

1-1 By: Nelson S.B. No. 1136
1-2 (In the Senate - Filed March 11, 2003; March 17, 2003, read
1-3 first time and referred to Committee on Health and Human Services;
1-4 April 22, 2003, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 7, Nays 0; April 22, 2003,
1-6 sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 1136 By: Nelson

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to access to certain private medical information.
1-11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
1-12 SECTION 1. The Legislature of the State of Texas finds that:
1-13 (1) the privacy requirements of the Health Insurance
1-14 Portability and Accountability Act of 1996 (Pub. L. No. 104-191)
1-15 and the privacy rules implementing these requirements contained in
1-16 45 C.F.R. Parts 160 and 164 give individuals important controls
1-17 over whether and how their protected health information is used and
1-18 disclosed for marketing purposes;
1-19 (2) with limited exceptions, the federal privacy
1-20 standards, as modified on August 14, 2002, require a health care
1-21 provider, health plan, or health care clearinghouse to obtain an
1-22 individual's written authorization before a use or disclosure of
1-23 the individual's protected health information can be made for
1-24 marketing;
1-25 (3) so as not to interfere with core health care
1-26 functions, the federal privacy standards and guidance documents
1-27 from the United States Department of Health and Human Services,
1-28 Office for Civil Rights, distinguish marketing communications from
1-29 certain treatment or health care operation activities;
1-30 (4) importing the marketing provisions under the
1-31 federal standards and guidance into state law will help clarify the
1-32 application of, and compliance with, state provisions that are
1-33 consistent with the federal privacy standards regarding marketing
1-34 communications;
1-35 (5) covered entities should be able to rely on the
1-36 federal guidance interpreting the marketing provisions under state
1-37 law that are consistent with the federal privacy standards without
1-38 sacrificing protection against improper use of protected health
1-39 information for marketing purposes; and
1-40 (6) this Act is necessary to safeguard uses and
1-41 disclosures of protected health information for marketing purposes
1-42 in this state consistent with the federal privacy standards and
1-43 federal guidance, to extend application of the federal privacy
1-44 standards regarding marketing communications to anyone that comes
1-45 into possession of protected health information, and to impose
1-46 stricter standards related to certain product-specific
1-47 communications that encourage a change in prescription drugs or
1-48 prescription medical devices.
1-49 SECTION 2. Subsection (b), Section 181.001, Health and
1-50 Safety Code, is amended to read as follows:
1-51 (b) In this chapter:
1-52 (1) "Commissioner" means the commissioner of health
1-53 and human services.
1-54 (2) "Covered entity" means any person who:
1-55 (A) for commercial, financial, or professional
1-56 gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro
1-57 bono basis, engages, in whole or in part, and with real or
1-58 constructive knowledge, in the practice of assembling, collecting,
1-59 analyzing, using, evaluating, storing, or transmitting protected
1-60 health information. The term includes a business associate, health
1-61 care payer, governmental unit, information or computer management
1-62 entity, school, health researcher, health care facility, clinic,
1-63 health care provider, or person who maintains an Internet site;

2-1 (B) comes into possession of protected health
2-2 information;

2-3 (C) obtains or stores protected health
2-4 information under this chapter; or

2-5 (D) is an employee, agent, or contractor of a
2-6 person described by Paragraph (A), (B), or (C) insofar as the
2-7 employee, agent, or contractor creates, receives, obtains,
2-8 maintains, uses, or transmits protected health information.

2-9 ~~[(2) "Health care operations" has the meaning assigned
2-10 by the Health Insurance Portability and Accountability Act and
2-11 Privacy Standards. The term does not include marketing as
2-12 described in 45 C.F.R. Section 164.514(e) and any subsequent
2-13 amendments.]~~

2-14 (3) "Health Insurance Portability and Accountability
2-15 Act and Privacy Standards" means the privacy requirements in
2-16 existence on August 14, 2002, of the Administrative Simplification
2-17 subtitle of the Health Insurance Portability and Accountability Act
2-18 of 1996 (Pub. L. No. 104-191) contained in 45 C.F.R. Part 160 and 45
2-19 C.F.R. Part 164, Subparts A and E [and the final rules adopted on
2-20 December 28, 2000, and published at 65 Fed. Reg. 82798 et seq., and
2-21 any subsequent amendments].

