
DUAL PURPOSE BIOTERRORISM INVESTIGATIONS IN LAW ENFORCEMENT AND PUBLIC HEALTH PROTECTION: HOW TO MAKE THEM WORK CONSISTENT WITH THE RULE OF LAW

Victoria Sutton, M.P.A., Ph.D., J.D.*

I. INTRODUCTION

The dual efforts of law enforcement and public health personnel are important to the governmental purpose of protecting citizen health and safety. However, while the goal is the same for both investigations, their objectives are different. Public health personnel seek to identify individuals who need to be treated or isolated in order to diagnose and contain the disease. Law enforcement personnel also seek to identify individuals, but for the purposes of determining who can assist in providing information leading to the apprehension of the perpetrator and supplying evidence of a potential crime of bioterrorism.

Expectations of privacy exist which make it more difficult to conduct these investigations with *joint* public health and law enforcement personnel involved in the investigations.¹ Public health personnel have private health information which is given to them under an expectation of privacy, while law enforcement personnel do not want to disclose information which may identify witnesses or jeopardize the investigation.² Both law enforcement and public health personnel are conducting investigations with the same individuals, which under the constraints of these concerns, would lead

* Victoria Sutton, M.P.A., Ph.D., J.D., is the Robert H. Bean Professor of Law and Director of the Center for Biodefense, Law and Public Policy at Texas Tech University. She is the author of *LAW AND BIOTERRORISM* (Carolina Academic Press 2003).

¹ See FBI & OFFICE OF JUST. PROGRAMS, CRIMINAL AND EPIDEMIOLOGICAL INVESTIGATION HANDBOOK 3-6 (2000), http://www2a.cdc.gov/phlp/forensicepi/docs/crim_epi_hdbk.pdf (last visited Oct. 8, 2005) [hereinafter INVESTIGATION HANDBOOK].

² *Id.* at 3-7.

to the same individuals being interviewed twice—once by public health personnel and once by law enforcement.

Beyond these problems, other issues, such as handling and collecting evidence, Miranda warnings, and false statements, all indicate different outcomes depending upon whether it is law enforcement personnel or public health personnel who are involved.³ Yet, it is essential that both objectives of the dual investigations are served under time constraints.

Patricia Quinlisk, State Epidemiologist for Iowa, gave congressional testimony on July 23, 2001, which illustrated the problem of not sharing information between law enforcement and public health personnel in investigations.⁴ She related the story of an outbreak of a sexually-transmitted disease in a state facility in Iowa for the mentally and physically handicapped.⁵ Local and state authorities began an investigation to control the outbreak, but law enforcement was investigating probable rape.⁶ Because the mentally handicapped are not competent to consent to sexual relations, there was *ipso facto* sexual abuse or rape.⁷ Both investigations proceeded without sharing information between the two groups, often asking interviewees the same questions.⁸ As Dr. Quinlisk suggested, sharing information between law enforcement and public health personnel would have been helpful in bringing a successful closure to the investigation.⁹

This article reviews the current authorities and commentaries on the dual-purpose investigation of law enforcement and public health personnel in a bioterrorism event. With that background, the article concludes with questionnaires for use in the dual-purpose investigation.¹⁰ It also provides a set of guidelines for reference in planning and carrying out investigations, which can be used as a

³ See *infra* Part IV.

⁴ *Combating Terrorism: Federal Response to a Biological Weapons Attack, Hearing Before the Health Comm. on Gov't Reform, 107th Cong. 5 (2001)* [hereinafter *Hearing*] (statement of Patricia Quinlisk), available at <http://bioterrorism.slu.edu/bt/official/congress/quinlisk072301.pdf> (last visited Oct. 28, 2005).

⁵ *Id.*

⁶ *Id.*

⁷ See *id.*

⁸ See *id.*

⁹ *Hearing, supra* note 4, at 5.

