June 16, 2021

Secretary Umair A. Shah
State of Washington Department of Health
P.O. Box 47890
Olympia, WA 98504-7890

Dear Secretary Shah:

The American Indian Health Commission for Washington State (Commission) advocates on behalf of the twenty-nine Tribes and two urban Indian health programs (UIHPs) to improve the health of American Indian/Alaska Native people in Washington State through Tribal-State Collaboration. The purpose of this letter is to request the Washington State Department of Health (DOH) take the following actions:

(1) conduct a formal consultation process for the development and implementation of the DOH "Data Sharing Agreement for Confidential Information or Limited Dataset(s)" (DSA); and

(2) continue the current practice of using the individual user form "Confidentiality Statement for DOH-Approved Tribal Government Representative or Indian Health Program Representative" and continue uninterrupted access to Washington Disease Reporting System (WDRS) for Tribes and UIHPs until a final DSA is developed in consultation and collaboration with Tribes.

The proposed DSA presents significant Tribal implications and, therefore, requires consultation under RCW 43.376.020 and the "Washington State Department of Health and Consultation and Collaboration Procedure."

Background

On June 3, 2021, DOH sent a "Dear Tribal Public Health Partner" email stating that "All Tribes/Tribal Entities and LHJs with WDRS access will need to have fully executed DSAs before the data can be linked to WDRS and that "Due to the urgency of this request" these DSA must be "signed and returned by June 25th." The email further states that "Details of this DSA have previously been shared with Tribes/Tribal Entities and LHJs on the Health Officer Calls." The DOH acknowledged that this process "is not ideal" and is "a stop gap measure to facilitate access to additional DOH data through WDRS to assist with COVID-19 response efforts."

We find the June 3, 2021, email to be unreasonable, administratively burdensome, and inconsistent with state law and DOH consultation policy.

Applicable Law and Policy

Under RCW 43.376.020(1), state agencies are required to "Make reasonable efforts to collaborate with Indian Tribes in the development of policies, agreements, and program implementation that directly affect Indian Tribes and develop a consultation process that is used by the agency for issues involving specific Indian Tribes."

The purpose of the "Washington State Department of Health and Consultation and Collaboration Procedure" is to implement Chapter 43.376. RCW. Under this policy, DOH is required to ***"consult with Tribal governments in a manner that is different than consultation with stakeholders, municipalities or counties, or local health jurisdictions"*** and that "unlike these entities, Tribal governments are sovereign nations and are not subject to the authority of Washington State." One of the primary goals of these provisions is to "ensure effective public health services for Indian people."

The DOH consultation policy provides a detailed process for effective collaboration on complex issues such as data sharing agreements through Tribal-specific forums. The policy specifies that "Necessary Tribal and agency subject matter experts and decision-makers should be present to explain issues, discuss concerns, and help identify recommendations. Meetings will include DOH representatives, including the DOH Tribal Liaison, Tribal leaders, AIHC, and other identified parties as appropriate." (See pg. 2.)

Issues

1. **The DOH DSA "directly affects" Indian Tribes under RCW 43.376(1) and, therefore, requires consultation and collaboration.**

The primary goal of DOH consultation policy is to "ensure effective public health services for Indian people." Denying or delaying Tribes and UIHPs access to data is a significant barrier to "ensuring effective public health services for Indian people" and, therefore, any restrictions on access to data or requirements to enter into a data sharing agreement directly affects Indian Tribes and UIHPs. The "Dear Tribal Public Health Partner" email effectively informs Tribes that they will lose access to WDRS unless they agree to DOH terms that lacked any Tribal consultation. Without access to WDRS, Tribes only have access to case data for individuals diagnosed within the Tribe's healthcare system. Tribes cannot effectively conduct case investigations and contact tracing and other public health interventions needed to serve the American Indian/Alaska Native populations unless they have access to all case data in WDRS.

