

April 7, 2020

Attorney General Mark Brnovich
Office of the Attorney General
2005 N Central Avenue
Phoenix, Arizona 85004

Re: Attorney General Opinion I20-005

Dear Attorney General Brnovich:

Recently, you made public statements calling into question whether the universities have released sufficient information to the public regarding the incidence of COVID-19 within the university communities. You started with a tweet insisting that “ASU needs to release more information to the public now.” Then you issued a legal opinion setting forth the universities’ disclosure obligations. You followed that with a “Conservative Circus” radio interview about the universities’ responses regarding COVID-19 and suggested they acted recklessly.¹ In that interview you also falsely claimed that you had prior discussions with ABOR and the universities about these matters.

The truth is that before making these statements, you made no effort to seek information from the Board or the universities regarding what they are actually doing.

If in fact you had asked, you would have realized there was no factual basis for the assertions you made in your tweet or your interview. Had you asked, you would have discovered that the universities have fully complied with all of the legal obligations referenced in your opinion letter. Had you asked, you would have learned that the universities have been monitoring and responding to the developing situation for months in an effort to protect our students, employees, and community. Our decisions, public communications, and individual notifications have been undertaken based on CDC guidance and in cooperation with public health officials.

In consultation with public health officials, we have focused our notification efforts on specific individuals who have been in close contact with ill individuals, because those are the individuals who are at heightened risk, and such notifications are consistent with the law. Several of the steps the universities have taken, including moving to remote learning and work and recommending self-isolation of individuals who have traveled or been in contact with ill individuals, have reduced the number of people who could have been exposed on campus, and thus reduced the number of individuals who have required notification.

The Law Authorizes Only Limited Information Release

The universities have acted in a manner consistent with all of the applicable legal requirements discussed in your opinion.

¹ In the James T. Harris radio interview on March 29, 2020, you stated “so, you know, I’m not exactly sure why, for example, in Arizona one of the largest block of people that have the Coronavirus are 20 to 44, but I hope to God it’s not because the universities were reckless in letting people come back from spring break, use the facilities, hang around, and potentially cause other people to be affected.”

Your opinion addresses four relevant federal statutes, each of which expressly *prohibits* the release of personally identifiable health information except in the most extreme circumstances. As your opinion notes:

- “Even during a pandemic, employers must maintain all information about employee illness as a confidential record in compliance with the [Americans with Disabilities Act].” (Opinion at 3 (internal quotations omitted).)
- The Family and Medical Leave Act also requires employers to maintain the confidentiality of leave related records, “including medical histories of employees or employees’ family members.” (Opinion at 3.)
- HIPAA, protects the privacy of health records and personal health information and limits disclosure without the patient’s authorization. (Opinion at 4.) Arizona’s complementary statute, which your opinion does not reference, expressly addresses sharing information about communicable diseases and provides that communications to contacts of an infected person must be made “without identifying the protected person.” A.R.S. § 36-664(C)(3).²
- FERPA, which applies to student records, prohibits the release of a student records without their consent,³ except in the event of an emergency “if knowledge of the information is *necessary* to protect the health or safety of the student or other individuals.” (Opinion at 5 (emphasis added).)

Based on these authorities, the universities can *never* release health information to the general public about specific employees without their consent. Individual student records may be released only if necessary to protect health or safety, and even then, only to the very small group of individuals who need that information to avoid potential harm, not, as you incorrectly claimed in your tweet, to the public at large. As the Department of Education guidance on which your legal opinion expressly relies indicates, the type of parties to whom disclosure of student information may be made under this limited exception are those “who provide specific medical or safety attention, such as public health and law enforcement officials.” (Opinion at 5.)

Despite acknowledging this governing law, the opinion makes broad and incorrect conclusions, including that the universities should release additional information about where employees who have fallen ill worked and where students who have fallen ill lived, took classes or may have visited. (Opinion at 4, 6.)

² This provision is contained in the same chapter as the statutes your opinion cites regarding the obligation of health care providers to disclose COVID-19 diagnoses, and specifically limits what can be done with the information disclosed by health care providers. (See Opinion at 7 (citing A.R.S. § 36-621).)

³ Your opinion states that consent may be given by the parent if a student is under the age of 18. (Opinion at 5 n.3.) That is not correct. Under FERPA, once a student enrolls in a college or university, their FERPA rights belong to them even if they are under 18. See United States Department of Education, Frequently Asked Questions About FERPA, *available at* <https://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpafaq.pdf> (“the rights under FERPA transfer from the parents to the student, once the student turns 18 years old or enters a postsecondary institution at any age”).

Even though your opinion is couched and captioned as a legal opinion, you do not rely on any law for this conclusion, instead basing it entirely on your stated policy view that “[i]n times of crisis, government should favor transparency in the interest of protecting the public” and your own judgment regarding what information is medically relevant and useful to the general public. (Opinion at 2.) But consistent with the legal authorities you cite, and appropriate medical guidance, such information will be reviewed on a case-by-case basis and only released to the general public in a manner that does not violate applicable law.

