Hawaii’s HIPAA Harmonization Act

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- Repealed in 2001

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

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

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

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 334-6
- HRS 333E-6
- HRS 325-101
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 325-123

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
### 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

### 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.*
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

**ARTICLE I**
**SECTION 6**

BACKGROUND

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?

**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
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

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

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)
**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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Questions