Public Health Data Exchange between Tribal, Federal, State, and Local Jurisdictions: A Legal Overview

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The COVID-19 pandemic illustrated the longstanding principle that communicable diseases do not stop at jurisdictional boundaries. The pandemic further revealed a growing need for Tribal, federal, state, and local governments to share public health data in responding to emergencies, including communicable disease outbreaks. All jurisdictions, in fulfilling their governmental duties to respond to a public health emergency, need access to public health data, including data from neighboring jurisdictions. Longtime Tribal public health leader and Chairwoman for the Upper Skagit Tribe, Marilyn Scott, has urged federal and state jurisdictions to understand that "Tribes having direct access to their own data is critical for Tribal governments to make decisions for the protection of our citizens within our jurisdictions."

Despite the urgent need, many governments currently lack written data sharing agreements with Tribal jurisdictions. Lack of such agreements can result in an inadequate, delayed, or failed response to a communicable disease outbreak. In preparing for the next public health emergency, Tribal, federal, state, and local jurisdictions should have a general understanding of the legal principles for exchanging public health data between jurisdictions. This legal overview is intended to address frequently asked questions regarding public health data exchange between Tribal, federal, state, and local jurisdictions and provide resources including recommended practices for drafting Tribal data sharing agreements.

FREQUENTLY ASKED QUESTIONS

1. Can Tribal jurisdictions exercise public health powers similar to state and federal governments?

Yes. Tribal governments are public health jurisdictions with inherent legal authorities and powers equal to or greater than state and local governments. Federal, Tribal, and state governments are the three types of sovereigns in the United States.[1] As one of the three sovereigns, Tribal governments possess the legal authority to protect the health and welfare of their citizens. In contrast to a local government that derives certain powers to enact regulations from a state, a Tribe's power is inherent, and the Tribe needs no authority from the federal government to exercise their public health powers.[2] A Tribal jurisdiction's power to govern their people predates the formation of the United States and is recognized and protected under federal law.[3] Such powers may not be divested nor diminished by a state government nor any other party, and no federal law has divested Tribes of their public health powers. [4]

Tribal jurisdictions possess a wide range of governmental public health powers including the following functions:

a. declaring public health emergencies;[5]
b. ordering mandatory isolation and quarantine;[6]
c. closing businesses and off-reservation borders to protect Tribal citizens;[7]
d. establishing priority groups and service populations for dispensing vaccines;[8]
e. performing case and contact investigations;[9]
f. conducting data surveillance (including, but not limited to, employing epidemiologists);[10] and
g. protecting the use of their nation's public health data by outside entities.[11]

2. Can state and local jurisdictions exercise public health powers on Tribal land?

Generally speaking, under federal law, state and local jurisdictions do not have authority to respond to a public health emergency on Tribal land.[12] This legal reality means the Tribal government will most often be the only jurisdiction with authority to respond and prevent further disease outbreak from spreading to neighboring jurisdictions. For this reason, it is critical that state and local jurisdictions support Tribal access to public health data so that Tribal governments may fulfill their governmental duties in responding to public health emergencies on Tribal land.

3. Do Tribal jurisdictions have the authority to exchange public health data with federal, state, and local jurisdictions?

Yes. Tribal nations possess the inherent power to exchange public health data with federal, state, and local jurisdictions. This power is derived from a Tribe's inherent sovereign power to exercise public health powers.[13]

4. Can federal, state, and local jurisdictions share public health data with Tribal jurisdictions, including data regarding non-Tribal members?

Yes. Under 45 C.F.R. § 164.512(b)(1)(i), covered entities can "disclose protected health information, without authorization, to public health authorities who are legally authorized to receive such reports for the purpose of preventing or controlling disease, injury, or disability." (emphasis added). The federal definition of public health authorities includes Tribal governments:

> Public Health Authority means an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate.[14]

Tribal nations possess the inherent sovereign authority to regulate non-Tribal member Indians' activities on Tribal land.[15] In addition, 45 C.F.R. § 164.512(b)(1) does not limit a public health authority's access to data based on whether the protected health information is in regard to a Tribal member or a non-Tribal member. To do so would be inconsistent with the spirit and intent of the regulation to permit data exchange to further public health purposes. For many years, federal, state, and local jurisdictions have received data regarding Tribal members residing within local jurisdictions without question. Tribal jurisdictions should be afforded the same access. Federal, state, and local jurisdictions should, consistent with federal law, share public health data regarding residents residing on Tribal land with Tribal governments regardless of whether the data concerns a

non-Tribal member or a Tribal member.

