



PIONEER INSTITUTE

PUBLIC POLICY RESEARCH

December 21, 2021

Patricia M. Scanlan
Primary Records Access Officer
Executive Office of Health & Human Services
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Boston MA 02108
(617) 573-1621
Letter emailed to: EHS.RAO@state.ma.us

Helen Rush-Lloyd
Records Access Officer
Massachusetts Department of Public Health
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Boston, MA 02108
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Letter emailed to: DPH.RAO@state.ma.us

Lesley Moreau, Primary RAO
Records Access Officer
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617-573-1758
Letter emailed to: ELDERS.RAO@state.ma.us

Dear Ms. Scanlan, Ms. Rush-Lloyd and Ms. Moreau:

On behalf of Pioneer Institute, this is a request for records pursuant to the Massachusetts Public Records Act, Mass. Gen. L. C. 66, Section 10.

Unless otherwise specified herein, the time period covered by this request includes records created during or already in existence between January 1, 2020 up to the present date.

For clarity and efficiency, we provide the following definitions:

- “Public record” or “record” has the meaning set forth in Mass. Gen. L. Chapter 4, Section 7, clause 26.¹
- “Communication” has the meaning set forth in Superior Court Rule 30A(1)(c)(1), namely: “[T]he transmittal of information (in the form of facts, opinions, ideas, inquiries, or otherwise).”

¹ Namely: “Public records” shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the enumerated exemptions. For avoidance of doubt, “records” as used herein includes emails.

- “Concerning” has the meaning set forth in Superior Court Rule 30A(1)(c)(8), namely: “[R]eferring to, describing, offering evidence of, or constituting.”
- “Executive Office of Health and Human Services” or “EOHHS” means the Massachusetts Executive Office of Health and Human Services and all its subdivisions thereof, including the MassHealth program. The EOHHS is a cabinet level agency within the Executive Branch of the Government of Massachusetts.
- “Department of Public Health” or “DPH” means the Massachusetts Department of Public Health, a state agency and all its subdivisions. The DPH is an agency that is part of the Executive Office of Health and Human Services.
- “Executive Office of Elder Affairs” or “EOEA” means the Executive Office of Elder Affairs, a state agency and all its subdivisions thereof. EOEA is an agency that is part of the Executive Office of Health and Human Services.

Subject to those parameters and definitions, we request the following records, and, for documents that are responsive but not produced, we specifically request a document-specific log fully satisfying Mass. Gen. L. C. 66, Section 10(b)(iv), 950 CMR 32.06(3)(c), and otherwise-applicable law.

RECORDS REQUESTS

1. The Massachusetts Department of Public Health (“DPH”) COVID-19 Dashboard (“Dashboard”) states as follows concerning DPH’s standard for determining whether to attribute a death to COVID-19: “Effective April 1, 2021, a confirmed death is a person who: died within 60 days of their first positive molecular test (unless their cause of death was clearly not related to COVID-19); or COVID-19 is listed on their death certificate following a positive molecular test regardless of time since diagnosis.”

Please produce all records concerning the development and adoption of that standard (hereafter, the “Current DPH Standard”). Such records should include, but not be limited to:

- (a) All records concerning any federal Centers for Disease Control (“CDC”) standard, criteria or guidance which were relied upon in developing and adopting the Current DPH Standard;
- (b) All records concerning any decisions, reasons or rationales as to why the Current DPH Standard was substituted for whatever standard was effective immediately prior to April 1, 2021.
- (c) All records of communications concerning individuals or entities outside the state government, such as (but not limited to) nursing home or assisted living industry representatives and/or lobbyists, non-governmental consultants, including academics, paid or unpaid, about the Current DPH Standard.

2. The Dashboard states that the Current DPH Standard was “[e]ffective April 1, 2021.” The Dashboard does not identify the standard utilized *prior to April 1, 2021* in determining whether to attribute a death to COVID-19.
- (a) Please produce records showing the substance of each such prior standard, and, for each, the time period in which each such prior standard was in effect.
 - (b) For each such prior standard, please produce all records concerning the development and adoption of that prior standard, including but not limited to all documents constituting, or referring to, any CDC standard, criteria or guidance relied upon in developing that prior standard, and communications concerning individuals or entities outside the state government, such as (but not limited to) nursing home or assisted living industry representatives and/or lobbyists, non-governmental consultants, including academics, paid or unpaid, about each prior standard.
3. The Dashboard’s “Higher Ed & LTCF [Long-term Care Facilities]” currently states:

Long Term Care Facilities

Cases and deaths in long-term care facilities are no longer being reported on the daily dashboard and are available in the Chapter 93 data here:

<https://www.mass.gov/info-details/covid-19-response-reporting#covid-19-chapter-93-data>

Data are reported according to federal CMS and CDC’s National Healthcare Safety Network criteria:

https://www.cdc.gov/nhsn/pdfs/covid19/ltrcf/57_144-toi-508.pdf

The referenced “Chapter 93 data” includes the “Chapter 93 Elder Facility Aggregative Report Monthly Update” (hereafter, the “Aggregative Report”) which (in part) identifies total COVID-19 deaths for Massachusetts’ eldercare facilities, including assisted living residences.