2-22 (4) "Marketing" means:

2-23 (A) making a communication about a product or
2-24 service that encourages a recipient of the communication to
2-25 purchase or use the product or service, unless the communication is
2-26 made:

2-27 (i) to describe a health-related product or
2-28 service or the payment for a health-related product or service that
2-29 is provided by, or included in a plan of benefits of, the covered
2-30 entity making the communication, including communications about:

2-31 (a) the entities participating in a
2-32 health care provider network or health plan network;

2-33 (b) replacement of, or enhancement
2-34 to, a health plan; or

2-35 (c) health-related products or
2-36 services available only to a health plan enrollee that add value to,
2-37 but are not part of, a plan of benefits;

2-38 (ii) for treatment of the individual;

2-39 (iii) for case management or care
2-40 coordination for the individual, or to direct or recommend
2-41 alternative treatments, therapies, health care providers, or
2-42 settings of care to the individual; or

2-43 (iv) by a covered entity to an individual
2-44 that encourages a change to a prescription drug included in the
2-45 covered entity's drug formulary or preferred drug list;

2-46 (B) an arrangement between a covered entity and
2-47 any other entity under which the covered entity discloses protected
2-48 health information to the other entity, in exchange for direct or
2-49 indirect remuneration, for the other entity or its affiliate to
2-50 make a communication about its own product or service that
2-51 encourages recipients of the communication to purchase or use that
2-52 product or service; and

2-53 (C) notwithstanding Paragraphs (A)(ii) and
2-54 (iii), a product-specific written communication to a consumer that
2-55 encourages a change in products [the promotion or advertisement, by
2-56 a covered entity, of specific products or services if the covered
2-57 entity receives, directly or indirectly, a financial incentive or
2-58 remuneration for the use, access, or disclosure of protected health
2-59 information. Marketing does not include a communication for
2-60 treatment or health care operations by a health care provider,
2-61 health plan, or participants in an organized health care
2-62 arrangement or their affiliated covered entities or business
2-63 associates].

2-64 (5) "Product" means a prescription drug or
2-65 prescription medical device ["Protected health information" means
2-66 individually identifiable health information, including
2-67 demographic information collected from an individual, that:

2-68 [(A) relates to:

2-69 [(i) the past, present, or future physical

3-1 ~~or mental health or condition of an individual;~~
 3-2 ~~[(ii) the provision of health care to an~~
 3-3 ~~individual; or~~
 3-4 ~~[(iii) the past, present, or future payment~~
 3-5 ~~for the provision of health care to an individual; and~~
 3-6 ~~[(B) identifies the individual or with respect to~~
 3-7 ~~which there is a reasonable basis to believe the information can be~~
 3-8 ~~used to identify the individual].~~

3-9 SECTION 3. Subsection (a), Section 181.002, Health and
 3-10 Safety Code, is amended to read as follows:

3-11 (a) Except as provided by Section 181.205, this [This]
 3-12 chapter does not affect the validity of another statute of this
 3-13 state that provides greater confidentiality for information made
 3-14 confidential by this chapter.

3-15 SECTION 4. Subchapter A, Chapter 181, Health and Safety
 3-16 Code, is amended by adding Section 181.005 to read as follows:

3-17 Sec. 181.005. DUTIES OF THE COMMISSIONER. (a) The
 3-18 commissioner shall administer this chapter and may adopt rules
 3-19 consistent with the Health Insurance Portability and
 3-20 Accountability Act and Privacy Standards to administer this
 3-21 chapter.

3-22 (b) The commissioner shall review amendments to the
 3-23 definitions in 45 C.F.R. Parts 160 and 164 that occur after August
 3-24 14, 2002, and determine whether it is in the best interest of the
 3-25 state to adopt the amended federal regulations. If the
 3-26 commissioner determines that it is in the best interest of the state
 3-27 to adopt the amended federal regulations, the amended regulations
 3-28 shall apply as required by this chapter.