5. What are some common assumptions about exchanging public health data with Tribal jurisdictions?

Tribes have reported to the American Indian Health Commission that other jurisdictions fail to provide access to public health data based on assumptions that Tribes lack capacity and/or capability to perform public health functions. Federal, state, and local jurisdictions must refrain from withholding public health data from Tribal jurisdictions based on these assumptions which reflect continued structural racism and discrimination. If a Tribe chooses, they may enter into agreements with another governmental or non-governmental entity to perform requested public health functions. Regardless of whether a Tribe performs their public health powers directly or through agreement, federal, state, and local jurisdictions should provide Tribal jurisdictions equitable access to data.

6. What are the impacts of withholding and/or limiting a Tribal jurisdiction's access to public health data?

Impeding a Tribal health jurisdiction's access to public health data can have serious consequences. As stated above, when a communicable disease outbreak occurs on Tribal land, a Tribal government will, more often than not, be the only jurisdiction with the legal authority to exercise public health powers such as mandating isolation and quarantine, mandating masking, and closing borders and business. If a serious disease outbreak occurs on Tribal land, and the Tribal government does not receive the information in a timely manner, that outbreak could spread more broadly into neighboring jurisdictions.

In addition, failure to share data can result in increased administrative burden to both Tribal and local jurisdictions.[16] For example, during the pandemic, a large Tribal jurisdiction reported to the American Indian Health Commission that it could not get read/write access to a state's disease reporting surveillance system. As a result, the Tribal public health staff was forced to write on paper and fax the information to a county health department who would then enter the information into the state system. This increased administrative burden to public health staff results in reduction of critical health services.

7. **How can a state identify which communicable disease cases to share with a Tribal jurisdiction?**

   A state should use similar methods for sharing communicable disease cases with Tribal jurisdictions that they do with local jurisdictions. For example, if a state shares communicable disease data with local jurisdictions according to the zip code where the person resides, the state should also share data with Tribal jurisdictions according to the zip code where the person resides when that zip code has Tribal land within it. In addition, if a state shares statewide data with local health jurisdictions, the state should provide Tribal jurisdictions with the same access.

   There is no reason to treat a Tribal jurisdiction differently by providing them with less access to data than local jurisdictions. Tribes are an integral part of a state's public health system. Failure to provide important disease information can slow public health response and increase the spread of disease to a population that is high risk as well to neighboring jurisdictions. Tribal, federal, state, and local health jurisdictions should be first in line for data about their citizens. Just like local health jurisdictions, Tribes have a responsibility to provide for the health and safety of citizens within their jurisdictions.

8. **What are Tribal data sharing agreements?**
   A Tribal data sharing agreement is an agreement between a Tribal jurisdiction and a federal, state, or local jurisdiction that provides the requirements for (1) collecting, managing, using, disclosing, and safeguarding Tribal and American Indian and Alaska Native information and data; and (2) providing Tribal jurisdictions equitable access to public health data. These types of agreements can leverage public health resources through the sharing of public health data across multiple jurisdictions.

9. **What are key provisions in Tribal data sharing agreements?**

   A Tribal data sharing agreement should align with the legal principles of Tribal data sovereignty and include the following components:

   a. **Recognition of Tribal Ownership in Data about Their Tribe and Their People.** Tribes retain an ownership interest in data, even when the Tribe's data are located in a state, federal or other dataset. This interest remains when the Tribe's data are aggregated with other data.[17]

   b. **Requirements for the Federal, State, and Local Jurisdictions to Protect Tribal and AI/AN Data.** Only a Tribe has the sovereign authority to determine how their data may or may not be used, including, but not limited to, how it is shared with third parties.[18]

   c. **Equitable Access to AI/AN Data to Perform Their Governmental Duties.** Without access to public health data, Tribal jurisdictions are severely limited in exercising their public health powers to protect the health and welfare of citizens residing on Tribal lands.[19]

   d. **Requirements for Tribal Decision-Making/Input on Federal, State, and Local Jurisdiction Use of Tribal and AI/AN Data**. "When a jurisdiction reports on or about American Indian or Alaska native peoples, **it should meaningfully partner and consult with Tribal leaders** on the analysis and interpretation of the data."[20]

10. What is cross-jurisdictional public health surveillance coordination?

Cross-jurisdictional collaboration is the ability of governments to work across traditional boundaries to prepare for, respond, and mitigate a public health emergency. Cross-jurisdictional collaboration is about (1) increasing a government's capacity to respond to a public health emergency; (2) reducing the cost of public health response; (3) preserving and improving local decision making and public health response to community members; and (4) improving the overall effectiveness and efficiency of public health response.