¹⁰ See *infra* Part VI.

resource by public health lawyers, health lawyers in general, and law enforcement personnel.¹¹

II. WHAT ARE THE RESPECTIVE CONCERNS?

Both law enforcement and public health personnel have concerns about sharing information in the investigative process of a bioterrorism event.¹² Law enforcement personnel have two primary concerns.¹³ First, they do not want to compromise their investigations by sharing informants' often-sensitive information with more individuals than absolutely necessary, because the more people who know the information, the more likely it is to be misused or exposed.¹⁴ Second, allowing public health personnel access to information about the individuals or type of information law enforcement seeks could cause the information's exposure and result in the individual evading capture.¹⁵

Public health personnel also have two primary concerns.¹⁶ First, the public health community is generally concerned about liability for releasing private health information.¹⁷ This concern includes sharing clinical samples taken from individuals who may be sought by law enforcement as evidence.¹⁸ In some jurisdictions, public health officials have taken the position that the isolates¹⁹ collected from patients belong to the state.²⁰ Under that rationale, such individuals then have no legitimate expectation of privacy or privilege when their samples become part of a criminal investigation.²¹ Second, public health personnel and medical personnel are concerned about the ethical responsibility of trust between patient and health care giver.²² This atmosphere of trust is intended to encourage the patient to disclose otherwise sensitive information, thus

¹¹ *Id.*

¹² INVESTIGATION HANDBOOK, *supra* note 1, at 3.

¹³ *Id.* at 6.

¹⁴ *Id.* at 5–6.

¹⁵ *Id.* at 6–7.

¹⁶ *Id.* at 3, 5.

¹⁷ INVESTIGATION HANDBOOK, *supra* note 1, at 3.

¹⁸ *Id.* at 4.

¹⁹ *Id.* (defining an isolate as a chemical substance or microorganism in an uncombined or pure state).

²⁰ *Id.*

²¹ *Id.*

²² INVESTIGATION HANDBOOK, *supra* note 1, at 5.

allowing the health care giver to render treatment based upon full disclosure of the patient's medical condition.²³

The challenge of designing a dual-purpose investigation is to fully address these legal concerns.

III. DID HIPAA CHANGE THE QUESTION OF SHARING BETWEEN PUBLIC HEALTH PERSONNEL AND LAW ENFORCEMENT?

HIPAA, the Health Insurance Portability and Accountability Act of 1996,²⁴ was created for several purposes.²⁵ One was to standardize information used in health care administration where information exchanged between insurers and administrators was streamlined.²⁶ As part of this requirement, provisions for maintaining the confidentiality of the information were created.²⁷ HIPAA also resolved some issues of when covered entities may share information with law enforcement personnel.²⁸ Covered entities are permitted to disclose otherwise private health information to public health authorities for matters of national security,²⁹ and to protect the President.³⁰ Further, covered entities may disclose to law enforcement personnel who are investigating a potential act of bioterrorism, although the information is limited to name and address, date and place of birth, ABO and Rh factor blood types (no DNA information), social security number, type of injury, date and time of injury, and physical characteristics,³¹ as long as it is relevant to the investigation.³² However, when an administrative order or subpoena from law enforcement personnel is specifically tailored to be relevant to a particular investigation, then the covered entity is required to release the information.³³ The latter instance does away

²³ *Id.*

²⁴ Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

²⁵ *See id.* at 2025.

²⁶ *Id.*

²⁷ *Id.* at 2026.

²⁸ 45 C.F.R. §§ 164.512(a)(1-2), (c), (f) (2005).

²⁹ *Id.* § 164.512(k)(2).

³⁰ *Id.* § 164.512(k)(3).

³¹ *Id.* § 164.512(a)(2)(i).

³² *Id.* § 164.512(C)(1).

³³ 45 C.F.R. § 164.512(f)(1)(ii).

with the question of discretionary disclosure on the part of the covered entity.³⁴

Interpreting the meaning of the term “covered entities” may be critical to the information-sharing process during a bioterrorism event. If the term is interpreted broadly to include the ad hoc assembly of emergency healthcare response teams, then HIPAA protections apply; whereas, if these are not considered covered entities, then prior agreements or state law can govern information-sharing.³⁵

IV. RECOMMENDATIONS FOR WORKING TOGETHER

A. Nunn-Lugar-Domenici Bioterrorism Exercises

The Nunn-Lugar-Domenici Act³⁶ provided for training local personnel to respond to bioterrorism attacks, and other weapons of mass destruction.³⁷ Bioterrorism scenarios and tabletop exercises addressing those threat scenarios were developed to create a two-day exercise for local responders. These tabletop exercises were utilized in communities across the nation.³⁸ Coincidentally, the first such exercise in bioterrorism was held in Lubbock, Texas just days after the first anthrax attacks in October 2001.³⁹ The exercise’s format provided the opportunity for law enforcement personnel and public health personnel, as well as many other groups of local and state responders to meet,⁴⁰ often for the first time.⁴¹ This kind of

³⁴ See *id.* § 164.512(f)(1).

