

Model State Public Health Privacy Act

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PREFATORY NOTES

The purpose of the Model State Public Health Privacy Act project is to develop a model state law [hereinafter the “Act”] addressing privacy and security issues arising from the acquisition, use, disclosure, and storage of identifiable health information by public health agencies at the state and local levels. The Act regulates the acquisition, use, disclosure, and storage of identifiable, health-related information by public health agencies without significantly limiting the ability of agencies to use such information for legitimate public health purposes.

The Act is divided into eight (8) Articles with various Sections [*please see the Table of Contents below*]. The organizational content of the Act is summarized as follows [*please refer to the text of the Act itself for precise language and comments*].

ARTICLE I, FINDINGS AND DEFINITIONS, sets forth legislative findings and purposes, as well as key definitions in the context of the Act, including (1) what it means to “*acquire*,” “*use*,” “*disclose*,” and “*store*” information; (2) “*protected health information*” -- to include only identifiable information regarding an individual’s health status; and (3) “*legitimate public health purposes*” -- referring to those population-based activities or individual efforts primarily aimed at the prevention of injury, disease, or premature mortality, or the promotion of health in the community. Other key terms frequently mentioned in the Act are also defined, including “*non-identifiable health information*,” “*public health agency*,” and “*public health official*.”

These and other definitions underlie the scope of the Act. Specifically, the Act protects the privacy and security of identifiable health-related information about individuals through various measures concerning the acquisition, use, disclosure, and storage of such information by public health agencies or public health officials. Critical to these objectives is the definition of “*protected health information*.” For the purposes of the Act, this term means any information, whether oral, written, electronic, visual, pictorial, physical, or any other form, that relates to an individual’s past, present, or future physical or mental health status, condition, treatment, service, products purchased, or provision of care, and which (a) reveals the identity of the individual whose health care is the subject of the information, or (b) where there is a reasonable basis to believe such information could be utilized (either alone or with other information that is, or should reasonably be known to be, available to predictable recipients of such information) to reveal the identity of that individual. Since non-identifiable health information does not implicate serious privacy and anti-discrimination concerns at the individual level, information which cannot freely be identified or linked with the identity of any individual is not subject to the Act’s provisions.

ARTICLE II, ACQUISITION OF PROTECTED HEALTH INFORMATION, sets forth fundamental requirements concerning the acquisition of protected health information by

public health agencies. Sections within Article II: (1) restrict the acquisition of protected health information to that information which is directly related to achieving legitimate public health purposes; (2) prohibit the secretive acquisition of protected health information; (3) require public notice and comment, accomplished in a confidential manner, prior to acquiring protected health information; and (4) require that public health agencies meet the same requirements for acquisitions of existing protected health information between agencies.

ARTICLE III, USES OF PROTECTED HEALTH INFORMATION, addresses the uses of protected health information by public health agencies. Uses of such information must be (1) directly related to the legitimate public health purpose for which the information was acquired; or (2) for public health, epidemiological, medical, or health services research provided that several requirements as stated in Section 3-101[c] of the Act are met. Subsequent uses of the information are allowed provided the agency can justify them under the standards for acquisition stated in Article II. The Act encourages the use of non-identifiable information whenever possible and requires the minimum amount of information to be used in the reasonable judgment of the public health official. Commercial uses of protected health information are prohibited. Protected health information whose use no longer furthers any legitimate public health purpose must be expunged in a confidential manner.

ARTICLE IV, DISCLOSURES OF PROTECTED HEALTH INFORMATION, generally concerns the disclosure of protected health information by public health agencies to persons outside the agency. Protected health information is deemed non-public information, which cannot be disclosed without the informed consent of the person who is the subject of the information (or the person's lawful representative) unless otherwise allowed via narrow exceptions stated in the Act.

The Act specifically defines informed consent for the purposes of disclosures of protected health information from public health agencies. Protected health information shall be disclosed for any purpose and to any person for which the disclosure is authorized via informed consent. Unless disclosure of protected health information is specifically authorized via informed consent or pursuant to the Act, non-identifiable health information shall be disclosed. When protected health information must be disclosed, it shall be limited to the minimum amount of information needed in the reasonable judgment of the person making the disclosure. Any disclosure of protected health information, with or without informed consent, must be accompanied by a written statement of the public health agency's policy on disclosures.

