

**The Report of the  
Medical Privacy Task Force  
To  
The State of Hawaii 2001 Legislature**



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  - Dr. George Bussey, Medical Director, Queen's Health Management, Chair of Insurance Workgroup;
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  - Gerald Okamoto, Director of Human Resources, Verizon Hawaii, Chair of Employment Workgroup;
  - Stacy Evensen, Assistant Vice President, Hawaii Medical Service Association, Chair of Education Workgroup;
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- 
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Compiled by the Office of Information Practices.

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## **I. Introduction**

The Medical Privacy Task Force has prepared this report pursuant to Act 140 of the 2000 Regular Session. This report sets forth the history of privacy of health care legislation in Hawaii, a chronology of the creation of the Medical Privacy Task Force, the work done by the Medical Privacy Task Force, and draft legislation.

Chapter 323C, Hawaii Revised Statutes, creates a comprehensive statutory scheme to protect health care information. Certain conditions must be met in order to access medical records. To educate how protected health information is used, the law requires that certain entities give notice to consumers about those uses and about their rights. When there are violations, the law also provides for sanctions and civil remedies. In short, this law gives control of medical record information to the individual.

After reviewing community concerns, the Medical Privacy Task Force offers the proposed legislation found at Appendix 3 of this report during the 2001 Legislative Session. It is the opinion of the Medical Privacy Task Force that this draft legislation deals with most of the concerns raised by individuals, the health care industry, insurance industry, employers, employees, unions, and educators. The recommended legislation also clarifies areas of chapter 323C, Hawaii Revised Statutes.

The Task Force expected that the federal rules required to be adopted under HIPAA would be released while the Task Force was still meeting to discuss issues under chapter 323C, Hawaii Revised Statutes. These rules were not released until December 20, 2000, after the Task Force's final meeting. As a result, the Task Force was not able to consider the HIPAA rules when it made its recommendations and created the draft legislation at Appendix 3 of this report. The Task Force is contemplating meeting once more in January 2001, and may consider the HIPAA rules at that time.

## **II. Privacy of Health Care Information**

### **A. History of the Law**

Every year from 1994 to 1998, the administration introduced bills to protect the privacy of health information. The administration recognized that, as technology changed and paper records were converted to electronic records, it was important to ensure that appropriate informational policies were in place to protect medical privacy. If the health care industry did not put into place appropriate informational policies, the industry ran the risk that patient trust in the system would diminish and the quality of health care would suffer.

In each of those years however, various members of the health care industry testified in opposition to the proposed bills. Finally, at the request of a member of the Senate, in 1998, representatives from the private sector and government formed the Patient Records Confidentiality Task Force (“PRCTF”), and asked the Office of Information Practices (“OIP”) to facilitate the group. The mission of the PRCTF was to draft legislation designed to ensure comprehensive protection for medical records.

The PRCTF recognized the health care industry’s need for protected health information. Nonetheless, it was shocking to discover how many people actually had access to the intimate details of one’s life. The PRCTF realized that information sharing had grown beyond the primary relationship between an individual and a doctor. Protected health information was now shared by a wide range of parties: consulting physicians and other health care providers, laboratories, hospitals, researchers, data organizations, various governmental agencies, attorneys, employers, insurers, and health plans.

The PRCTF prepared legislation aimed at protecting the privacy of patient records. Initially, members of the PRCTF disagreed on fundamental aspects of privacy. Notably, individuals, individual advocates, and doctors wanted medical records to be completely private, accessible only by written consent. Health plans, hospitals, and government regulators wanted access to the records.

After months of education on how the health care world actually uses protected health information, the group finally began to work out their differences. As a group, the PRCTF agreed that full and complete confidentiality between individual and doctor would not work in today’s health care industry, and that the review of protected health information helps to improve the delivery of health care and further medical research.

The group agreed that for purposes of health care operations certain parties could, without written consent, look at medical records under certain conditions. Health care insurers, for example, have a responsibility to review medical records because individuals and employers pay for coverage, and insurers feel they have a fiscal duty to ensure proper payment for services rendered to the individual. Other providers, such as hospitals, have need to review medical record information for purposes of maintaining the quality of health care delivered by those providers. Other parties, such as health data organizations, need data to provide recommendations for improvements to health care delivery to the health care community.

This ability to look at protected health information without authorization would, however, be balanced by the person’s right to “opt-out” from these automatic disclosures.

In addition to the “opt-out” provision, the PRCTF worked to protect against inappropriate disclosure of medical records outside of these parties and conditions. Therefore, the PRCTF required individual consent for disclosure, and imposed sanctions for improper disclosure.

The community would need assistance in understanding its proposed legislation, the PRCTF recommended that it be administered by a regulatory authority, and that the OIP be that authority.

The PRCTF’s work resulted in House Bill 351. Introduced in the 1999 Legislative Session, H.B. 351 sparked controversy. During testimony on the bill, many concerned citizens opposed the portions of the bill that allowed limited disclosures of protected health information. Some felt that those conditions went beyond the acceptable boundaries of privacy. They testified that health insurers and other parties could take advantage of an individual’s medical record because H.B. 351 allowed access to the records. Others testified that if this bill had not been introduced, individuals’ privacy would continue to suffer because there was no comprehensive state or federal law to protect the privacy of protected health information. The insurance industry testified in opposition to the bill, and in later versions the Legislature took certain insurers out of the definition of insurer.

After intense discussions in committee hearings, the House passed the bill with only one dissenting vote. The Senate then passed it unanimously. On May 4, 1999, the Legislature passed HB 351 HD2 SD1 CD1. On June 23, 1999, Acting Governor Mazie Hirono signed H.B. 351 into law as Act 87 (codified at chapter 323C, Hawaii Revised Statutes).

Act 87 was to become effective July 1, 2000. This period would have given the community an additional legislative session to correct any actual problems. During the 2000 Regular Session, the Legislature passed only three bills amending chapter 323C, Hawaii Revised Statutes, all of which ultimately became Acts:

1. S.B. 2254 SD1 HD2 CD1 (Act 140) clarified general rules for use and disclosure of protected health information by amending the definition for “nonidentifiable health information,” and by amending sections 323C-32, and 323C-37, Hawaii Revised Statutes. This Act also established a Medical Privacy Task Force (“Task Force”) within the OIP for administrative purposes. The Task Force was created to advise and assist the OIP in analyzing health care information issues for the purpose of drafting rules to implement the requirements of chapter 323C, Hawaii Revised Statutes, and to prepare this report to the Legislature, along with draft legislation to amend chapter 323C, Hawaii Revised Statutes.

2. HB 1491 HD1 SD1 CD1 (Act 91) made housekeeping amendments to sections 323C-38 and 622-52, Hawaii Revised Statutes, relating to subpoenas of health care information.
3. SB 2151 SD1 HD1 CD1 (Act 127) created a new requirement that health care providers and public health authorities disclose health information relating to an individual's mental health history to the county chief of police when the chief of police requests it, provided that: (1) the information is used only to evaluate the individual's fitness to acquire or own a firearm, and (2) the individual has signed a waiver permitting release of the health information for that purpose.

On July 1, 2000, Act 87 took effect. At that time, many members of the insurance and employer communities voiced new concerns about compliance with the law. Providers, government agencies, and the public also complained that parts of the law were confusing, not clear, or otherwise in need of amendment. In response, on August 7, 2000, the Legislature called a 2000 Second Special Session to address those concerns, and to deal with a separate issue regarding legislative terms.

S.B. 2 and H.B. 2, companion bills, were introduced, postponing the effective date of chapter 323C, Hawaii Revised Statutes, from July 1, 2000, to July 1, 2001. This new effective date would allow the Legislature to make amendments to chapter 323C, Hawaii Revised Statutes, during the 2001 Legislative Session before the law became effective. The Legislature passed HB 2, which the Governor signed into law as Act 1 on August 29, 2000. Act 1 is effective retroactive to July 1, 2000.

## **B. The Law as Currently Enacted**

Act 87 of the 1999 Regular Session, codified at chapter 323C, Hawaii Revised Statutes, takes effect July 1, 2001. This law regulates information practices in the health care industry, including patient access to medical records and health care provider disclosure of protected health information. The law's stated objectives are to:

- protect an individual's right to privacy of protected health information under the Hawaii Constitution,
- protect individuals against the adverse effects of improper disclosure of protected health information,
- establish mechanisms to protect against unauthorized and inappropriate use of protected health information,

- encourage the exchange of health care information in a manner that will ensure confidentiality of protected information without impeding high quality health care,
- allow appropriate transfer of personal health information into nonidentifiable health information for legitimate purposes including research and promotion of public health,
- discourage litigation by establishing procedures that will provide courts with strong evidence that protected health information was properly handled and disclosed, and
- establish remedies for violations of Act 87.

Chapter 323C, Hawaii Revised Statutes, can be broken down into eight sections as follows:

### **1. Individual's Right to Access Protected Health Information**

Section 323C-1, Hawaii Revised Statutes, defines “protected health information” broadly.<sup>1</sup> Although health care providers are the owners of medical records in their possession<sup>2</sup>, under section 323C-11, Hawaii Revised Statutes, individuals have a right to inspect and copy medical records about them within 30 days after their request is received by a covered entity.<sup>3</sup>

Unless a court orders otherwise, section 323C-11(c), Hawaii Revised Statutes, states that an entity is not required to provide an individual with access to his or her medical records in certain circumstances.<sup>4</sup>

<sup>1</sup> The term includes information identifiable to an individual including demographic information, whether or not recorded in any form or medium that relates directly or indirectly to the past, present, or future: (1) physical or mental health or condition of a person including tissue and genetic information; (2) provision of health care to an individual; or (3) payment for the provision of health care to an individual.

<sup>2</sup> See Section 323C-12, Hawaii Revised Statutes.

<sup>3</sup> See Section 323C-1, Hawaii Revised Statutes, defines “entity” as “a health care provider, health care data organization, health plan, health oversight agency, public health authority, employer, insurer, health researcher, law enforcement official, or educational institution,” except as the term “entity” is otherwise defined in chapter 323C, Hawaii Revised Statutes, for purposes of a particular section only.

<sup>4</sup> These circumstances include when the disclosure could endanger the life or physical safety of, or cause substantial mental harm to, the subject of the record; when the information identifies, or could reasonably lead to the identification of, a person who provided information under a promise of confidentiality, unless the confidential source can be protected by redaction or other means; when the information is protected from discovery under section 624-25-5, Hawaii Revised Statutes; or when the information was collected for or during a clinical trial monitored by an institutional review board, the

If an entity denies an individual access to a medical record, the entity has a duty to inform the individual in writing. Haw. Rev. Stat. § 323C-11(d) (Supp. 2000). The entity must tell the individual, within 30 days after the date the request was received, the reasons for the denial, procedures for further review of the denial, and the individual's right to file a concise statement with the entity setting forth the request for inspection and copying. Haw. Rev. Stat. § 323C-11(c) (Supp. 2000).

## **2. Use and Disclosure of Protected Health Information**

Chapter 323C, Hawaii Revised Statutes, prohibits entities from improperly using and disclosing protected health information. It also requires that entities establish and maintain safeguards<sup>5</sup> to protect the confidentiality, security, accuracy, and integrity of protected health information. Haw. Rev. Stat. § 323C-14 (Supp. 2000).

An entity may use or disclose protected health information only if proper notice has been given to the individual. If proper notice has been given, an entity may use the protected health information within the entity for purposes of treatment and certain qualified health care operations. Otherwise, with the exception of certain public policy uses, all other uses and disclosures require a written consent. Haw. Rev. Stat. § 323C-21(b) (2000).

## **3. Notice of Confidentiality Practices**

The notice of confidentiality practices explains generally what an individual's rights are and what confidentiality practices that entity follows. The notice provisions in the law are at sections 323C-13, and 323C-22, Hawaii Revised Statutes. The law contains specific language that must be included in a notice.

Entities that hold protected health information must give notice of confidentiality practices in one of two different ways, depending upon the type of entity. Health Plans must give notice to and obtain a signed form from each individual eligible to receive care under the health plan: 1) upon enrollment, 2) annually, and 3) whenever confidentiality practices are substantially amended. All other entities, including health care providers, health care data organizations, health oversight agencies, public health authorities, employers insurers, health

trial is not complete, and the researcher reasonably believes that access would harm the conduct of the trial.

<sup>5</sup> The Task Force is in the process of drafting administrative rules on safeguards. This is discussed below in the section on the "Rules Workgroup."

researchers, and educational institutions, are required to post notice of their confidentiality practices in a conspicuous place.

#### **4. Individual "Opt-Out" Rights**

If an individual wishes to stop some of his protected health information from being disclosed, he or she may "opt-out" of the disclosures for those purposes.<sup>6</sup> Instead, if the provider agrees, the individual may pay the provider directly for those services. The health care provider then has the duty to ensure that this portion of the protected health information is not disclosed without a proper authorization.

Haw. Rev. Stat.

§ 323C-21(c) (Supp. 2000).

#### **5. Authorization**

Section 323C-23, Hawaii Revised Statutes, requires that for uses other than treatment or qualified health care operations, an individual must give his or her consent to disclose (called an "authorization"). The authorization must:

- identify the person who is authorized to disclose the protected health information;
- identify the individual;
- describe the nature of and time span of the protected health information to be disclosed;
- identify to whom the protected health information is to be disclosed;
- describe the purpose of the disclosure;
- state that the consent is subject to revocation; and
- include the date upon which the consent to disclose ends.
- disclosures must be authorized, in writing, dated and signed by the individual (or if electronic, authenticated by a unique identifier). The individual may revoke the authorization at any time.

#### **6. Disclosures Without Consent**

<sup>6</sup> The Task Force has eliminated "opt-out" from chapter 323C, Hawaii Revised Statutes. A complete discussion of this is located below under the subheading "Recommendations."

Part IV of chapter 323C, Hawaii Revised Statutes, lists the instances when protected health information may be disclosed without an authorization. These include disclosures:

- to the coroner or medical examiner;
- to a designated relative or representative, if certain conditions are met;
- to assist in identification or safe handling of a deceased individual;
- in emergency circumstances when it is necessary to protect the health or safety of the subject from serious, imminent harm;
- to a health oversight agency for an oversight function authorized by law;
- to a public health authority or other person authorized by law for use in legally authorized activities;
- to entities for research purposes if certain conditions are met;
- in judicial or administrative procedures; and
- for civil or administrative law enforcement officials.

## 7. The OIP's Role

The PRCTF recommended that the OIP have certain regulatory authority, but the Legislature decided not to adopt such a scheme until further study. Instead, Act 87 gave the OIP two new functions:

- **Rulemaking Authority.** The OIP is required to adopt rules to implement the establishment of: 1) safeguards to protect confidentiality by entities, and, 2) standards for electronic disclosures. Haw. Rev. Stat. §§ 323C-14(b), 323C-41 (Supp. 2000).
- **Prevention and Deterrence.** The OIP may provide advice, training, technical assistance, and guidance regarding ways to prevent improper disclosure of protected health information. Haw. Rev. Stat. § 323C-54 (Supp. 2000).

## 8. Sanctions

**Criminal Penalties.** Act 87 provides that the knowing or intentional disclosure of protected health information in violation of the law is a class C felony (five years in prison). The knowing or intentional sale, transfer, or use of protected health information for commercial advantage, personal gain, or malicious harm is a class B felony (ten years in prison). Haw. Rev. Stat. § 323C-51 (Supp. 2000).

**Civil Penalties:** Individuals whose rights under chapter 323C, Hawaii Revised Statutes, have been violated may bring a civil action. Available civil remedies include: injunctive relief, equitable relief, compensatory damages, punitive damages, costs of the action, attorneys' fees, and any other relief the court finds appropriate. In addition, a court may serve a cease and desist order upon a person who has violated any provision of the law, and may impose fines. Haw. Rev. Stat. § 323C-52 (Supp. 2000).

### **III. Medical Privacy Task Force**

#### **A. Creation and Members**

Act 140 required the OIP's Director to appoint at least one representative from each of the following groups to the Medical Privacy Task Force:

- health care consumer organizations,
- provider organizations,
- hospitals,
- individual and group medical practitioners,
- health insurance plans,
- health care data organizations,
- medical researchers,
- employers,
- pharmaceutical companies, and
- the State Departments of Health, and Commerce and Consumer Affairs.

