

AN ACT

relating to protecting the privacy of medical records; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 2, Health and Safety Code, is amended by adding Subtitle I to read as follows:

SUBTITLE I. MEDICAL RECORDS

CHAPTER 181. MEDICAL RECORDS PRIVACY

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 181.001. DEFINITIONS. (a) Unless otherwise defined in this chapter, each term that is used in this chapter has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards.

(b) In this chapter:

(1) "Covered entity" means any person who:

(A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site;

(B) comes into possession of protected health information;

(C) obtains or stores protected health information

under this chapter; or

(D) is an employee, agent, or contractor of a person

described by Paragraph (A), (B), or (C) insofar as the employee, agent, or contractor creates, receives, obtains, maintains, uses, or transmits protected health information.

(2) "Health care operations" has the meaning assigned by the Health Insurance Portability and Accountability Act and Privacy Standards. The term does not include marketing as described in 45 C.F.R. Section 164.514(e) and any subsequent amendments.

(3) "Health Insurance Portability and Accountability Act and Privacy Standards" means the privacy requirements of the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) and the final rules adopted on December 28, 2000, and published at 65 Fed. Reg. 82798 et seq., and any subsequent amendments.

(4) "Marketing" means the promotion or advertisement, by a covered entity, of specific products or services if the covered entity receives, directly or indirectly, a financial incentive or remuneration for the use, access, or disclosure of protected health information. Marketing does not include a communication for treatment or health care operations by a health care provider, health plan, or participants in an organized health care arrangement or their affiliated covered entities or business associates.

(5) "Protected health information" means individually identifiable health information, including demographic information collected from an individual, that:

(A) relates to:

(i) the past, present, or future physical or mental health or condition of an individual;

(ii) the provision of health care to an individual; or

(iii) the past, present, or future payment for the provision of health care to an individual; and

(B) identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Sec. 181.002. APPLICABILITY. (a) This chapter does not affect the validity of another statute of this state that provides greater confidentiality for information made confidential by this chapter.

(b) To the extent that this chapter conflicts with another law with respect to protected health information collected by a governmental body or unit, this chapter controls.

Sec. 181.003. SOVEREIGN IMMUNITY. This chapter does not waive sovereign immunity to suit or liability.

Sec. 181.004. RULES. A state agency that licenses or regulates a covered entity may adopt rules as necessary to carry out the purposes of this chapter.

[Sections 181.005-181.050 reserved for expansion]

SUBCHAPTER B. EXEMPTIONS

Sec. 181.051. PARTIAL EXEMPTION. Except for Subchapter D, this chapter does not apply to:

(1) a licensee as defined in Article 28B.01, Insurance Code;

(2) an entity established under Article 5.76-3, Insurance

Code; or

(3) an employer.

Sec. 181.052. PROCESSING PAYMENT TRANSACTIONS BY FINANCIAL INSTITUTIONS. (a) In this section, "financial institution" has the meaning

assigned by Section 1101, Right to Financial Privacy Act of 1978 (12 U.S.C. Section 3401), and its subsequent amendments.

(b) To the extent that a covered entity engages in activities of a financial institution, or authorizes, processes, clears, settles, bills, transfers, reconciles, or collects payments for a financial institution, this chapter and any rule adopted under this chapter does not apply to the covered entity with respect to those activities, including the following:

(1) using or disclosing information to authorize, process, clear, settle, bill, transfer, reconcile, or collect a payment for, or related to, health plan premiums or health care, if the payment is made by any means, including a credit, debit, or other payment card, an account, a check, or an electronic funds transfer; and

(2) requesting, using, or disclosing information with respect to a payment described by Subdivision (1):

(A) for transferring receivables;

(B) for auditing;

(C) in connection with a customer dispute or an inquiry from or to a customer;

(D) in a communication to a customer of the entity regarding the customer's transactions, payment card, account, check, or electronic funds transfer;

(E) for reporting to consumer reporting agencies; or

(F) for complying with a civil or criminal subpoena or a federal or state law regulating the covered entity.

Sec. 181.053. NONPROFIT AGENCIES. The department shall by rule exempt from this chapter a nonprofit agency that pays for health care services or prescription drugs for an indigent person only if the agency's primary business is not the provision of health care or reimbursement for health care services.

Sec. 181.054. WORKERS' COMPENSATION. This chapter does not apply to:

(1) workers' compensation insurance or a function authorized by Title 5, Labor Code; or

(2) any person or entity in connection with providing, administering, supporting, or coordinating any of the benefits under a self-insured program for workers' compensation.