While the Act generally prohibits disclosures without informed consent, such disclosures may be allowed for narrow exceptions including (1) to individuals who are the subjects of the information; (2) to appropriate federal agencies pursuant to federal or state law; (3) to health care personnel in the event of an emergency to protect the health or life of the individual to whom the information relates; (4) pursuant to a court order authorizing the disclosure through subpoena,

compelled testimony, in a civil, criminal, administrative, or other legal proceeding; (5) to health oversight agencies to perform oversight functions concerning the public health agency; or (6) for the purpose of identifying a deceased individual, the deceased's manner of death, or provide necessary information about a deceased person who is a donor or prospective donor of an anatomical gift.

The dilemma of *secondary disclosures* of protected health information by persons who receive the information from public health agencies is resolved by prohibiting the subsequent disclosure of the information to other persons unless authorized by the Act. Finally, public health agencies are required to establish written records of disclosures of protected health information.

ARTICLE V, SECURITY SAFEGUARDS AND RECORD RETENTION, imposes the general duty on public health agencies to acquire, use, disclose, and store protected health information in a confidential manner. Specific security measures concerning protected health information are set forth, including a requirement that CDC security recommendations concerning HIV/AIDS information be followed. The Act proposes the appointment of a new or existing public health official as a public health information officer in each public health agency. This individual is responsible for overseeing the administration of security and privacy issues inherent in government collection and use of identifiable protected health information. This individual is also responsible for preparing and circulating reports concerning the status of protected health information privacy on at least an annual basis.

ARTICLE VI, FAIR INFORMATION PRACTICES, sets forth basic fair information practices designed to allow individuals the opportunity to inspect and copy their protected health information in the possession of public health agencies (subject to minimal limitations), as well as request that information that is erroneous, incomplete, or false be corrected, amended, or deleted. Denials of rights to inspect, copy, or revise incorrect or incomplete information by the public health agency must be in writing. Individuals may appeal such determinations.

ARTICLE VII, CRIMINAL SANCTIONS AND CIVIL REMEDIES, sets forth various criminal penalties and civil enforcement mechanisms to protect individuals who are harmed by violations of the Act by public health agencies, public health officials, and other persons. Several forms of immunity are provided. The State's Administrative Procedure Act generally applies to actions taken by public health agencies pursuant to this Act.

ARTICLE VIII contains **MISCELLANEOUS PROVISIONS**, including (1) the short title of the act (the Model State Public Health Privacy Act); (2) a uniformity of the law provision; (3) a severability clause; (4) a clause for repeals of existing state law; (5) a saving clause concerning preemption; (6) a provision concerning unintended conflicts of federal and existing state laws; and (7) a provision setting forth an effective date of the Act if passed.

COMMENTS explaining the various provisions of the Act follow Sections of each Article where appropriate. These Comments are explanatory, not legally binding.

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ARTICLE I

FINDINGS AND DEFINITIONS

Section 1-101. Legislative Findings

The [*State Legislative Body*] finds that:

(1) Public health agencies acquire, use, disclose, or store an increasing amount of health-related information about individuals, some of which is highly-sensitive, in paper-based and electronic forms for legitimate public health purposes;

(2) Uses of health-related information for legitimate public health purposes are critically important to preserving, monitoring, and improving population-based health as well as personal health of individuals;

(3) Individuals have significant privacy interests with respect to health-related information which can be identified to them;

(4) Individual privacy interests in health-related information justify duties and limitations concerning (a) the acquisition, use, disclosure, and storage of such information; (b) individual access to such information in the possession of public health agencies; and (c) security protections for such information;

(5) Individual interests in the privacy of health-related information are significantly reduced when the information is acquired, used, disclosed, or stored in non-identifiable forms;

(6) Public health agencies have a significant interest in protecting the privacy of health-related information in their possession where protecting the privacy of such information encourages individuals to participate in public health programs and objectives; and

(7) While public health agencies generally have an excellent record of protecting the privacy interests of individuals in health-related information possessed by the agencies, additional statutory protections will further clarify and protect individual privacy interests while facilitating, without jeopardizing, legitimate public health purposes.

