

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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PRIOR TO HAWAII'S HARMONIZATION ACT



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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- Repealed in 2001

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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



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

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

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

**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**



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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. The legislature shall take affirmative steps to implement this right.

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**ARTICLE I
SECTION 6
BACKGROUND**



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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**



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CONSTITUTIONAL RIGHTS & JUSTICE

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**



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CONSTITUTIONAL RIGHTS & JUSTICE

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



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- 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

GENERAL CHECKLIST



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Privacy Issues

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

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

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Questions



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