³⁵ See James G. Hodge, Jr. et al., *The HIPAA Privacy Rule and Bioterrorism Planning, Prevention, and Response*, 2 *BIOSECURITY & BIOTERRORISM* 74 (2004) (noting that the misunderstanding of the HIPAA Privacy Rule can impede information sharing in a bioterrorism event).

³⁶ Defense Against Weapons of Mass Destruction Act of 1996, Pub. L. No. 104-201, § 1402, 110 Stat. 2422 (1996).

³⁷ U.S. DEP’T OF HOMELAND SECURITY, *HOMELAND SECURITY EXERCISE AND EVALUATION PROGRAM: VOL. 1: OVERVIEW AND DOCTRINE 1* (May 2004), <http://www.ojp.usdoj.gov/odp/docs/HSEEPv1.pdf> (last visited Oct. 8, 2005).

³⁸ *Id.* at 2. Author’s personal experience (contact author for further detail).

³⁹ See John J. Flalka, *Bioterrorism Exercise Reflects Nation’s New Sense*, *WALL STREET J.*, Oct. 1, 2001, at A26.

⁴⁰ NAT’L DOMESTIC PREPAREDNESS OFFICE & DEP’T OF DEFENSE, *FINAL REPORT OF THE BIOLOGICAL WARFARE IMPROVED RESPONSE PROGRAM (BW-IRP) CRIMINAL AND EPIDEMIOLOGICAL INVESTIGATION WORKSHOP, JANUARY 19–21, TO U.S. ARMY SOLDIER AND BIOLOGICAL CHEMICAL COMMAND (SBCCOM) 3* (2000), available at <http://bt.naccho.org/Bttoolbox/downloads/NDPO-DOD%20Criminal.pdf> (last visited Oct. 8, 2005) [hereinafter REPORT TO SBCCOM].

⁴¹ Author’s personal experiences and observations of events.

face-to-face meeting is considered to be one of the most valuable parts of the scenario training.

B. SCCCOM Guidance

In December 2000, before the anthrax attacks of the fall of 2001, the United States Army Soldier and Biological Chemical Command (SBCCOM) suggested that in the context of a bioterrorism event there was a perceived gap in communication between law enforcement-lead investigations and epidemiologist-lead investigations.⁴² A report resulting from the SBCCOM workshop described a process which made timeliness a priority, and which required each group to adapt to the needs of the other group by integrating their questions.⁴³ The recommended approach called for minimizing the need for each group to interview the same people.⁴⁴ The approach achieved this result by providing public health personnel (in this plan, identified as epidemiologists) and law enforcement personnel with questionnaires.⁴⁵ The questionnaires were designed to satisfy the investigation needs of both groups.⁴⁶ The report gave an example of how this process might work.⁴⁷ If between the epidemiologist and the law enforcement personnel there was a pool of 100 people to interview, then each group would interview only fifty.⁴⁸ The law enforcement personnel would obtain information for the epidemiologists through additional epidemiological questionnaires.⁴⁹ The epidemiologists would use these questionnaires to decide which of the fifty should have follow-up epidemiological interviews.⁵⁰ For example, thirty of the fifty might require follow-ups.⁵¹ The same process would be followed in interviews by the epidemiologists.⁵² As a result, the number of interviewees would be reduced by twenty for each group, thus maximizing the time and efficiency of the investigators.⁵³

⁴² REPORT TO SBCCOM, *supra* note 40, at 1.

⁴³ *Id.* at 2–3.

⁴⁴ *Id.* at 5.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ REPORT TO SBCCOM, *supra* note 40, at 5.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² REPORT TO SBCCOM, *supra* note 40, at 5.

⁵³ *Id.*

The Questionnaire in Part VI combines the National Domestic Preparedness Office/Department of Defense (NDPO/DOD) report questionnaires for law enforcement personnel and public health personnel into a single form.⁵⁴ The combined questionnaire uses the set of questions that public health personnel ask which can also benefit the criminal investigation,⁵⁵ and the set of questions that law enforcement personnel ask which can benefit the public health investigation.⁵⁶

Consistent with these questionnaires is the guidance from the declassified coordinated document by the Federal Bureau of Investigation (FBI), Department of Homeland Security (DHS), and the Department of Health and Human Services & the Centers for Disease Control (DHHS/CDC).⁵⁷ That document directs:

In coordination with public health and law enforcement, identify and list the names and contact information for anyone who may have been exposed to the suspicious substance so that they may be contacted when the LRN [Laboratory Response Network] test results are available or if there is other additional information. If positive results are obtained, state and local public health departments will need to contact those potentially exposed as soon as possible to provide appropriate assistance (e.g., antibiotics, education, additional testing, vaccination, surveillance/symptom reporting).⁵⁸

Conceivably, taking clinical samples could be part of the interview process. Sample taking could be accomplished if each interviewer is accompanied by healthcare personnel for purposes of taking and handling samples.