COMMENTS

The inclusion of a statement of legislative findings and purposes [*see* § 1-102] is a common feature of health information privacy legislation, whether federal or state. These findings and purposes

serve as useful guides for officials, courts, and the public to understand the bases for which the Act was drafted and enacted. These statements should not be read to provide substantive protections like the remainder of the Act. Thus, while these statements do not compel or prohibit conduct nor provide authority for certain actions or inactions, they help to illustrate some of the principles which underlie the purposes and objectives of the Act.

Section 1-102. Purposes

The [*State Legislative Body*] states that the purposes of this Act are to:

- (1) Address privacy and security issues arising from the acquisition, use, disclosure, and storage of protected health information by public health agencies at the State and local levels;
- (2) Protect health-related information in the possession of public health agencies against unauthorized disclosures without significantly limiting the ability of agencies to use such information for legitimate public health purposes;
- (3) Encourage wide use and disclosure of non-identifiable health information because this information does not implicate privacy and security concerns at the individual level and may greatly facilitate the accomplishment of legitimate public health purposes;
- (4) Require the acquisition and uses of protected health information to be consistent with legitimate public health purposes;
- (5) Prohibit disclosures of protected health information without the informed consent of the individual who is the subject of the information, with specified, narrow exceptions;
- (6) Impose the duty on public health agencies to hold and use protected health information securely;
- (7) Impose a general duty on public health agencies to ensure the accuracy of protected health information;
- (8) Allow individuals access to their protected health information in the possession of public health agencies through inspection and copying privileges;
- (9) Provide individuals the opportunity to request the correction, amendment, or deletion of erroneous, incomplete, or false protected health information; and
- (10) Prescribe various criminal penalties and civil enforcement mechanisms to protect individuals who are harmed by violations of the Act by public health agencies, public health officials, and other persons.

Section 1-103. Definitions

As used in this Act, these terms shall be defined as follows:

- (1) “**Acquire,**” “**Acquired,**” or “**Acquisition**” means to collect or gain possession or control of any part of protected health information for legitimate public health purposes.
- (2) “**Act**” means the Model State Public Health Privacy Act.
- (3) “**Amend**” means to indicate one or more disputed entries in protected health information or to change the entry without obliterating the original information.
- (4) “**Confidentiality statement**” means a written statement dated and signed by an applicable individual which certifies the individual's agreement to abide by the security policy of a public health agency, as well as this Act.
- (5) “**Disclose,**” “**Disclosed,**” or “**Disclosure**” means to release, transfer, disseminate, provide access to, or otherwise communicate or divulge all or any part of any protected health information to any person or entity, other than a public health agency or authorized public health official.
- (6) “**Expunge**” or “**Expunged**” means to permanently destroy, delete, or make non-identifiable.
- (7) “**Health oversight agency**” means a person who (a) performs or oversees an assessment, investigation, or prosecution relating to compliance with legal or fiscal standards concerning fraud or fraudulent claims regarding health care, health services or equipment, or related activities; and (b) is a public executive branch agency, acts on behalf of a public executive branch agency, acts pursuant to a requirement of a public executive branch agency, or carries out such activities under federal or state law.
- (8) “**Institutional review board**” means any board, committee, or other group formally designated by an institution or authorized under federal or state law to review, approve the initiation of, or conduct periodic review of research programs to assure the protection of the rights and welfare of human research subjects, consistent with requirements of the Federal Policy for the Protection of Human Subjects.
- (9) “**Legitimate public health purpose**” means a population-based activity or individual effort primarily aimed at the prevention of injury, disease, or premature mortality, or the promotion of health in the community, including (a) assessing the health needs and status of the

community through public health surveillance and epidemiological research, (b) developing public health policy, and (c) responding to public health needs and emergencies.

(10) “**Non-identifiable health information**” means any information, whether oral, written, electronic, visual, pictorial, physical, or any other form, that relates to an individual’s past, present, or future physical or mental health status, condition, treatment, service, products purchased, or provision of care, and which (a) does not reveal the identity of the individual whose health status is the subject of the information, or (b) where there is no reasonable basis to believe such information could be utilized (either alone or with other information that is, or should reasonably be, known to be available to predictable recipients of such information) to reveal the identity of that individual.

