

**HEALTH INFORMATION PRIVACY PROTECTIONS
UNDER FEDERAL AND STATE LAW
ABA Health Law Section
Department of Health & Human Services Project
October 23, 2006**

I. Privacy Protections Under Constitutional Law

The right to privacy of highly personal information has been recognized as a right protected under the right to be free of unreasonable searches and seizures under the Fourth Amendment and the right to liberty under the Fifth and Fourteenth Amendments to the United States Constitution.¹ The right to privacy of personal information also has been recognized by Congress and by the U.S. Department of Health and Human Services as a “fundamental” constitutional right.²

The right to privacy is also expressly set forth in the Constitutions of ten states: Alaska, Art. I, §22; Arizona, Art. II, §8; California, Art. I, §1 and §3; Florida, Art. I, §12; Hawaii, Art. I, §§6 and 7; Illinois, Art. I, §§6 and 12; Louisiana, Art. I, §5; Montana, Art. II, §10; South Carolina, Art. I, §10 and Washington, Art. I, §7. Other states have recognized a right to information privacy as implicit in their state constitutions.³

Health information privacy has been defined by the National Committee on Vital and Health Statistics and by the National Institute of Medicine as “the individual’s right to control the acquisition, uses, or disclosures of his or her identifiable health data.”⁴ A similar definition has been adopted by the courts and the Department of Health and Human Services.⁵

¹Ferguson v. City of Charleston, 532 U.S. 67, 121 S. Ct. 1281 (2001); Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869 (1977); United States v. Scott, 424 F.3d 888 (9th Cir. 2005); Douglas v. Dobbs, 419 F.3d 1097 (10th Cir. 2005); Tucson Women’s Clinic v. Eden, 371 F.3d 1173 (9th Cir. 2004); Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000).

² Privacy Act of 1974, amendment added by section 2(a) (2) and (4) of Pub. L. 93-579, “Congress finds that...the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;...the right to privacy is a personal and fundamental right protected by the Constitution of the United States...”. See also, 65 Fed. Reg. at 82,464 (December 28, 2000), “[p]rivacy is a fundamental right.”

³ See, e.g., Dr. K v. State Board of Physician Quality Assurance, 98 Md. App. 103, 632 A. 2d 453 (1993), cert. denied, 334 Md. 18, 637 A.2d 1191, cert. denied, 513 U.S. 817, 115 S. Ct. 73 (1994); Davis v. Davis, 842 S.W. 2d 588 (Tenn. 1992).

⁴ “Privacy and Confidentiality”, a report to the Secretary of HHS by the National Committee on Vital and Health Statistics (June 22, 2006).

⁵ U. S. v. Westinghouse, 638 F. 2d 570, 577, n. 5 (3rd Cir. 1980); 65 Fed. Reg. at 82,465.

The right to privacy is not absolute but generally can be overridden only by an infringement that is narrowly tailored to serve a compelling governmental interest.⁶ Further, constitutional protections apply only to government interference with fundamental rights and liberty interests rather than interference by private individuals and entities.⁷

The Constitutional right to health information privacy applies to all citizens and is generally remedied by judicial injunctive relief, however, violations can result in civil claims against government officials under 42 U.S.C. §1983.⁸

II. The Laws of Privilege

A psychotherapist-patient privilege is recognized in all 50 states and the District of Columbia.⁹ A psychotherapist-patient privilege is also recognized under federal common law as well.¹⁰ Such privileges usually cover all communications between a patient and a psychiatrist, psychologist, social worker and other types of counselors. Under such privileges, confidential communications between a therapist and a patient may not be disclosed unless the patient waives the privilege.

In addition, 43 states and the District of Columbia recognize a physician-patient privilege.¹¹ The privilege is not recognized in only the states of Alabama, Georgia, Kentucky, Maryland, Tennessee, South Carolina and West Virginia. The physician-patient privilege generally applies to all information pertaining to the diagnosis or treatment of an individual.

Generally, the privilege is asserted in a motion to quash a subpoena or other request for health information. However, the State of Missouri prescribes fines, imprisonment or both for a professional who unlawfully discloses privileged communications.