The SBCCOM report for the exchange of the information between law enforcement personnel and public health personnel makes seven recommendations: (1) establish an information exchange group whose function is to identify key investigators on each team to bring them together for information sharing; (2) develop close personal relationships between law enforcement and public health personnel, beginning by meeting each other; (3) include an epidemiologist on the criminal investigation team; (4) increase awareness of the threat of a bioterrorism incident in the emergency response community; (5) pre-establish agreements on

⁵⁴ See *infra* Part VI.

⁵⁵ INVESTIGATION HANDBOOK (Table 2), *supra* note 1, at 33.

⁵⁶ INVESTIGATION HANDBOOK (Table 1), *supra* note 1, at 28.

⁵⁷ FBI ET AL., GUIDANCE ON INITIAL RESPONSES TO A SUSPICIOUS LETTER/CONTAINER WITH A POTENTIAL BIOLOGICAL THREAT (2004), <http://www.bt.cdc.gov/planning/pdf/suspicious-package-biothreat.pdf> (last visited Oct. 8, 2005) [hereinafter GUIDANCE ON INITIAL RESPONSES].

⁵⁸ *Id.* at 6.

sensitive information; (6) pre-establish laboratory testing resources and agreements; and (7) conduct chain-of-custody training for all participants.⁵⁹

Planning for a bioterrorism event, which includes clarifying legal authorities, is the most important step for assuring effectiveness of dual-purpose investigations in such a situation.⁶⁰

C. Evidence and Chain of Custody

The topic of collecting and handling evidence merits separate treatment within this article, because those activities are critical throughout the investigation and must be considered in any process or pre-agreement between investigative groups. The chain of custody is a process and method for tracking, maintaining control over, and providing accountability for all evidentiary items in a criminal investigation.⁶¹

Constitutional law provides that evidence used in criminal proceedings must be collected with the protection of the Fourth Amendment which prohibits unreasonable search and seizures.⁶² Evidence collected by public health personnel, if used in a criminal proceeding, must also conform to those standards because in a criminal proceeding context such personnel are government actors.⁶³ Thus, the Fourth Amendment applies and protects individuals from governmental intrusions beyond the individual's expectation of privacy.⁶⁴ For example, collecting public health evidence in a private dwelling would not extend to searching through desk drawers, unless this was part of a public health investigation.⁶⁵

The most specific guidance on the chain of custody is found in an unclassified document, dated November 2, 2004, and coordinated between the FBI, DHHS, and the CDC.⁶⁶ The document ad-

⁵⁹ REPORT TO SBCCOM (Table 10), *supra* note 40, at 27.

⁶⁰ See generally Jay C. Butler et al., *Collaboration Between Public Health and Law Enforcement: New Paradigms and Partnerships for Bioterrorism Planning and Response*, 8 EMERGING INFECTIOUS DISEASES 1152, 1152-56 (2002).

⁶¹ INVESTIGATION HANDBOOK, *supra* note 1, at 25.

⁶² See generally Edward P. Richards, *Collaboration Between Public Health and Law Enforcement: The Constitutional Challenge*, 8 EMERGING INFECTIOUS DISEASES 1157, 1157-58 (2002).

⁶³ *Id.* at 1158.

⁶⁴ *Id.* at 1157-58.

⁶⁵ *Id.* at 1158.

⁶⁶ GUIDANCE ON INITIAL RESPONSES, *supra* note 57.

dresses initial responses to a suspicious letter or container which are potential biological threats.⁶⁷ Specifically, the guidance states:

Treat the scene as a crime scene. Preserve evidence in coordination with law enforcement and ensure that materials are safely packaged. Take steps to retain enough suspicious material for: (a) Laboratory analysis; and (b) Forensic examination of criminal evidence, regardless of whether the threat is ultimately determined to be accompanied by a hazardous material. Transfer custody of evidence to a law enforcement officer as soon as possible. Maintain chain of custody by obtaining a record of names and signatures every time custody of a suspicious material or sample for laboratory analysis changes hands.⁶⁸

The same guidance further recommends that the FBI or responding law enforcement agency must include a chain-of-custody form with the incident report.⁶⁹

The coordinated document directs that hazardous materials (HAZMAT) units⁷⁰ screen evidence from the crime scene (otherwise collected by public health officials or other law enforcement units) for the presence of chemical or radiological material on-site, and then double-bag the evidence in clear sealed bags, consistent with chain-of-custody requirements.⁷¹ Photographs of the area or other site are also recommended, as is making a record of who is taking the photograph.