Public health issues and emergencies know no boundaries. The time to coordinate with a Tribal government is not during the emergency; it is before. In the area of public health surveillance, Tribal, federal, state, and local jurisdictions should coordinate efforts in sharing public health data to strengthen communicable disease response. When neighboring jurisdictions have equal access to data, governments can respond more efficiently and effectively to disease outbreaks. Activities that strengthen cross-jurisdictional public health surveillance include conducting regional hotwashes and tabletop exercises and developing and executing Tribal data sharing agreements.

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[1] RESTATEMENT OF THE LAW OF AMERICAN INDIANS, ch. 1, intro. note (AM. L. INST. 2022) (citing to Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 U L.J. 1, 1 (1997)).

[2] *See Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *See also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982).

[3] The U.S. Supreme Court has ruled that Tribes possess all attendant rights and powers of governments to protect the health and welfare of their citizens: "The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial…" *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *See also*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 at 16 (1831).

[4] *See* Aila Hoss, *Toward Tribal Health Sovereignty*, 2022 WIS. L. REV. ONLINE 413, 420 (2022) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978)), https://wlr.law.wisc.edu/wp-content/uploads/sites/1263/2022/04/14-Hoss-Camera-Ready.pdf.

[5] *See* OFFICE FOR STATE, TRIBAL, LOCAL, AND TERRITORIAL SUPPORT, CENTERS FOR DISEASE CONTROL AND PREVENTION, *Tribal Emergency Preparedness Law* (March 2, 2017), https://www.cdc.gov/phlp/docs/brief-Tribalemergency.pdf.

[6] *Id.*

[7] CENTERS FOR DISEASE CONTROL AND PREVENTION, *Legal Authorities: Isolation and Quarantine*, https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html#print.

[8] CENTERS FOR DISEASE CONTROL AND PREVENTION, COVID-19 VACCINATION PROGRAM INTERIM OPERATIONS GUIDANCE JURISDICTION OPERATIONS, VERSION 2.0 (October 29, 2020) (stating that "each Tribal nation has the sovereign authority to provide for the welfare of its people and, therefore, has the authority to: Determine the population(s) it chooses to serve; Choose how vaccines are distributed to its community; and Establish priority groups when there is a limited supply of COVID-19 vaccine or other accompanying resources."), https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim_Playbook.pdf.

[9] *Id.*

[10] *See Supra* Hoss at 419.

[11] Sallie Milam, *Data Governance Strategies for States and Tribal Nations*, NETWORK FOR PUBLIC HEALTH LAW (Sept. 10, 2020), https://www.networkforphl.org/resources/data-governance-strategies-for-states-and-Tribal-nations/?msclkid=d41c5fbda92d11ecb58179dd429446a4.

[12] *See Supra* RESTATEMENT OF THE LAW OF AMERICAN INDIANS §31 (citing to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) and *McClanahan v. Arizona State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973).

[13] *See Supra* Hoss at 419-20.

[14] 45 C.F.R. § 164.501. (emphasis added).

[15] *See* RESTATEMENT OF THE LAW OF AMERICAN INDIANS §27 (AM. L. INST. 2022) (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337-338(1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982); *Washington Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 152 (1980); *Montana v. Unites States*, 450 U.S. 544, 557-567 (1981)).

[16] Jessica McKee and Heather Erb, *Tribal Covid-19 Pandemic After Action Report,* AMERICAN INDIAN HEALTH COMMISSION at 24 (Mar. 2023).

[17] *See* Ángel Ross, *Powering Health Equity Action with Online Data Tools: 10 Design Principles*, EQUITY TRUST AND POLICY LINK at 15 (Sept. 2017), https://nationalequityatlas.org/sites/default/files/10-Design-Principles-For-Online-Data-Tools.pdf.

[18] *See Supra* Milam.

[19] *See Supra* Ross, at 14.

[20] *See Supra* Milam. (emphasis added).