III. Health Information Privacy Protections Related To: Cancer Registries, Genetic Testing, HIV/AIDS, Mental Health Facilities, and Sexually Transmitted Diseases

Many states have adopted laws that protect health information relating to certain health conditions such as mental illness, genetic testing, cancer, HIV/AIDS, sexually transmitted diseases, and other conditions. However, there is

⁶ Washington v. Glucksberg, 118 U.S. 355, 117 S. Ct. 2258 (1997). See also, Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000).

⁷ Citizens for Health v. Leavitt, 428 F. 3d 167 (3rd Cir. 2005), cert. denied, 2006 WL 993492 (October 2, 2006).

⁸ See, e.g., Sterling v. Borough of Minersville, 232 F.3d 190 (3rd Cir. 2000); Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000).

⁹ See statutes cited in Jaffee v. Redmond, 518 U.S. 1, 12, n. 11, 116 S. Ct. 1923 (1996).

¹⁰ Id.

¹¹ See “The State of Health Privacy”, Health Privacy Project (2000)

considerable variation among the states in the type of information protected and the scope of the protections provided.¹²

A. Cancer Registries

Nine states do not maintain cancer registries (Connecticut, Georgia, Iowa, Montana, Nebraska, New Mexico, North Dakota, Utah and Wyoming). The remaining 41 states and District of Columbia maintain a cancer registry that monitors causes and cancer treatments, and requires health care providers to report cancer cases, usually to the state's health department. The information collected is considered confidential, privileged and not subject to inspection. The information may, however, be disclosed to other cancer registries, federal cancer control agencies, state health departments, and health researchers.

Seventeen (17) states that have cancer registry statutes impose fines and penalties for violations of cancer registry provisions (Nevada provides for criminal and civil causes of action). In eleven (11) states, disclosure in violation of the registry provisions is a misdemeanor, and penalties include a fine, imprisonment or both (Alaska, Arizona, Colorado, District of Columbia, Hawaii, Minnesota, Nebraska, Nevada, Oklahoma, Tennessee and Texas). In seven (7) states, a person or entity that violates the statute is subject to civil penalties ranging from \$100 to \$25,000 per violation (Delaware, Idaho, Louisiana, Mississippi, Missouri, Nevada and Virginia).¹³

B. Genetic Testing

Genetic testing statutes are available in thirty-eight (38) states and restrict the manner in which genetic tests and information may be required, used and disclosed. The remaining eleven (11) states and the District of Columbia do not protect genetic test results (Alabama, Connecticut, Idaho, Iowa, Kansas, Kentucky, Mississippi, North Dakota, Pennsylvania, Texas, Washington and West Virginia). Genetic testing is defined by most states as a laboratory test of DNA or RNA that can identify an individual's predisposition to illness or disease. In the majority of states, results of genetic tests may not be used by health plans or employers to discriminate against an individual.

Twenty three (23) states, however, provide a cause of action for violations of genetic testing statute provisions. Causes of action include claims of unfair trade practices and equitable relief (Ohio and South Carolina), civil liability and criminal charges and penalties. Civil remedies and fines are available in nineteen

¹² *The State of Health Privacy*, Health Privacy Project, 2nd edition (2002), available at www.healthprivacy.org. Health Care Compliance Reporter, <http://www.health.cch.com>, then follow "Laws & Regulations" (last visited October 10, 2006). Available through CCH on-line, by subscription only.

¹³ *Id.*

(19) states to a person who suffers injury from a disclosure (Alaska, Arizona, Colorado, Delaware, Georgia, Illinois, Louisiana, Maine, Maryland, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Utah, Vermont, Virginia, Wyoming). In four (4) states a violation is considered a misdemeanor punishable by a fine, imprisonment or both (Arkansas, Florida, Oregon and Wisconsin).¹⁴

C. HIV/AIDS

Indiana, Nebraska, Tennessee and Wyoming are the only states that do not protect HIV/AIDS information. The remaining states hold that HIV/AIDS records are privileged. The protections extend generally to reports, records, and data pertaining to testing, care, treatment, reporting and research that identify an individual who has or is suspected of having HIV/AIDS. The protected information may be disclosed only in accordance with specified statutory requirements. Remedies and penalties in some states include both civil and criminal causes of action for the unauthorized disclosure of HIV/AIDS information (Arizona, Montana and North Dakota).

