

By: Nelson

S.B. No. 1136

A BILL TO BE ENTITLED

AN ACT

relating to access to certain private medical information.

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

SECTION 1. The Legislature of the State of Texas finds that:

(1) the privacy requirements of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) and the privacy rules implementing these requirements contained in 45 C.F.R. Parts 160 and 164 give individuals important controls over whether and how their protected health information is used and disclosed for marketing purposes;

(2) with limited exceptions, the federal privacy standards, as modified on August 14, 2002, require a health care provider, health plan, or health care clearinghouse to obtain an individual's written authorization before a use or disclosure of the individual's protected health information can be made for marketing;

(3) so as not to interfere with core health care functions, the federal privacy standards and guidance documents from the United States Department of Health and Human Services, Office for Civil Rights, distinguish marketing communications from certain treatment or health care operation activities;

(4) importing the marketing provisions under the federal standards and guidance into state law will help clarify the application of, and compliance with, state provisions that are

1 consistent with the federal privacy standards regarding marketing
2 communications;

3 (5) covered entities should be able to rely on the
4 federal guidance interpreting the marketing provisions under state
5 law that are consistent with the federal privacy standards without
6 sacrificing protection against improper use of protected health
7 information for marketing purposes; and

8 (6) this Act is necessary to safeguard uses and
9 disclosures of protected health information for marketing purposes
10 in this state consistent with the federal privacy standards and
11 federal guidance, to extend application of the federal privacy
12 standards regarding marketing communications to anyone that comes
13 into possession of protected health information, and to impose
14 stricter standards related to certain product-specific
15 communications that encourage a change in prescription drugs or
16 prescription medical devices.

17 SECTION 2. Subsection (b), Section 181.001, Health and
18 Safety Code, is amended to read as follows:

19 (b) In this chapter:

20 (1) "Commissioner" means the commissioner of health
21 and human services.

22 (2) "Covered entity" means any person who:

23 (A) for commercial, financial, or professional
24 gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro
25 bono basis, engages, in whole or in part, and with real or
26 constructive knowledge, in the practice of assembling, collecting,
27 analyzing, using, evaluating, storing, or transmitting protected

1 health information. The term includes a business associate, health
2 care payer, governmental unit, information or computer management
3 entity, school, health researcher, health care facility, clinic,
4 health care provider, or person who maintains an Internet site;

5 (B) comes into possession of protected health
6 information;

7 (C) obtains or stores protected health
8 information under this chapter; or

9 (D) is an employee, agent, or contractor of a
10 person described by Paragraph (A), (B), or (C) insofar as the
11 employee, agent, or contractor creates, receives, obtains,
12 maintains, uses, or transmits protected health information.

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

18 (3) "Health Insurance Portability and Accountability
19 Act and Privacy Standards" means the privacy requirements in
20 existence on August 14, 2002, of the Administrative Simplification
21 subtitle of the Health Insurance Portability and Accountability Act
22 of 1996 (Pub. L. No. 104-191) contained in 45 C.F.R. Part 160 and 45
23 C.F.R. Part 164, Subparts A and E ~~[and the final rules adopted on~~
24 ~~December 28, 2000, and published at 65 Fed. Reg. 82798 et seq., and~~
25 ~~any subsequent amendments]~~.

26 (4) "Marketing" means:

27 (A) making a communication about a product or

1 service that encourages a recipient of the communication to
2 purchase or use the product or service, unless the communication is
3 made:

4 (i) to describe a health-related product or
5 service or the payment for a health-related product or service that
6 is provided by, or included in a plan of benefits of, the covered
7 entity making the communication, including communications about:

8 (a) the entities participating in a
9 health care provider network or health plan network;

10 (b) replacement of, or enhancement
11 to, a health plan; or

12 (c) health-related products or
13 services available only to a health plan enrollee that add value to,
14 but are not part of, a plan of benefits;

15 (ii) for treatment of the individual;

16 (iii) for case management or care
17 coordination for the individual, or to direct or recommend
18 alternative treatments, therapies, health care providers, or
19 settings of care to the individual; or

20 (iv) by a covered entity to an individual
21 that encourages a change to a prescription drug included in the
22 covered entity's drug formulary or preferred drug list;