At the time the Legislature adopted Act 140 it was not known that the insurance and employment industries had concerns with chapter 323C, Hawaii Revised Statutes. As July 1, 2000 approached it became clear that the insurance and employer industries were not prepared for the impact of chapter 323C, Hawaii Revised Statutes. There was a great deal of confusion within the insurance industry as to the actual impact of chapter 323C, Hawaii Revised Statutes upon the insurers. Legal interpretation varied as to whether insurers were covered by the law. Because

of the intimate relationship between employers and the insurance industry, the many legal interpretations caused further confusion.

The community, including physicians, began to call for a special session to “fix” the law. When the Special Session concluded, the Task Force Chair appointed the members of the Task Force.<sup>7</sup> In addition to the representatives required by Act 140, the Director made appointments from the following groups:

- the insurance industry (3 representatives),
- an insurance data organization,
- labor,
- educational institutions,
- medical educational institutions,
- the Department of Labor and Industrial Relations, and
- the Department of Human Resources Development.

The Task Force Chair established four Workgroups and asked different members of the Task Force to lead these Workgroups. The Task Force Chair invited all interested members of the community to participate in those Workgroups. Over 170 people attended and participated in the meetings of these Workgroups. Each Workgroup was assigned to identify problems and to provide proposals to the full Task Force. The Workgroups met a total of 39 times between August and October, 2000.

The Task Force met between September and December, 2000, in an effort to address as many issues as possible and to determine what solutions could be offered to the problems identified by the Workgroups. The result of these efforts is the proposed legislation at Appendix 3 of this report.

Meetings of the Task Force and its Workgroups have been open to the public, who were encouraged to provide input and comments. Notices of all meetings of the Task Force and its four Workgroups since July 1, 2000, were filed at the Lieutenant Governor’s office in accordance with the Sunshine Law at part 1 of chapter 92, Hawaii Revised Statutes, and posted on the OIP’s web site.

<sup>7</sup> See the members listed in the Acknowledgment sections. Due to the very intensive meeting schedule of the Task Force and the conflict in their own time schedules, the last four representatives resigned from the Task Force. The Task Force and the OIP thank these individuals for the time and effort they gave toward this report.

The OIP web site contains links to chapter 323C, Hawaii Revised Statutes, and Acts that amended the law in 2000. The site, [www.state.hi.us/oip](http://www.state.hi.us/oip), features information about the Medical Records Task Force and its Workgroups, including notices and agendas of public meetings, and minutes of meetings.

## **B. Workgroups**

### **1. Compliance Workgroup**

The Compliance Workgroup, under the direction of Chair Phyllis Dendle, met until October 4, 2000. The Compliance Workgroup identified several items of concern raised by the enactment of chapter 323C, Hawaii Revised Statutes. This Workgroup brought these issues to the Task Force for discussion (and possible inclusion in the draft legislation).<sup>8</sup> The Task Force discussed the issues raised by the Compliance Workgroup, and either accepted them, rejected them, or amended them for inclusion in the draft legislation.

### **2. Education Workgroup**

<sup>8</sup> These issues included: collective bargaining issues; employer disclosure of protected health information; amending the definitions of payment, entity, law enforcement agency, protected health information, nonidentifiable information, treatment, qualified health care operations, public health authority; amending all references to educational institutions; permitting the re-release of information by a provider who has appropriately acquired information from another source; permitting the use of protected health information by educating current and student health care providers; allowing disclosure for the dispensing of prescription medication; permitting use and disclosure of protected health information for risk management purposes; permitting the use and disclosure of nonidentifiable health information; deleting "self payment" for health care and "opt-out"; amending disclosure of "unique individual identifiers" to include decoding key language; revising the notice requirement as it applies to Quest enrollment and disenrollment; deleting the requirement for health plans to get signatures on required notices; permitting the OIP to issue a standard authorization form; deleting the automatic revocation of authorization upon disenrollment from a health plan; for directory information, changing the requirement of notifying the individual first to see if the individual objects to giving out of name, status, and location; permitting disclosure to "caregivers"; permitting providers to give immunization information to schools; amending the release of information pursuant to subpoenas; revising the language regarding minors; clarifying the release of protected health information about deceased individuals, with specific language on Kalaupapa residents; creating a new exemption for organ procurement organizations and changing their definition; revising or deleting criminal sanctions; amending the compensatory damages section, deleting punitive damages and attorneys' fees; deleting the section on cease and desist orders; Removing the requirement that fines go to the general fund; amending the prevention and deterrence section to permit the OIP to adopt rules on all of chapter 323C, Hawaii Revised Statutes, and to develop model forms; expanding the "no authorization needed zone" to include community and ancillary health agencies and clergy; permitting oral rather than written requests by an individual to review his or her own records; addressing implied consent; and amending language regarding clinical trials.

The Education Workgroup was to design a comprehensive public awareness campaign to ensure that the community-at-large has a general understanding of its] rights and responsibilities under 323C. In addition, the workgroup focused on affected entities by providing specific training and/or information about their roles and obligations under the law.

Stacy Evensen, Moya Gray and Bart Aronoff made presentations throughout the community, either singly or jointly. Heidi Singh, former Task Force Member, and formerly of Hawaii Medical Association (“HMA”) compiled a comprehensive “compliance kit” for HMA member providers and conducted a series of statewide briefings in August.

The Education Workgroup Chair Stacy Evensen felt that this campaign to reach the broader community had been completed. As it met most of its goals and did not have adequate resources to continue, the Education Workgroup disbanded. The Workgroup agreed that there was no further need to meet in person unless new education issues emerge that need to be addressed.

### **3. Employment Workgroup**

Gerald Okamoto has led the Employment Workgroup in its efforts to identify issues specific to that group. The Employment Workgroup, which included employers, unions and employees, met bi-weekly between July 12, 2000, and October 12, 2000.

The largest issue for employers was the authorization required by chapter 323C, Hawaii Revised Statutes. Employers, based upon conflicting legal interpretation, wanted to eliminate the need for an authorization or to clarify the requirements for an authorization. Employers felt that authorizations were costly.

The Employment Workgroup was also concerned that the law seemingly required authorizations for workers’ compensation, temporary disability, and unemployment insurance. In those areas, when the employer is “pitted” against an “employee”, the authorization was seen as a weapon against the employer.

Employees and labor organizations on the other hand, felt that employers were using the authorization to eliminate all benefits and privacy rights an employee had, and objected to the sorts of authorizations that had been used prior to the Second Special Session.

### **4. Insurance Workgroup**

The Insurance Workgroup, with Chair George Bussey and Bob Dove as Vice Chair, identified issues specific to the insurance arena. This group met weekly from August 24, 2000, through October 12, 2000.

Participants in this workgroup discussed the impact chapter 323C, Hawaii Revised Statutes had on the provision of workers' compensation, automobile, home, business, and personal liability insurance. Life and health insurers were also represented at the Insurance Workgroup.

In 1999, at the request of the insurance industry, the definition of insurers in chapter 323C, Hawaii Revised Statutes excluded life, no fault and disability insurers. This resulted in requiring these "excluded" insurers to use an authorization for every use and disclosure of protected health information. Thus, the largest concern of the Insurance Workgroup was the impact of being excluded from the definition of "insurer."

The Insurance Workgroup also was concerned with the cost of the notice requirements and recommended that notice be published once or twice a year in the newspaper or by a government agency.

Some participants in the Insurance Workgroup felt it would be a good idea to submit "parallel track" legislation to develop a more simple law. This parallel track would take a "prohibited uses" approach on items such as commercial gain, malicious harm, and discrimination.

Other Insurance Workgroup participants favored a united position by the Task Force. Chair Bussey asked those participants to work in parallel with the workgroup so that the workgroups resources could be spent on its assigned task. Chair Bussey decided that because the Insurance Workgroup was charged with recommending changes to the existing law, it would not be submitting parallel track legislation to create a new law. He did not, however, object to groups outside the Task Force working on their own to develop other proposed legislation.<sup>9</sup>

## **5. Rules Workgroup**

Section 323C-14, Hawaii Revised Statutes, requires that each entity subject to chapter 323C, Hawaii Revised Statutes, establish and maintain administrative, technical, and physical safeguards that are appropriate to the size and nature of the entity establishing the safeguards, and that are appropriate to protect the confidentiality, security, accuracy, and integrity of protected health information created received, obtained, maintained, used, transmitted, or disposed of by the

<sup>9</sup> A so-called "Coalition draft" of proposed legislation was written by a coalition of the following organizations: Society for Human Resource Management, Hawaii Insurers Council, Hawaii Hotel Association, Hawaii Bankers Association, and Hawaii Employers Council. Task Force and Insurance Workgroup member Paul Ables noted that the Coalition draft was different from the parallel track.

entity. The OIP is required to adopt rules pursuant to chapter 91, Hawaii Revised Statutes, to implement section 323C-14, Hawaii Revised Statutes.

Prior to the creation of the Task Force, members of the health care industry and employer representatives, had been meeting with OIP to draft rules required by chapter 323C, Hawaii Revised Statutes. This group did not complete its work. Therefore, the Chair created the Rules Workgroup. This Workgroup met between May and September, 2000. At its first meeting, the Rules Workgroup stated its purpose was “to be an advisory committee to the OIP offering suggestions as to problem areas in the proposed rules.” In doing this, the Rules Workgroup looked at work done by the prior group, and proposed federal rules under the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)<sup>10</sup>.

Under the direction of Laura Sherrill, the Rules Workgroup created proposed draft administrative rules and a draft impact statement that may be set for public hearing according to the rule-making procedures set forth at chapter 91, Hawaii Revised Statutes. The OIP’s rules and impact statement will not be submitted for public hearing until after the 2001 Legislative Session. This will allow the OIP to make any revisions to the draft rules and impact statement that might be necessary in light of any amendments that may be made to chapter 323C, Hawaii Revised Statutes, during the 2001 Legislative Session.

#### **IV. Findings and Recommendations of the Medical Privacy Task Force**

From September through December of 2000, the Task Force met 39 times, often times eight hours a day for a week or two, to discuss issues surrounding chapter 323C, Hawaii Revised Statutes.

##### **A. Findings:**

Through the efforts of its Workgroups, the Task Force identified concerns that the community had in complying with chapter 323C, Hawaii Revised Statutes. This report will not detail those concerns. The specific concerns will be found in the minutes of the meetings. This report will, however, attempt to place all of the concerns in context.

The greatest problem the community faced was with conflicting, and sometimes bizarre, legal interpretations that created unintended consequences. For example, although the legislation clearly excluded certain insurers from the “free flow zone”, some lawyers were advising insurers that they were covered as “agents” of

<sup>10</sup> See Appendix I, National Trends for a discussion of the Federal Health Insurance Portability and Accountability Act of 1996.

others. Other lawyers advised that disability insurers and others were excluded from the definition of insurers.

The impact of this confusion of interpretation, was confusion of application. Some insurers prepared authorizations, other insurers did not. For those who felt they were covered and required to use authorizations, the sheer numbers of authorizations required for their businesses made their costs skyrocket.

Employers believed that they needed authorizations as well. Instead of preparing simple authorizations, however, employers prepared five and seven page authorizations that included waivers and releases of all rights – certainly not intended by the statute. Employers had other problems when employees began to refuse to sign authorizations for use of protected health information, such as drug test results.

As a result of the confusion, records were not being released, providers weren't paid, some patients did not receive care and some employees did not receive benefits. These unintended consequences paralyzed certain relationships, including the employer-employee, doctor-patient-insurer and insurer-employer-employee relationships.

The second issue the Workgroups identified was the cost of required notices. The Task Force agreed that the method of providing notice as currently set out was too expensive. In some instances, entities under chapter 323C, Hawaii Revised Statutes felt they had to provide multiple notices.

#### **A. Practical Approach Taken:**

To address these issues, the Task Force used chapter 323C, Hawaii Revised Statutes, as the legislative framework upon which it fashioned remedies. Recognizing that protected health information was used to provide Hawaii residents benefits, jobs, education and a very high standard of health care, the Task Force took a very practical approach to proposing remedies.

The Task Force attempted to maintain privacy protections while ensuring that these protections did not impede, much less cripple, health care or routine business activities that rely on the sharing of protected health information. As was clear to the PRCTF, it became apparent to the members of the Task Force early in its intense work schedule, that achieving a balance between these two goals was a complex process. The Task Force accepted the challenge and worked diligently to try to resolve these issues.

Solutions to the perceived problems of chapter 323C, Hawaii Revised Statutes, were proposed, discussed, accepted or rejected. As would be expected

with such a complex and sensitive consumer and business issue, unanimous consensus was rare. Give and take on multiple issues was the order of the day. Time constraints and strong differences of opinion ultimately affected the Task Force's proposed legislation. Financial and criminal sanctions, the ability of consumers to "opt out" of the "free flow" disclosures, use of the law as a litigation tool in insurance or employment claims against insurers and employers, and even the basic approach to chapter 323C, Hawaii Revised Statutes, as the framework were primary issues of contention.

While majority votes were obtained on most of the contentious issues, the Task Force's diversity of member viewpoints and its final product likely reflect the overall community view on these issues. The Task Force considers its approach will only be effective if taken as an integrated, balanced and interdependent package. Basic changes to any of the sections will likely cause the law to be applied in confusing ways or again misinterpreted. Significant changes would diminish the ability of the law to protect privacy rights without adding delays and financial burdens of such significance that will ultimately be felt by all consumers in the State. Such result will create the confusion that existed in July of 2000.

## **B. Recommendations:**

The Workgroups brought several different recommendations to the Task Force: (1) detailed proposals recommended by the Compliance Workgroup, (2) proposals made by the Chair, (3) proposals made by Task Force member Professor Richard Miller, and (4) proposals brought to the Employment Workgroup through a coalition of various interests.<sup>11</sup> Several other Task Force members and members of the public also submitted proposed language, commentary, and other written materials directly to the Task Force for consideration. After much discussion, the Task Force majority adopted the proposals discussed below<sup>12</sup>.

### **1. Definitions**

The Task Force proposes new sections throughout chapter 323C, Hawaii Revised Statutes. In many instances, these new sections create the need for corresponding definitions of terms. The following terms are proposed to be added to the definition section:

<sup>11</sup> See footnote 8 for a list of members of this coalition.

<sup>12</sup> The Task Force has not proposed any amendments to the following sections: §323C-14 Safeguards; §323C-21 Coroner or medical examiner; §323C-33 Identification of deceased individuals; §323C-35 Disclosure for health oversight; and §323C-41 Standards for electronic disclosures.

**Caregiver.** A definition for caregiver is proposed to allow for health care providers to arrange for the provision of assistance or other home care services that are not offered by providers.

**Continuum of Care.** The term “continuum of care” is proposed to again allow for non-providers to obtain protected health information for purposes of providing ancillary services.

**Delivery and Financing of Health Care.** The Task Force amended the “free flow zone” and in doing so used different definitions, including this definition.

**Director.** This definition will refer to the Director of the Office of Information Practices, who is given jurisdiction over administration of chapter 323C, Hawaii Revised Statutes, under the proposed legislation.

**Employment Related Benefits, Entitlements or Services.** The Task Force amended the “free flow zone” and in doing so used different definitions, including this definition.

**Labor Organization.** Labor organizations are not covered by chapter 323C, Hawaii Revised Statutes. Labor concerns have been addressed in the proposed legislation and therefore a definition of “labor organization” was appropriate.

**Subject Individual.** The Task Force proposes adding this definition for purposes of simplification and clarity.

The Task Force also proposes significant amendments to the following definitions:

**Insurer.** At the request of the insurance industry, this definition was amended to include all insurers under state or federal law.

**Public Health Authority.** This definition currently refers to the Department of Health. The Task Force proposes amending this definition to include agencies of sovereign nations, the United States, tribal governments, States, and political subdivisions of States that have primary responsibility for public health matters or are engaged in injury reporting, public health surveillance, or the like.

Other definitions required amendments for purposes of clarification, and will not be discussed here.

In cases where the Task Force is recommending repeal of certain parts of chapter 323C, Hawaii Revised Statutes, definitions that correspond to those sections are also proposed for repeal. The Task Force proposes removal of the following definitions because, due to other proposed amendments, these definitions are no longer needed in the law: **Qualified Health Care Operations**, and **Unique Individual Identifier**.