(11) “**Person**” means a natural person, corporation, estate, trust, partnership, limited liability company, association, joint venture, government or governmental body, or any other legal or commercial entity.

(12) “**Protected health information**” means any information, whether oral, written, electronic, visual, pictorial, physical, or any other form, that relates to an individual’s past, present, or future physical or mental health status, condition, treatment, service, products purchased, or provision of care, and which (a) reveals the identity of the individual whose health care is the subject of the information, or (b) where there is a reasonable basis to believe such information could be utilized (either alone or with other information that is, or should reasonably be known to be, available to predictable recipients of such information) to reveal the identity of that individual.

(13) “**Public health**” means population-based activities or individual efforts primarily aimed at the prevention of injury, disease, or premature mortality, or the promotion of health in the community.

(14) “**Public health agency**” means any organization operated by any state or local government that acquires, uses, discloses, or stores protected health information for legitimate public health purposes.

(15) “**Public health official**” means any officer, employee, private contractor or agent, intern, or volunteer of a public health agency with authorization from the agency or pursuant to law to acquire, use, disclose, or store protected health information.

(16) “**Public information**” means information which is generally open to inspection or review by the general public.

(17) “**Request**” means a written, dated, and signed correspondence in paper or electronic form through which the identity of the person making the request can be verified.

(18) “**Requestor**” means any individual, the parent or legal guardian of a minor, or a person’s legally-appointed guardian who makes a request.

(19) “**Store,**” “**Stored,**” or “**Storage**” means to hold, maintain, keep, or retain all or any part of protected health information.

(20) “**Use**” or “**Used**” means to employ or utilize all or any part of any protected health information for a legitimate public health purpose.

COMMENTS

This Section contains the Act’s definitions. These definitions are critical toward understanding the scope and extent of the Act and its coverage. Although these terms may be precisely defined, these definitions also allow for reasonable interpretation by State Legislative bodies, public health agencies and officials, courts, and the public. Through such interpretations, the Act may continue to have substantive meaning as the types and uses of health-related information by public health agencies change.

Subsection (1) defines the series of terms “**Acquire,**” “**Acquired,**” or “**Acquisition**” to mean to collect or gain possession or control of any part of protected health information for legitimate public health purposes. These terms are broadly defined to encompass the collection or gaining of possession or control of any part of protected health information by public health agencies.

Subsection (2) defines “**Act**” to mean the Model State Public Health Privacy Act. Wherever the word “Act” appears in the body of the law as stated [unless indicated otherwise], it refers to the complete Act in its entirety.

Subsection (3) defines the term “**Amend**” to mean the indication of one or more disputed entries in protected health information or to change the entry without obliterating the original information. For a public health agency to amend a protected health information record [as required under § 6-103(b) of the Act] thus means one of two things: (a) that the agency indicate that a certain entry of information in the record is disputed by the individual to whom the entry relates; or (b) that the agency change an incorrect entry without destroying the original information. For example, if a health record used by a public health agency indicated a person had HIV when this is demonstrated to be false, the agency would amend the record to indicate the fallacy of this information without simply deleting the information itself. This procedure allows the agency and the individual who is the subject of the information to verify that a correction is appropriate and has been made.

Subsection (4) defines “**Confidentiality statement**” to mean a written statement dated and signed by an applicable individual which certifies the individual's agreement to abide by the security policy of any public health agency as required under § 5-101(d)(2) of this Act.

Subsection (5) defines the series of terms, “**Disclose,**” “**Disclosed,**” or “**Disclosure**” to mean the release, transfer, dissemination, providing access to, or otherwise communicating or divulging all or any part of any protected health information to any person or entity other than a public health agency or

authorized public health official. This definition is critical to Article IV of the Act and is meant to be broad in scope. It specifically defines disclosure for the purposes of the Act to include any communication of protected health information to any persons outside a public health agency or an authorized public health official. Communication of such information between authorized public health officials within a public health agency or between public health agencies is not a “disclosure” under the Act, but a “use” of the information as defined in Subsection (20).