Any impediment to how a Tribe accesses data directly affects a Tribe's ability to effectively respond to a pandemic and is essential to effective governance. As the DSA recognizes, "The ability to view public health information about individual COVID-19 events across jurisdictions supports more effective and efficient public health practices through coordination and elimination of duplicative work across jurisdictions…" (See p. 14.) Consistent with this principle, each Tribe must have access to COVID-19 cases within its jurisdiction and to data that informs the health status of its Tribal citizens in order to effectively conduct pandemic response activities. Additionally, each Tribe must have access to data needed to coordinate response activities with neighboring jurisdictions. This access must acknowledge that Tribes are recognized public health authorities under both federal and state law[1] and serve both

[1] 45 CFR § 164.501; 45 C.F.R. § 164.512(b).

Tribal and non-Tribal members.[2] Local health jurisdictions (LHJs), including Whatcom County and Grays Harbor County, have stated their support for Tribal and UIHP full access to WDRS as it decreases the LHJs' administrative burden and supports effective pandemic response coordination with Tribal jurisdictions. Thus, the DSA should not unnecessarily restrict how a Tribe accesses and utilizes the data.

Requirements in a DOH data sharing agreement also have direct effects upon Tribal sovereignty. The agreement must respect Tribal data sovereignty by protecting and securing data regarding Tribal citizens, data that can uniquely identify any specific Tribal nation, and data that Tribes enter into state databases. Washington State must acknowledge that each Tribe owns its data and must be able to govern the collection, handling, use, and release of its data. The current draft agreement fails to recognize any of these principles that have been raised at multiple Data Sovereignty Workgroup meetings by Tribal representatives and Tribal leaders since last April. These concerns have yet to be discussed and must be addressed in the DSA Tribal consultation the Commission is requesting.

2. DOH did not make "reasonable efforts" to collaborate under RCW 43.376(1).

The Commission has convened thirteen Data Sovereignty Workgroup meetings since April 2021 with DOH representatives and Tribal and UIHP staff and leadership to address issues of Tribal data sovereignty regarding COVID-19 data and to secure adequate access to DOH data systems for Tribes and UIHPs. These efforts have, unfortunately, resulted in very little progress. However, the Data Sovereignty Workgroup would have been an appropriate forum for DOH to initiate discussions regarding the DSA and begin the process of collaborating with Tribal subject matter experts prior to consultation and finalizing an agreement. DOH had over a year of notice from Tribes on various concerns regarding data access and did nothing to collaborate with Tribes in the development of this DSA nor did DOH provide any drafts of the DSA to Tribes before distributing it for final execution.

In addition, the Commission is not clear on the nature of the urgency that DOH asserts and how such an urgency would trump compliance with DOH policy and state law to consult with Tribes and confer with UIHPs on issues that "directly affect" Tribes. We believe that providing Tribes with only 22 days to review a document in which no collaboration occurred during its development fails to meet the "reasonable efforts" requirement of RCW 43.376(1). On a practical level, Tribal leaders, Tribal attorneys, and Tribal staff will need to review and respond to an agreement with significant legal implications.

The Commission is also unclear as to why the current confidentiality agreement signed by individual WDRS users from Tribal nations and UIHPs ("Confidentiality Statement for DOH-Approved Tribal Government Representative or Indian Health Program Representative") is not the current "stop gap measure." A reasonable approach would to be to continue to utilize these agreements until a more thorough DSA with appropriate Tribal and UIHP input is developed.

[2] Tribal nations have authority to serve non-Tribal members during a public health crisis just as State and Local governments serve nonresidents within their jurisdictions. Tribes also have the authority to regulate nonmembers on Tribal trust land when responding to public health emergencies. *See Water Wheel Camp Recreational Area v. LaRance,* 642 F.3d 802, 814 (9th Cir. 2011)*;* and *Knighton v. Cedarville Rancheria,* 922 F.3d 892 (9th Cir. 2017) holding that a Tribe's regulatory power over nonmembers on Tribal land is derived from its "inherent sovereign power to protect self-government and control internal relations."

3. DOH DSA process did not follow requirements under the DOH Consultation Policy.

As noted in the above section, the DOH consultation policy requires DOH to treat Tribes not as stakeholders but as sovereign nations. DOH has in the following respects treated Tribes more like stakeholders in this process and not Tribal nations.