## **2. Inspection and Copying of Protected Health Information**

The Task Force proposes amending subsection 323C-11(b), Hawaii Revised Statutes. The proposal would further individuals' rights to obtain their protected health information by requiring that an entity disclose to them, information that the entity received from other sources, in addition to the protected health information generated by that entity.

The Task Force representative from the Hawaii Medical Association indicated that physicians generally do not want to be required to disclose medical records they have received from other doctors, but that they have not generated themselves. The majority of the Task Force felt, however, that public policy should allow an individual access to all information maintained about him or herself no matter by whom it was generated.

The second proposed amendment to subsection 323C-11(b), Hawaii Revised Statutes, would clarify that an individual is not required to request records in writing, and an entity may respond to oral requests for inspection and copying.

The Task Force also proposes amendments to section 323C-11(c), Hawaii Revised Statutes, to clarify the availability of information in a clinical trial to individuals.

## **3. Notice**

The Task Force proposes amendments to the notice requirements found in sections 323C-13 and 22, Hawaii Revised Statutes. The proposed notice will have mandatory elements. When requested, an entity will be required to explain how individual rights are exercised within that entity.

A significant issue facing the community was the cost of notices, and the possibility of duplicative notices. The Task Force worked to simplify the notice requirements without reducing its effectiveness. Significantly, the Task Force proposes that only two entities provide notice. Employers and health care providers

would be required to post or provide their own notice or a model notice. For those entities that may be required by HIPAA to post a particular notice, the proposed notice requirements should complement potential HIPAA requirements.

Section 323C-13(b), Hawaii Revised Statutes, contains the minimum requirements of what must be contained in a notice. The Task Force has proposed changes to clarify what is required by a notice.

Subsections 323C-22(b) and (d), Hawaii Revised Statutes, require health plans to make reasonable efforts to obtain an individual's signature on its notice. The Task Force believed this to be an expensive and not very helpful for educational purposes, and proposes to eliminate this requirement. In place of this requirement, the Task Force proposes that the OIP's Director, under a new section 323C-62, develop a model notice based on the standards in the proposed amendments to section 323C-13 Hawaii Revised Statutes. If employers or providers posted or provided this model notice, they would be deemed in compliance with the chapter.

#### **4. Removal of "Opt-Out"**

In chapter 323C, Hawaii Revised Statutes, the free flow zone allows providers and others to share protected health information without an authorization from a patient. To balance this, chapter 323C, Hawaii Revised Statutes gives everyone the ability to "opt-out" of these disclosures. Therefore, one may pay for treatment and, if the provider agrees, the information generated by that treatment may be kept confidential and private.<sup>13</sup>

This "opt-out" provision presented some problems in application. As a result, some members of the Task Force proposed eliminating this patient right.

The Task Force's discussion on whether to remove the "opt-out" provision from the law was long and contentious. The final vote was sixteen in favor of removing the "opt-out" provision from the law, one (Chair Gray) opposed, and one abstained. Subsequently, during review of this Report, Dr. George Bussey also voiced his objection.

From a physician's point of view, "opt-out" causes at least three problems:

- (1) the quality of health care would be affected because a doctor cannot know everything that happened to an individual in the past that might be relevant to current treatment if it has been opted-out (as examples, an individual might not remember to tell the doctor everything, or may not know what information is relevant to current treatment; for minors,

<sup>13</sup> See section on "The Law as Currently Enacted" above for a discussion on "opt-out."

if a parent decided to “opt-out,” the child may never know about a prior condition);

- (2) you cannot always easily segregate information; and
- (3) the initial request to “opt-out” may not be clear as to whether a subsequent authorization would include information that was opted-out previously. In addition, when a doctor refers an individual to another doctor, the individual’s medical records are generally sent by the referring doctor.

For providers, while the “opt-out” provision allowed individuals to withhold disclosure of their information *only* if the provider agreed to it, hospitals did not believe they had this choice. For example, as hospitals must treat everyone who enters the emergency room, they did not have the ability to “bargain” with the individual as to the “opt-out.” Eighty to ninety percent of emergency room individuals, however, are not true emergencies, and so the “emergency” exception in chapter 323C, Hawaii Revised Statutes, would not apply. Hospitals were willing to support a more limited version of the “opt-out” rights.

Many members of the Task Force felt that only the wealthy could choose to exercise the “opt-out” provision. Other members noted that in some situations individuals are required to provide their protected health information in return for employment benefits; and the labor representatives noted that members of unions cannot individually “opt-out” of a benefit that was collectively bargained for.

The insurance industry believed that, because most insurance coverage in Hawaii are required by law, “opt-out” will cause problems with pricing models because there will not be accurate information. Moreover, the insurance industry believes that the “opt-out” provision would encourage fraud.

Based on all these concerns, a majority of the Task Force decided to eliminate the opt-out provision. Some members of the Task Force proposed to delete the “opt-out” from the law, and to prepare alternate language for a bill if the Legislature so requested in a committee. The majority of the Task Force felt it was better to present one position.

Chair Gray, who strenuously opposed removal of the “opt-out” provision, proposed to keep the “opt-out” provision in the law but list circumstances when an individual could not “opt-out.” If this was not accepted, she proposed that she would agree to removal of the “opt-out” if the Task Force can show there is a compelling State interest to invade individual’s right to privacy. She noted that compelling State interests to invade rights to privacy have traditionally been for purposes of public health and safety.

The Task Force noted there are many compelling State interests such as, provision of health care, a functioning economy, fighting fraud, the ability of an individual to receive benefits, a system of medical treatment and payment for services that works, income protection, labor relations, educational pursuits, and workplace health and safety.

## **5. Authorizations**

The Task Force agreed that, because the payment process may not have been completed, there should be no automatic revocation of authorization when insurance is discontinued or cancelled. The Task Force also made technical amendments to the authorization requirements to eliminate confusion in legal interpretation.

## **6. Circumstances Under Which No Authorization Is Required**

As chapter 323C, Hawaii Revised Statutes currently exists, no authorization is necessary for certain uses and disclosures of protected health information. The Task Force agreed to add additional circumstances, as follows:

- **Individual Disclosures.** Chapter 323C, Hawaii Revised Statutes, did not specifically state that individual's can disclose their own information without an authorization. Therefore, the Task Force proposes that the law explicitly state this. The Task Force proposes that an individual (or an authorized representative) who voluntarily discloses protected health information about him or herself is deemed to have authorized the use and further disclosure of that information.
- **Activities that are Required by Law, Rules, or Court Order.** The Task Force proposes adding this section to clarify that when use or disclosure of protected health information is required by State or federal law, rule, or court order, a holder of protected health information may disclose it without an authorization.
- **For the Delivery and Financing of Health Care.** Certain uses of protected health information for insurance purposes are already permitted under chapter 323C, Hawaii Revised Statutes. However, additional functions are necessary to fully bring the insurance industry into the law. Therefore, the Task Force proposes amending chapter 323C, Hawaii Revised Statutes to include some additional insurance functions.

- **Claims or Requests for Employment Benefits and Entitlements.** This new section was included to eliminate the problem the community experienced as to provision of employment benefits dependent upon the use of protected health information, such as workers' compensation benefits. Under this proposed section, when an individual has made a claim or request, or when a report of injury for which benefits may be sought has been filed for employment related benefits, and protected health information is necessary to administer those benefits, no authorization to use or disclose the protected health information is necessary.
- **Workplace or Educational Health and Safety.** This new section was included to eliminate the potential problem of the use and disclosure of protected health information related to workplace or educational health and safety. The Task Force proposes no authorization is required when the use of protected health information, such as compiling, or maintenance of protected health information, or for reporting, investigating, consulting, or taking other action is necessary to ensure or promote a healthy and safe work or educational environment.
- **Collective Bargaining.** This new section was included to eliminate the potential problem of the use and disclosure of protected health information related to dispute resolutions under a collective bargaining agreement. This section would allow disclosure of protected health information without an authorization for activities that promote resolution of disputes between employees and employers under collective bargaining agreements when such information is required as part of that process.

## 7. Limitations or Restrictions on Uses and Disclosures

In adding these new sections the Task Force also looked at expanding the existing limitations and restrictions. This proposed new section states that protected health information may not be used, disclosed, or obtained without an authorization under the proposed sections noted immediately above, unless:

- notice has been given,
- the protected health information is limited to no more than the amount necessary to carry on the task, operation or program;
- the handling of an examination of the protected health information is limited to those whose job requires them to use or disclose protected health information; and

- the safeguards to protect the confidentiality, security, accuracy and integrity of protected health information, required under section 323C-14, Hawaii Revised Statutes, are established and maintained.

#### **8. Statements of Authority and Compliance**

Members of the Task Force that hold significant amounts of protected health information were concerned about their liability for disclosing this information without an authorization. In fact, it was clear that while providers could release protected health information without an authorization under chapter 323C, Hawaii Revised Statutes some were not doing so. Therefore, the Task Force agreed that the holder of the protected health information could release the information under the additional proposed sections only upon “an affirmative statement by the requester that it has authority” and “that the requester has complied with the requirements imposed on it by this chapter.” Should the holder of protected health information rely in good faith upon this statement, disclosure shall be deemed to be in compliance with the law.

#### **9. Designated Representative, Relative, Surrogate, or Caregiver**

The Task Force proposes that this section be broadened to include caregivers, a statement that a good faith disclosure under this part not be a violation of the chapter, and that a part of this section be separated into the next section.

#### **10. Directory Information**

The Task Force proposes this section be separated into its own section and amended to eliminate the implication that a hospital can release directory information only after the patient has been notified of the right to object in writing. The Task Force also felt that it would be best to eliminate the second subsection of the law to allow for easier disclosure of protected health information when a person’s physical or mental condition could be harmed.

#### **11. Emergency Circumstances**

Two new subsections numbered 323C-34(b) and (c), were added to the draft legislation to cover disaster situations. These subsections would: (1) allow disclosure of certain protected health information for the coordination and provision of disaster welfare information to the public, and (2) allow disclosure of names and other information about individuals injured in mass casualty events, provided there has been no objection to the disclosure. In addition, the language was broadened to allow disclosures to prevent harm, not only to the subject individual but harm to others, as well.

#### **12. Public Health**

The Task Force agreed with the Department of Health (“DOH”) that the DOH’s director should be allowed to weigh the public versus the private interests in disclosure of protected health information in certain circumstances, and to disclose protected health information when it would affect the public at large. The Task Force incorporated the Compliance Workgroup’s language adding subsection 323C-36(d), to the draft legislation, which would grant the Director of Health this authority.

### **13. Organ Procurement Organizations**

The Task Force agreed to add a new section allowing entities to disclose protected health information to organ donation organizations in order for those organizations to carry out all legally permitted functions related to anatomical gifts. Organ donation organizations would also be able to use protected health information for such purposes with the caveat that they may not further disclose the protected health information except as authorized by chapter 323C, Hawaii Revised Statutes. Concerns from organ donation organizations prompted this language to ensure they will be able to carry out their functions after chapter 323C, Hawaii Revised Statutes, becomes effective.

### **14. Educational Institutions**

The Task Force proposes new language relating to educational institutions that would allow a limited sharing of protected health information for specific situations as provided in the proposed new section 323C-L. This new section would allow educational institutions to share protected health information in order to fulfill requirements elsewhere in Hawaii Revised Statutes, and in Hawaii Administrative Rules.

Proposed new language would also list four circumstances under which educational institutions could use or disclose protected health information, obtained from the subject individual without an authorization, with the educational institution and its employees, agents, or a health care provider.

### **15. Disclosures in Dispute Resolution Procedures**

Providers and others had some concerns with the law as currently enacted in this section as it did not cover all types of proceedings and it did not indicate who is responsible for determining when a medical condition is at issue. The Compliance Workgroup proposed, and the Task Force adopted, specific language to address some of these concerns.

The Task Force proposed to broaden the arenas in which subpoenas could be used to obtain protected health information, requiring the party issuing the subpoena to make certain attestations in writing, that the subpoena be served upon

the party, allowing disclosure of the protected health information to parties to the proceedings, those presiding over the proceeding and all lawfully permitted to participate, including court reporters. Proposed amendments to this section also include a good faith provision.

## **16. Civil or Administrative Law Enforcement Inquiries**

Certain amendments were proposed by the Task Force to clarify the language of this section.

## **17. Civil or Administrative Proceedings or Tribunals**

Earlier this year, the Department of the Attorney General published Opinion No. 2000-02, regarding the effect of the law on state functions (available at the OIP web site<sup>14</sup>). This opinion was written in response to questions from State agencies on the application of chapter 323C, Hawaii Revised Statutes, to their operations. One area of great concern was workers' compensation as it is administered by the Department of Labor and Industrial Relations Disability Compensation Division ("DCD") and Labor and Industrial Relations Appeals Board ("LIRAB"). While this opinion was detailed and quite helpful to agencies, due to time constraints, it was not able to address the extent to which protected health information in the DCD's and LIRAB's written decisions may be disclosed to persons other than the parties DCD, LIRAB, and the Hawaii Supreme Court. The current practices of the DCD, LIRAB, and other administrative or adjudicatory bodies is to publish relevant facts in their decisions. Often these facts include protected health information. Prior to the enactment of Act 2 of the 2000 Second Special Session, which changed the effective date of Act 87 of the 1999 Session to July 1, 2001, LIRAB had temporarily halted its proceedings as it was unclear how chapter 323C, Hawaii Revised Statutes, would affect its practices.

To try to alleviate problems the law has created, the Task Force proposes enactment of section 323C-39.1, which provides that for purposes of due process, when a party or claimant has introduced protected health information into evidence to support a claim or defense, the adjudicating body may include the protected health information in its decisions, orders, or other published portions of the proceedings.

<sup>14</sup> The OIP web site contains links to chapter 323C, Hawaii Revised Statutes, and Acts that amended the law in 2000. The site, [www.state.hi.us/oip](http://www.state.hi.us/oip), features information about the Medical Records Task Force and its Workgroups, including notices and agendas of public meetings, and minutes of meetings.

## **18. Limited Disclosure for Identification Purposes in Law Enforcement Procedures**

This proposed new section follows a portion of the rules proposed under HIPAA which would allow entities to disclose protected health information to law enforcement officials for purposes of identifying suspects, fugitives, material witnesses or missing persons, and protected health information about suspected victims of crimes, abuse, or other harm under limited circumstances.

## **19. Rights of Minors**

Section 323C-42, Hawaii Revised Statutes, as currently enacted, gives minors more rights than they are accorded in other laws. The Compliance Workgroup therefore proposed that section 323C-42(c)(2), Hawaii Revised Statutes, be repealed. This amendment would conform minors' rights in this chapter with those of other laws.

## **20. Deceased Individuals**

Section 323C-43, Hawaii Revised Statutes, currently provides deceased individuals with privacy rights. Members of the community raised the concern that this section prevents people, particularly those from Kalaupapa, from tracing their ancestry. The Task Force was advised that due to the stigma of Hansen's Disease, many Kalaupapa residents changed their names to protect their families, and this has made the tracing of genealogy difficult.

In addition, prior to the adoption of Chapter 323C, Hawaii Revised Statutes, the Office of Information Practices had issued opinion letters advising that rights to privacy died with the person. The Task Force therefore proposes deleting section 323C-43, Hawaii Revised Statutes. This proposal would also readress the unintended consequences that chapter 323C, Hawaii Revised Statutes, has had on the ability of next of kin to obtain records of deceased family members.

## **21. Wrongful Disclosure of Protected Health Information**

Many Task Force members and members of the public felt that the current imposition of felony violations is too severe. Hawaii Medical Association voiced its position at several Task Force meetings that it did not want any criminal sanctions in the law. Sanctions were a major issue for the Task Force, and different groups had greatly varying positions on what types of sanctions for violations of the law, if any, were appropriate. After lengthy discussion, the Task Force adopted a three-tiered penalty and fines structure: (1) violations of chapter 323C, Hawaii Revised Statutes, (2) grossly negligent violations, and (3) sales or transfers of protected health information. These proposed changes are reflected in the draft legislation to amend

section 323C-51, Hawaii Revised Statutes. This section would also now include defenses.