Sec. 181.055. EMPLOYEE BENEFIT PLAN. This chapter does not apply to:

(1) an employee benefit plan; or

(2) any covered entity or other person, insofar as the entity or person is acting in connection with an employee benefit plan.

Sec. 181.056. AMERICAN RED CROSS. This chapter does not prohibit the American Red Cross from accessing any information necessary to perform its duties to provide disaster relief, disaster communication, or emergency leave verification services for military personnel.

Sec. 181.057. INFORMATION RELATING TO OFFENDERS WITH MENTAL IMPAIRMENTS. This chapter does not apply to an agency described by Section 614.017 with respect to the disclosure, receipt, transfer, or exchange of medical and health information and records relating to individuals in the custody of an agency or in community supervision.

Sec. 181.058. EDUCATIONAL RECORDS. In this chapter, protected health information does not include:

(1) education records covered by the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g) and its subsequent amendments; or

(2) records described by 20 U.S.C. Section 1232g(a)(4)(B)(iv) and its subsequent amendments.

[Sections 181.059-181.100 reserved for expansion]

SUBCHAPTER C. ACCESS TO AND USE OF HEALTH CARE INFORMATION

Sec. 181.101. COMPLIANCE WITH FEDERAL REGULATIONS.

A covered entity shall comply with the Health Insurance Portability and Accountability Act and Privacy Standards relating to:

(1) an individual's access to the individual's protected health information;

(2) amendment of protected health information;

(3) uses and disclosures of protected health information, including requirements relating to consent; and

(4) notice of privacy practices for protected health information.

Sec. 181.102. INFORMATION FOR RESEARCH. (a) A covered entity may disclose protected health information to a person performing health research, regardless of the source of funding of the research, for the purpose of conducting health research, only if the person performing health research has obtained:

(1) individual consent or authorization for use or disclosure of protected health information for research required by federal law;

(2) the express written authorization of the individual required by this chapter;

(3) documentation that a waiver of individual consent or authorization required for use or disclosure of protected health information has been granted by an institutional review board or privacy board as required under federal law; or

(4) documentation that a waiver of the individual's express written authorization required by this chapter has been granted by a privacy board established under this section.

(b) A privacy board:

(1) must consist of members with varying backgrounds and appropriate professional competency as necessary to review the effect of the research protocol

for the project or projects on the privacy rights and related interests of the individuals whose protected health information would be used or disclosed;

(2) must include at least one member who is not affiliated with the covered entity or an entity conducting or sponsoring the research and not related to any person who is affiliated with an entity described by this subsection; and

(3) may not have any member participating in the review of any project in which the member has a conflict of interest.

(c) A privacy board may grant a waiver of the express written authorization for the use of protected health information if the privacy board obtains the following documentation:

(1) a statement identifying the privacy board and the date on which the waiver of the express written authorization was approved by the privacy board;

(2) a statement that the privacy board has determined that the waiver satisfies the following criteria:

(A) the use or disclosure of protected health information involves no more than minimal risk to the affected individuals;

(B) the waiver will not adversely affect the privacy rights and welfare of those individuals;

(C) the research could not practicably be conducted without the waiver;

(D) the research could not practicably be conducted without access to and use of the protected health information;

(E) the privacy risks to individuals whose protected health information is to be used or disclosed are reasonable in relation to the anticipated benefits, if any, to the individuals and the importance of the knowledge that may reasonably be expected to result from the research;

(F) there is an adequate plan to protect the identifiers from improper use and disclosure;

(G) there is an adequate plan to destroy the identifiers at the earliest opportunity consistent with conduct of the research, unless there is a health or research justification for retaining the identifiers or the retention is otherwise required by law; and

(H) there are adequate written assurances that the protected health information will not be reused or disclosed to another person or entity, except:

(i) as required by law;

(ii) for authorized oversight of the research project; or

(iii) for other research for which the use or disclosure of protected health information would be permitted by state or federal law;

(3) a brief description of the protected health information for which use or access has been determined to be necessary by the privacy board under Subdivision (2)(D); and

(4) a statement that the waiver of express written authorization has been approved by the privacy board following the procedures under Subsection (e).

(d) A waiver must be signed by the presiding officer of the privacy board or the presiding officer's designee.

(e) The privacy board must review the proposed research at a convened meeting at which a majority of the privacy board members are present, including at least one member who satisfies the requirements of Subsection (b)(2). The waiver of express written authorization must be approved by the majority of the privacy board members present at the meeting, unless the privacy board elects to use an expedited review procedure. The privacy board may use an expedited review procedure only if the research involves no more than

minimal risk to the privacy of the individual who is the subject of the protected health information of which use or disclosure is being sought. If the privacy board elects to use an expedited review procedure, the review and approval of the waiver of express written authorization may be made by the presiding officer of the privacy board or by one or more members of the privacy board as designated by the presiding officer.