Subsection (6) defines the terms “**Expunge**” or “**Expunged**” to mean to permanently destroy, delete, or make non-identifiable. Where the Act requires protected health information to be expunged, the information must be physically or technologically destroyed, deleted from computer or paper-based records, or made non-identifiable.

Subsection (7) defines “**Health oversight agency**” to mean a person who performs or oversees oversight functions related to fraud or fraudulent claims regarding health care, health services or equipment, or related activities and is either (a) a public executive branch agency, or (b) a person acting on behalf of or pursuant to a requirement of such an agency, or implementing health oversight activities under authority of federal or state law.

Subsection (8) defines “**Institutional review board**” to mean any board, committee, or other group formally designated by an institution or authorized under federal or state law to review, approve the initiation of, or conduct periodic review of research programs to assure the protection of the rights and welfare of human research subjects, consistent with requirements of the Federal Policy for the Protection of Human Subjects [otherwise known as “The Common Rule”]. IRB’s are a fixture of the modern medical research industry. In this Act, the approval of an IRB may be required to allow for the disclosure of protected health information for research purposes pursuant to § 3-101[c].

Subsection (9) defines “**Legitimate public health purpose**” to mean a population-based activity or individual effort primarily aimed at the prevention of injury, disease, or premature mortality, or the promotion of health in the community. This includes, but is not limited to, activities such as (a) assessing the health needs and status of the community through public health surveillance and epidemiological research, (b) developing public health policy, and (c) responding to public health needs and emergencies. These examples are consistent with public health objectives as defined by the Institute of Medicine in its report, *THE FUTURE OF PUBLIC HEALTH* (1988). The Act does not attempt to categorically list substantive legitimate public health purposes, nor does it concern the merit of such purposes. As a result, the Act acknowledges that federal, State, and local governments may legally define what is a legitimate public health purpose via statutory law, administrative regulation, case law, or accepted public health practice. Provided such definitions are consistent with the broad definition of legitimate public health purposes in this Act, they shall be considered authoritative in interpreting and enforcing the provisions of this Act.

Subsection (10) defines “**Non-identifiable health information**” as any information, whether oral, written, electronic, visual, pictorial, physical, or any other form, that relates to an individual’s past, present, or future physical or mental health status, condition, treatment, service, products purchased, or provision of care, and which (a) *does not reveal* the identity of the individual whose health status is the subject of the information, or (b) where there *is no reasonable basis* to believe such information could be utilized (either alone or with other information that is, or should reasonably be, known to be available to predictable recipients of such information) to reveal the identity of that individual.

This definition incorporates similar language as used to define “protected health information” in Subsection (12) with two primary differences. First, non-identifiable health information *does not* directly reveal the identity of the individual whose health status is the subject of the information. Direct identification could occur through the inclusion of many types of personal information including names,

Social Security numbers, addresses, employers, medical providers, or other facts. Second, non-identifiable information cannot be utilized alone or conjunction with other information to reveal the identity of the individual. Thus, for example, if aggregate data about persons are disclosed that are non-identifiable on their face, but can be matched or linked with information that is available to predictable recipients of the disclosed information, the disclosed data cannot be considered “non-identifiable” for the purposes of the Act. Unless it can be concluded that health information is non-identifiable under this definition, it must be considered protected health information under Subsection (12).

Subsection (11) defines “**Person**” broadly to mean natural persons as well as legal entities including corporations, trusts, estates, partnerships, limited liability companies, associations, joint ventures, governments, or governmental bodies.

Subsection (12) defines “**Protected health information**” to mean any information, whether oral, written, electronic, visual, pictorial, physical, or any other form, that relates to an individual’s past, present, or future physical or mental health status, condition, treatment, service, products purchased, or provision of care, and which (a) *reveals* the identity of the individual whose health care is the subject of the information, or (b) where there *is a reasonable basis* to believe such information could be utilized (either alone or with other information that is, or should reasonably be known to be, available to predictable recipients of such information) to reveal the identity of that individual. Since the privacy and security protections of the Act only confer to health data which are identifiable to individuals who are the subjects of the information, this definition should be interpreted broadly.