## **22. Administrative Enforcement**

The Task Force strongly recommends that a regulatory authority be created to eliminate the confusion arising from differing legal interpretations and to handle complaints about violations. The Task Force originally considered a proposal to name multiple government agencies to have such authority, but decided that there should be only one agency and recommends, because of its expertise in the area, that it be the Office of Information Practices.

### **A. Implementation, Reports**

This section requires the Director of the OIP to adopt rules to implement chapter 323C, Hawaii Revised Statutes, and to file an annual report to the Legislature.

## **23. Complaints**

The Task Force members agreed that while a major role for the regulatory authority would be to educate, it should also hear complaints. Rather than being an investigative body, this authority would be complaint-driven and would have the authority to impose penalties. This complaint process would include a thirty day mediation period. The regulatory authority would be able to weed out frivolous and untimely complaints. Decisions of the regulatory authority would be subject to appeal to the circuit court. The OIP would not hear criminal complaints, but shall have the authority to refer possible criminal cases to the appropriate prosecuting agency. A concern was raised by some members of the Task Force that the Legislature may not provide the OIP with additional funds to operate as the regulatory authority for chapter 323C, Hawaii Revised Statutes. Therefore, there is a provision for an appropriation.

The Task Force agreed that the law should not create a separate civil cause of action, and any evidence adduced in an administrative procedure will not be admissible in a civil tort action. In addition, there will not be awards of compensable damages. Section 323C-52, Hawaii Revised Statutes, pertaining to civil actions is accordingly proposed for repeal in the draft legislation.

## **24. Hearings**

The proposed section 323C-64, would allow the OIP, as a regulatory authority, to conduct hearings if the OIP's Director has reason to believe that a

person has violated the law, and sets forth standards and procedures for those hearings.

## **25. Violations**

Section 323C-65, if enacted, would list the types of orders the OIP's Director may issue, including monetary penalties for violations. These decisions may be appealed to the circuit court. If a violation was unavoidable, sanctions shall not be imposed. Significantly, the Task Force agreed that all penalties should be postponed for a period of 18 months after the law goes into effect. This will give the business community necessary time to prepare for the law.

## **26. Cease and Desist Orders, Civil Penalties**

The Task Force agreed to proposed amendments to section 323C-53, Hawaii Revised Statutes. These amendments would provide that the OIP's Director, rather than the courts, would issue cease and desist orders. The language allowing monetary penalties as part of cease and desist orders is proposed for repeal.

## **27. Notice to Other Regulatory Agencies**

This proposed new section 323C-67, would require the Director of the OIP to notify any agency that has regulatory oversight over an organization when the Director has taken action against an entity for a violation of the law.

## **28. Relationship to Other Laws**

The Task Force noted that in some situations, other statutes apply that are more specific than chapter 323C, Hawaii Revised Statutes, for example, organ donation statutes at chapter 327, Hawaii Revised Statutes. The Task Force has therefore proposed amendments to section 323C-55, Hawaii Revised Statutes. The substantive amendments would list those types of laws that chapter 323C, Hawaii Revised Statutes, would not supercede.

## **29. Amendments to the UIPA**

### **• Information Practices Commission**

The Task Force members adopted the idea that a commission is needed. This body shall consist of five members appointed by the Governor. Each member shall serve a four-year term, and terms shall be staggered. The composition of this body shall balance the interests of consumers, health care, employers, employees, and business. The commission would be attached to the OIP.

- **Duties of the Information Practices Commission**

The commission will solicit and receive public comment on information practices. Every two years, it shall file a report with the OIP's Director, the Governor, and the Legislature on its findings and recommendations on all matters within the jurisdiction of the OIP.

**30. Effective Date**

The proposed legislation at Appendix 3 would change the effective date of chapter 323C, Hawaii Revised Statutes, to January 1, 2002. It would also provide that violations of the law occurring before January 1, 2003, shall be exempt from remedy or penalty, but the OIP's Director would still be able to impose cease and desist orders. The reasons for these dates are to allow affected entities to come in to compliance with the law.

**V. Conclusion**

The Task Force's diversity of member viewpoints appears to reflect the overall community view on these issues.

The Task Force recommends that the Legislature consider the proposed legislation as the end result community negotiation and compromise. Taken as a whole it is an integrated, balanced and interdependent package.

Significant changes would diminish the ability of the law to protect privacy rights without adding delays and financial burdens of such significance that will ultimately be felt by all consumers in the state. Such result will create the confusion that existed in July of 2000.

# Appendices

## **VI. Appendix 1 - National Trends**

### **A. Gallup Poll: Public Attitudes Toward Medical Privacy**

On September 26, 2000, The Gallup Organization published a report on medical privacy for the Institute for Health Freedom. That report was based on the results of a survey of the opinions of a national cross-section of adults in telephone owning households, 18 years of age or older, concerning access and the confidentiality of their medical records.

The survey found that for most adults the confidentiality of their medical records is very important, and only the confidentiality of financial information is judged very important by a greater proportion. Eighty-four percent of adults feel it is very important that their financial information be kept confidential. Almost as many (78%) feel it is very important that their medical records be kept confidential. By comparison, less than half (39%) of those polled feel it is very important that their employment history be kept confidential, and only thirty percent feel it is very important that their educational history be kept confidential.

Women are more likely than men to feel it is very important their medical records should be kept confidential (81% versus 74%). Adults aged 35 to 49 are more likely than adults 18 to 34 to say it is very important that their medical records be kept confidential.

Many adults oppose access by any group. Asked if they favored or opposed allowing various groups to see their medical records without permission, there is no group that a majority of adults would favor allowing access to their medical records without their authorization. The most "acceptable" is pharmacists. Forty percent of adults favor allowing pharmacists to see their medical records without permission while 59% would be opposed.

There is strong opposition to non-medical groups gaining access to their medical records. Ninety-two percent oppose giving government agencies access. Eighty-eight percent oppose the police or lawyers, or employers (84%) being allowed to see their medical records. Eighty-two percent oppose letting insurance companies see their medical records without permission. Ninety-five percent oppose allowing banks to see their medical records without permission.

Local and state health departments are acceptable to a larger proportion than government agencies overall. However, seventy-one percent oppose giving these agencies access to protected health information without permission. Seventy-one percent also oppose giving doctors access to their medical records without permission. Medical researchers would be denied access too, sixty-seven percent oppose allowing researchers permission to see their medical records without permission.

Only sixty-one percent of adults surveyed have heard or read anything recently about new federal regulations that would change the rules regarding access to medical records. Adults, age 50 or older (20%) and college-educated adults (19%) are more likely than others to say they have heard about the issue.

Asked their opinion of keeping their medical records in a national computerized database, eighty-eight percent of adults are opposed. Only 10% would favor keeping records in a national database. Adults, ages 35 to 49 are more likely than younger or older adults to oppose a national database for medical records. College-educated adults are more likely than those with fewer years of formal education to oppose a national database (93% versus 83%).

Twelve percent of adults have seen or heard anything recently about a proposal to assign medical identification numbers. Even fewer (8%) adults support a plan that requires every American to be assigned a medical identification number. Adults 35 years of age or older are more likely than younger adults to be aware of the medical identification proposals. Ninety-five percent of adults say doctors and hospitals should have to obtain their permission before releasing medical records to a national database. In addition, only 4% believe personal information told a doctor in confidence and entered into their medical records should be included in the national database.

Eighty-six percent of adults feel a physician should ask permission first before running additional tests, during the course of regular testing, for genetic factors that may be related to possible health problems. Approximately fourteen percent feel the physician should be allowed to run the additional tests without asking permission. Ninety-three percent of adults (93%) feel medical and government researchers should obtain permission before studying a person's genetic information. Only six percent feel it isn't necessary to obtain the person's permission.

**B. Federal Health Insurance Portability and Accountability Act of 1996**

The Federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) applies to health plans, health care clearing houses, and health care providers. HIPAA protects individually identifiable health information which is or has been electronically transmitted or maintained. The federal Department of Health and Human Services announced on November 13, 2000, that rules based on HIPAA would be adopted in a few weeks (“Rules”). These Rules would have an impact on medical records information practices. At the time this report went to print, the Rules were not yet adopted.

As with chapter 323C, Hawaii Revised Statutes, under the Rules, an individual has a right to inspect and copy protected health information of a health care provider or health plan for as long as the information is maintained. The entity has thirty days to comply, and can only deny access under five circumstances. § 164.514(a)(b).

The proposed Rules would allow individuals to amend or correct their protected health information if the information is erroneous or incomplete and the covered entity is the original creator of the information. Such amendments or corrections must be completed within sixty days from receipt of the request. § 164.516(a)-(e). Under the proposed Rules an individual is also entitled to an “accounting of how health care information was used (other than for treatment, payment, qualified health care operations, use for health oversight, and law enforcement). § 164.515

The proposed Rules notice requirements are very similar to those in chapter 323C, Hawaii Revised Statutes, however, HIPAA’s proposed Rules would create additional requirements. § 164.512

The Rules mandate the establishment of safeguards similar to those found in chapter 323C, Hawaii Revised Statutes. However, the Rules also require entities to designate privacy officials who are responsible for the development and implementation of privacy policies and procedures of the entity. In addition, these Rules mandate training for all employees who are likely to have contact with protected health information, as well as other requirements.

Disclosure of protected health information is prohibited under the Rules unless it is for treatment, payment, or qualified health care operations. § 164.518. The proposed Rules would further prescribe use and disclosure requirements.

As with the current version of chapter 323C, Hawaii Revised Statutes, an individual has the right to “opt-out” from certain free flow disclosures under the Rules. Individuals can ask entities subject to HIPAA to restrict the uses of protected health information for treatment, payment, or health care operations. If the provider agrees to these restrictions, the provider shall not make uses or disclosures inconsistent with such restrictions. § 164.506(c).

The Rules also require an authorization for any use not covered under HIPAA. The authorization must contain certain information required by those Rules. § 164.508.

HIPAA allows for the following uses and disclosures without an authorization:

- Health oversight including quality assurance,
- Public health activities,
- Research approved by an IRB or privacy board,
- Judicial and administrative proceedings,
- Coroners and medical examiners,
- Law enforcement purposes,
- Emergency circumstances,
- To provide information to next of kin,
- For government health data systems,
- Disclosure of directory information,
- To financial institutions for processing payment, and
- Other situations where it is mandated by other laws.

Section 164-510 contains important limitations on excepted uses and disclosures.

Parents of minors may exercise rights on behalf of their children under HIPAA. If, however, the minor lawfully receives a health care service without the consent of or notification to a parent, the minor is treated as an individual for purposes of exercising any rights under HIPAA.

Under the Rules, covered entities must comply with requirements of the proposed rules for two years following an individual’s death.

Entities covered under HIPAA may get technical assistance from the Secretary of Health and Human Services to comply with the proposed rules.

Individuals who feel an entity has violated the law may file a complaint with the Secretary, who may investigate and review. The Secretary may then resolve the issues informally, or issue written findings. There are also fines of up to \$25,000.00 per year. §164.522. In addition, under HIPAA the Secretary may refer the case for criminal prosecution and jail time. HIPAA contains no right to civil action by individuals, but the Department of Justice may prosecute criminal violations.

On December 20, 2000, as this Report was going to print, the federal government released its rules required by HIPAA. The OIP attempted to obtain a copy of these rules, but was unable to do so before this Report was printed.

### **C. Gramm-Leach-Bliley Act**

The Gramm-Leach-Bliley Act (“GLB”) is federal law that has removed the prohibitions placed upon banks from offering financial products that are offered by insurers and brokers. The GLB included language which provided some limited protections of nonpublic personal information. Under this law, financial institutions are required to disclose their privacy policies and practices to customers and consumers, and must develop safeguards and allow consumers to “opt-out.” The GLB also contains excepted uses and disclosure and criminal sanctions.

The GLB contemplates regulations being adopted by several different regulatory authorities, including the state insurance commissioners. The National Association of Insurance Commissioners has proposed regulations governing the use of protected health information.

## **VII. Appendix 2–Dissenting Report**

Three members of the Task Force expressed a desire to repeal chapter 323C, Hawaii Revised Statutes, or to hold off on it and wait for federal legislation and rules in this area.

In an email to the OIP received November 6, 2000, these members expressed the view that Hawaii should wait, as most other states are doing, until it is clear what effect federal laws such as HIPAA and the Gramm-Leach-Bliley Act will have (both discussed at Appendix 1 of this report). The members also note that there were many areas of chapter 323C, Hawaii Revised Statutes, where the Task Force could not reach consensus, which left some issues unresolved due to insufficient time, particularly, the basic approach to be taken to address the protection of medical records information. According to the dissenting report these members will submit their own proposed legislation that will focus on protecting an individual rights to privacy by prohibiting objectionable practices in a clear manner.

Specifically, Task Force member and HIC representative Paul Ables<sup>15</sup>, presented the Task Force with the idea that proposed legislation should prohibit: (1) the sale of personal protected health information for the purpose of marketing a product or service to the subject of such information, and (2) the disclosure of personal protected health information in order to defame or intentionally inflict emotional distress to the subject. Those in support of the dissenting report believe this type of legislation would assure consumers, health care providers, employers and insurers that business practices necessary to support the successful and cost-effective delivery of health care continue, while restricting practices and conduct that people find most objectionable.

Discussion was had on whether or not to include the dissenting position and proposed legislation as a dissenting report to accompany this Report by the Task Force. The Task Force decided they had no time to discuss and address the dissenting report. The text of the dissenting report subsequently follows.

DISSENTING REPORT ON THE OFFICE OF INFORMATION PRACTICES (OIP)  
MEDICAL PRIVACY TASK FORCE REPORT

<sup>15</sup> Glaxo-Wellcome representative Linda Chu Takayama and Hawaii Employer's Council representative Connie Hastert joined in support of this proposal.

Honolulu, Hawaii  
November 6, 2000

Honorable (name)  
President of the Senate  
Twenty First State Legislature  
Regular Session of 2001  
State of Hawaii

Honorable Calvin Say  
Speaker, House of Representatives  
Twenty First State Legislature  
Regular Session of 2001  
State of Hawaii

Sir:

Your dissenting members agree with the intent of S.B. 2254, S.D.1, H.D.2, C.D.1, (2000), Section 4 which reads, " (a) There is established the medical privacy task force within the office of information practices for administrative purposes. The task force shall advise and assist the office of information practices in analyzing health care information issues for the purpose of drafting rules to implement the requirements of chapter 323C, Hawaii Revised Statutes.

(b) Members of the task force shall be chosen by the director of the office of information practices and the task force shall consist of at least one representative from each of the following groups: health care consumer organizations, provider organizations, hospitals, individual and group medical practitioners, health insurance plans, health care data organizations, medical researchers, employers, pharmaceutical companies, department of health, and department of commerce and consumer affairs.

(c) The medical privacy task force shall submit a report of findings and recommendations, including recommended legislation, concerning health care issues that need statutory revision to chapter 323C, Hawaii Revised Statutes, to the Legislature no later than twenty days prior to the convening of the regular session of 2001. The task force shall continue until terminated by the director of the office of information practices."

The task force assigned by the 2000 Legislature to make recommendations for amendment to Act 87 (1999) relating to the privacy of health care information has met on numerous occasions during the interim in an attempt to offer suggested changes to the law that would protect the privacy of medical records information of individuals while allowing commerce and employment

to continue in Hawaii without imposing impractical burdens and costs on those who live in Hawaii and those who transact business with Hawaii.

While there is clearly some concern about the privacy of medical records information, that concern is not as yet well defined. Nor is the complex manner in which medical records information is used as well understood as it needs to be before Hawaii proceeds to put in place a highly complex system to manage personal medical information. The federal government is presently in the process of considering, and has begun to promulgate rules regarding, the establishment of just such a system. While, in some quarters, these federal initiatives, particularly the Gramm-Leach Bliley law and the Health Insurance Portability and Accountability Act and the rules promulgated pursuant to these laws, are seen as a justification for Hawaii passing a complex law, we believe the opposite is true. There is in fact nothing in these laws that suggests Hawaii will somehow receive "extra credit" for adopting its own system at this time. We believe it would be more reasonable to wait, as most other states are doing, until it is clear as to what shape these laws and their rules will take and the effect they will have before we lead the parade. This is particularly true at a time when even the proponents of a complex and comprehensive law have conceded publicly that there is no pattern in Hawaii of abuse of personal medical and health information.

