacy Rule is frequently misunderstood. For example, it only applies to “covered entities” and their business associates—usually hospitals, clinical laboratories, and health insurance plans.<sup>40</sup> Not all state health departments’ public health or communicable disease divisions are covered by its

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36. Cynthia Howell & John Moritz, *State, Local Agencies Keep Lid on Crisis Plans*, ARK. DEMOCRAT GAZ. (Little Rock) (Mar. 15, 2020, 9:25 AM), <https://perma.cc/4GVQ-45ZV>.

37. Hannah Gaskill, *Some State Agencies Pause Access to Public Information During COVID-19 Pandemic*, MD. MATTERS (Takoma Park) (May 6, 2020), <https://perma.cc/L4QC-YD4F>.

38. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of Titles 5 to 42 U.S.C.).

39. DEP’T OF HEALTH & HUMAN SERVS., SUMMARY OF THE HIPAA PRIVACY RULE, <https://perma.cc/G74V-P8E8> (last updated July 26, 2013).

40. See Adam A. Marshall & Gunita Singh, *Journalists’ Guide to HIPAA during COVID-19*, REP. COMM. FOR FREEDOM OF THE PRESS (Apr. 28, 2020), <https://perma.cc/VQV6-Z74G>.

mandates.<sup>41</sup> Furthermore, the Privacy Rule does not apply to, or bar the disclosure of, de-identified or aggregate data.<sup>42</sup> And finally, there are myriad exemptions that allow even covered entities to disclose protected health information. These admittedly complex rules prompted the Reporters Committee for Freedom of the Press to issue comprehensive guidance to journalists about HIPAA's scope and exceptions.<sup>43</sup> For example, if a state or local government entity is required to disclose information under a public records law, HIPAA does not bar its disclosure.<sup>44</sup> Another exception to HIPAA's privacy rule, set forth at 45 C.F.R. §164.512(j), allows covered entities to disclose protected health information if it "is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public," and the disclosure is to "a person or persons reasonably able to prevent or lessen the threat." This exception—which we refer to as the "Public Health Exception"—has not been subject to much judicial or scholarly interpretation, and none with respect to its application to the news media.

*A. Reporting by the News Media Can "Reasonably Prevent or Lessen the Threats" Associated with the Pandemic*

The news media are well-positioned to prevent or lessen the threat to individuals posed by COVID-19, because the press's chief function is to communicate information to the public. As the Supreme Court has recognized, the press is "a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity."<sup>45</sup>

During the course of the pandemic, when states—and the agencies and localities therein—have been releasing varying degrees of information related to the number of tests administered to detect the virus, positive cases of COVID-19, deaths resulting from COVID-19, and related information, the news media have played a critical role in securing and publishing ever-increasing accumulations of data from government bodies. For example, in Florida, state health administrators long refused to disclose the names of the assisted living facilities in which residents had tested positive for COVID-19, despite repeated requests from journalists for this information.<sup>46</sup> For weeks, the press and the public pressured the administration to release these data, and by mid-April 2020, a coalition of news media entities threatened to sue the governor for violating the state's public

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41. Colleen Healy Boufides et al., *FAQ: COVID-19 and Health Data Privacy*, NETWORK FOR PUB. HEALTH L. (May 20, 2020), <https://perma.cc/V6CN-QKXH>.

42. See, e.g., *Journalists' Guide to HIPAA during COVID-19*, *supra* note 40.

43. *Id.*

44. See *id.*

45. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

46. Daniel Chang, *Herald Drafted a Suit Seeking ALF Records. DeSantis Aide Pressured Law Firm Not to File It*, MIAMI HERALD (Apr. 11, 2020, 7:36 PM), <https://perma.cc/Z3L9-Z2XG>.

records law.<sup>47</sup> On the eve of the lawsuit, Governor DeSantis's administration released the information.<sup>48</sup> Then, the same news media coalition sued for access to records containing data on the *number* of resident and staff deaths by facility, after which, the DeSantis administration relented and disclosed the fatality data.<sup>49</sup>

In Louisiana, where African Americans are particularly disproportionately affected by COVID-19, New Orleans Public Radio repeatedly sought data reflecting fatalities from COVID-19 broken down by race.<sup>50</sup> Hours after the station published a story explaining the devastating links between COVID-19 and race in Louisiana, Governor Edwards, for the first time, publicly shared that more than 70 percent of those who have died from COVID-19 in the state were Black.<sup>51</sup> And in Ohio, a local news station filed a public records request with the state's Department of Health for data illuminating which nursing homes in the state housed residents who had tested positive for COVID-19. The Department of Health then began publishing the total number of cases at each nursing home, broken down by county.<sup>52</sup>

The news media have also taken on the role of independently investigating and making available information related to the virus and COVID-19. Publications such as the New York Times, the Washington Post, and Reuters have been collecting, analyzing, and disseminating these data. They have become a valuable resource during the public health crisis because their data have complemented and/or supplemented numbers published by the government.<sup>53</sup> In some cases, the work of the news media is filling vast information voids in jurisdictions where there is a dearth of information related to the virus and COVID-19.