- DOH refers to Tribes in the June 3 email and in the DSA as "Tribal health partners." Tribes are not partners. They are sovereign nations.
- DOH's attempt to create one DSA that applies to both Tribes and LHJs is inconsistent with this requirement. Tribes as sovereign nations are not subject to state laws and regulations and have Tribal laws that must be considered when developing a DSA.
- DOH, in treating Tribes as sovereign nations and not stakeholders, must collaborate with Tribal subject matter experts including the Commission. Adequate groundwork is needed before any consultation to prevent inefficient use of Tribal leaders' and UIHP leadership's time. DOH failed to reach out to Tribal law and policy experts when developing this agreement. This failure is also inconsistent with prior agency practices. In 2015, DOH staff worked extensively with Tribal and UIHP experts to develop the current revised DOH consultation policy. Most recently, multiple DOH staff collaborated with the Commission to develop the Behavioral Health Tribal Attestation. These practices were put in place to save Tribal leaders' time, avoid confusion, minimize misunderstandings between Tribes, UIHPs, and DOH, and most importantly develop policies that are consistent with applicable laws.
- We are also concerned that DOH appears to be imposing additional requirements upon Tribes that are not required of LHJs. As stated in the June 3rd email, Tribes, but not LHJs, are required to sign a main agreement in order to access WDRS data.

Finally, we hope in the future that DOH adheres to the formality required in the DOH consultation policy and prior practice by most all federal and state agencies by requesting Tribal action through a "Dear Tribal Leader Letter." Such communications should not occur in the body of an email.

Requests

1. Create a DSA Process for Tribes that is Separate and Distinct from Local Health Jurisdictions

For the reasons stated above, Tribes should have a separate process for the development and implementation of DSAs. Tribes should be informed that a separate Tribal process is being developed as outlined below.

2. Revise the DSA in Consultation and Collaboration with the Tribes and UIHPs

The current version of the DSA does not address critical issues raised by the Tribes for over a year regarding Tribal data sovereignty. In the June 3 email, DOH stated "We understand the concerns Tribes and Tribal partners have regarding data protection and will keep that under constant consideration as we move forward." The final version of the DSA must satisfactorily resolve these issues of concern. DOH must consult and confer with Tribes and UIHPs in the process of developing the DSA moving forward.

3. Extend Tribal and UIHP Access to WDRS

DOH should continue the current practice of using the individual user form "Confidentiality Statement for DOH-Approved Tribal Government Representative or Indian Health Program Representative" and continue uninterrupted access to WDRS for Tribes and UIHPs until a final DSA is developed in consultation and collaboration with Tribes.

4. Establish a Consultation and Collaboration Process

We request the following consultation and collaboration process that is consistent with prior practice at DOH and other state agencies:

- **AIHC and DOH Collaboration Period.** As stated above, AIHC and DOH staff have in prior practice collaborated on draft DOH policies before submitting drafts to Tribes and UIHPs for review and consultation so Tribal leaders, Tribal attorneys and Tribal staff do not have to spend valuable time reviewing a document that does not incorporate Tribal and UIHP protections under federal and state law and policy and/or is inconsistent with Tribal and UIHP practices. This practice is in keeping with the DOH Consultation policy.
- **Roundtable 1** – July 15, 2021, afternoon
- **Roundtable 2** – August 3, 2021, afternoon
- **Formal Tribal Consultation** – August 26, 2021, morning
    - Agenda
        - Review of DOH Consultation Policy and Procedure
        - Overview of Agreement – Key Provisions
        - Consultation Discussion, Questions

We appreciate our continued partnership with the DOH and the State of Washington in serving Tribes, Urban Indian Health Programs, and American Indian/Alaska Native people. If you have any questions, please contact Vicki Lowe, Executive Director, vicki.lowe.aihc@outlook.com.

Sincerely,

Stephen Kutz, BSN, MPH
Chair, American Indian Health Commission

cc: Tribal Chair
AIHC Delegates
Molly Voris, Office of the Governor
Tamara Fife, Tribal Relations Director, DOH
David Bayne, Office of Strategic Partnership, DOH
Cathy Wasserman, Office of Science, Health, and Informatics, DOH
Juliana Grant, Public Health Outbreak Coordination, Informatics, and Surveillance,DOH
Michele Roberts, Prevention and Community Health Division, DOH