The direction of the task force was to focus on using the current statute, the new chapter 323C, as a basis, and to provide amendments so that certain private and public systems and services would not be severely hampered or come to a halt because of ambiguity or varying interpretations of the law. The task force was then separated into subcommittees where issues were discussed in detail on Rules, Compliance, Insurance, and Employment.

The result of this process is the report of the task force to the Legislature. The final report and accompanying legislation is complex and reflects many areas of consensus on specific legislative language on issues. However, there were many areas where consensus could not be reached among task force members and some issues were left unresolved due to insufficient time. One of the areas that has not been sufficiently examined is the basic approach that should be taken to address the protection of medical records information. Perhaps, therefore, a better way to proceed at this time is to craft a law that would protect an individual's rights to privacy by prohibiting objectionable practices in a clear manner.

This dissenting report and accompanying legislation is submitted by those undersigned members of the task force who

believe this approach, that describes prohibited practices, is more direct and clear than the difficult and, we believe, the unnecessary task of defining all circumstances in which an authorization is or is not necessary to release medical records information. There is no evidence of widespread abuse of medical records information in Hawaii. However, the complexity of Act 87 (1999) caused chaos in our business and employment community with no accompanying benefit. The potential for resulting chaos from another complex law is real and may decrease quality of healthcare, add delays in processing and payment of patient claims, add unnecessary costs, delay employee benefits, and put Hawaii at a disadvantage when our residents, businesses and public agencies are doing business in other states.

For these reasons, your dissenting members of the medical privacy task force are not in accord with the intent and purpose of the report submitted by a majority of the medical privacy task force, and recommend that it not be adopted by the Legislature.

Respectfully submitted,

|        |                |
|--------|----------------|
| _____  | _____          |
| (name) | (organization) |
| _____  | _____          |
| (name) | (organization) |
| _____  | _____          |
| (name) | (organization) |

### A BILL FOR AN ACT

RELATING TO PRIVACY OF MEDICAL RECORDS INFORMATION.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

SECTION 1. Chapter 323C is hereby amended by repealing the entire chapter.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

“ CHAPTER

PRIVACY OF MEDICAL RECORDS

**Section -1. Notice.** (a) The Office of Information Practices shall post on its website and publish a notice twice a year in a publication of general circulation the notice set out in subsection (b). The notice shall be printed in clear type for the purpose of informing each individual about the individual's rights under this chapter.

(b) The notice shall contain the following language:

" IMPORTANT: THIS NOTICE DEALS WITH VIOLATIONS OF CHAPTER \_\_\_\_\_ WHICH ESTABLISHES RESTRICTIONS ON THE SHARING OF INFORMATION FROM YOUR MEDICAL RECORDS. PLEASE READ THIS CAREFULLY.

**In 2000, the Hawaii State Legislature adopted a law to establish restrictions on the sharing of medical information of Hawaii's citizens.**

As explained in more detail in Chapter \_\_\_\_\_, certain activities are prohibited by this law. Specifically, no person shall knowingly or intentionally use or disclose information from an individual's medical record that identifies that individual by name, without the individual's consent, for the following purposes:

- (1) Marketing of products or services to the individual, either directly or indirectly, unless at the request of the individual; or
- (2) Disclosing or using personal medical information in order to defame or intentionally inflict emotional distress upon the individual who is the subject of the information.

Penalties assessable for violations of this chapter range from \$5,000 to \$100,000. If you have any questions about this notice or about Hawaii's medical records privacy law, contact the Office of Information Practices at xxx-xxxx; neighbor islands, call 1800-xxx-xxxx."

**Section -2. General rules regarding use and disclosure.** No person shall knowingly or intentionally use or disclose information from an individual's medical record that identifies that individual by name or by other means that identify the individual without the individual's consent, for the following purposes:

- (a) Marketing of products or services to the individual, either directly or indirectly, unless at the request of the individual; or
- (b) Releasing personal medical information for the purpose of defaming the individual or to intentionally inflict emotional distress upon the individual.

**Section -3. Duties and Responsibilities of the Office of Information Practices.** (a) Complaints. The OIP shall investigate complaints alleging violations of this chapter.

- (1) Complaints shall be signed and in writing;
- (2) Complaints shall be filed within 180 days of the time the act allegedly in violation of this chapter occurred.
- (3) The OIP shall order the assessment of penalties as outlined in section -4.
- (4) Complainants shall be notified of the results of the investigation within a reasonable period of time.
- (5) The OIP may take any appropriate action to resolve complaints as may be necessary to appropriately remedy and deter the unlawful use or disclosure of medical records information in the public interest. These actions may include, but are not limited to, letters

of warning, alternative dispute resolution, sanctions or penalties, and referrals to another agency.

(b) Education and information. The OIP shall provide information and training to promote awareness of and to encourage compliance with this chapter.

(c) Rules and interpretations. The OIP shall adopt rules to administer this chapter.

(d) Reports. The OIP shall submit an annual report to the Legislature on its activities with regard to this chapter.

**Section -4. Penalties.** (a) For any violation of this chapter, payment of a civil penalty of not more than \$5,000 for each and every act in violation but not to exceed \$50,000 in the aggregate for multiple violations.

(b) For any violation of section -2(b), payment of a civil penalty of not more than \$100,000 for each and every act in violation."

SECTION 3. This act shall take effect upon its approval

OTHERS WHO SUPPORT THIS DISSENTING REPORT

\* Task Force members

1. Bank of Hawaii
2. \*GlaxoWellcome
3. Hawaii Bankers Association
4. \*Hawaii Employers Council
5. Hawaii Hotel Association
6. \*Hawaii Insurers Council
7. Society for Human Resource Management - Hawaii Chapter

## VIII. Appendix 3—Medical Privacy Task Force Proposed Legislation

### A BILL FOR AN ACT

RELATING TO PROTECTED HEALTH INFORMATION.

### BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 323C, Hawaii Revised Statutes, is amended as follows:

#### "PART I. GENERAL PROVISIONS

**§323C-A Purpose.** The purpose of this article is to give effect to Hawai'i Constitution, Article I, §6, by taking affirmative steps to implement the people's right to privacy with regard to protected health information. Individual authorizations are required for disclosures of protected health information from holders other than the subject individual. Where necessary for purposes and activities for which there is a compelling state interest, protected health information may be disclosed without authorization, only with limitations designed to meet the compelling state interest, with significant safeguards for privacy, and when appropriate, with adequate notice.

**§323C-1 Definitions.** As used in this chapter, except as otherwise specifically provided:

"Accrediting body" means a committee, organization, or institution that has been authorized by law or is recognized by a health care regulating authority as an accrediting entity or any other entity that has been similarly authorized or recognized by law to perform specific accreditation, licensing, or credentialing activities.

"Agent" means a person not otherwise defined in this chapter who represents and acts for another under a contract or relationship of agency, or whose function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between the principal and a third person, including a contractor.

["Commissioner" means the insurance commissioner.]

"Caregiver" means a person who has exhibited special concern for the individual and who is involved in the support, facilitation or provision of the individual's health care.

"Continuum of care" means a system of services between all persons engaged in health care or other services that support the health care of patients in any setting.

"Delivery and Financing of Health Care" includes but is not limited to the following activities

- a) Treatment;
- b) The provision of drugs or supplies pursuant to a prescription or order, when disclosure is needed to obtain, convey or provide information about the drugs or supplies;
- c) Payment which includes the activities undertaken by or on behalf of a covered entity or an agent to obtain premiums, to obtain reimbursement for provision of health care or to determine or fulfill its responsibility for coverage under the health plan or insurance policy and for provisions of benefits under the health plan or insurance policy. Activities that constitute payment include determinations of coverage, improving methods of paying or coverage policies, adjudication or subrogation of claims derived from health status, billing, claims management, and medical data processing; review of health care services with respect to medical necessity, coverage under a health plan, appropriateness of care, or justification of charges; and utilization review activities, including precertification and preauthorization of services;
- d) Case management;
- e) Disease management;
- f) Conducting quality assurance activities or outcomes assessments;
- g) Reviewing the competence or qualifications of health care professionals, including peer review and evaluating provider clinical performance;
- h) Performing accreditation, licensing, or credentialing activities;
- i) Analyzing health plan claims or health care records data;
- j) Carrying out utilization management;
- k) Conducting or arranging for reporting or auditing services in accordance with statute, rule, or accreditation requirements;
- l) Conducting or participating in educational activities or training programs involving health care providers, students and trainees learning under supervision;
- m) risk management, including but not limited to, compiling and analyzing information in anticipation of, or for use in, civil, administrative or criminal proceedings;
- n) Complaints, grievance and appeal procedures related to provision of health care as well as administration of other consumer disputes and inquiries;
- o) Policyholder service functions;
- p) Claims administration, adjustment and management;
- q) Fraud investigation;

- r) underwriting;
- s) Loss control, ratemaking and guaranty fund functions;
- t) Reinsurance and excess loss insurance;
- u) Internal administration of compliance, managerial, and information systems and database security;
- v) The replacement of a group benefit plan or insurance policy or program;
- w) Activities in connection with a sale, merger, transfer or exchange of all or part of a business or operating unit so long as the protected health information is used for same purposes for which it was obtained.

"Director" means the director of the office of information practices.

"Disclose" means to release, transfer, provide access to, share, or otherwise divulge protected health information to any person other than the subject individual who is the subject of the information. The term includes the initial disclosure and any subsequent redisclosures of protected health information.

"Educational institution" means an institution or place for instruction or education including any public or private elementary school, secondary school, vocational school, correspondence school, business school, junior college, teachers college, college, normal school, professional school, university, or scientific or technical institution, or other institution furnishing education for children and adults.

"Employer" means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company, or corporation, whether domestic or foreign, a debtor in possession or receiver or trustee in bankruptcy, or a legal representative of a deceased person, who has one or more individuals in his or her employment.

"Employment" means services performed for wages under any contract of hire, written or oral, expressed or implied, with an employer.

"Employment related benefits, entitlements or services" means benefits, accommodations or entitlements, which may be provided either voluntarily, by contract or by law to an employee or volunteer, including but not limited to, leave of absence and return to work programs, case management services, wages, wage replacement benefits, unemployment insurance benefits, disability, pension, retirement, health or other insurance benefits, health and safety programs.

"Entity" means a health care provider, health care data organization, health plan, health oversight agency, public health authority, employer, insurer, health researcher, labor organization, law enforcement agency [official], or educational institution, except as otherwise defined for purposes of a particular section only.

"Health care" means the provision of care, services, or supplies to an individual and includes any:

- (1) Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative, care, counseling, service or procedure with respect to the [or maintenance services]:
  - (A) [With respect to the] physical, functional status, behavioral or mental condition of an individual; or
  - (B) Affecting the structure or function of the human body or any part of the human body, including the procurement or banking of blood, sperm, organs, or any other tissue; or
- (2) Any sale or dispensing of a drug, device, equipment, or other health care-related item to an individual, or for the use of an individual pursuant to a prescription or order by a health care provider.

"Health care data organization" means an entity that engages primarily in the business of collecting, analyzing, and disseminating identifiable and nonidentifiable patient information. A health care data organization is not a health care provider, an insurer, a health researcher, or a health oversight agency.

"Health care provider" means a person who, with respect to any protected health information, receives, creates, uses, maintains, or discloses the protected health information while acting in whole or in part in the capacity of:

- (1) A person who is licensed, certified, registered, or otherwise authorized by federal or state law to provide an item or service that constitutes health care in the ordinary course of business, or practice of a profession;
- (2) A federal, state, or employer-sponsored program that directly provides items or services that constitute health care to beneficiaries; or
- (3) An officer, employee, or agent of a person described in paragraph (1) or (2).

"Health oversight agency" means a person who, with respect to any protected health information, receives, creates, uses, maintains, or discloses the information while acting in whole or in part in the capacity of:

- (1) A person who performs or oversees the performance of an assessment, evaluation, determination, or investigation, relating to the licensing, accreditation, or credentialing of health care providers; or
- (2) A person who:
  - (A) Performs or oversees the performance of an audit, assessment, evaluation, determination, or investigation relating to the effectiveness of, compliance with, or applicability of, legal, fiscal, medical, or scientific standards or aspects of performance related to the delivery of, or payment for, health care; and
  - (B) Is a public agency, acting on behalf of a public agency, acting pursuant to a requirement of a public agency, or, for violations of

paragraph (1), carrying out activities under a federal or state law governing the assessment, evaluation, determination, investigation, or prosecution [for violations of paragraph (1)].

"Health plan" means any person that offers any health insurance plan, including any hospital or medical service plan, dental or other health service plan or health maintenance organization plan, provider-sponsored organization, or other program providing [or arranging for the provision of] for health care benefits, whether or not funded through the purchase of insurance.

"Health researcher" means a person, or an officer, employee or independent contractor of a person, who receives protected health information as part of a systematic investigation, testing, or evaluation designed to develop or contribute to generalized scientific and clinical knowledge.

"Individual's designated representative" means a person who is authorized by law (based on grounds other than the minority of an individual), or by an instrument recognized under law, to act as an agent, attorney, guardian, proxy, or other legal representative of a protected individual. The term includes a health care power of attorney.

"Institutional review board" means a research committee established and operating in accord with Title 45 Code of Federal Regulations 46 sections 107, 108, 109, and 115.

"Insurer" means any person, including persons who are self-insured, regulated under the insurance laws of any state of the United States of America and its territories and the laws of the United States of America. [chapter 432D, article 1 of chapter 432, any group that has purchased a group insurance policy issued by a person regulated under chapter 432D, and any person regulated under article 10A of chapter 431, other than a life insurer, disability income insurer, or long-term care insurer.]

"Labor organization" means any organization in which employees are organized for the purpose of collective bargaining and which is the exclusive representative of all employees in one or more bargaining unit(s) and which has adopted formal collective bargaining procedures for dispute resolution.

"Law enforcement inquiry" means a lawful investigation conducted by an appropriate government agency or official inquiring into a violation of, or failure to comply with, any civil or administrative statute or any regulation, rule, or order issued pursuant to such a statute. It does not include a lawful criminal investigation or prosecution conducted by the county prosecutors or the department of the attorney general.

"Nonidentifiable health information" means any information that meets all of the following criteria: would otherwise be protected health information except that the information in and of itself does not reveal the identity of the [individual whose health or health care is the subject of the information] subject individual and will not be

used in any way that would identify the subjects of the information or would create protected health information."

"Office of information practices" shall be as defined by chapter 92F.

"Person" means a government, governmental subdivision, agency or authority, corporation, company, association, firm, partnership, insurer, estate, trust, joint venture, individual, individual representative, and any other legal entity.

"Protected health information" means any information, identifiable to an individual, [including demographic information] whether or not recorded in any form or medium that relates [directly or indirectly] to the past, present, or future:

- (1) Physical, behavioral or mental health or condition of a person, including tissue and genetic information;
- (2) Provision of health care or treatment to an individual; or
- (3) payment for the provision of health care or treatment to an individual when it includes the information in (1) or (2) above.

"Public health authority" means [the department of health] an agency of a sovereign nation, the United States, a federally recognized tribal government, a State, or a political subdivision of a State that:

- (1) Has primary responsibility for public health matters; or
- (2) Is primarily engaged in activities such as injury reporting, public health surveillance, and public health investigation or intervention.

["Qualified health care operations" means:

(1) Only those activities conducted by or on behalf of a health plan or health care provider for the purpose of carrying out the management functions of a health care provider or health plan, or implementing the terms of a contract for health plan benefits as follows:

- (A) Payment, which means the activities undertaken by a health plan or provider which are reasonably necessary to determine responsibility for coverage, services, and the actual payment for services, if any;
- (B) Conducting quality assurance activities or outcomes assessments;
- (C) Reviewing the competence or qualifications of health care professionals;
- (D) Performing accreditation, licensing, or credentialing activities;
- (E) Analyzing health plan claims or health care records data;
- (F) Evaluating provider clinical performance;
- (G) Carrying out utilization management; or
- (H) Conducting or arranging for auditing services in accordance with statute, rule, or accreditation requirements;

(2) A qualified health care operation shall:

- (A) Be an operation which cannot be carried on with reasonable effectiveness and efficiency without identifiable patient information;
- (B) Be limited to only that protected health information collected under the terms of the contract for health plan benefits and without which the operation cannot be carried on with reasonable effectiveness and efficiency;
- (C) Be limited to the minimum amount of protected health information, including the minimum number of records and the minimum number of documents within each patient's record, necessary to carry on the operation with reasonable effectiveness and efficiency; and
- (D) Limit the handling and examination of protected health information to those persons who are reasonably well qualified, by training, credentials, or experience, to conduct the phase of the operation in which they are involved.]

