

# Hawaii's HIPAA Harmonization Act

TERRI A. O'CONNELL  
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## Introduction

- Speaker
- Agenda
  - Hawaii's Harmonization Act
  - State Laws Beyond HIPAA
  - Hawaii's State Constitution
  - Questions
- Purpose: Help point you in the right direction

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## PRIOR TO HAWAII'S HARMONIZATION ACT



### Before HIPAA rules enacted

- *Hawaii Privacy of Health Care Information Act* in 1999
- Lieutenant Governor's Office requested a blanket exemption
- Repealed in 2001

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**BACKGROUND  
ON HAWAII'S  
HARMONIZATION  
ACT**



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*Hawaii's Health Care Privacy  
Harmonization Act in 2012*

- Patient interests paramount
- HIPAA was comprehensive
- Hawaii had > 50 laws or rules governing health care privacy

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**CHAPTER 232B  
HAWAII'S  
HARMONIZATION  
ACT**



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**Haw. Rev. Stat. §§ 323B-1 to 323B-4**

- Haw. Rev. Stat. § 323B-1  
Applicability
- Haw. Rev. Stat. § 323B-2  
Definitions
- Haw. Rev. Stat. § 323B-3  
Privacy of individually identifiable  
health information
- Haw. Rev. Stat. § 323B-4  
Relationship to other laws

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**Haw. Rev. Stat.  
§ 323B-1  
Applicability**

This chapter shall apply, unless amended by specific reference to this chapter or any section thereof.



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**Haw. Rev. Stat.  
§ 323B-2  
Definitions**

All terms in Haw. Rev. Stat. § 323B-2 are defined by HIPAA

➤ 45 CFR §§ 160.103 or 164.402

➤ Terms include:

- Breach
- Business associate
- Covered entity
- Disclosure
- Health Information
- Individually identifiable health information
- Unsecured protected health information
- Use



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**Haw. Rev. Stat.  
§ 323B-3  
Privacy of IIHI**



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**Despite any law to the contrary:**

- (a) Use or disclosure of individually identifiable health information (IIHI) permitted by 45 CFR Part 164, Subpart E is deemed to comply with all Hawaii laws relating to use, disclosure or confidentiality

**Examples provided in the Act's purpose:**

- HRS 334-5
- HRS 333E-6
- HRS 325-101

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**Haw. Rev. Stat.  
§ 323B-3  
Privacy of IIHI  
Continued**



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**Despite any law to the contrary:**

- (a) Use or disclosure of IIHI permitted by 45 CFR Part 164, Subpart E is deemed to comply with all Hawaii laws relating to use, disclosure or confidentiality
- (b) An authorization for release of IIHI complying with 45 CFR § 164.508 is deemed to comply with Hawaii laws for individual authorization

**Examples of Hawaii laws:**

- HRS §§ 431:10A-118, 432:1-607 & 432D-26
- HRS 325-123

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**Haw. Rev. Stat.  
§ 323B-3  
Privacy of IIHI  
Continued**



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**Despite any law to the contrary:**

- (a) Use or disclosure of IIHI permitted by 45 CFR Part 164, Subpart E is deemed to comply with all Hawaii laws relating to use, disclosure or confidentiality
- (b) An authorization for release of IIHI complying with 45 CFR § 164.508 is deemed to comply with Hawaii laws for individual authorization
- (c) Any notice of breach of unsecured PHI that complies with 45 CFR Part 164, Subpart D is deemed to comply with Hawaii laws relating to notice

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**Haw. Rev. Stat.  
§ 323B-4  
Relationship to  
Other Laws**



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**Chapter 323B is not construed to:**

- 1) Authorize disclosure of IIHI if not allowed by federal/state law
- 2) Compel disclosure of IIHI if not required by law
- 3) Require a written authorization of IIHI or de-identified info if HIPAA does not require
- 4) Limit state laws requiring reporting or public health investigations
- 5) Limit health plan reporting
- 6) Limit/affect evidentiary privilege, discovery, confidentiality protection by state law, decision, order re: IIHI sought/used/produced in any judicial or administrative proceeding

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**CHAPTER 323B  
NOT  
APPLICABLE**



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**Examples**

- Chapter 577 titled “Children”
- HRS § 325-16.5 (b) re: court ordered HIV tests
- HRS § 622-57 (c)-(h) re: deceased persons
- Peer review or quality assurance activities
- Registries re: donor, tumor, vital statistics
- Child abuse records

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**CHAPTER 323B  
NOT  
APPLICABLE  
CONTINUED**



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**Examples**

- Chapter 487J titled “Personal Information Protection”
- Chapter 431 of the Insurance Code, Article 3A titled “Privacy of Consumer Financial Information”
- Hawaii State Constitution Article I, § 6

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**HAWAII  
STATE  
CONSTITUTION**



*Article I, Section 6*

*The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.*

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**ARTICLE I  
SECTION 6  
BACKGROUND**



**Constitutional Convention of Hawaii 1978**

- relates to privacy in the informational and personal autonomy sense
- ability of a person to control the privacy of information about himself, such as unauthorized public disclosure of embarrassing or personal facts about himself
- concerns the possible abuses in the use of highly personal and intimate information in the hands of government or private parties

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**ARTICLE I  
SECTION 6**



*The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.*

What is obvious about Hawaii's Constitutional Right to Privacy?

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**ARTICLE I  
SECTION 6**



What is obvious about Hawaii's Constitutional Right to Privacy?

- *Basic personal right to privacy*
- *Very broad, beyond health records includes any private information*
- *Goes beyond HIPAA*
- *The state must have a compelling interest to infringe upon privacy right*
- *No guidelines, like administrative, etc.*
- *No penalties indicated*
- *Other ideas*

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## RECENT HAWAII CASE LAW



Hawaii judiciary recognizes Article 1 § 6 provides more protection over patient medical records than does HIPAA

*Cohan v. Ayabe*, 132 Hawaii 408 (2014)

- Plaintiff in tort litigation in which his medical condition and treatment at issue

*Cohan holding*

- Medical information cannot be used outside the litigation even if de-identified

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## RECENT HAWAII CASE LAW



*Naipo v. Border*, 125 Hawaii 31 (2011)

- Naipo was not a party to the litigation
- Subpoena duces tecum issued to hospital for Naipo's medical records

*Naipo holding*

- Cannot compel confidential patient medical records in litigation where the patient is not a party & where no compelling state interest has been shown

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## EFFECT OF HAWAII CASE LAW



Consider subpoena for a non-party to litigation

- No confidential patient medical information should be released for litigation purposes if the patient is not a party to the litigation (*Naipo*)
- The redaction or de-identification of medical information for a patient not a party to the litigation is likely not sufficient to allow release of the records (extension of *Cohan*)

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## EXAMPLE OF EFFECT ON BUSINESS ASSOCIATE AGREEMENT



- Potential issue if BAA allows
  - business associate to disclose PHI if not a HIPAA violation
  - PHI disclosure if required by law
- Above allows parties to litigation to release de-identified records
- Instead require BA to notify covered entity providing the PHI if
  - BA is subpoenaed for patients' PHI and/or
  - require BA to relinquish control over subpoenas to the covered entity

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**GENERAL  
CHECKLIST**



**Privacy Issues**

- Check entity's policy and procedures
- Check HIPAA
- Check state laws
- Check Hawaii case law
- Call your attorney

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**Thank you  
for your time  
and participation!**

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**Terri A. O'Connell**  
toconnell@goodsill.com  
www.goodsill.com

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# Questions

