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HOUSE BILL 14

48TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SPECIAL SESSION, 2008

INTRODUCED BY

Elias Barela

AN ACT

RELATING TO HEALTH RECORDS; CLARIFYING INDIVIDUAL RIGHTS WITH
RESPECT TO THE DISCLOSURE OF INFORMATION CONTAINED IN
ELECTRONIC MEDICAL RECORDS; PROVIDING FOR A PRIVATE RIGHT OF
ACTION; CLARIFYING THE PROTECTION OF PRIVACY OF ELECTRONIC
MEDICAL RECORDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. DEFINITIONS.--As used in this act:

A. "demographic information" means information in
an electronic medical record that identifies the individual who
is the subject of the medical record, including the
individual's name, date of birth and address and other
information that identifies the individual, that may be used to
identify the individual or that associates the individual with
the individual's electronic medical record;

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1 B. "disclosure" means the release, transfer,
2 provision or otherwise divulging of an individual's electronic
3 medical records to a person other than the holder of the
4 records and includes having access to those records;

5 C. "electronic" means relating to technology having
6 electrical, digital, magnetic, wireless, optical,
7 electromagnetic or similar capabilities;

8 D. "electronic medical record" means a medical
9 record created, generated, sent, communicated, received or
10 stored by electronic means;

11 E. "health care" means care, services or supplies
12 related to the health of an individual and includes:

13 (1) preventive, diagnostic, therapeutic,
14 rehabilitative, maintenance or palliative care and counseling;

15 (2) service, assessment or procedure with
16 respect to the physical or mental condition or functional
17 status of an individual or that affects the structure or
18 function of an individual's body; and

19 (3) the sale or dispensing of a drug, a
20 device, a piece of equipment or other item in accordance with a
21 prescription;

22 F. "health care group purchaser" means a person,
23 other than a person licensed as a property and casualty or
24 workers' compensation insurer, licensed, certified or otherwise
25 authorized or permitted by the New Mexico Insurance Code to pay

1 for or purchase health care coverage on behalf of an identified
2 individual or group of individuals, except for life insurers
3 and disability income insurers, regardless of whether the cost
4 of coverage or services is paid for by the purchaser or the
5 persons receiving coverage or services;

6 G. "health care information" means any information,
7 whether oral or recorded in any form or medium, related to the
8 past, present or future physical or mental health or condition
9 of an individual; the provision of health care to an
10 individual; or the past, present or future payment for the
11 provision of health care to an individual;

12 H. "health care institution" means an institution,
13 facility or agency licensed, certified or otherwise authorized
14 or permitted by law to provide health care in the ordinary
15 course of business;

16 I. "health care provider" means an individual
17 licensed, certified or otherwise authorized or permitted by law
18 to provide health care in the ordinary course of business or
19 practice of a profession;

20 J. "health information exchange" means an
21 arrangement among persons providing for the disclosure of
22 electronic medical records;

23 K. "information" means data, including text,
24 images, sounds and codes and computer programs, software and
25 databases;

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1 L. "medical record" means a record of health care
2 information;

3 M. "record" means information that is inscribed on
4 a tangible medium or that is stored in an electronic or other
5 medium and is retrievable in perceivable form;

6 N. "record locator service" means a system that
7 provides a means of identification of the existence and
8 location of the electronic medical records of a specified
9 individual; and

10 O. "treatment" means the provision, coordination or
11 management of health care and related services by one or more
12 health care providers, including the coordination or management
13 of health care by a health care provider with a third party;
14 consultation between health care providers relating to an
15 individual; or the referral of an individual for health care
16 from one health care provider to another.

17 Section 2. USE AND DISCLOSURE OF ELECTRONIC HEALTH CARE
18 INFORMATION.--

19 A. A person shall not use or disclose health care
20 information in an individual's electronic medical record to
21 another person in violation of state or federal law.

22 B. A person may disclose demographic information
23 and information about the location of an individual's
24 electronic medical records to a record locator service in
25 accordance with law. A person participating in a health

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1 information exchange using a record locator service shall not
2 have access to demographic information, information about the
3 location of the individual's electronic medical records or
4 information in an individual's electronic medical record except
5 in connection with the treatment of the individual or with the
6 express authorization of the subject of the medical record.