V. NEW YORK CITY'S GROUNDBREAKING PROTOCOL

The FBI is the lead agency for investigating potential bioterrorism,⁷² thus New York City and the FBI worked together to craft an agreement which allows public health personnel and law enforcement personnel to work together in the event of a bioterrorism incident.⁷³ On November 21, 2004, the New York Times reported that after two years, New York City and the FBI had reached an agreement on bioterrorism investigations.⁷⁴ The agreement includes a set of rules to protect the respective interests of the city and the FBI, while sharing information collected by both public health personnel

⁶⁷ *Id.*

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at 3.

⁷⁰ Occupational Safety and Health Standards, 29 C.F.R. § 1910.120 (2005).

⁷¹ GUIDANCE ON INITIAL RESPONSES, *supra* note 57, at 2.

⁷² INVESTIGATION HANDBOOK, *supra* note 1, at 8.

⁷³ Judith Miller, *City and F.B.I. Reach Agreement on Bioterror Investigations*, N.Y. TIMES, Nov. 21, 2004, at A39.

⁷⁴ *Id.*

and law enforcement personnel.⁷⁵ The need for this agreement to address information-sharing conflicts arose from the investigations of the fall 2001 anthrax attacks.⁷⁶

The agreement allows law enforcement officials to access bioterrorism victims' private medical information, but they must agree to keep the information confidential.⁷⁷ HIPAA, however, does not consider law enforcement personnel to be covered entities.⁷⁸ Therefore, law enforcement personnel are not required to keep private health information confidential.⁷⁹ However, under the New York City/FBI protocol, law enforcement must agree not to disclose.⁸⁰

A. Protocol Assumptions and Principles

This protocol establishes a means for the Department of Health and Mental Hygiene (DOHMH), New York Police Department (NYPD), and the FBI ("the parties") to collaborate in joint investigations during the initial phase of the epidemiologic and possible criminal investigations of a suspected or confirmed bioterrorist event.⁸¹ It rests on the following shared understandings and principles:

1. All activities and data sharing that occur as part of this protocol will comply with all applicable laws, rules and regulations (including the NYC Health Code, NYC Administrative Code, NYS Sanitary Code, Federal Privacy Act and the Health Insurance Portability and Accountability Act) that govern when routinely collected public health and law enforcement data can be shared with other parties.
2. The joint investigation will focus on interviews (e.g., patients, relatives and potential contacts) that will ad-

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 45 C.F.R. § 160.103 (2004).

⁷⁹ See Rebecca H. Bishop, *The Final Patient Regulations Under the Health Insurance Portability and Accountability Act; Promoting Patient Privacy or Public Confusion?*, 37 GA. L. REV. 723, 730, 734, 737 (2002-03).

⁸⁰ AGREEMENT BETWEEN CITY OF N.Y. DEP'T OF HEALTH AND MENTAL HYGIENE, CITY OF N.Y. POLICE DEP'T AND FBI REGARDING JOINT FIELD INVESTIGATIONS FOLLOWING A SUSPECTED BIOTERRORIST INCIDENT, at 2 (2004), <http://www2a.cdc.gov/phlp/docs/Investigations.pdf> (last visited Oct. 8, 2005) [hereinafter NEW YORK CITY-FBI PROTOCOL].

⁸¹ *Id.*

dress primarily where and when exposures to suspected or confirmed biological agents may have occurred. Data collected will be shared and protected in accordance with all applicable laws and regulations.

3. Absent unusual circumstances as agreed upon between all of the parties, joint investigation interviews will occur in a location adequately removed from potentially contaminated areas or crime scenes.