(f) A covered entity may disclose protected health information to a person performing health research if the covered entity obtains from the person performing the health research representations that:

(1) use or disclosure is sought solely to review protected health information as necessary to prepare a research protocol or for similar purposes preparatory to research;

(2) no protected health information is to be removed from the covered entity by the person performing the health research in the course of the review; and

(3) the protected health information for which use or access is sought is necessary for the research purposes.

(g) A person who is the subject of protected health information collected or created in the course of a clinical research trial may access the information at the conclusion of the research trial.

Sec. 181.103. DISCLOSURE OF INFORMATION TO PUBLIC HEALTH AUTHORITY. A covered entity may use or disclose protected health information without the express written authorization of the individual for public health activities or to comply with the requirements of any federal or state health benefit program or any federal or state law. A covered entity may disclose protected health information:

(1) to a public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public interventions;

(2) to a public health authority or other appropriate government authority authorized by law to receive reports of child or adult abuse, neglect, or exploitation; and

(3) to any state agency in conjunction with a federal or state health benefit program.

[Sections 181.104-181.150 reserved for expansion]

SUBCHAPTER D. PROHIBITED ACTS

Sec. 181.151. REIDENTIFIED INFORMATION. A person may not reidentify or attempt to reidentify an individual who is the subject of any protected health information without obtaining the individual's consent or authorization if required under this chapter or other state or federal law.

Sec. 181.152. MARKETING USES OF INFORMATION. (a) A covered entity may not disclose, use, or sell or coerce an individual to consent to the disclosure, use, or sale of protected health information, including prescription patterns, for marketing purposes without the consent or authorization of the individual who is the subject of the protected health information.

(b) A written marketing communication must be sent in an envelope showing only the addresses of sender and recipient and must:

(1) state the name and toll-free number of the health care entity sending the marketing communication; and

(2) explain the recipient's right to have the recipient's name removed from the sender's mailing list.

(c) A person who receives a request under Subsection (b)(2) to remove a person's name from a mailing list shall remove the person's name not later than the fifth day after the date the person receives the request.

[Sections 181.153-181.200 reserved for expansion]

SUBCHAPTER E. ENFORCEMENT

Sec. 181.201. INJUNCTIVE RELIEF; CIVIL PENALTY. (a) The attorney general may institute an action for injunctive relief to restrain a violation of this chapter.

(b) In addition to the injunctive relief provided by Subsection (a), the attorney general may institute an action for civil penalties against a covered entity for a violation of this chapter. A civil penalty assessed under this section may not exceed \$3,000 for each violation.

(c) If the court in which an action under Subsection (b) is pending finds that the violations have occurred with a frequency as to constitute a pattern or practice, the court may assess a civil penalty not to exceed \$250,000.

Sec. 181.202. DISCIPLINARY ACTION. In addition to the penalties prescribed by this chapter, a violation of this chapter by an individual or facility that is licensed by an agency of this state is subject to investigation and disciplinary proceedings, including probation or suspension by the licensing agency. If there is evidence that the violations of this chapter constitute a pattern or practice, the agency may revoke the individual's or facility's license.

Sec. 181.203. EXCLUSION FROM STATE PROGRAMS. In addition to the penalties prescribed by this chapter, a covered entity shall be excluded from participating in any state-funded health care program if a court finds the covered entity engaged in a pattern or practice of violating this chapter.

Sec. 181.204. AVAILABILITY OF OTHER REMEDIES. This chapter does not affect any right of a person under other law to bring a cause of action or otherwise seek relief with respect to conduct that is a violation of this chapter.

SECTION 2. Title 1, Insurance Code, is amended by adding Chapter 28B to read as follows:

CHAPTER 28B. PRIVACY OF HEALTH INFORMATION

SUBCHAPTER A. GENERAL PROVISIONS

Art. 28B.01. DEFINITIONS. In this chapter:

(1) "Health information" means any information or data regarding an individual, other than age or gender, whether oral or recorded in any form or medium, that is created by or derived from a health care provider or the individual and that relates to:

(A) the past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) the provision of health care to an individual; or

(C) payment for the provision of health care to an individual.

(2) "Licensee" means a person who holds or is required to hold a license, registration, certificate of authority, or other authority under this code or another insurance law of this state. The term includes an insurance company, group hospital service corporation, mutual insurance company, local mutual aid association, statewide mutual assessment company, stipulated premium insurance company, health maintenance organization, reciprocal or interinsurance exchange, Lloyd's plan, fraternal benefit society, county mutual insurer, farm mutual insurer, or insurance agent.