Civil liability for actual damages, costs and attorneys fees is available in Arizona, California, Delaware, Hawaii, Illinois, Maine, Montana, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Vermont, Virginia, West Virginia and Wisconsin. Misdemeanor charges may be brought in Arizona, Colorado, Florida, Georgia, Idaho, Iowa, Kansas, Montana, North Carolina, South Dakota and Utah and are punishable by fine, imprisonment up to one year or both. Injunctive relief is also available in Delaware, Missouri, Montana and Wisconsin.¹⁵

D. Mental Health

Only three states, Arkansas, Massachusetts and Minnesota, do not provide statutory protection for the records of an individual confined to a mental health facility, mental health program or mental health treatment. In the remaining forty-seven (47) states and the District of Columbia, this information is confidential, and may not be disclosed without the patient's authorization.

However, only twenty (20) states provide a civil or criminal remedy for the release or public disclosure of mental health information. Both remedies are available in the District of Columbia, Illinois and Nebraska. The following states provide for civil liability only, including damages, costs and/or reasonable attorney's fees: District of Columbia, Connecticut, Illinois, Nebraska, New Jersey, Oregon, Texas, Virginia, Washington and Wisconsin. In the District of Columbia, Colorado, Hawaii, Illinois, Iowa, Kansas, Kentucky, Nebraska, South Carolina,

¹⁴ Id.

¹⁵ Id.

Utah and Wyoming a misdemeanor charge including a fine, imprisonment or both are available remedies.¹⁶

E. Sexually Transmitted Diseases

Thirty-one (31) states and the District of Columbia have statutes governing sexually transmitted diseases, and information about the sexually transmitted disease must be reported to state and local health officials. These reports are confidential except as is necessary to carry out the purposes of state laws on controlling sexually transmitted diseases. In states where physicians are required to report a sexually transmitted disease, the reports are confidential, not subject to subpoena or discovery proceedings, and in some states are also inadmissible in evidence in any legal proceeding (Nebraska). New York is the only state in which reports of sexually transmitted disease may be disclosed by court order in a criminal or family court proceeding.

Only a few states provide a remedy and impose penalties for a violation of the statute's non-disclosure provision. In Florida, Idaho, New Mexico, North Carolina, Oregon, Rhode Island, South Carolina, Utah and Washington a prohibited disclosure is a misdemeanor punishable by fine, imprisonment or both. States that impose a fine or provide civil penalties for disclosure of sexually transmitted disease information include North Dakota and Pennsylvania. The state of Washington permits both civil and criminal actions.¹⁷

IV. Electronic Data Breach Disclosure Laws

Since 2003, 33 states have adopted electronic data breach disclosure laws that require notification of individuals of the improper disclosure of identifiable information that is maintained in electronic form. Those states are Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin.

Generally, these breach notice laws apply to any person or business that conducts business within the state and that owns, licenses or maintains computerized data containing personal information. The notice requirement applies to unencrypted personal information which "was, or is reasonably believed to have been, acquired by an unauthorized person". See, e.g., Cal. Civ. Code §1798.82. The notice must be provided "in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement". Any individual injured by a violation of the breach disclosure

¹⁶ Id.

¹⁷ Id.

law may file a civil action to recover damages. See, e.g., Cal. Civ. Code §1798.84.

California also requires businesses to notify customers, upon request, of all information and third parties to which they have disclosed certain information, including medical information, that is used for direct marketing purposes. Cal. Civ. Code §1798.83. In addition to civil actions for damage, customers may recover under this section civil penalties of up to \$500 per violation and up to \$3000 per violation if the violation is willful, intentional, or reckless. Cal. Civ. Code §1798.84.

Judith Mondello
AT&T Midwest Legal Department
225 West Randolph Street
Floor 25B
Chicago, Illinois 60606
Tel: 312.727.6433
Fax: 312.726.3490

JM9423@att.com

James C. Pyles
Powers, Pyles, Sutter and Verville, P.C.
1875 Eye Street, NW
Washington, D.C. 20006
e-mail: jim.pyles@ppsv.com
Telephone (202) 466-6550
Fax (202) 785-1756