4. All parties recognize the potential “chilling effect” that the presence of law enforcement officers may have on patients being interviewed, on the medical professionals with whom DOHMH routinely works and upon whom traditional public health surveillance—through mandated disease reporting—depends. Efforts will be made to minimize those effects (e.g., law enforcement personnel interviewing patients will not be wearing uniforms). It is understood that joint investigations remain essentially a public health epidemiologic investigational activity, that DOHMH is not an agent of law enforcement when conducting such investigations, and that all confidential medical information discussed or obtained in the course of such investigations shall be deemed subject to the provisions of NYC Health Code Section 11.07(c).

5. When possible, FBI and NYPD personnel will be assigned to train with DOHMH field investigation teams beforehand to facilitate familiarity among team members.

6. When possible, FBI and NYPD personnel will be assigned to work with the same DOHMH field investigation teams for the duration of a joint investigation.

7. FBI and NYPD will be responsible for evaluating and addressing the security needs of DOHMH field investigation teams.⁸²

B. Deployment

When the decision has been made to conduct a joint field investigation, the following will occur:

⁸² *Id.*

1. Absent unusual circumstances as agreed upon between all of the parties, if the subject of the interview is hospitalized, DOHMH will inform the facility's on-call administrator that public health and law enforcement personnel will be interviewing a patient(s) at their facility. Whenever possible, the interview will be conducted in a manner that minimizes disruption to normal hospital operations and patient care. FBI and NYPD will deploy the minimum number of personnel needed to perform the interview(s).
2. DOHMH, FBI, and NYPD teams will collect needed equipment and meet at an agreed upon staging area for a briefing and transport to the hospitals or other facilities where individuals will be interviewed.
3. Absent unusual circumstances as agreed upon between all of the parties, when arriving at a facility, DOHMH, FBI and NYPD personnel will inform the on-call administrator.
4. While at the hospital, DOHMH team members will independently identify other patients who may have illness consistent with the disease of concern by reviewing additional medical records and/or interviewing medical staff. Absent unusual circumstances as agreed upon between all of the parties, FBI and NYPD will not be present while DOHMH conducts these activities, in order to protect the confidentiality of other patients at the hospital or medical care setting who are not yet known to have the disease of concern.
5. Whenever joint interviews are conducted, DOHMH, FBI and NYPD team members will introduce and identify themselves and explain that they need to ask a series of questions to help determine where and when the subjects may have been infected.
6. During the joint interview, DOHMH questions will be limited to those pertaining to the illness of concern and how the subject may have been exposed or infected. To the extent possible under the circumstances and as agreed upon between all of the parties, confidential medical information will not be discussed in the joint interview and will be maintained by DOHMH. Absent unusual circum-

stances as agreed upon between all of the parties, DOHMH personnel will review medical records and interview patients and health care providers independently to collect confidential medical information that is needed for the public health investigation. The subject of the interview will not be physically examined when law enforcement personnel are present in the room.

7. Absent unusual circumstances as agreed upon between all of the parties, DOHMH staff will interview the subject of the interview first, while the FBI and NYPD personnel are present in the room. The data collection tool that will be used will be a DOHMH-prepared questionnaire. After completing the DOHMH interview, the FBI and NYPD personnel will interview the patient, while the DOHMH staff remains in the room.

8. If the subject of the interview requests that either party leave the room before or during the interview, this will occur, although DOHMH, FBI or NYPD personnel may decide to return to interview this person at a later time.

9. After the interview, DOHMH, FBI and NYPD joint investigation team members will review the collected data and share information as appropriate.

10. If requested by FBI and NYPD, and agreed upon by DOHMH, copies of all completed questionnaires will be shared with FBI and NYPD, as appropriate and consistent with all applicable laws. Records containing confidential information will be maintained at DOHMH, FBI and NYPD in a secure manner that is agreed upon by the parties.

11. During the period of the joint investigation, FBI and NYPD may assign liaisons to DOHMH, and vice versa.

12. During the period of the joint investigation, the parties will inform each other in a timely fashion of any information that may have an impact on the joint investigation. If DOHMH determines a possible time and/or location of a biological agent's release, it will inform FBI and NYPD immediately, and vice versa.

13. The parties will consult to determine the best course of action regarding when to conclude the joint investigation.

14. If it is mutually agreed by the parties that the investigation of a BT event is concluded or no longer suspected, all confidential DOHMH, NYPD, and FBI documents will be maintained in a secure manner that is agreed upon by the parties.

