INTERNATIONAL OMBUDSMAN ASSOCIATION

MEMORANDUM

TO: IOA Members
FROM: Chuck Howard, Executive Director of IOA
Date: October 23, 2020

RE: **UPDATED IOA Guidance Concerning COVID-19 and Contact Tracing**

I am writing this UPDATE to my previous memorandum, IOA Guidance Concerning COVID-19 and Contract Tracing, attached below, to alert IOA members that the Center for Disease Control (CDC) has altered its definition of "close contact" referenced in footnote 1 of the prior memorandum on page 5. This change may be relevant to your analysis of the issues addressed in that memorandum.

The CDC previously defined a "close contact" as "someone who was within 6 feet of an infected person for at least 15 minutes starting from two days before illness onset (or, for asymptomatic client, 2 days prior to a positive specimen collection) until the time the patient is isolated."

In an announcement made on October 21st, the CDC revised its definition of "close contact" to include aggregate exposures totaling 15 minutes or more during a 24-hour period. The revised definition now provides as follows:

> Someone who was within 6 feet of an infected person for a ***cumulative total*** of 15 minutes or more over a 24-hour period* starting from 2 days before illness onset (or, for asymptomatic patients, 2 days prior to test specimen collection) until the time the patient is isolated. (Emphasis added)

The CDC further elaborated on this revised definition as follows:

> *Individual exposures added together over a 24-hour period (e.g., three 5-minute exposures for a total of 15 minutes). Data are limited, making it difficult to precisely define "close contact;" however, 15 cumulative minutes of exposure at a distance of 6 feet or less can be used as an operational definition for contact investigation. Factors to consider when defining close contact include proximity (closer distance likely increases exposure risk), the duration of exposure (longer exposure time likely increases exposure risk), whether the infected individual has symptoms (the period around onset of symptoms is associated with the highest levels of viral shedding), if the infected person was likely to generate respiratory aerosols (e.g., was coughing, singing, shouting), and other environmental factors (crowding, adequacy of ventilation, whether exposure was indoors or outdoors). Because the general public has not received training on proper selection and use of respiratory PPE, such as an N95, the determination of close contact should generally be made irrespective of whether the contact was wearing respiratory PPE. At this time, differential determination of close contact for those using fabric face coverings is not recommended*

INTERNATIONAL OMBUDSMAN ASSOCIATION

MEMORANDUM

TO: IOA Members
FROM: Chuck Howard, Executive Director of IOA
Date: June 8, 2020

RE: **IOA Guidance Concerning COVID-19 and Contact Tracing**

INTRODUCTION

This memorandum from IOA responds to inquiries from IOA members on issues related to COVID-19 and how contract tracing may affect ombuds practices. The guidance we offer below is based on our knowledge to date. As we learn more and have more experience in dealing with these issues, additional questions may arise, and we will provide updates to the extent we can.

Please remember that not only does the COVID-19 pandemic raise state and local jurisdictional issues in the United States, it is by definition a world-wide issue, implicating laws and regulations throughout the world. In the United States, we understand that contact tracing is an activity that will be conducted at state and local levels, and it may well be handled in similar ways in other countries. Any guidance offered by this memorandum should be checked with or supplemented with guidance from the appropriate authorities in the jurisdictions in which an IOA member works. In addition, ombuds should be aware of other applicable laws and regulations in their jurisdictions that apply to privacy, personal identifying information, and personal health information.

It is not possible in this memorandum to analyze the issues of COVID-19 and contact tracking under the laws and regulations in every jurisdiction. Accordingly, this memorandum relies on both general principles and best practice guidelines provided in the interim guidance documents issued by the United States' Centers of Disease Control and Prevention (CDC) on developing a COVID-19 case investigation and contact tracing plan. Further information on CDC guidance is available from the CDC website.