(3) "Nonpublic personal health information" means health information:

(A) that identifies an individual who is the subject of the information; or

(B) with respect to which there is a reasonable basis to believe that the information could be used to identify an individual.

Art. 28B.02. PERSONALLY IDENTIFIABLE HEALTH INFORMATION: PRIVACY NOTICE AND DISCLOSURE AUTHORIZATION. (a) A licensee must obtain an authorization to disclose any nonpublic personal health information before making such a disclosure.

(b) The request for authorization required by this article may be in written or electronic form and must:

(1) state the identity of the consumer or customer who is the subject of the nonpublic personal health information;

(2) describe:

(A) the types of nonpublic personal health information to be disclosed;

(B) the parties to whom the licensee discloses nonpublic personal health information;

(C) the purpose of the disclosure;

(D) how the information will be used; and

(E) the procedure for revoking the authorization;

(3) include the signature and date signed of:

(A) the consumer or customer who is the subject of the nonpublic personal health information; or

(B) the individual who is legally empowered to grant authority;

(4) provide notice:

(A) of the length of time for which the authorization is valid; and

(B) that the consumer or customer may revoke the authorization at any time; and

(5) specify the amount of time that the authorization remains valid, which may not exceed 24 months.

(c) The right of a consumer or customer to revoke an authorization at any time is subject to the rights of an individual who acted in reliance on the authorization before receiving notice of a revocation.

(d) The licensee shall retain the original or a copy of the authorization in the record of the individual who is the subject of the nonpublic personal health information.

Art. 28B.03. DELIVERY OF AUTHORIZATION. (a) A request for authorization and an authorization form may be delivered to a consumer or a customer if the request and the authorization form are clear and conspicuous.

(b) A licensee must include delivery of the authorization in a notice to the consumer or customer only if the licensee intends to disclose protected health information under this chapter.

Art. 28B.04. EXCEPTIONS. A licensee may disclose nonpublic personal health information to the extent that the disclosure is necessary to perform the following insurance functions on behalf of that licensee:

(1) the investigation or reporting of actual or potential fraud, misrepresentation, or criminal activity;

(2) underwriting;

(3) the placement or issuance of an insurance policy;

(4) loss control services;

(5) ratemaking and guaranty fund functions;

(6) reinsurance and excess loss insurance;

(7) risk management;

(8) case management;

(9) disease management;

(10) quality assurance;

(11) quality improvement;

(12) performance evaluation;

(13) health care provider credentialing verification;

(14) utilization review;

(15) peer review activities;

(16) actuarial, scientific, medical, or public policy research;

(17) grievance procedures;

(18) the internal administration of compliance, managerial, and information systems;

(19) policyholder services;

(20) auditing;

(21) reporting;

(22) database security;

(23) the administration of consumer disputes and inquiries;

(24) external accreditation standards;

(25) the replacement of a group benefit plan or workers' compensation policy or program;

(26) activities in connection with a sale, merger, transfer, or exchange of all or part of a business or operating unit;

(27) any activity that permits disclosure without authorization under the federal Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. Section 1320d et seq.), as amended;

(28) disclosure that is required, or is a lawful or appropriate method to enforce the licensee's rights or the rights of other persons engaged, in carrying out a transaction or providing a product or service that the consumer requests or authorizes;

(29) claims administration, adjustment, and management;

(30) any activity otherwise permitted by law, required pursuant to a governmental reporting authority, or required to comply with legal process; and

(31) any other insurance functions that the commissioner approves that are:

(A) necessary for appropriate performance of insurance functions; and

(B) fair and reasonable to the interests of consumers.

Art. 28B.05. EXCEPTION FOR COMPLIANCE WITH FEDERAL RULES. This subchapter does not apply to a licensee who is required to comply with the standards governing the privacy of individually identifiable health information adopted by the United States Secretary of Health and Human Services under Section 262(a), Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. Sections 1320d-1320d-8).

Art. 28B.06. PROTECTION OF FAIR CREDIT REPORTING ACTS. (a) This chapter may not be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act (15 U.S.C. Section 1681 et seq.) and an inference may not be drawn based on this chapter regarding whether information is transaction or experience information under Section 603 of that Act (15 U.S.C. Section 1681a).

(b) This chapter does not preempt or supersede a state law related to medical record, health, or insurance information privacy that is in effect on July 1, 2002.

Art. 28B.07. VIOLATION; PENALTIES. A licensee may not knowingly or wilfully violate this chapter.