15. It is understood that any DOHMH information or documents that may have been provided to the FBI and/or the NYPD in the course of a joint investigation shall remain confidential and will be separately maintained by the FBI and/or the NYPD, respectively. Such information or documents shall not be used or redisclosed for any purpose other than one directly related to the suspected or confirmed BT event that generated the subject joint investigation, without the specific approval of the DOHMH commissioner or his/her designee. Similarly, all FBI or NYPD information or documents, which are provided to DOHMH in the course of a joint investigation, shall remain confidential and will be separately maintained by DOHMH. They shall not be used or redisclosed for any purpose other than one directly related to the BT event which generated the subject joint investigation, without the specific approval of an authorized representative of the FBI or of the NYPD, respectively.⁸³

VI. SHARED QUESTIONNAIRE APPROACH

The use of a shared questionnaire for both law enforcement and public health investigators will streamline the investigation and allow the same form to be used. Many of the initial questions that both law enforcement and public health personnel must use in an investigation are identical. Investigators should also question each other, and utilizing these shared questionnaires can achieve the goals of a dual investigation.

⁸³ *Id.*

A. Interviewee Questions for Public Health and Law Enforcement Personnel Combined Questionnaire

1.0 Personal Information

1.1 Questions of interest to Public Health Personnel

- What is the victim's name?
- What is the victim's age/date of birth?
- What is the victim's sex?
- What is the victim's address?
- What is the victim's social security number?
- What is the victim's driver's license number?
- What is the victim's occupation/employer?
- What is the victim's religious affiliation?
- What is the victim's level of education?
- What is the victim's ethnicity/nationality?
- Record any personal property (bag & tag).
- Are there any common denominators among victims and/or patients—i.e., race, socio-economic status, socio-political groups & associations, locations, events, travel, religion, etc.?

1.2 Questions of interest to Law Enforcement Personnel

- What do you think made you ill?
- When (date/time of onset) did you start feeling sick?
- Do you know of anyone else who has become ill or died—e.g., family, coworkers, etc.?
- Have you had any medical treatment in the last month? What is the name of the healthcare provider? Where were you treated?
- Do you have any allergies to medications?

2.0 Travel Information

2.1 Questions of interest to Public Health Personnel

- Have you traveled outside of the United States in the last 30 days?
- Have you traveled away from home in the last 30 days?
- What is your normal mode of transportation and route to and from work everyday?
- What have been your activities for the last 30 days?

2.2 Questions of interest to Law Enforcement Personnel

[none]

3.0 Activities Information

3.1 Questions of interest to Law Enforcement Personnel

- Where do you live and work/go to school?
- Did you attend a public event—i.e., sporting event, social function, visit a restaurant, etc.?
- Have you or your family members traveled more than 50 miles in the last 30 days?
- Have you or your family members had any contact with individuals who had been in another country in the last 30 days?

4.0 Agent Dissemination Information

4.1 Questions of interest to Law Enforcement Personnel

- Did you see an unusual device or anyone spraying something?
- Have you detected any unusual odors or tastes?
- Have you noticed any sick or dead animals?
- Was there any potential dispersal devices/laboratory equipment/suspicious activities?

B. Questionnaire for Investigator to Investigator (to be used in combination with each Interviewee Questionnaire)

1. *Public Health Investigator would ask Law Enforcement Personnel:*

Incident Information

- Has the interviewer heard any unusual statements—i.e., threatening statements, biological agents?
- What is the agent? Is the agent's identity suspected, presumed, or confirmed?
- What is the victim's account of what happened or how he/she might have gotten sick?
- What is the time/date of exposure? Is the time/date suspected, presumed, or confirmed?
- What is the number of victims? Is the number suspected, presumed, or confirmed?
- What, if any, is the cluster of casualties? Is the cluster suspected, presumed, or confirmed?
- What are the potential methods of exposure—e.g., ingested, inhaled, skin contact?
- Where is the exact location of the incident? Is this location suspected, presumed, or confirmed?

- Was this a single or multiple release incident? Is this suspected, presumed, or confirmed?
- What is the case distribution? What are the names, dates of birth, and addresses of the cases?
- What physical evidence should we seek?
- Did anyone witness a suspicious incident? What are their names, dates of birth, and addresses?

Safety Information

- What makes this case suspect?
- Is there any information that would indicate a suspicious event?
- Are there safety or security issues for the medical/public health personnel?

Criminal Investigation Information

- Who is the point of contact in the law enforcement community?
- To whom should we refer any potential witnesses?
- What are the chain of custody needs?

2. Law Enforcement Investigator would ask Public Health Personnel:**Medical Information**

- Is the victim's disease contagious?
- When did the victim first seek treatment for the illness?
- What are the laboratory results?
- Who collected, tested, analyzed, and had access to the samples?