RECOMMENDATIONS

1. **Basic practices.** An initial question for ombuds to consider is when they should return to work in their organization's on-premises office setting. There are advantages and disadvantages to both working in an office and working remotely. Greater accessibility should be weighed against greater risk of exposure. Of course, some ombuds may have no choice in the matter; they may be required to return to their organization's offices or directed to continue to work remotely. There are, however, some advantages to continuing to work remotely, especially in higher risk environments such as hospitals and health care institutions, and virtual, Zoom, or telephone conversations limit the risk of exposure for both the ombuds and visitors. Even if there is a general "return to work" policy in effect,

ombuds may wish to consider getting approval to generally continue to work from home as the safest strategy.

Once ombuds are again able to speak with visitors in person, our recommendation is that ombuds should implement widely recommended commonsense actions to protect themselves, their staff, and their visitors. These steps are simple but important:

- Continued use of technology. Use of remote communication technology is an essential tool and will likely still be important to provide people with safe and comfortable options. Appropriate care must be taken to ensure security of virtual communications and compliance with confidentiality ethical obligations.

- Social distancing--Maintaining the recommended distance of at least six feet from other people. This may in some instances require relocating chairs or desks, meeting outside or in other places, and taking other actions necessary to maintain a safe distance between the ombuds and a visitor.

- Continuing to wear protective face masks. Without effective immunization or treatment protocols yet, we recommend that ombuds consider continuing to wear face masks even after they are no longer required by their institution or local jurisdiction until such time that the pandemic has been controlled or effective immunization treatment options exist. It is also a good idea to have an extra supply of clean masks available for visitors upon request when consistent with their organization's protocols.

- Hands. We should all know by now not to shake hands, and no one knows if this practice will return after the pandemic. We also are often told that we should wash our hands often, with soap and either hot or cold water, and for at least twenty seconds. Hand sanitizer, disinfectant wipes, and disposable gloves should also be available (and used) in ombuds offices.

- Disinfecting the workspace. Just like retail establishments and restaurants, ombuds should take care to make sure that frequent and thorough cleaning ofworkspaces occurs.

- A couple of brief questions at the beginning of a visit. Ombuds might consider asking visitors how they are feeling and/or whether they are aware of any known exposure to COVID-19. These can be asked in a conversational manner and, depending on the visitor's response, may suggest either follow up questions or other precautions.

- Website (and other documentation) additions. After considering guidance contained in any "return to work" protocols from their organization, ombuds should consider adding a special notice concerning COVID-19 to their ombuds websites and other documentation. Such a notice might suggest that people who believe that they have been exposed to COVID-19, are currently ill, or who are in quarantine should make an appointment for a virtual meeting. Visitors might be reminded that face masks are required for all in-person visits with the

ombuds (and, if applicable, face mask can be provided by the office if the visitor does not have one). And finally, such a notice might include further information, as described below, about the exception to confidentiality for information that might pose an imminent risk of serious harm to others.

2. **Disclosures to Ombuds.** Ombuds have already been hearing from inquirers and others that someone may have been exposed to or tested positive for COVID-19 but has refused to report this fact to their institution, public health authorities, or others, or to take action to protect others from infection. These issues implicate both the principle of confidentiality and the exception to confidentiality for matters that represent an imminent threat of serious harm.

As with other types of issues, we believe it is appropriate for ombuds to explore ways in which this type of issue can be raised, reported, or resolved without the ombuds having to address whether there is an imminent threat of serious harm that compels the ombuds to break confidence. One obvious way is for the visitor to agree to a disclosure or report by the visitor or the ombuds. Assuming that there is not a way to otherwise address the issue, the ombuds should consider whether it is appropriate to invoke this exception to confidentiality.

Our interpretation of the IOA Code of Ethics and Standards of Practice is that it is the responsibility of an ombuds to determine whether particular circumstances constitute an imminent threat of serious harm. To assist ombuds in resolving this question based on the facts of a specific case, we urge ombuds to consider the following principles and practices:

- Because of the lethality of COVID-19 to individuals in certain demographic categories such as those over 60 and with other medical conditions, exposure to a person with COVID-19 may well constitute an imminent threat of serious harm.