The New York Times's GitHub repository of coronavirus cases and deaths publishes cumulative counts of coronavirus cases in the United States at the state and county levels from the first reported coronavirus case in the United States

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47. Mary Ellen Klas & Lawrence Mower, *Under Pressure, DeSantis Releases Names of Elder Care Homes with COVID-19 Cases*, MIAMI HERALD (Apr. 18, 2020, 5:53 PM), <https://perma.cc/KYH5-9KPQ>. The Reporters Committee was included in the news media coalition described in this news article.

48. Complaint to Enforce the Public Records Act, *Associated Press v. Agency for Health Care Adm.*, No. 2020 CA 000812 (Fla. Cir. Ct. 2d Cir. and Fla. Leon Cty.) (Apr. 27, 2020).

49. Carol Marbin Miller & Ben Wieder, *After Refusing for Weeks, Florida Releases Nursing Home Records, Showing Flurry of Deaths*, MIAMI HERALD (May 1, 2020), <https://perma.cc/5V6W-YWDW> (noting that on May 1, 2020, the DeSantis administration released detailed information about coronavirus fatalities at long-term care facilities after more than a month of refusing to do so).

50. Tegan Wendland, *Black Communities Are Hit Hardest by COVID-19 in Louisiana and Elsewhere*, NEW ORLEANS PUB. RADIO (Apr. 6, 2020), <https://perma.cc/9ZBT-3UHN>.

51. *Id.*

52. Rachel Polansky & Phil Trexler, *State of Ohio Releases Some Details on COVID-19 Cases in Nursing Homes after 3News Investigation*, WKYC (Apr. 17, 2020, 6:28 PM), <https://perma.cc/9EX7-TSX3>.

53. Joe Fox et al., *At Least 106,000 People Have Died from Coronavirus in the U.S.*, WASH. POST (Mar. 27, 2020), <https://perma.cc/M63R-QTYT>; *Tracking the Novel Coronavirus in the U.S.*, REUTERS, <https://perma.cc/6LMV-M44V> (last updated July 4, 2020).

through the present.<sup>54</sup> The data are a result of efforts by New York Times journalists to monitor news conferences, as well as to collect and analyze numbers from state health departments and other state and local entities “in an attempt to provide a complete record of the ongoing outbreak.” The result is an extremely valuable service in response to what the Times refers to as “a fragmented American public health system,”<sup>55</sup> where “[n]o single agency has provided the public with an accurate, up-to-date record of coronavirus cases, tracked to the county level.”<sup>56</sup> Indeed, individual states and counties are tracking confirmed cases of the coronavirus and publishing those data, but with varying degrees of speed and accuracy; a publicly available tracker from the federal Centers for Disease Control and Prevention, updated on weekdays, includes only state-level data.<sup>57</sup>

As a result, journalists, researchers, scientists, and government officials have come to rely on the data published by the Times.<sup>58</sup> The Times has been guided by the belief that “the data may help reveal how Covid-19 has spread through communities and clusters,” and fueled by the “hope [that] the data set can help inform the ongoing public health response to the pandemic and ultimately, save lives.”<sup>59</sup>

Other news media have also compiled and disseminated state-level information, including the *Texas Tribune*, *Los Angeles Times*, and many more.<sup>60</sup> What these entities share is a motivation to understand “which geographic areas may be hit the hardest” and how the virus’s “spread in hard-hit areas may offer clues for regions that could face wider outbreaks in the future.”<sup>61</sup> Members of the news media are, therefore, doing crucial work to illuminate trends and individual stories, helping to empower communities to better protect themselves.

*B. Entities Subject to HIPAA’s Privacy Rule Should Afford Journalists the Ability to Utilize 45 C.F.R. §164.512(j)*

The relevant language of HIPAA’s Public Health Exception states:

A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure:

- (i) (A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and

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54. *An Ongoing Repository of Data on Coronavirus Cases and Deaths in the U.S.*, GITHUB, <https://perma.cc/Q6U2-BD5H> (last visited May 8, 2020).

55. *Id.*

56. *We’re Sharing Coronavirus Case Data for Every U.S. County*, N.Y. TIMES (Mar. 28, 2020), <https://perma.cc/956T-HNCB>.