23 (B) an arrangement between a covered entity and
24 any other entity under which the covered entity discloses protected
25 health information to the other entity, in exchange for direct or
26 indirect remuneration, for the other entity or its affiliate to
27 make a communication about its own product or service that

1 encourages recipients of the communication to purchase or use that
2 product or service; and

3 (C) notwithstanding Paragraphs (A)(ii) and
4 (iii), a product-specific written communication to a consumer that
5 encourages a change in products [~~the promotion or advertisement, by~~
6 ~~a covered entity, of specific products or services if the covered~~
7 ~~entity receives, directly or indirectly, a financial incentive or~~
8 ~~remuneration for the use, access, or disclosure of protected health~~
9 ~~information. Marketing does not include a communication for~~
10 ~~treatment or health care operations by a health care provider,~~
11 ~~health plan, or participants in an organized health care~~
12 ~~arrangement or their affiliated covered entities or business~~
13 ~~associates].~~

14 (5) "Product" means a prescription drug or
15 prescription medical device [~~"Protected health information" means~~
16 ~~individually identifiable health information, including~~
17 ~~demographic information collected from an individual, that:~~

18 [~~(A) relates to:~~

19 [~~(i) the past, present, or future physical~~
20 ~~or mental health or condition of an individual,~~

21 [~~(ii) the provision of health care to an~~
22 ~~individual, or~~

23 [~~(iii) the past, present, or future payment~~
24 ~~for the provision of health care to an individual, and~~

25 [~~(B) identifies the individual or with respect to~~
26 ~~which there is a reasonable basis to believe the information can be~~
27 ~~used to identify the individual].~~

1 SECTION 3. Subsection (a), Section 181.002, Health and
2 Safety Code, is amended to read as follows:

3 (a) Except as provided by Section 181.205, this [~~This~~]
4 chapter does not affect the validity of another statute of this
5 state that provides greater confidentiality for information made
6 confidential by this chapter.

7 SECTION 4. Subchapter A, Chapter 181, Health and Safety
8 Code, is amended by adding Section 181.005 to read as follows:

9 Sec. 181.005. DUTIES OF THE COMMISSIONER. (a) The
10 commissioner shall administer this chapter and may adopt rules
11 consistent with the Health Insurance Portability and
12 Accountability Act and Privacy Standards to administer this
13 chapter.

14 (b) The commissioner shall review amendments to the
15 definitions in 45 C.F.R. Parts 160 and 164 that occur after August
16 14, 2002, and determine whether it is in the best interest of the
17 state to adopt the amended federal regulations. If the
18 commissioner determines that it is in the best interest of the state
19 to adopt the amended federal regulations, the amended regulations
20 shall apply as required by this chapter.

21 (c) In making a determination under this section, the
22 commissioner must consider, in addition to other factors affecting
23 the public interest, the beneficial and adverse effects the
24 amendments would have on:

25 (1) the lives of individuals in this state and their
26 expectations of privacy; and

27 (2) governmental entities, institutions of higher

1 education, state-owned teaching hospitals, private businesses, and
2 commerce in this state.

3 (d) The commissioner shall prepare a report of the
4 commissioner's determination made under this section and shall file
5 the report with the presiding officer of each house of the
6 legislature before the 30th day after the date the determination is
7 made. The report must include an explanation of the reasons for the
8 determination.

9 SECTION 5. Section 181.056, Health and Safety Code, is
10 amended to read as follows:

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

16 SECTION 6. Section 181.152, Health and Safety Code, is
17 amended to read as follows:

18 Sec. 181.152. MARKETING USES OF INFORMATION. (a) A
19 covered entity must obtain clear and unambiguous permission in
20 written or electronic form to use or disclose protected health
21 information for any marketing communication, except if the
22 communication is:

23 (1) in the form of a face-to-face communication made
24 by a covered entity to an individual;

25 (2) in the form of a promotional gift of nominal value
26 provided by the covered entity;

27 (3) necessary for administration of a patient

1 assistance program or other prescription drug savings or discount
2 program; or

3 (4) made at the oral request of the individual ~~[may not~~
4 ~~disclose, use, or sell or coerce an individual to consent to the~~
5 ~~disclosure, use, or sale of protected health information, including~~
6 ~~prescription patterns, for marketing purposes without the consent~~
7 ~~or authorization of the individual who is the subject of the~~
8 ~~protected health information]~~.