- Ombuds should, at the beginning of a conversation with an inquirer and as part of their "set speech" describing how ombuds work and the principles on which their work is based, specifically mention that one of the exceptions to confidentiality is for an imminent threat of serious harm and that that may include instances of unreported exposure to or diagnosis of COVID-19. The reference to exposure to COVID-19 is important to mention because some people may be asymptomatic yet contagious.

- Ombuds should revise or supplement website information, FAQs, and other documents relating to their offices to address the possibility that ombuds may need to invoke the imminent threat of serious harm exception to confidentiality in the event that they learn of information that could expose people to COVID-19.

3. **Contact Tracing.**

What is contact tracing? CDC guidance, and presumably that from similar agencies in other jurisdictions, focuses on contact tracing to help stop or slow the spread of epidemic and pandemic diseases. This concept of contact tracing is not new and has been used for many years in connection with previous outbreaks of infectious diseases.

The process usually consists of two parts: First, once a person (the "patient" or the "client") has been diagnosed as having the disease, a case investigation is undertaken with that patient to try to determine who they might have come into close contact with, and thus possibly infected, during a relevant period. This usually includes a telephone interview by someone employed by a public health agency and likely will soon--if not now--implicate contact tracing technology though cell phones. The case investigation interview seeks not only to identify who might have been exposed to the disease through close contact but also to elicit contact information for those people. Second, once information is obtained on people who may have been exposed to the disease by the patient, the contact tracing phase begins, as public health agency personnel contact people identified by a patient to urge them to consult with a doctor, seek testing, self-quarantine, and take other appropriate action, depending on the circumstances. Generally, there is a follow-up interview with the persons contacted to see if they subsequently develop the disease, in which case a new case investigation begins with them as the patient to identify people who they may have infected.

CDC Guidance on Contact Tracing. Ombuds should be aware that CDC guidance documents emphasize that the contact tracing process is both voluntary and confidential. In describing the case investigation process, CDC's publication, "HEALTH DEPARTMENTS: Interim Guidance on Developing a COVID-19 Case Investigation & Contact Tracing Plan" ("CDC Guidance") states: "**Contact elicitation is a voluntary** and critical part of the case interview." (Page 18, emphasis added) CDC Guidance indicates that the case investigation interview should focus on identifying the patient's "close contacts"[1] and further states: "**It will be important that the case investigator clearly explain why close contacts are being elicited and assure the patient that their identity will not be disclosed to any close contacts they identify**." (Id., emphasis added)

In a section entitled "Confidentiality and Consent" CDC Guidance states: "All aspects of case investigation and contact tracing must be **voluntary, confidential,** and culturally appropriate. (page 36, emphasis added)

Because of the importance of confidentiality to the issues considered by ombuds in this context, the remaining paragraphs of the "Confidentiality and Consent" section are quoted here in full:

> Minimum professional standards for any agency handling confidential information should include providing employees with appropriate information and/or training regarding confidential guidelines and legal regulations. All public health staff involved in a case investigation and contact tracing activities with access to such information should sign a confidentiality statement acknowledging the legal requirements not to disclose COVID-19 information. Efforts to locate and communicate with clients and close contacts must be carried out in a manner that preserves the confidentiality and privacy of all involved. This includes never revealing the name of the client to a close contact unless permission

[1] CDC defines a "close contact" as "someone who was within 6 feet of an infected person for at least 15 minutes starting from two days before illness onset (or, for asymptomatic client, 2 days prior to a positive specimen collection) until the time the patient is isolated. (CDC Guidance, page 18)

has been given (preferably in writing) and not giving confidential information to third parties (e.g., roommates, neighbors, family members).

Maintaining confidentiality during COVID-19 case investigations and contact tracing can be particularly difficult in congregate settings. Prior discussions with the client can generate solutions for safeguarding confidentiality. Onsite administrators/employers who already know confidential information regarding a client or contacts can be asked to respect confidentiality even if they are not legally bound to do so.