With respect to the Aggregative Report, please produce:

- (a) All records of or concerning communications to eldercare facilities and/or to representatives of eldercare industry groups or lobbyists about reporting COVID-19 death information. These documents should include, but not be limited to, memoranda, emails, circulars or similar records that:
 - (i) Provide guidance about identifying and reporting COVID-19 deaths.
 - (ii) Transmit and/or provide guidance about the “National Healthcare Safety Network (NHSN) criteria” (hereafter, the “NHSN Criteria”), found at https://www.cdc.gov/nhsn/pdfs/covid19/ltrcf/57_144-toi-508.pdf.
 - (iii) Communicate or reflect in any way the NHSN Criteria’s requirement, at page 11 thereof, that a count of LTC deaths must include “resident deaths in the facility AND in other locations, such as an acute care facility, in which the resident with COVID-19 was transferred to receive treatment”,

with the exception of “[r]esidents discharged (specifically, not expected to return to the facility) from the facility.” (emphasis in original)

- (b) All records of or concerning communications *to state personnel* (employees or independent contractors) about collecting, quality-checking, and publicly reporting COVID-19 death information received from eldercare facilities. Those records should include, but not be limited to memoranda, emails, or similar documents that:
 - (i) Communicate or reflect in any way guidance about developing the Aggregative Report.
 - (ii) Communicate or reflect in any way guidance concerning the NHSN Criteria.
 - (iii) Communicate or reflect in any way the NHSN Criteria’s requirement, at page 11 thereof, that a count of LTC deaths must include “resident deaths in the facility AND in other locations, such as an acute care facility, in which the resident with COVID-19 was transferred to receive treatment”, with the exception of “[r]esidents discharged (specifically, not expected to return to the facility) from the facility.” (emphasis in original).
 - (c) Screenshots, or other records sufficient to show, the complete content of the REDCap data-entry process, whereby eldercare facilities report COVID-19 data to the state government.²
4. Records concerning whether the Aggregative Report’s count of total LTC deaths in fact includes, as required by page 11 of the NHSN Criteria, “resident deaths in the facility AND in other locations, such as an acute care facility, in which the resident with COVID-19 was transferred to receive treatment”, with the sole exception of “[r]esidents discharged (specifically, not expected to return to the facility) from the facility.” (emphasis in original).
5. Until April 15, 2021, the COVID-19 Dashboard’s “Higher Ed & LTCF” section reported a specific number of total deaths in long-term care facilities. Please produce:
- (a) Records concerning the methodology that was utilized in calculating that number.

² Pioneer wishes to see what eldercare facility personnel see at each step of this process, which cannot be accessed by the public. See <https://www.mass.gov/info-details/chapter-93-elder-care-facility-reporting-in-redcap>

- (b) All records concerning the decision to remove that number from the Dashboard.
 - (c) Memoranda, emails or other records concerning any actual or claimed inconsistency between that Dashboard's number and the total number of eldercare deaths reported in the Aggregative Report.
6. On April 23, 2021 the Boston Globe reported that "[a]pplying the new federal standard for COVID nursing home deaths had cut the number [of such deaths] from 9,018 on April 14 to 6,722. Then, the state took an extra step: It asked all licensed nursing homes and rest homes to review deaths among their residents with the more narrow standard in mind. The state relied on nursing home administrators, who had more firsthand knowledge of each case, to winnow the list down to 5,502 deaths."³ Please produce all records concerning this reported review of deaths among nursing home residents.
 7. Please produce each Aggregative Report that has been publicly issued and then later made unavailable to the public on the Dashboard.⁴
 8. All records concerning the EOHHS or DPH decision not to add or failure not to add superseded Aggregative Reports to the Dashboard's 'Archive of Chapter 93 Reports.'
 9. All records concerning the decision to cease publication of the Weekly Public Health Report, and/or concerning consideration of reinstating the publication of that Report.

Very truly yours,

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³ <https://www.bostonglobe.com/2021/04/23/nation/is-massachusetts-undercounting-covid-deaths-nursing-homes/>

⁴ As of this writing, the Dashboard's "Archive of Chapter 93 COVID-19 Data" (here: <https://www.mass.gov/info-details/covid-19-response-reporting>) includes only two such Aggregative Reports, even though they have been published on a monthly basis. (The two reports in that Archive are a report under the heading "June 30", and another under the heading "December 31".)