Personnel Safety Information

- What precautions should criminal investigators take?
- What physical protection from the disease/agent is needed?
- Is the agent communicable by person-to-person exposure? How is the disease spread?

Epidemiological Investigation Information

- Who is the point of contact in the medical/public health community?
- Where should the sick be referred?
- What makes this case suspect?
- What is the spectrum of illness the law enforcement community could be seeing—case definition?

VII. CONCLUSION

In situations where time is the controlling factor, the shared questionnaire approach of the SBCCOM in combination with the interview process is optimal. While public health is the predominate concern, law enforcement concerns are still protected. The chain-of-custody issues must be carefully planned and should include chain-of-custody training for public health investigators.

From these reports, studies, guidances, and the City of New York and FBI agreement, the following guidelines can be summarized into a resource for the dual-purpose bioterrorism investigation:

1. Face-to-face meetings: Planning should occur prior to an event and include face-to-face meetings between law enforcement and public health personnel in local jurisdictions. An important point to recognize is that if any incident is determined to be a potential bioterrorism event, the FBI will intervene and lead the investigation. Therefore, FBI offices should ensure that their personnel make personal contacts with the public health personnel in their respective jurisdictions. Taking into account the rotation of FBI personnel to different offices, these contacts should be made on an annual basis.

2. Authorities: Agreements should be made between law enforcement personnel and public health personnel for determining authority. These agreements should include any instances where state law may be more restrictive than federal law (HIPAA) in the protection of private health information. The role of each agency should be clearly set forth in the agreement. The agreement between New York City and the FBI is an example of such a step.⁸⁴

3. Legal authorities: To guide a dual-purpose investigation, there must be advance interpretation of legal authorities including state public health law, federal laws (including HIPAA), and evidence and chain-of-custody legal issues. The advance development of a list of public health lawyers and criminal lawyers in each jurisdictional division in the state (counties, regions, etc.) who will volunteer to analyze legal issues in their specialized areas would provide a legal expertise network.

4. Questionnaire development: Questionnaires such as those developed by SBCCOM, which can be used to assist the dual pur-

⁸⁴ See generally NEW YORK CITY-FBI PROTOCOL, *supra* note 80.

poses of the bioterrorism event investigation, should be reviewed and discussed as part of the planning process. The combined form in Part VI can be used for discussion purposes.⁸⁵

5. Chain of custody: Using a common chain-of-custody form is also recommended, as well as recording names and signatures for every transfer of the evidence between persons. As soon as possible, the evidence should be transferred to the appropriate law enforcement officer, who will continue to maintain that record-keeping process.

6. Maintaining a list of interviewees: From the beginning of any incident, record the names and contact information for any individuals who may be exposed so that the analyzing laboratory can contact them for appropriate treatment.

7. Preserving evidence: The primary concern of both law enforcement and public health personnel is the immediate protection of individuals' health. Once the activities to protect individual health are underway, further attention to preserving evidence should be addressed.

8. Record depository: Both law enforcement and public health personnel should keep copies of the same records for their use throughout the investigation. The groups should agree on security procedures for those records for the periods during and after the investigation.

These recommendations address the preparation and early response phase for any potential bioterrorism event concerning information-sharing in a dual-purpose investigation. The next phase of a response to a bioterrorism event will likely move to other considerations as dictated by the particular circumstances and controlled by the Biological Incident Annex⁸⁶ and the Terrorism Incident Law Enforcement and Investigation Annex of the National Response Plan.⁸⁷ However, establishing these guidelines and the proper legal protocol for initiating the investigation will further the objective of lessening the terror which bioterrorists evoke. Predictability and the rule

⁸⁵ See *supra* Part VI.

⁸⁶ DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL RESPONSE PLAN: BIOLOGICAL INCIDENT ANNEX (2004), http://www1.va.gov/emshg/docs/national_response_plan/files/Biological.pdf (last visited Oct. 8, 2005).

⁸⁷ DEP'T OF JUST. & FBI, NATIONAL RESPONSE PLAN: TERRORISM INCIDENT LAW ENFORCEMENT AND INVESTIGATION ANNEX (2004), http://www1.va.gov/emshg/docs/national_response_plan/files/Terrorism.pdf (last visited Oct. 8, 2005).

of law established by forward planning and thoughtful analysis in advance of a bioterrorism event are essential to combating bioterrorism.