57. *Id.*

58. *See An Ongoing Repository of Data on Coronavirus Cases and Deaths in the U.S.*, *supra* note 54.

59. *Id.*

60. *See, e.g., Coronavirus in Texas: How Many Cases, Deaths and Tests*, TEXAS TRIB. (Austin), <https://perma.cc/SUJ8-XTQN> (last updated May 12, 2020); *Tracking Coronavirus in California*, L.A. TIMES, <https://perma.cc/9FUX-BPGD> (last updated May 13, 2020).

61. *We’re Sharing Coronavirus Case Data for Every U.S. County*, N.Y. TIMES, *supra* note 56.

(B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat[.]<sup>62</sup>

In a letter from the former director of the Office for Civil Rights at the Department of Health and Human Services that was issued to U.S. health care providers, school administrators were regarded as coming within the ambit of this exception.<sup>63</sup> HHS has also issued broad guidance on this exception, stating that “[h]ealth care providers may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public.”<sup>64</sup>

At least one government entity to date has taken advantage of the unique role and reach of the news media in addressing the current public health crisis. In April 2020, the Iowa Attorney General’s Office affirmed that disclosures about positive cases of COVID-19 to media can be helpful in reducing the spread of the virus.<sup>65</sup> Specifically, it explained that names of long-term care facilities and other businesses that have experienced significant outbreaks of COVID-19 should be released to the media, as the “state epidemiologist has determined that it is necessary for the protection of the health of the public to” identify such facilities.<sup>66</sup> This approach is correct given the distinctive ability of the news media to empower communities through disseminating information, as discussed above.

Other government agencies should follow suit when considering whether to apply HIPAA’s Public Health Exception. Consider, for example, Louisiana, where African Americans make up more than 70 percent of those who have died from COVID-19 in that state.<sup>67</sup> New Orleans Public Radio repeatedly sought data reflecting fatalities from COVID-19, broken down by race, before such information was provided by the state. If it had been released earlier, doctors, health workers, and communities of color would have had additional crucial days, or weeks, to become aware of the trend and take corrective action. Likewise, CDC data that had been collected by the agency for months, but not published until they were obtained by the *New York Times* through a FOIA lawsuit, show that “Black and Latino people have been disproportionately affected by the coronavirus in a widespread manner

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62. 45 C.F.R. §164.512(j)(1) (2019).

63. Leon Rodriguez, Dep’t of Health & Human Serv., Message to Our Nation’s Health Care Providers from the U.S. Department of Health and Human Services, UNC Health Care (Jan. 15, 2013), <https://perma.cc/6NLJ-K6Z4> (explaining, in the wake of the Sandy Hook mass shooting, that “police, a parent or other family member, school administrators or campus police” are all potential recipients of protected health information under the 45 C.F.R. §164.512(j) exception).

64. DEP’T OF HEALTH & HUMAN SERV., COVID-19 & HIPAA BULLETIN: LIMITED WAIVER OF HIPAA SANCTIONS AND PENALTIES DURING A NATIONWIDE PUBLIC HEALTH EMERGENCY (Mar. 2020) (providing guidance on the application of HIPAA specifically during the pandemic).

65. Iowa Dep’t of Just., Off. of the Att’y Gen., *Frequently Asked Health-Related Legal Questions Regarding the COVID-10 Pandemic*, <https://perma.cc/X2MV-NQSE> (last updated Apr. 20, 2020).

66. *Id.*

67. See Wendland, *supra* note 50.

that spans the country, throughout hundreds of counties in urban, suburban and rural areas, and across all age groups.”<sup>68</sup>

Covered entities should fully recognize that when journalists seek certain information to inform the public, even if that information is covered by the Privacy Rule, disclosure can in fact “prevent or lessen a serious and imminent threat” to their community. Government records custodians and private entities in possession of such data should bear in mind the unique ability of the news media to analyze and distribute critical information that communities need to navigate this crisis as effectively as possible.

#### CONCLUSION

Government entities at the federal and state levels have pursued various policies that have both facilitated and hindered journalists’ access to information about the pandemic and governments’ responses to it. Timely and dependable access to public records and meetings is always necessary for democratic governance, but it is especially critical in times of crisis and uncertainty. As the Supreme Court has noted, gathering information about government conduct in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting “the free discussion of governmental affairs.”<sup>69</sup> As COVID-19 continues to change our society, governments should recognize the power of the news media to disseminate information about the disease in a timely manner, and should empower the media to fulfill their constitutionally recognized role.

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68. Richard A. Opiel Jr., Rober Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://perma.cc/FE4R-8PH8>.

69. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).