"Subject individual" means the individual to whom the protected health information refers.

"Surrogate" means a person, other than an individual's designated representative or relative, who is authorized to make a health-care decision for the individual.

"Treatment" means the provision of health care by, or the coordination of health care among health care providers, or the referral of a patient from one provider to another, or coordination of health care or other services among health care providers and or third parties, including services for the continuum of care.

[authorized by the health plan or the plan member.]

["Unique patient identifier" means a number or alpha-numeric string assigned to an individual, which can be or is used to identify an individual's protected health information.]

"Writing" means a written form that is either paper- or computer-based, and includes electronic signatures.

## PART II. INDIVIDUAL'S RIGHTS

**§323C-11 Inspection and copying of protected health information.** (a) For the purposes of this section only, "entity" means a health care provider, health plan, employer, health care data organization, insurer, or educational institution.

(b) At the request in writing of a[n] subject individual and except as provided in subsection (c), an entity shall permit a[n] subject individual [who is the subject of protected health information] or the subject individual's designee, to inspect and copy protected health information concerning the individual, including records created under section 323C-12, [that the entity maintains] and protected health information received from other sources, that are maintained by the entity. The

entity shall adopt appropriate procedures to be followed for the inspection or copying and may require an individual to pay reasonable costs associated with the inspection or copying. Nothing in this subsection prevents the entity from allowing inspection and copying rights when requested orally.

(c) Unless ordered by a court of competent jurisdiction, an entity is not required to permit the inspection or copying of protected health information if any of the following conditions are met:

- (1) The entity determines that the disclosure of the information could reasonably be expected to endanger the life or physical safety of, or cause substantial mental harm to, the subject individual [who is the subject of the record];
- (2) The information identifies, or could reasonably lead to the identification of, a person who provided information under a promise of confidentiality concerning the subject individual [who is the subject of the information] unless the confidential source can be protected by redaction or other similar means;
- (3) The information is protected from discovery or disclosure under state or federal law [as provided in section 624-25.5]; or
- (4) The information was collected for [or during] a clinical trial monitored by an institutional review board, and the trial is not complete [, and the researcher reasonably believes that access would harm the conduct of the trial.]

(d) If an entity denies a request for inspection or copying pursuant to subsection (c), the entity shall inform the individual in writing of:

- (1) The reasons for the denial of the request for inspection or copying;
- (2) Any procedures for further review of the denial; and
- (3) The individual's right to file with the entity a concise statement setting forth the request for inspection or copying.

(e) If an individual has filed a statement under subsection (d)(3), the entity in any subsequent disclosure of the portion of the information requested under subsection (b) shall include:

- (1) A copy of the individual's statement; and
- (2) A concise statement of the reasons for denying the request for inspection or copying.

(f) An entity shall permit the inspection and copying under subsection (b) of any reasonably segregable portion of a record after deletion of any portion that is exempt under subsection (c).

(g) An entity shall comply with or deny, in accordance with subsection (d), a request for inspection or copying of protected health information under this section

not later than thirty days after the date on which the entity or agent receives the request.

(h) An agent of an entity shall not be required to provide for the inspection and copying of protected health information, except where:

- (1) The protected health information is retained by the agent; and
- (2) The agent has received in writing a request from the entity involved to fulfill the requirements of this section, at which time this information shall be provided to the individual. The agent shall comply with subsection (g) with respect to any such information.

(i) The entity shall afford at least one level of appeal by parties not involved in the original decision.

(j) This section shall not be construed to require that an entity described in subsection (a) conduct a formal, informal, or other hearing or proceeding concerning a request for inspection or copying of protected health information.

(k) If an entity denies a[n] subject individual's request for copying pursuant to subsection (c), or if an individual so requests, the entity shall permit the inspection or copying of the requested protected health information by the subject individual's designated representative, upon presentation of a proper authorization signed by the individual, unless it is patently clear that doing so would defeat the purpose for which the entity originally denied the subject individual's request for inspection and copying.

**§323C-12 Additions to protected health information.** A health care provider is the owner of the medical records in the health care provider's possession that were created by the health care provider in treating a patient. A[n] subject individual or the subject individual's authorized representative may request in writing that a health care provider that generated certain health care information append additional information to the record in order to improve the accuracy or completeness of the information; provided that appending this information does not erase or obliterate any of the original information. A health care provider shall do one of the following:

- (1) Append the information as requested; or
- (2) Notify the subject individual that the request has been denied, the reason for the denial, and that the subject individual may file a statement of reasonable length explaining the correctness or relevance of existing information or as to the addition of new information. The statement or copies shall be appended to the medical record and at all times accompany that part of the information in contention.

**§323C-13 Notice of [confidentiality] information practices; forms of notices.** [(a) For the purposes of this section only, "entity" means [a] health care provider, health care data organization, health plan, health oversight agency, public health authority, employer, insurer, health researcher, or educational institution.

(b) [(a) An [entity] employer and health care provider shall prominently post or provide the [current] notice [of the entity's confidentiality practices] described in subsection (b) or the model noticed approved by the director under section 323C-62. The notice shall be printed in clear type and composed in plain language. This notice shall be given pursuant to the requirements of section 323C-22. [For the purpose of informing each individual of the importance of the notice and educating the individual about the individual's rights under this chapter, the notice shall contain the following language, placed prominently at the beginning:

IMPORTANT: THIS NOTICE DEALS WITH THE SHARING OF INFORMATION FROM YOUR MEDICAL RECORDS. PLEASE READ IT CAREFULLY. This notice describes your confidentiality rights as they relate to information from your medical records and explains the circumstances under which information from your medical records may be shared with others. This information in this notice also applies to others covered under your health plan, such as your spouse or children. If you do not understand the terms of this notice, please ask for further explanation.

In addition, as shall be appropriate to the size and nature of the entity, the notice shall include information about:]

(b) The notice shall at a minimum consist of the following elements:

- (1) A description of an individual's rights with respect to protected health information which shall contain at a minimum, the following:
  - (A) An individual's right to inspect and copy their record;
  - (B) An individual's right to request that a health care provider append information to their medical record; [and
  - (C) An individual's right to receive this notice by each health plan upon enrollment, annually, and when confidentiality practices are substantially amended.]
- (2) The uses and disclosures of protected health information that are authorized under this chapter including [including [information about] a description of the uses and disclosures:
  - [(A) Payment;
  - (B) Conducting quality assurance activities or outcomes assessments;

- (C) Reviewing the competence or qualifications of health care professionals;
  - (D) Performing accreditation, licensing, or credentialing activities;
  - (E) Analyzing health plan claims or health care records data;
  - (F) Evaluating provider clinical performance;
  - (G) Carrying out utilization management; or
  - (H) Conducting or arranged for auditing services in accordance with statute, rule or accreditation requirements;]
  - (A) related to health care delivery and financing activities;
  - (B) related to activities to determine, administer or pay employment benefits or entitlements for which a claim has been filed;
  - (C) related to activities that promote workplace or educational health and safety and that are required by federal or state law or rule or as terms of employment may require;
  - (D) that are required by law or rule.
- [(3) The right of the individual to limit disclosure of protected health information by deciding not to utilize any health insurance or other third party payment as payment for the service, as set forth in section 323C-21(c);]
- [(4)](3)The procedures for [giving consent to] authorizing the use and disclosures of protected health information and for revoking the [consent] authorization to use and disclose;
- [(5)](4)The description of procedures established by the entity for the exercise of the individual's rights required under this chapter; [and]
- (5) A statement advising the individual of his or her right to complain to the entity and to the office of information practices if the individual believes that his or her privacy rights have been violated;
- (6) A statement of the entity's duties and obligations regarding the privacy of the protected health information obtained, used or disclosed by the entity.
- [6] (7)[The] An individual's right to obtain a copy of the notice of confidentiality practices required under this chapter.
- (c) An entity shall establish procedures for the exercise of individual rights under this part. The actual procedures established by the entities for the exercise of individual rights under this part shall be available in writing upon request.

**§323C-14 Establishment of safeguards.** (a) An entity shall establish and maintain administrative, technical, and physical safeguards that are appropriate to the size and nature of the entity establishing the safeguards, and that are appropriate to protect the confidentiality, security, accuracy, and integrity of protected health information created, received, obtained, maintained, used, transmitted, or disposed of by the entity.

(b) The office of information practices shall adopt rules pursuant to chapter 91 to implement subsection (a).

### **PART III. [RESTRICTIONS ON] RULES ON USE AND DISCLOSURE**

**§323C-21 General rules regarding use and disclosure.** (a) An entity shall not obtain, use or disclose protected health information except as [authorized] permitted under this [part and under part IV] chapter. [Disclosure] Use or disclosure of health information in the form of nonidentifiable health information shall not be construed as a use or disclosure of protected health information, except as set forth in subsection (h).

(b) [For the purpose of treatment or qualified health care operations, an entity may only use or disclose protected health information if the use or disclosure is properly noticed pursuant to sections 323C-13 and §323C-22. For all other uses and disclosures, an entity may only use or disclose protected health information, if the use or disclosure is properly consented to pursuant to section 323C-23.] Disclosure to agents of an entity shall be considered as a disclosure within an entity.

[(c) If an individual does not want protected health information released pursuant to [subsection] (b), the individual shall advise the provider prior to the delivery of services that the relevant protected health information shall not be disclosed pursuant to subsection (b), and the individual shall pay the health care provider directly for health care services. A health plan may decline to cover particular health care services if an individual has refused to allow the release of protected health care information pertaining to those particular health care services. Protected health information related to health care services paid for directly by the individual shall not be disclosed without consent.]

[(c)][(d)] An agent who receives protected health information from or on behalf of an entity shall be subject to all rules of disclosure and safeguard requirements under this part.

[(d)][(e)] Every use and disclosure of protected health information shall be limited to the purpose for which it was collected. Any other use without a valid consent to disclose shall be an unauthorized disclosure.] Protected health information may be used, within an entity, by those employees whose job functions require the use of such information.

(e) Entities who receive protected health information from other sources as provided in this chapter, may use and disclose this information as provided in this chapter.

(f) Nothing in this part permitting the disclosure of protected health information shall be construed to require disclosure.

(g) An entity may disclose protected health information to an employee or agent of the entity not otherwise authorized to receive such information for purposes of creating nonidentifiable information, if the entity prohibits the employee or agent of the entity from using or disclosing the protected health information for purposes other than the sole purpose of creating nonidentifiable information, as specified by the entity.

(h) Any individual or entity who manipulates or uses nonidentifiable health information to identify an individual, shall be deemed to have disclosed protected health information. [The disclosure or transmission of a unique patient identifier shall be deemed to be a disclosure of protected health information.]

**§323C-22 Giving notice [regarding disclosure of protected health information for treatment or qualified health care operations.]** (a) The notice required by section 323C-13 shall be:

- (1) [Given by each health plan upon enrollment, annually, and when confidentiality practices are substantially amended, to each individual who is eligible to receive care under the health plan, or to the individual's parent or guardian if the individual is a minor or incompetent;] Published by the director two times a year; and
- (2) Posted by health care providers and employers in a conspicuous place or provided by health care providers and employers. [or provided by an entity other than a health plan.

(b) For each new enrollment or re-enrollment by an individual in a health plan, on or after July 1, 2000, a health plan shall make reasonable efforts to obtain the individual's signature on the notice of confidentiality practices. The notice to be signed shall state that the individual is signing on behalf of the individual and all others covered by the individual's health plan. If the plan is unable to obtain the aforementioned signature, the plan shall note the reason for the failure to obtain said signature. The lack of a signed notice of confidentiality practices shall not justify a denial of coverage of a claim, nor shall it limit a health plan's access to information necessary for treatment and qualified health care operations; provided that the individual may elect to keep the records from being disclosed by paying for the subject health care services, as provided under section 323C-21(c).] Except as provided in this chapter, the notice required by this section and section 323C-13

shall not be construed as a waiver of any rights that the individual has under other federal or state laws, rules of evidence, or common law.

[(d) For the purposes of this subsection, "reasonable efforts" may include but are not limited to requiring the employer to present the notice to the individual and to request a signature, or mailing the notice to the individual with instructions to sign and return the notice within a specified period of time.]

**§323C-23 Authorization to obtain, use and disclose protected health information [other than for treatment, payment, or qualified health care operations.]** (a) Any [entity] person may obtain, use and disclose protected health information [for purposes other than those noticed under section 323C-22,] pursuant to a separate written authorization [to disclose] executed by the subject individual or the subject individual's designated representative[who is the subject of the information.] The authorization must meet the requirements of subsection (b).

(b) To be valid, an authorization shall be separate from any other notice or authorization required by this part, shall be either in writing, dated, and signed by the subject individual or the individual's designated representative, or in electronic form, dated, and authenticated by the individual using a unique identifier, shall not have been revoked, and shall do the following:

- (1) Identify the persons or [entity] entities authorized to disclose protected health information;
- (2) Identify the subject individual [who is the subject of the protected health information];
- (3) Describe the nature of [and the time span of the] protected health information to be disclosed and used.
- (4) Identify the persons, or entities or types of entities to whom the information is to be disclosed and used by;
- (5) Describe the general purposes of the uses and disclosure;
- (6) State that it is subject to revocation by the subject individual [and indicate that the consent to disclose is valid until revocation by the individual] except to the extent that a person has acted in reliance on it; and
- (7) [Include the date at which the authorization consent to disclose ends.] State the date, event or condition upon which the authorization will expire if not revoked before. This date, event or condition must ensure that the authorization will last no longer than reasonably necessary to serve the purpose for which it is given.

(c) The subject [An] individual or individual's designated representative may revoke in writing an authorization under this section at any time. [An authorization obtained by a health plan under this section is deemed to be revoked at the time of

the cancellation or nonrenewal of enrollment in the health plan. An entity] A person that discloses protected health information pursuant to an authorization that has been revoked under this subsection shall not be subject to any liability or penalty under this part for the disclosure if that [entity] person acted in good faith without reason to believe it had been revoked. [and had no actual or constructive notice of the revocation.]

[d) Sections 323C-31 to 323C-39 provide for exceptions to the requirement for the authorization.]

[e] (d) A recipient of protected health information pursuant to an authorization under this section may use the information solely to carry out the purpose for which the information was authorized for [release] disclosure.

[f] (e) Each entity [collecting or storing] disclosing protected health information shall maintain [for seven years], as part of an individual's protected health information, a record of each authorization by the individual and any revocation of authorization by the individual for as long as that entity maintains the protected health information.

[g] (f) Any provision in an authorization required by this section which expressly waives or releases any rights of the subject individual against any person or entity shall be null and void.

[h] (g) The use of coercion, duress, or threat to withhold benefits by the person or entity for whose protection the authorization is sought shall render the authorization null and void; provided that informing the individual of the consequences permitted by law of a refusal to execute the authorization shall not constitute coercion, duress, or a threat to withhold benefits.

#### **PART IV. NO AUTHORIZATION REQUIRED [EXCEPTED USES AND DISCLOSURES]**

§323C-B Individual Disclosures. (a) No authorizations are required for uses and disclosures of protected health information by the individual or for those uses and disclosures permitted under sections 323C-C to 323C-40.

(b) Any individual who voluntarily discloses his or her own protected health information, or the protected health information of an individual which he or she is authorized to disclose under sections 323C-32 or 323C-42, shall be deemed to have authorized the use and further disclosure of such information for any express purpose or purposes for which the information was given and for any implied purpose or purposes and to any person or persons which a reasonably prudent person, viewing the facts and circumstances would deem to be within the expectations of the individual.

**§323C-C Activities that are required by law, rules or court order.** Any holder of an individual's protected health information, when required to disclose by state or federal law, rules or court order, may disclose the protected health information without an authorization.