3-29 (c) In making a determination under this section, the
 3-30 commissioner must consider, in addition to other factors affecting
 3-31 the public interest, the beneficial and adverse effects the
 3-32 amendments would have on:

3-33 (1) the lives of individuals in this state and their
 3-34 expectations of privacy; and

3-35 (2) governmental entities, institutions of higher
 3-36 education, state-owned teaching hospitals, private businesses, and
 3-37 commerce in this state.

3-38 (d) The commissioner shall prepare a report of the
 3-39 commissioner's determination made under this section and shall file
 3-40 the report with the presiding officer of each house of the
 3-41 legislature before the 30th day after the date the determination is
 3-42 made. The report must include an explanation of the reasons for the
 3-43 determination.

3-44 SECTION 5. Section 181.056, Health and Safety Code, is
 3-45 amended to read as follows:

3-46 Sec. 181.056. AMERICAN RED CROSS. This chapter does not
 3-47 prohibit the American Red Cross from accessing any information
 3-48 necessary to perform its duties to provide biomedical services,
 3-49 disaster relief, disaster communication, or emergency leave
 3-50 verification services for military personnel.

3-51 SECTION 6. Section 181.152, Health and Safety Code, is
 3-52 amended to read as follows:

3-53 Sec. 181.152. MARKETING USES OF INFORMATION. (a) A
 3-54 covered entity must obtain clear and unambiguous permission in
 3-55 written or electronic form to use or disclose protected health
 3-56 information for any marketing communication, except if the
 3-57 communication is:

3-58 (1) in the form of a face-to-face communication made
 3-59 by a covered entity to an individual;

3-60 (2) in the form of a promotional gift of nominal value
 3-61 provided by the covered entity;

3-62 (3) necessary for administration of a patient
 3-63 assistance program or other prescription drug savings or discount
 3-64 program; or

3-65 (4) made at the oral request of the individual ~~[may not~~
 3-66 disclose, use, or sell or coerce an individual to consent to the
 3-67 disclosure, use, or sale of protected health information, including
 3-68 prescription patterns, for marketing purposes without the consent
 3-69 or authorization of the individual who is the subject of the

protected health information].

(b) If a covered entity uses or discloses protected health information to send a [A] written marketing communication through the mail, the communication must be sent in an envelope showing only the names and 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 45th [~~fifth~~] day after the date the person receives the request.

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

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

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

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

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

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

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

SUBCHAPTER F. PREEMPTION OF STATE LAW

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

Sec. 181.252. TASK FORCE. (a) The office of the attorney general may establish a task force to assist and advise the attorney general in performing the state law preemption analysis.

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

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

(1) a public member;

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

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

(4) a member employed by a pharmaceutical manufacturer.

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

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

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

5-1 (2) related to a person required to register as a
5-2 lobbyist under Chapter 305, Government Code, within the second
5-3 degree of affinity or consanguinity.

5-4 (f) Members of the task force may not receive compensation
5-5 from the state for service on the task force.

5-6 Sec. 181.253. REPORT TO LEGISLATURE. (a) Not later than
5-7 November 1, 2004, the attorney general shall file a report with the
5-8 presiding officer of each house of the legislature that identifies
5-9 the laws the attorney general believes are preempted by the Health
5-10 Insurance Portability and Accountability Act and Privacy
5-11 Standards.

5-12 (b) The report must contain the attorney general's
5-13 recommendations for legislation to make the state laws consistent
5-14 with the Health Insurance Portability and Accountability Act and
5-15 Privacy Standards.

5-16 Sec. 181.254. EXPIRATION. This subchapter expires
5-17 September 1, 2005.

5-18 SECTION 9. Sections 181.004 and 181.204 and Subchapter C,
5-19 Chapter 181, Health and Safety Code, are repealed.

5-20 SECTION 10. (a) Except as provided by Subsection (b) of
5-21 this section, this Act takes effect September 1, 2003.

5-22 (b) The changes in law made by this Act to Subdivision (4),
5-23 Subsection (b), Section 181.001, and Section 181.152, Health and
5-24 Safety Code, take effect January 1, 2004.

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