Legal and ethical concerns for privacy and confidentiality extend beyond COVID-19. All personal information regarding any COVID-19 clients and contacts should be afforded the same protections. This includes any and all patient records. Data and security protocols should include recommendations for password-protected computer access as well as locked, confidential storage cabinets and proper shredding disposal of notes and other paper records. Protocols should include instructions for the protection of confidential data and confidential conversations in a working-from-home setting (e.g., make telephone or video-conferencing calls from private rooms to avoid the conversation being overheard). Approaches to ensuring confidentiality and data security should be included in training of staff.

Implications for ombuds. To date, ombuds have expressed concerns about two issues: What should I do if I am exposed to COVID-19 by a visitor? and What should I do if I become infected and am requested, as part of contact tracing, to disclose the identities of people who have visited with me?

What should I do if I am exposed to COVID-19 by a visitor?

If an ombuds is someone who has been identified as a "close contact" as part of a case investigation of a COVID-19 patient and is therefore contacted by a public health agency employee as part of a contact tracing effort, the ombuds should expect that he or she will not be told the identity of that COVID-19 patient. The ombuds will not know whether the possible infecting person was a visitor or someone else with whom the ombuds may have been in close contact. The focus of that contact tracing interview will be to urge testing, consultation with medical professionals, and self-isolation for 14 days. Accordingly, it is unlikely that issues of ombuds confidentiality will arise in this situation. However, the ombuds can expect a follow up interview from the public health agency to determine whether the ombuds in fact develops COVID-19, in which case there will a further case investigation interview to elicit close contact information from the ombuds. This is addressed in the next question.

What should I do if I become infected and am requested, as part of contact tracing, to disclose the identities of people who have visited with me?

Before getting to the harder part of this question, please note that if proper social distancing has occurred in all ombuds visitor contacts, as recommended above, no visitors should fall within the definition of a "close contact."

If, for some reason, ombuds have been in contact with visitors and have been unable to maintain social distance, ombuds must address the confidentiality exception question of whether to disclose the identity

of a visitor who was in close contact with them. In analyzing this issue, we urge ombuds to consider the following:

- Supplying "close contact" information in a case investigation interview is voluntary. The ombuds may refuse to do so. The ombuds may want to inquire whether, given the uncertain status of technology contact tracing, further information is necessary from the ombuds or is available elsewhere. The ombuds may also wish to inquire about the public health agency's actions to preserve the confidentiality of any information that might be disclosed, such as whether confidentiality agreements with employees have been obtained (and what they provide), confirmation that the ombuds' identity would not be disclosed to people identified, and what policies, laws, or regulations govern the confidentiality of information disclosed to a public health agency employee.

- In deciding whether to cooperate with a case investigation interview eliciting information about close contacts, the ombuds should remember that the inquiry is directed to identifying *all* close contacts within the relevant time frame--not just those of visitors.

- Finally, and most importantly, the ombuds should consider the possibility that he or she may have infected other people and thereby possibly put them in a position of imminent risk of serious harm. The ombuds must decide whether the facts of a specific case come within this exception to confidentiality, but any decision to disclose a visitor contact is mitigated by several factors, including the following: that the ombuds need not disclose the fact that the contact occurred in the course of the ombuds' professional activities; that the contact disclosed will not be informed who the patient was who made the disclosure; that public health employees engaged in the process are also bound by confidentiality obligations; and that nothing about the reason for a visitor's contact with the ombuds or the substance of a visitor's communications with an ombuds need be disclosed.

In light of this guidance provided by IOA on the issues identified above, IOA does not see any role appropriate for it as a "lockbox" for IOA members' visitor information. IOA also sees no need for IOA members to adopt special precautions to preserve visitor contact information beyond the ombuds' existing standard practices.

CONCLUSION

IOA hopes that this memorandum will assist ombuds in better understanding the implications of COVID-19 and the contact tracing process on their practices. IOA also hopes that this guidance will assist ombuds as they work with visitors and make decisions on whether, in any specific situation, disclosure of otherwise confidential information is appropriate. If there are questions not addressed by this memorandum that ombuds believe may lend themselves to general guidance, please contact the IOA Executive Director, Chuck Howard, at choward@ombudsassociation.org.