Art. 28B.08. RULES. The commissioner may adopt rules as necessary to implement this chapter.

Art. 28B.09. INJUNCTIVE RELIEF; CIVIL PENALTY. (a) The attorney general may institute an action for injunctive relief to restrain a violation of this chapter.

(b) In addition to the injunctive relief provided by Subsection (a), the attorney general may institute an action for civil penalties against a covered entity or health care entity for a violation of this chapter. A civil penalty assessed under this section may not be less than \$3,000 for each violation.

(c) If the court in which an action under Subsection (b) is pending finds that the violations have occurred with a frequency as to constitute a pattern or practice, the court may assess a civil penalty not to exceed \$250,000.

(d) The civil penalty authorized by this article is in addition to any other civil, administrative, or criminal action provided by law.

Art. 28B.10. DISCIPLINARY ACTION. In addition to the penalties prescribed by this chapter, a violation of this chapter by a licensee is subject to investigation and disciplinary proceedings, including probation or suspension. Evidence of a pattern or practice of violations under this chapter may subject the licensee to license revocation.

Art. 28B.11. EXCLUSION FROM STATE PROGRAMS. In addition to the penalties prescribed by this chapter, a licensee shall be excluded from participating in any state-funded health care program if there is evidence that the licensee engaged in a pattern or practice of violating this chapter.

Art. 28B.12. AVAILABILITY OF OTHER REMEDIES. This chapter does not affect any right of a person under other law to bring a cause of action or otherwise seek relief with respect to conduct that is a violation of this chapter.

SECTION 3. Section 161.032, Health and Safety Code, is amended to read as follows:

Sec. 161.032. RECORDS AND PROCEEDINGS CONFIDENTIAL.

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

(b) Notwithstanding Section 551.002, Government Code, the following proceedings may be held in a closed meeting following the procedures prescribed by Subchapter E, Chapter 551, Government Code:

(1) a [A] proceeding of a medical peer review committee, as defined by Section 151.002, Occupations Code [4.03, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes)], or medical committee; or

(2) a meeting of the governing body of a public hospital, hospital district, [or] hospital authority, or health maintenance organization of a public hospital, hospital authority, hospital district, or state-owned teaching hospital at which the governing body

receives records, information, or reports provided by a medical committee, ~~[or]~~ medical peer review committee, or compliance officer ~~[is not subject to Chapter 551, Government Code]~~.

(c) Records, information, or reports of a medical committee, ~~[or]~~ medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, ~~[or]~~ medical peer review committee, or compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.

(d) ~~(b)~~ The records and proceedings may be used by the committee and the committee members only in the exercise of proper committee functions.

(e) The records, information, and reports received or maintained by a compliance officer retain the protection provided by this section only if the records, information, or reports are received, created, or maintained in the exercise of a proper function of the compliance officer as provided by the Office of Inspector General of the United States Department of Health and Human Services.

(f) ~~(e)~~ This section and Subchapter A, Chapter 160, Occupations Code ~~[Section 5.06, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes)]~~, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

SECTION 4. The heading to Subchapter D, Chapter 161, Health and Safety Code, is amended to read as follows:

SUBCHAPTER D. MEDICAL COMMITTEES, ~~AND~~ MEDICAL
PEER REVIEW COMMITTEES, AND COMPLIANCE OFFICERS

SECTION 5. (a) Except as provided by Subsection (c), this Act takes effect September 1, 2001.

(b) A covered entity shall comply with the requirements of Chapter 181, Health and Safety Code, as added by this Act, not later than September 1, 2003.

(c) Chapter 28B, Insurance Code, as added by this Act, takes effect January 1, 2002.

(d) The commissioner of insurance may delay the date for compliance with Chapter 28B, Insurance Code, as added by this Act, if the commissioner determines that an entity needs more time to establish policies and systems to comply with the requirements of that chapter.

(e) An authorization or consent granting access to an individual's health care records executed before the effective date of this Act is governed by the law in effect when the authorization or consent was executed, and the former law continues in effect for that purpose.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 11 passed the Senate on March 21, 2001, by a viva-voce vote; May 25, 2001, Senate refused to concur in House amendments and requested appointment of Conference Committee; May 25, 2001, House granted request of the Senate; May 27, 2001, Senate adopted Conference Committee Report by a viva-voce vote.

Secretary of the Senate

I hereby certify that S.B. No. 11 passed the House, with amendments, on May 23, 2001, by a non-record vote; May 25, 2001, House granted request of the Senate for appointment of Conference Committee; May 27, 2001, House adopted Conference Committee Report by a non-record vote.

S.B. No. 11

Chief Clerk of the House

Approved:

Date

Governor