7 C. A health information exchange maintaining a
8 record locator service, a health care provider or health care
9 institution shall maintain an audit log of health care
10 providers, health care institutions, persons and other entities
11 accessing information in the record locator service that at
12 least contains information on:

13 (1) the identity of the health care provider,
14 health care institution, person or other entity accessing the
15 information;

16 (2) the identity of the individual whose
17 information was accessed by the health care provider, health
18 care institution, person or other entity; and

19 (3) the date the information was accessed.

20 D. A health care group purchaser shall not require
21 a health care provider or health care institution to
22 participate in a record locator service as a condition of
23 payment or participation.

24 E. A person operating a record locator service or
25 health information exchange shall provide a mechanism under

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1 which individuals may exclude their demographic information and
2 information about the location of their electronic medical
3 records from the record locator service. A person operating a
4 record locator service or a health information exchange that
5 receives an individual's request to exclude all of the
6 individual's information from the record locator service or to
7 have a specific health care provider or health care institution
8 excluded from using the record locator service to access that
9 individual's information is responsible for removing that
10 information from the record locator service.

11 F. When requesting demographic information or
12 information in an individual's electronic medical record using
13 a record locator service or a health information exchange, the
14 requesting health care provider or health care institution
15 shall warrant that the request is for the treatment of the
16 individual and the person releasing the information may rely
17 upon the warranty of the person making the request that the
18 request is for the treatment of the individual.

19 G. An individual may annually request a copy of the
20 audit log of the individual's medical record.

21 Section 3. OUT-OF-STATE DISCLOSURES.--A disclosure
22 otherwise permissible under this act may be made to health care
23 providers, health care institutions or record locator services
24 located or operating outside the state.

25 Section 4. HEALTH CARE REPRESENTATIVES.--A health care

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1 provider, health care institution or health care group
2 purchaser is not subject to regulatory or disciplinary actions
3 or civil liability for:

4 A. complying with a request or authorization made
5 by a person who the health care provider, health care
6 institution or health care group reasonably believed had the
7 authority to exercise the rights and powers of an individual
8 pursuant to this act; or

9 B. declining to comply with a request or
10 authorization made by a person based on a reasonable belief
11 that the person lacked authority to exercise the rights and
12 powers of an individual pursuant to this act.

13 Section 5. BREACH OF THE SECURITY SYSTEM.--

14 A. An entity that holds an individual's electronic
15 medical record or maintains computerized data that includes
16 medical records shall disclose any breach following discovery
17 or notification of the breach to a person whose medical record
18 was, or was reasonably believed to have been, acquired by an
19 unauthorized person.

20 B. The disclosure shall be made without
21 unreasonable delay, which shall allow an entity time to
22 determine the scope of the breach and restore the integrity of
23 the data or data system or accommodate the legitimate needs of
24 law enforcement pursuant to Subsection D of this section.

25 C. Disclosure shall be provided in the following

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1 manner:

2 (1) written notice;

3 (2) electronic notice, provided that the
4 notice is consistent with the provisions applicable to
5 electronic records and signatures in Section 7001 of Title 15
6 of the United States Code; or

7 (3) substitute notice, if the entity
8 demonstrates that the cost of providing notice would exceed two
9 hundred fifty thousand dollars (\$250,000), that the affected
10 class of subject persons to be notified exceeds five hundred
11 thousand or that the entity does not have sufficient contact
12 information. Substitute notice shall be provided in the
13 following manner:

14 (a) email notice;

15 (b) conspicuous posting of the notice on
16 the entity's commonly used web site; or

17 (c) notification by publication.

18 D. Disclosure may be delayed if a law enforcement
19 agency determines that disclosure will impede a criminal
20 investigation. However, disclosure shall be made after the law
21 enforcement agency determines that it will not compromise the
22 investigation.