9 (b) If a covered entity uses or discloses protected health
10 information to send a [A] written marketing communication through
11 the mail, the communication must be sent in an envelope showing only
12 the names and addresses of sender and recipient and must:

13 (1) state the name and toll-free number of the ~~[health~~
14 ~~care]~~ entity sending the marketing communication; and

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

17 (c) A person who receives a request under Subsection (b)(2)
18 to remove a person's name from a mailing list shall remove the
19 person's name not later than the 45th ~~[fifth]~~ day after the date the
20 person receives the request.

21 (d) A marketing communication made at the oral request of
22 the individual under Subsection (a)(4) may be made only if clear and
23 unambiguous oral permission for the use or disclosure of the
24 protected health information is obtained. The marketing
25 communication must be limited to the scope of the oral permission
26 and any further marketing communication must comply with the
27 requirements of this section.

1 SECTION 7. Subchapter E, Chapter 181, Health and Safety
2 Code, is amended by adding Section 181.205 to read as follows:

3 Sec. 181.205. MITIGATION. (a) In an action or proceeding
4 to impose an administrative penalty or assess a civil penalty for
5 actions related to the disclosure of individually identifiable
6 health information, a covered entity may introduce, as mitigating
7 evidence, evidence of the entity's good faith efforts to comply
8 with:

9 (1) state law related to the privacy of individually
10 identifiable health information; or

11 (2) the Health Insurance Portability and
12 Accountability Act and Privacy Standards.

13 (b) On receipt of evidence under Subsection (a), a court or
14 state agency shall consider the evidence and mitigate imposition of
15 an administrative penalty or assessment of a civil penalty
16 accordingly.

17 SECTION 8. Chapter 181, Health and Safety Code, is amended
18 by adding Subchapter F to read as follows:

19 SUBCHAPTER F. PREEMPTION OF STATE LAW

20 Sec. 181.251. STATE LAW PREEMPTION ANALYSIS. The office of
21 the attorney general shall perform an analysis of state law to
22 determine which provisions of state law related to the privacy of
23 individually identifiable health information are preempted by the
24 Health Insurance Portability and Accountability Act and Privacy
25 Standards.

26 Sec. 181.252. TASK FORCE. (a) The office of the attorney
27 general may establish a task force to assist and advise the attorney

1 general in performing the state law preemption analysis.

2 (b) The attorney general shall adopt a plan of operation for
3 the task force. The plan must include qualifications for the
4 members of the task force.

5 (c) The attorney general may appoint as many members to the
6 task force as the attorney general determines are necessary. In
7 making appointments to the task force the attorney general shall
8 consider any appropriate factor, including a person's expertise. A
9 task force must include:

10 (1) a public member;

11 (2) a member from the Texas State Board of Medical
12 Examiners;

13 (3) a member employed by a hospital licensed in this
14 state; and

15 (4) a member employed by a pharmaceutical
16 manufacturer.

17 (d) Two or more members of the task force may not be
18 employees or officers of the same company or organization.

19 (e) A person may not be a public member of the task force if
20 the person is:

21 (1) required to register as a lobbyist under Chapter
22 305, Government Code; or

23 (2) related to a person required to register as a
24 lobbyist under Chapter 305, Government Code, within the second
25 degree of affinity or consanguinity.

26 (f) Members of the task force may not receive compensation
27 from the state for service on the task force.

1 Sec. 181.253. REPORT TO LEGISLATURE. (a) Not later than
2 November 1, 2004, the attorney general shall file a report with the
3 presiding officer of each house of the legislature that identifies
4 the laws the attorney general believes are preempted by the Health
5 Insurance Portability and Accountability Act and Privacy
6 Standards.

7 (b) The report must contain the attorney general's
8 recommendations for legislation to make the state laws consistent
9 with the Health Insurance Portability and Accountability Act and
10 Privacy Standards.

11 Sec. 181.254. EXPIRATION. This subchapter expires
12 September 1, 2005.

13 SECTION 9. Sections 181.004 and 181.204 and Subchapter C,
14 Chapter 181, Health and Safety Code, are repealed.

15 SECTION 10. (a) Except as provided by Subsection (b) of
16 this section, this Act takes effect September 1, 2003.

17 (b) The changes in law made by this Act to Subdivision (4),
18 Subsection (b), Section 181.001, and Section 181.152, Health and
19 Safety Code, take effect January 1, 2004.