**§323C-D For delivery and financing of health care.** When an individual has sought or been provided health care, no authorization is necessary for uses and disclosures which are necessary to provide timely, quality and affordable health care, including, but not limited, to those activities defined as delivery and financing of health care, when the holder of protected health information has met the requirements of sections 323C-H, 323C-I and all other obligations under this chapter.

**§323C-E For claims or requests for employment related benefits, entitlements or services.** When an individual has made a claim or request, or when a report of injury for which benefits may be sought has been filed, for employment related benefits, entitlements or services and protected health information is necessary to determine, support and administer those employment related benefits, entitlements or services, no authorization is required for such uses and disclosures of protected health information when the holder of protected health information has met the requirements of section 323C-H, §323C-I and all other obligations under this chapter.

**§323C-F For workplace or educational health and safety.** When activities require the use or disclosure of protected health information to ensure a healthy and safe workplace or educational environment, no authorization is required for such uses and disclosures when the holder of protected health information has met the requirements of section 323C-H, §323C-I and all other obligations under this chapter. These activities may include, but are not limited to, data compiling, maintenance and reporting, investigating, consulting, and taking actions that promote workplace and educational health and safety, including but not limited to, federal and state requirements.

**§323C-G For purposes of collective bargaining.** When activities, which promote the resolution of disputes between employers and employees under collective bargaining agreements only, require the use and disclosure of protected health information no authorization to use or disclose protected health information is required, when the holder of protected health information has met the requirements of section 323C-H, §323C-I and all other obligations under this chapter for the following activities:

- (1) for the duty of fair representation by the exclusive representative of the employee or class of employees;
- (2) enforcement of the terms of a written collective bargaining agreement reached between the employer and the labor organization and executed by both parties;
- (3) resolution of a grievance or an arbitration issue under a collective bargaining agreement which issue includes protected health information of the individual employee, other employees within the class of employees who are parties to the grievance, or other employees whose protected health information is relevant to a disparate treatment case;
- (4) adjudicating or determining an employee's internal administrative or judicial appeal arising out of the labor organization's handling of the case;
- (5) communicating about grievance administration, with designated representative, third-party labor arbitrators or mediators mutually agreed to by the labor organization and employers, government agencies and boards and commissions and courts which adjudicate labor disputes;
- (6) communicating with the officially designated representatives of the national or international labor organizations that are formally affiliated with the labor organization for purposes of appeal only.

**§323C-H Limitations or restrictions on uses and disclosures.** For those functions, activities or operations in §323C-C through §323C-G protected health information may not be disclosed, obtained, or used without an authorization unless the following limitations or requirements are met:

- (1) Notice has properly been given;
- (2) The protected health information may be disclosed, obtained, or used for purposes noticed and related activities, or as authorized by law, rule or by lawful agreement;
- (3) The protected health information to be disclosed is limited to no more than the amount, including the number of records and the number of documents, reasonably necessary to carry on the task, operation, or program with reasonable effectiveness and economic feasibility;
- (4) The handling and examination of protected health information is limited to those persons whose job requires them to use or disclose protected health information, and who are reasonably well qualified, by training, credentials, or experience, to conduct the phase of the task, operation, or function in which they are involved; and

- (5) The safeguards required by section 323C-14 to protect the confidentiality, security, accuracy, and integrity of protected health information are established and maintained by the person or entity obtaining, using, or disclosing the information.

**§323C-I Statements of authority and compliance.** The holder may release protected health information under sections 323C-C through 323C-G only upon an affirmative statement by the requester that it has authority under one or more requirements of sections 323C-C through 323C-H to obtain protected health information and that the requester has complied with the requirements imposed on it by this chapter. If the holder relies in good faith upon the requester's statement of authority and compliance, the disclosure of protected health information shall be deemed to be in compliance with this law. This section shall not require written documentation of the authority.

**§323C-31 Coroner or medical examiner.** When a coroner or medical examiner or one of their duly appointed deputies seek protected health information for the purpose of inquiry into and determination of the cause, manner, and circumstances of a death, any person shall provide the requested protected health information to the coroner or medical examiner or to the duly appointed deputies without undue delay. If a coroner or medical examiner or their duly appointed deputies receives protected health information, this protected health information shall remain protected health information unless it is attached to or otherwise made a part of a coroner's or medical examiner's official report. Health information attached to or otherwise made a part of a coroner's or medical examiner's official report shall be exempt from this chapter.

**§323C-32 Individual's designated representative, relative, or surrogate, or caregiver.** [(a)] A health care provider, [or a person who receives protected health information under subsection (b),] may disclose protected health information regarding an individual to an individual's designated representative, relative, surrogate or caregiver if:

- (1) The subject individual [who is the subject of the information]:
- (A) Has been notified of the individual's right to object to the disclosure and the individual has not objected to the disclosure; or
  - (B) Is in a physical or mental condition such that the individual is not capable of objecting, and there are no prior indications that the individual would object; and

- (2) The information disclosed is for the purpose of [providing health care to that individual] the provision, support, or facilitation of health care to the individual.

[The]A good faith disclosure under this section of [the] protected health information which is consistent with good medical or professional practice, is not a violation of this chapter.

**§323C-J Directory information.** (a) [Except as provided in subsection (d), a] A health care provider may disclose the information described in subsection [(c)] (b) to any other person if the subject individual [who is the subject of the information]:

- (1) Has [been notified of the individual's right to object and the individual has] not objected to the disclosure; or
- (2) Is in a physical or mental condition such that the subject individual is not capable of objecting; and
  - (A) The individual's designated representative, relative, [or] surrogate or caregiver has not objected; and
  - (B) There are no prior indications that the subject individual would object.

[(c)](b) Information that may be disclosed in subsection [(b)] (a) is only that information that consists of any of the following items:

- (1) The name of the subject individual [who is the subject of the information];
  - (2) The general health status of the individual, described as critical, poor, fair, stable, or satisfactory or in terms denoting similar conditions; or
  - (3) The location of the individual on premises controlled by a provider.
- This disclosure shall not be made if the information would reveal specific information about the physical or mental condition of the individual, unless the individual expressly authorizes the disclosure.

[(d) A disclosure shall not be made under this section if the health care provider involved has reason to believe that the disclosure of this information could lead to physical or mental harm to the individual, unless the individual expressly authorizes the disclosure.]

**§323C-33 Identification of deceased individuals.** A health care provider may disclose protected health information if the disclosure is necessary to assist in the identification or safe handling of a deceased individual.

**§323C-34 Emergency circumstances.** (a) Any person who creates or receives protected health information under this chapter may use or disclose protected health information in [emergency] circumstances when the use or disclosure is necessary to protect the health or safety of an [the] individual [who is

the subject of the information] from serious, imminent harm. A disclosure made in the good faith belief that the use or disclosure was necessary to protect the health or safety of an individual from serious, imminent harm shall not be a violation of this chapter.

(b) A provider may disclose a person's name, city of residence, age, sex and general condition to a state or federally recognized disaster relief organization or public health authority for the purpose of coordination and provision of disaster welfare information to the public, provided that the person or the person's guardian, designated representative, relative or surrogate has not objected.

(c) A state or federally recognized disaster relief organization or public health authority may disclose the name, city of residence, age, sex, general condition, and treating facility of any person who has been injured in a mass casualty event, provided that the patient or the patient's guardian, designated representative, relative, or surrogate has not objected.

**§323C-34.5 Disclosure for firearm permit and registration purposes.** A health care provider or public health authority shall disclose health information, including protected health information, relating to an individual's mental health history, to the appropriate county chief of police in response to a request for the information from the chief of police, provided that:

- (1) the information shall be used only for the purposes of evaluating the individual's fitness to acquire or own a firearm; and
- (2) the individual has signed [a waiver] an authorization permitting [release] disclosure of the health information for that purpose.

**§323C-35 Disclosures for health oversight.** (a) Any person may disclose protected health information to a health oversight agency for purposes of an oversight function authorized by law.

(b) For purposes of this section, the individual with authority to authorize the health oversight function involved shall provide to the person described in subsection (a) a statement that the protected health information is being sought for a legally authorized oversight function.

(c) Protected health information about an individual that was obtained under this section may not be used in, or disclosed to any person for use in, an administrative, civil, or criminal action or investigation directed against the individual unless the action or investigation arises out of and is directly related to:

- (1) The receipt of health care or payment for health care;
- (2) An action involving a fraudulent claim related to health; or
- (3) An action involving oversight of a public health authority or a health researcher.

(d) Protected health information disclosed for purposes of this section remains protected health information and shall not be further disclosed by the receiving health oversight agency, except as permitted under this section.

**§323C-36 Public health.** (a) Any person or entity may disclose protected health information to a public health authority or other person authorized by law, for use in a legally authorized:

- (1) Disease or injury report;
- (2) Public health surveillance;
- (3) Public health investigation or intervention; or
- (4) Health or disease registry.

(b) The disclosure of protected health information, pursuant [to] this section, to a public health authority or other person authorized by law shall not be a violation of this part.

(c) Protected health information disclosed for purposes of this section remains protected health information and shall not be further disclosed by the receiving authority or person, except as permitted under this section.

(d) The department of health may disclose protected health information when the director of health determines that disclosure is necessary to protect the health or safety of the public, and that the public interest in disclosure outweighs the privacy interests of the individual.

**§323C-37 Health research.** (a) A [health care provider, health plan, public health authority, employer, insurer, or educational institution] holder of protected health information may disclose protected health information to a health researcher if the following requirements are met:

- (1) The research shall have been approved by any institutional review board accepted by the holder of the protected health information. In evaluating a research proposal, an institutional review board shall require that the proposal demonstrate a clear purpose, scientific integrity, and a realistic plan for maintaining the confidentiality of protected health information; Research not otherwise subjected by federal regulation to institutional review board review shall be subject only to the review requirements of this paragraph;
- (2) The [health care provider, health plan, public health authority, employer, insurer, or educational institution] holder of protected health information shall only disclose protected health information which it has previously created or collected; and

- (3) The holder of protected health information shall keep a record of all health researchers to whom protected health information has been made available.
- (4) Research which has been approved by an institutional review board prior to the effective date of this law will be exempt from subsection (a)(1).

(b) A health researcher who receives protected health information shall remove and destroy, at the earliest opportunity consistent with the purposes of the project involved, any information that would enable an individual to be identified.

(c) A health researcher who receives protected health information shall not disclose or use the protected health information [or unique patient identifiers] for any purposes not reviewed by an institutional review board under this part or for any purposes other than the health research project for which the information was obtained, except that the health researcher may disclose the information pursuant to section 323C-35(a).

**§323C-K Organ procurement organization.** (a) An entity may disclose protected health information to an organ procurement organization, as defined in chapter 327, to carry out all legally permitted functions related to anatomical gifts, as those functions are defined in chapter 327.

(b) An organ procurement organization that receives protected health information may use and disclose such protected health information to carry out all legally permitted functions related to anatomical gifts, as defined in chapter 327.

(c) Protected health information disclosed for purposes of this section remains protected health information and shall not be further disclosed by the receiving organ procurement organization, except as permitted under this chapter.

**§323C-L Educational Institutions.** (a) A health care provider may disclose to an educational institution protected health information as is necessary to fulfill the requirements of sections 302A-1154 through 1163 and sections 325-33-34, and chapter 11-157, Hawaii Administrative Rules.

(b) Protected health information obtained from an individual disclosure as set forth in section 323C-A or pursuant to a written authorization as defined in section 323C-23 may be used or disclosed by or between employees or agents of the educational institution, or between a health care provider and an educational institution for the purposes of:

- (1) Ensuring student attendance and enrollment;
- (2) Preparing and collaborating on an agenda for a student's pursuit of knowledge;

(3) Ensuring the safety and welfare of the students and employees of the educational institution;

(4) Carrying out campus-security related activities.

(c) For purposes of section 323C-23, the language in subsection (b) shall be considered to be a specific use for purposes of the requirements of the authorization.

**§323C-38 Disclosure in [civil, judicial and administrative procedures] dispute resolution procedures.** (a) Unless otherwise protected from disclosure by state or federal law, [P]protected health information may be obtained, used or disclosed pursuant to a [discovery request or] subpoena in a [civil action] judicial proceeding brought in a state or federal court, a subpoena related to a state administrative proceeding, a Medical Claims Conciliation Panel proceeding as set forth in chapter 671, a Court Annexed Arbitration proceeding as set forth in chapter 601, or an arbitration or other alternative dispute resolution proceeding authorized by law or contract. [, only if the disclosure is made pursuant to a court order as provided for in subsection (b) or to a written authorization under section 323C-23.]

Disclosures under this section may be made pursuant to:

(1) written authorization under section 323C-23; or

(2) [(b) A] a court order issued under this section. Such court order shall:

(A) Provide that the protected health information involved is subject to court protection;

(B) Specify to whom the information may be disclosed;

(C) Specify the information that may not otherwise be disclosed or used; and

(D) Meet any other requirements that the court determines are needed to protect the confidentiality of information.

(b) [(c) This section shall not apply in a case in which] Neither a court order nor a written authorization under section 323C-23 shall be required when the protected health information sought under the [discovery request or] subpoena is:

(1) Nonidentifiable health information; or

(2) [Related to a party to the litigation whose medical condition is at issue.]

The party or claimant issuing the subpoena, or that party's or claimant's attorney, attests in writing, under penalty of perjury:

(A) that the protected health information sought relates to a party in the judicial proceeding or to a claimant in any other proceeding set forth in subsection (a), whose medical condition is at issue; and,

(B) That, five days prior to the service of the subpoena, notice of the subpoena together with a copy of the subpoena, has been

served on the party or claimant whose medical condition is at issue or upon the attorney for that party or claimant and that such service has been made in the manner provided by applicable statute, court or administrative rules.

(c) All protected health information obtained under this section may only be used for purposes of the judicial or other proceeding set forth in subsection (a) for which the protected health information was obtained. Unless otherwise provided by order of court, such protected health information may be disclosed to the parties to the proceeding (including their attorneys, employees, representatives, insurers, expert witnesses, agents and consultants), to those presiding over the proceeding and to all those lawfully permitted to participate in, attend, or assist with the proceeding.

(d) Parties, claimants and court reporters may, in good faith, furnish copies and disclose protected health information pursuant to court rules, and the rules and procedures of other dispute resolution tribunals.

[(d)] (e) The [release] good faith use and disclosure of any protected health information under this section shall not violate this part.

### **§323C-39 Disclosure for civil or administrative law enforcement**

**[purposes] inquiries.** (a) A subpoena or summons for a disclosure of protected health information for law enforcement inquiries [under subsection (b)(1)] shall only be issued if the civil or administrative law enforcement agency involved shows that there is probable cause to believe that the information is relevant to a legitimate law enforcement inquiry. [For the purposes of this [section] only, "entity" means a health care provider, health plan, health oversight agency, employer, insurer, and educational institution.

(b) Except as to disclosures to a health oversight agency, which are governed by section 323C-35,] An entity or other person who receives protected health information pursuant to sections 323C-23 and 323C-[31] -A through 323C-[37] -K, may disclose protected health information under this section, if the disclosure is pursuant to:

- (1) An administrative subpoena or summons or judicial subpoena;
- (2) [Consent] Authorization in accordance with section 323C-23; or
- (3) A court order.

[(c) A subpoena or summons for a disclosure under subsection (b)(1) shall only be issued if the civil or administrative law enforcement agency involved shows that there is probable cause to believe that the information is relevant to a legitimate law enforcement inquiry.

(d)] (b) When the matter or need for which protected health information was disclosed to a civil or administrative law enforcement agency under subsection [(b)]

(a) has concluded, including any derivative matters arising from the matter or need, the civil or administrative law enforcement agency shall either destroy the protected health information, or return all of the protected health information to the person from whom it was obtained.

[(e)] (c) To the extent practicable, and consistent with the requirements of due process, a civil or administrative law enforcement agency shall redact personally identifying information from protected health information prior to the public disclosure of the protected information in a judicial or administrative proceeding.

[(f)] (d) Protected health information obtained by a civil or administrative law enforcement agency pursuant to this section may only be used for purposes of a legitimate law enforcement activity.