23 E. For purposes of this section:

24 (1) "breach" means unauthorized acquisition of
25 electronic data or a computerized system containing unencrypted

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1 and confidential medical information maintained in a record.
2 Good faith acquisition of personal information by an employee
3 or agent of the entity for the purposes of the entity is not a
4 breach, provided that the personal information is not used for
5 an unauthorized purpose or subject to further unauthorized
6 disclosure; and

7 (2) "entity" means a person who holds or
8 compiles electronic medical records or maintains a computerized
9 system that contains electronic medical records, including a
10 health care provider, health care institution, health care
11 group purchaser or a person engaged in a health information
12 exchange.

13 Section 6. LAW ENFORCEMENT ACCESS.--

14 A. Unless otherwise provided by this section, a law
15 enforcement agency may require a health care provider, health
16 care institution, health care group purchaser or person engaged
17 in a health information exchange to disclose the contents of a
18 medical record to the law enforcement agency by an
19 administrative subpoena authorized by statute or a grand jury,
20 a trial subpoena or a court order for disclosure pursuant to
21 Subsection B of this section.

22 B. The disclosure of medical records to a law
23 enforcement agency pursuant to Subsection A of this section
24 shall be allowed only if the law enforcement agency offers
25 specific and articulatable facts showing reasonable grounds to

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1 believe that the contents of a medical record are relevant and
2 material to an ongoing criminal investigation.

3 C. The law enforcement agency shall disclose to an
4 individual that it has requested the individual's medical
5 records before the receipt of the records in a manner provided
6 in Subsection C of Section 5 of this act unless a court
7 determines otherwise pursuant to Subsection D of this section.

8 D. Upon request by a law enforcement agency, a
9 court shall order that the disclosure required under Subsection
10 C of this section be delayed for up to ninety days if the court
11 determines that there is reason to believe that disclosure of
12 the existence of a court order may result in:

- 13 (1) endangering the life or physical safety of
14 an individual;
15 (2) flight from prosecution;
16 (3) destruction or tampering with evidence;
17 (4) intimidation of a potential witness; or
18 (5) jeopardizing an investigation or delaying
19 a trial.

20 E. On a motion made by a health care provider,
21 health care institution, health care group purchaser or person
22 engaged in health information exchange, a court issuing an
23 order for disclosure may quash or modify such order if the
24 information or records requested are unusually voluminous in
25 nature or compliance with such order otherwise would cause an

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1 undue burden on the health care provider, health care
2 institution, health care group purchaser or person engaged in a
3 health information exchange.

4 F. A willful disclosure to unauthorized persons of
5 a medical record obtained by a law enforcement agency that is
6 not made pursuant to a law enforcement agent's official duties
7 shall be a violation of this act. This subsection, however,
8 shall not apply to information disclosed to the public by a
9 federal, state or local governmental entity or by a plaintiff
10 in a civil action, provided that the disclosure was lawful and
11 prior to a civil or administrative proceeding.

12 Section 7. RIGHT TO CIVIL ACTION--DEFENSES--LIMITATIONS.--

13 A. A person aggrieved by a violation of this act
14 may recover in a civil action from a health care provider,
15 health care institution, health care group purchaser or person
16 engaged in a health information exchange that knowingly or
17 willfully violates this act.

18 B. In a civil action under this section, relief may
19 include:

20 (1) preliminary and other equitable or
21 declaratory relief as appropriate;

22 (2) damages pursuant to Subsection C or D of
23 this section; and

24 (3) reasonable attorney fees and other
25 reasonable costs incurred as the result of litigation.

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1 C. If the violator knowingly violates this act, the
2 court may assess the sum of actual damages and profits made by
3 the violator as a result of the violation, provided that
4 damages awarded shall not be less than one thousand dollars
5 (\$1,000).

6 D. If the violator willfully violates this act, the
7 court may also assess punitive damages.

8 E. Good faith reliance on a subpoena, court order
9 or legislative authorization for disclosure is a complete
10 defense to any civil action brought under this act.

11 F. A civil action under this section shall not be
12 commenced later than two years after the date upon which the
13 claimant discovered or had a reasonable opportunity to discover
14 the violation.

15 Section 8. EFFECTIVE DATE.--The effective date of the
16 provisions of this act is January 1, 2009.