The Universities Are Releasing Appropriate Information in Cooperation with Public Health Officials

The universities have acknowledged positive COVID-19 diagnoses. The level of public disclosure you are demanding could lead to identifying information, which, as you acknowledge, is prohibited. In addition, as regards the need for disclosure to the general public, I note that our buildings are not generally open to the public at this time, and the same holds true for dorm rooms, which currently have reduced occupancy.

However, appropriate private disclosures have been made, and the universities have been publicly communicating extensively regarding COVID-19 and what members of the university community can do to be safe.

Searching the internet or any media source would reveal the dozens of public statements the universities have made on this topic, providing guidance developed in consultation with public health officials and updates on the specific situations at each university.⁴ The universities have also been communicating regularly with students, families, and employees at each stage of this rapidly-evolving situation, updating them on current information and best practices for maintaining safety and health based on that information. We also work directly with individual students and employees to address their own unique situations.

Specific to the particular issue of possible exposure to COVID-19 on campus, the universities have taken numerous proactive steps, including:

- Switching to alternative modes of instruction and remote work so that students and employees do not need to return to campus to complete their courses or do their job.
- Cancelling non-essential travel and large gatherings to reduce opportunities for transmission.
- Setting standards for self-isolation by individuals who have traveled to areas with COVID-19 outbreaks or been in close contact with ill individuals, so that those individuals do not return to campus during the incubation period.
- Supporting students who are unable to leave campus housing. This includes providing health care and food support to students who are self-isolating pursuant to public health guidance.

⁴ Each university has a specific site dedicated to COVID-19 information with up-to-date guidance and an archive of past messages. The ASU site is <https://eoss.asu.edu/health/announcements/coronavirus>; the NAU site is <https://nau.edu/coronavirus/>; and the UA site is <https://www.arizona.edu/coronavirus-covid-19-information>.

- Providing leave time to individuals so that they can remain home while they are ill, quarantined, or caring for those who are, reducing the risks to the community of someone coming to work ill because they feel compelled to do so.

Lastly, the universities have participated in specific notifications given to individuals who have been in close contact with those diagnosed with COVID-19. We have undertaken this effort in partnership with public health officials, relying on their medically informed guidance regarding who should be notified and consistent with our and their obligations under A.R.S. § 36-664(C).

Your opinion says that your recommended approach “is consistent with the CDC guidelines.” (Opinion at 6.) However, that guidance does not include notification of everyone who may have been on the same campus or in the same building as an ill individual, but instead is based on who may have had close contact with an ill individual.⁵ The determination of who to notify is based on the specific facts of the ill individual’s condition and activities, including whether they have even been on the university campus within the incubation period.

Your legal opinion would have benefited from acknowledging these facts.

The Universities Are Taking Other Steps to Protect and Assist Our Communities

The current public health crisis poses significant challenges to every member of our community, and the Board and the universities are committed to doing our part to ensure that we can weather this difficult situation together. We have converted our on-campus activities to remote ones with unprecedented speed in order to permit our students to continue their education while practicing the social distancing appropriate to protect themselves and others.

We are also engaged in numerous efforts that support our broader communities. Those include performing essential research into COVID-19 testing and treatment; expanding community testing capacity; designing, constructing, and distributing of much-needed personal protective and medical equipment; developing and distributing teaching materials to support parents and teachers in at-home learning; providing early graduation options for medical students able to care for COVID-19 and other patients; and partnering with health care providers and others meeting community needs.

Given the expertise of our faculties, we have also concentrated on what we can do to spread the distribution of accurate information about public health and medical topics and combat misinformation that, if permitted to spread, can be dangerous and deadly too. The Board is committed to relying on and distributing only accurate information regarding this public health crisis and how we are responding.

⁵ Centers for Disease Control, Public Health Recommendations for People in U.S. Communities Exposed to a Person with Known or Suspected COVID-19, other than Health Workers or other Critical Infrastructure Workers, available at <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html> (last visited April 6, 2020) (individuals who are at heightened risk are those who have had close contact for a prolonged period of time or who are household members, intimate partners, or caregivers).

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Your lack of collaboration with the board and universities to seek accurate information before issuing your legal opinion or making public statements is disappointing. As Arizona grapples with this public health crisis, it is incumbent on us all to work together. We ask that you check with the Board before you communicate about what the Board and the universities may or may not be doing. This will enhance any further guidance you provide on these issues.

Sincerely,



Jennifer Pollock

Senior Vice President and General Counsel

Cc: The Honorable Doug Ducey
Governor of Arizona

The Honorable Karen Fann
President, Arizona Senate

The Honorable Russel Bowers
Speaker, Arizona House of Representatives

Joseph Kanefield
Chief Deputy, Attorney General's Office