[(g)] (e) If protected health information is obtained without meeting the requirements of subsection [(b)] (a) (1), (2), or (3), any information that is unlawfully obtained shall be excluded from court proceedings unless the [defendant requests] the court orders otherwise.

**§323C-M Disclosure in civil or administrative proceedings or tribunals.** For purposes of due process, when any party or claimant has introduced into evidence protected health information in support of a claim or defense in the proceedings, the adjudicatory body may include such protected health information in its decisions, orders or other published portions of the proceedings.

**§323C-N Limited disclosure for identification purposes in law enforcement procedures.** An entity may disclose protected health information to a law enforcement official if:

(a) the disclosure is for the purpose of identifying a suspect, fugitive, material witness or missing person, provided that the entity may disclose only the following information:

- (1) name;
- (2) address;
- (3) social security number;
- (4) date of birth;
- (5) place of birth;
- (6) type of injury or other distinguishing characteristics; and
- (7) date and time of treatment; or

(b) the disclosure is of the protected health information of an individual who is or is suspected to be a victim of a crime, abuse or other harm, if the law enforcement official represents that:

- (1) such information is needed to determine whether a violation of law by a person other than the victim has occurred; and

- (2) immediate law enforcement activity that depends upon obtaining such information may be necessary.

**§323C-40 Payment card and electronic payment transaction.** (a) If an individual pays for health care by presenting a debit, credit, or other payment card or account number, or by any other electronic payment means, the entity receiving payment may disclose to a person described in subsection (b) only such protected health information about the subject individual as is necessary for the processing of the payment transaction or the billing or collection of amounts charged to, debited from, or otherwise paid by, the individual using the card, number, or other electronic means.

(b) A person who is a debit, credit, or other payment card issuer, or is otherwise directly involved in the processing of payment transactions involving such cards or other electronic payment transactions, or is otherwise directly involved in the billing or collection of amounts paid through these means, may use or disclose protected health information about a[n] subject individual that has been disclosed in accordance with subsection (a) only when necessary for:

- (1) The settlement, billing, or collection of amounts charged to, debited from, or otherwise paid by the individual using a debit, credit, or other payment card or account number, or by other electronic payment means;
- (2) The transfer of receivables, accounts, or interest therein;
- (3) The internal audit of the debit, credit, or other payment card account information;
- (4) Compliance with federal, state, or county law; or
- (5) Compliance with a properly authorized civil, criminal, or regulatory investigation by federal, state, or county authorities as governed by the requirements of this section.

**§323C-41 Standards for electronic disclosures.** The office of information practices shall adopt rules to establish standards for disclosing, authorizing, and authenticating, protected health information in electronic form consistent with this part.

**§323C-42 Rights of minors.** (a) In the case of an individual who is eighteen years of age or older, all rights of an individual under this chapter shall be exercised by the individual.

(b) In the case of an individual of any age who, acting alone, can obtain a type of health care without violating any applicable federal or state law, and who has

sought this care, the individual shall exercise all rights of an individual under this chapter with respect to health care.

- (c) Except as provided in subsection (b), in the case of an individual who is[:
- (1) U]nder [fourteen] eighteen years of age, all of the individual's rights under this chapter shall be exercised only through the parent or legal guardian. [;
  - (2) At least fourteen but under eighteen years of age, the rights of inspection and amendment, and the right to authorize use and disclosure of protected health information of the individual may be exercised by the individual, or by the parent or legal guardian of the individual. If the individual and the parent or legal guardian do not agree as to whether to authorize the use or disclosure of protected health information of the individual, the individual's authorization or revocation of authorization shall control.]

**§323C-43 Deceased individuals.** This chapter shall continue to apply to protected health information concerning a deceased individual following the death of that individual. A person who is authorized by law or by an instrument recognized under law, to act as a personal representative of the estate of a deceased individual, or otherwise to exercise the rights of the deceased individual, to the extent so authorized, may exercise and discharge the rights of the deceased individual under this chapter.]

## PART V. SANCTIONS

**§323C-51 Wrongful disclosure of protected health information.** [(a) A person who knowingly or intentionally obtains protected health information relating to an individual or discloses protected health information to another person in violation of this chapter shall be guilty of a class C felony.

(b) A person who knowingly or intentionally sells, transfers, or uses protected health information for commercial advantage, personal gain, or malicious harm, in violation of this chapter shall be guilty of a class B felony.] (a) Any person who, with knowledge of or reason to know that it is prohibited by this chapter, intentionally, knowingly, or recklessly obtains, uses, causes to be used, or discloses protected health information in violation of this chapter, shall be punished

- (1) for a first offense, a fine not exceeding \$1,000;
- (2) for a second and later offense, a fine not exceeding \$5,000; and
- (3) for any subsequent offense, shall be guilty of a class C felony.

Any fine assessed here shall be reduced by any fines previously assessed by the director under section 65 for the same act.

(b) Any person who, with knowledge of or reason to know that it is prohibited by this chapter, intentionally or knowingly obtains, uses or discloses protected health information in violation of this chapter with the intent to sell, transfer, or use for commercial advantage or personal gain or to cause malicious harm shall be guilty of a class C felony.

(c) It shall be a defense to the violations or crimes in this section that

(1) the obtaining, use, or disclosure of protected health information was incidental to a bona fide sale, merger or transfer by an entity or person of a business or practice to a person or entity licensed or otherwise qualified to engage in such business or practice;

(2) the principal purpose of obtaining, using, or disclosing protected health information was not to receive a commercial advantage or personal gain or to cause malicious harm and that any amount received or the value of any thing or benefit provided to induce the obtaining, use, or disclosure of protected health information did not exceed \$500; or

(3) the person obtained, used, or disclosed protected health information in the course of lawful employment or under a lawful agreement involving stenographic duties or reproduction of records for entities authorized to obtain, use, or disclose protected health information under this chapter;

(4) The disclosure of protected health information was made in the good faith belief that the disclosure was in the best interest of the subject individual or his or her family; or

(5) The obtaining, use or disclosure of protected health information was made under constitutional privilege.

**[§323C-52 Civil actions by individuals.** (a) Any individual whose rights under this chapter have been violated may bring a civil action against the person or entity responsible for the violation.

(b) In any civil action brought under this section, if the court finds a violation of an individual's rights under this chapter, the court may award:

(1) Injunctive relief, including enjoining a person or entity from engaging in a practice that violates this chapter;

(2) Equitable relief;

(3) Compensatory damages for injuries suffered by the individual. Injuries compensable under this section may include, but are not limited to, personal injury including emotional distress, reputational injury, injury to property, and consequential damages;

- (4) Punitive damages, as appropriate;
  - (5) Costs of the action;
  - (6) Attorneys' fees, as appropriate; and
  - (7) Any other relief the court finds appropriate.
- (c) No action may be commenced under this section after the time period stated in section 657-7.]

## **PART VI. ADMINISTRATIVE ENFORCEMENT**

**§323C-O Implementation; reports.** The director shall adopt rules pursuant to chapter 91 to implement this chapter. The director shall file an annual report with the Legislature.

**§323C-54 Notice, prevention and deterrence.** (a) The director shall develop and approve by January 1, 2002 a model notice based on the standards set forth in Section 323C-13. Conspicuous posting or providing of this model notice by providers and employers shall be deemed to be in compliance with Section 323C-13.

(b) To promote the prevention and deterrence of acts or omissions that violate laws designed to safeguard the protected health information in a manner consistent with this chapter, the director of the office of information practices, with any other appropriate individual, organization, or agency, may provide advice, training, technical assistance, and guidance regarding ways to prevent improper disclosure of protected health information.

**§323C-P Complaints.** (a) A person may file with the director a written complaint for alleged violations of this chapter. A complaint, except for those complaints alleging a refusal to grant access, copying or appending, shall be filed within one hundred and eighty days after the person discovered or should have discovered the alleged violation but not more than two years after the alleged violation, unless the alleged violation was deliberately concealed. A complaint that alleges a refusal to grant access, copying or appending shall be filed within forty-five days after the alleged refusal. It is a violation of this chapter to engage in a pattern of filing frivolous, vexatious or bad faith complaints.

(b) The director may:

- (1) Dismiss any complaint if the director determines that:
  - (A) The complaint is not timely, is trivial, frivolous, vexatious, or made in bad faith;
  - (B) The complainant should exhaust other grievance or review procedures; or

- (C) The complaint could more appropriately be dealt with either initially or in its totality by means of another procedure or body:
- (2) Mediate any dispute;
  - (3) Conduct a hearing under section 323C-Q, if the director believes there are reasonable grounds to believe there has been a violation of this chapter.
  - (4) Employ any other of the powers given to the director under section 323C-Q as necessary to enforce the obligations imposed by this chapter;
  - (5) Take any appropriate action to resolve complaints as may be necessary to appropriately remedy and deter the unlawful use or disclosure of protected health information in the public's interest. These actions may include, but are not limited to, conducting hearings or alternative dispute resolution, letters of warning, assessing sanctions or penalties, and making referrals to another agency;
  - (6) Issue cease and desist orders; or
  - (7) Determine that this chapter has been violated and may assess penalties against that complainant or complainant's lawyer when there is a finding by the director that a complainant or complainant's lawyer has engaged in a pattern of filing frivolous, vexatious or bad faith complaints.

**§323C-Q Hearings.** (a) If the director has reason to believe that a person has violated this chapter, the director shall issue and serve upon the person and the complainant, a copy of the complaint and a notice of a hearing, to be held at a time and place fixed in the notice, which shall not be fewer than thirty days after the date of service.

(b) At the time and place fixed for the hearing, the person and the complainant shall have an opportunity to be heard.

(c) The director shall prepare the findings and conclusions and shall issue it to the parties involved. In addition, the director may include orders relating to the promotion of compliance with this chapter. A summary of the decision and order shall be published in the director's annual report to the Legislature.

(d) At the director's discretion, the director may also employ any other of the powers given to the director under section 323C-P as necessary to enforce the obligations imposed by this chapter.

(e) The director's findings and conclusions and other orders shall not be used in any separate tort action alleging an invasion of privacy.

**§323C-R Violations of this Chapter.** (a) When the director determines that a provision under this chapter has been violated, the director may order one or more of the following penalties:

- (1) For any violation of this chapter, payment of a civil penalty of not more than \$500 for each and every act or violation but not to exceed \$5,000 in the aggregate for multiple violations;
- (2) For a knowing violation of this chapter, payment of a civil penalty of not more than \$25,000 for each and every act or violation but not to exceed \$100,000 in the aggregate for multiple violations; and
- (3) For violations of this chapter that have occurred with such frequency as to constitute a general business practice, a civil penalty of \$100,000.

Any administrative penalties assessed here shall be reduced by the amount of criminal sanctions imposed for the same acts previously paid or payable under this chapter.

(b) When making a determination of violation, the director shall consider whether the disclosure was unavoidable under the circumstances. If the director determines that the disclosure was unavoidable, the sanctions required under section (a) shall not be imposed.

(c) The director's decision may be appealed to circuit court pursuant to Chapter 91 Hawaii Revised Statutes. The court may award the costs of the appeal to the person in whose favor a judgment was rendered.

(d) In any proceeding brought under this part, the director may award to the prevailing party such costs and fees, including attorney's fees, as justice may require. In determining whether to make such an award and the amount of such award, the director shall consider whether the claim or defense was made in good faith, whether the claim or defense was frivolous, whether acts in violation of this chapter were inadvertent, unavoidable, negligent, or intentional, and such other facts or findings as the director may deem relevant to the determination.

**§323C-53 Cease and desist orders; civil penalty.** (a) [A court] The director shall issue and cause to be served upon a person, who has violated any provision of this chapter, a copy of the [court's] director's findings and an order requiring the person to cease and desist from violating this chapter, or to otherwise comply with the requirements of this chapter. [The court may also order any one or more of the following:

- (1) For any violation of this chapter, payment of a civil penalty of not more than \$500 for each and every act or violation but not to exceed \$5,000 in the aggregate for multiple violations;
- (2) For a knowing violation of this chapter, payment of a civil penalty of not more than \$25,000 for each and every act or violation but not to exceed \$100,000 in the aggregate for multiple violations; and
- (3) For violations of this chapter that have occurred with such frequency as to constitute a general business practice, a civil penalty of \$100,000.]

(b) Any person who violates a cease and desist order or injunction issued under this section may be subject to a civil penalty of not more than \$[1]50,000 for each and every act in violation of the cease and desist order.

(c) No order or injunction issued under this section shall in any way relieve or absolve any person affected by the order from any other liability, penalty, or forfeiture required by law.

(d) Any civil penalties collected under this section shall be deposited into the general fund.

**§323C-S Notice to other regulatory agencies.** Whenever the director takes action against any entity for violation of this chapter, the director shall notify any agency that has regulatory oversight over the organization of the director's action.

**§323C-55 Relationship to other laws.** (a) Nothing in this chapter shall be construed to preempt or modify any provisions of state law concerning a privilege of a witness or person in a court of the state. Receipt of notice pursuant to section 323C-22 or consent to disclose pursuant to section 323C-23 shall not be construed as a waiver of these privileges.

(b) Nothing in this chapter shall be construed to preempt, supersede, or modify the operation of [any] the following state laws [that]:

- (1) Chapter 92F, Hawaii Revised Statutes; nothing in this chapter shall be construed to close public access to government records that have been traditionally open to the public. Except as set forth herein, all uses and disclosures by government agencies subject to chapter 92F shall be governed by the requirements of chapter 92F. Except as set forth herein, uses and disclosures by the non-administrative functions of the judicial branch of government shall be as necessary for purposes of providing due process;

- (2) All laws requiring any entity to report protected health information to a government agency or an agent of a government agency, including discrimination laws and worker compensation laws;
- (3) The Federal Educational Records Protection Act, 20 U.S.C. §1232g;
- (4) All laws that provide[s] for the reporting or disclosure of vital statistics such as birth or death information;
- [(2)] (5) All laws that require[s] the reporting of abuse or neglect information about any individual;
- [(3)] (6) All laws that relate[s] to public or mental health and that prevents or otherwise restricts disclosure of information otherwise permissible under this chapter, except that if this chapter is more protective of information, it shall prevail;
- [(4)] (7) Governs a minor's right to access protected health information or health care services; [or]
- [(5)] (8) Meets any other requirements that the court determines are needed to protect the confidentiality of the information; or
- (9) Any other laws that are more protective than this chapter."

SECTION 2. Chapter 92F is amended by adding the following:

**§92F-43 Information practices commission.** (a) There is established an information practices commission. The commission shall consist of five members appointed by the governor. In making these appointments, the governor shall balance the interests and needs of consumers, health care and business. These appointments shall not be subject to senate confirmation. The term of the commissioners shall be four years, except that the terms of the initial commissioners shall be two years for two commissioners, three years for two other commissioners and four years for one commissioner, as determined by the governor. The commission shall select one of its members to serve as chairperson. Vacancies in the commission shall be filled by the governor. Commissioners shall serve without compensation but shall be reimbursed for reasonable expenses, including travel expenses incurred in the discharge of their duties. The commission shall be attached to the office of information practices.

**§92F-44 Duties of the commission.** To assist the office of information practices in implementing the responsibilities under its jurisdiction, the commission shall solicit and receive public comment on information practices. Every two years the commission shall file a report with the director, the governor and the Legislature on its finding and recommendations on all matters within the jurisdiction of the office of information practices, including legislative changes, if any."

SECTION 3. There is appropriated out of the general revenues of the State of Hawaii the sum of \$ \_\_\_\_\_ or so much thereof as may be necessary for fiscal year 2001-2002, and the same sum, or so much thereof as may be necessary for fiscal year 2002-2003, for the purposes of this act. The sum appropriated shall be expended by the office of information practices for purposes of this act.

SECTION 4. In codifying the new parts added to Chapter 235, Hawaii Revised Statutes, by section 1 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in the new sections' designations in this Act.

SECTION 5. Act 87, Session Laws of Hawaii 1999, is amended by amending section 10 to read as follows:

“SECTION 10. This act shall take effect on [July 1, 2001] January 1, 2002. No act or omission occurring before January 1, 2003 shall give rise to a remedy or penalty under this act; provided however, that the director may issue cease and desist orders section 53 at any time after January 1, 2002.”

INTRODUCED BY: \_\_\_\_\_