

2. Clarifying Legal and Policy Issues

Preparing to Meet with Your Attorney Guide

Of all the advice in this toolkit, among the most important is to meet early and often with your agency or department's attorney to address any legal aspects of creating a surveillance program. While this task may raise some concerns, taking a proactive approach to this aspect of your program by preparing in the following key areas can help you identify, and in many cases avert, potential issues:

- Understanding the statutory and legal environment in which your surveillance program will likely operate (see *Clarifying Legal Authority* in this section)
- Understanding the roles of your agency's attorney
- Knowing how to present your case

Understanding the statutory and legal environment for your program

The *Clarifying Legal Authority* tool in this section addresses this topic and should be considered critical preparatory "homework" for your planning committee to complete before meeting with your agency's attorney¹. In addition to the questions the tool raises, your agency's attorney may ask your committee questions that have ramifications on the agency's legal authority to create a surveillance program:

- Who will have access to the data?
- For what purposes will they use the data?
- Do you plan to disclose the data to any internal, or more critically, external, entities such as advocacy groups, neighboring states, or CDC? If so, which entities?
- Do you anticipate third parties requesting the data for research purposes?
- If you intend to make the data publicly available, how will you do so (e.g., via a summary annual report for the agency website, part of a larger surveillance report, or findings presented in media releases)?

Understanding the attorney's role

Your agency's attorney serves two important roles for the agency: (1) supporting it in achieving the public health mission within the confines of current law; and (2) protecting it against conducting embarrassing or unlawful activity or implementing poorly formulated plans. By fully answering the questions included in the *Clarifying Legal Authority* tool, you increase the likelihood that when you meet with your agency attorney, she or he will view the project in the former, more supportive light. Conversely, being unprepared or uninformed about privacy and other legal issues may put your agency attorney in a more defensive frame of mind.

¹ Note that many agencies have a legal unit with a number of attorneys that provide legal counsel. One or more attorneys may be assigned to specifically work with your program area.

Presenting your case

By training, attorneys build their cases before presenting them. Take the same approach to help build your credibility with them. Making more definitive statements such as, “Here’s what I’ve learned in my research to support creating this program,” and then following up with, “Have I missed anything?” can lead to far more productive and supportive meetings with your attorney. Approaching them with open-ended questions such as, “Can we do this...?” likely makes you appear unprepared and may result in less support for your program.

In addition, these tips can help build a strong case for your surveillance program:

- Connect the overall goal of the new program to a larger surveillance, agency or leadership priority to broaden the context in which to support your program’s creation.
- Prepare to discuss all the possible uses of the data internally and externally, distinguishing between those most critical for meeting your intended program purposes and those that simply add extra value. Be willing to forego the latter data uses to ensure that your agency attorney supports the former uses.
- Ask others to learn how your agency attorney or legal unit responded to similar cases in the past. This background research may inform you about how to better build a case for your program that gains legal support.

Working with the attorneys of your community partners

Depending on the size and governance structure of your surveillance program, you may also meet with attorneys for your community partners. These meetings could involve negotiating data use agreements, business associate agreements, project charters, privacy protections and limitations on public release of information. In addition, you will likely discuss the important issue of determining whether the program can be classified as surveillance or research (see *Distinguishing Surveillance from Research* in this section’s *Supplemental Reading*). The implications for each classification are significant.

Just as thorough preparation for meeting with your agency’s attorneys can help streamline discussions and avert potential issues, so can preparing for discussions with community partner attorneys. Keep in mind that these attorneys bear responsibility for minimizing their organization’s exposure to liability. Although successful past data sharing projects with an organization may ease the way in negotiations, they provide no guarantee of support for current projects. In general, preparations for these discussions tend to be lengthy.