The term incorporates a two-part scheme into defining health-related information for the purposes of the Act. The information must be identifiable and it must generally concern one’s health. The information may be identifiable on its face to the individual who is the subject of the information. For example, the information may be in the form of a medical record or listing that contains one’s name, Social Security number, or other common identifier.

Alternatively, there may be a reasonable basis to believe such information could be utilized alone or with other information that is or may reasonably be available to persons receiving such information that would allow such persons to reveal the identity of that individual. For example, where a health record contains information that is sufficiently unique to identify the individual to whom it relates (such as a fingerprint), it must be considered protected health information. In addition, if a health record contains sufficient information to identify an individual to whom it relates because it provides information which specifically narrows the class of individuals in an aggregate setting (such as a HIV report that contains the race, sex, age, county of residence, date of infection, place of treatment, or other information about an individual in a rural community with limited cases of HIV infection), such may also be considered identifiable in its existing form, and thus protected health information.

Subsection (13) defines “**Public health**” to mean population-based activities or individual efforts primarily aimed at the prevention of injury, disease, or premature mortality, or the promotion of health in the community. While this definition is broad, it is limited to activities which are geared toward modern public health goals. This definition is explicitly incorporated into the definition of “legitimate public health purpose” in Subsection (9).

Subsection (14) defines “**Public health agency**” to include any organization operated by any state or local government that acquires, uses, discloses, or stores protected health information for legitimate public health purposes. Public health agencies include, but may not be limited to, public health offices established by state or local law, testing laboratories, testing facilities, treatment clinics, research facilities, and information storage facilities. Public health agencies do not include government-funded facilities which primarily provide individual health care (such as locally-operated hospitals), governmental organizations which operate primarily in individual health-related areas (such as workers’

compensation commissions), or private organizations (such as private research labs) which are merely funded in whole or part by state or local governments.

Subsection (15) defines "**Public health official**" broadly to mean any officer, employee, private contractor or agent, intern, or volunteer of a public health agency with authorization from the agency or pursuant to law to acquire, use, disclose, or store protected health information. Virtually anyone, whether public or private, having access to a public health agency and its protected health information is to be considered an official of the agency for the purposes of the Act.

Subsection (16) defines "**Public information**" to mean information which is generally open to inspection or review by the general public. Protected health information is not public information, as stated in § 4-101.

Subsection (17) defines "**Request**" to mean a written, dated, and signed correspondence in paper or electronic form through which the identity of the person making the request can be verified. Verification of one's identity is left to the reasonable discretion of the holder of the request document.

Subsection (18) defines "**Requestor**" to mean any individual, the parent or legal guardian of a minor, or the legally-appointed guardian of another person (who is mentally incompetent or otherwise unable to make health-related decisions), who makes a request.

Subsection (19) defines the series of terms, "**Store**," "**Stored**," or "**Storage**," to mean the holding, maintaining, keeping, or retaining of all or any part of protected health information. The essence of this definition centers around the possession of protected health information by public health agencies for a period of time.

Subsection (20) defines "**Use**" or "**Used**" to mean the employment or utilization of all or any part of protected health information for legitimate public health purposes. The Act allows public health agencies to use protected health information for legitimate public health purposes with minimal restrictions. Uses of such information include transferring information within or among public health agencies who have the authority to acquire the information. Uses do not include disclosing such information to any person outside a public health agency.

ARTICLE II**ACQUISITION OF PROTECTED HEALTH INFORMATION****Section 2-101. Acquisition of Protected Health Information**

[a] **In General.** A public health agency shall only acquire protected health information where:

- (1) the acquisition relates directly to a legitimate public health purpose;
- (2) the acquisition is reasonably likely to achieve such purpose, taking into account the provisions of this Act and other governing laws, and the availability of resources or means to achieve such purpose; and
- (3) the legitimate public health purpose cannot otherwise be achieved as well or better with non-identifiable information.

[b] **Secret Acquisition.** Protected health information shall not be secretly acquired by a public health agency.

[c] **Public Notice Requirements.** Prior to implementation of a public health agency determination to acquire or store protected health information, the agency shall announce, through public notice and comment, and through public written notice distributed and posted in a manner and to such extent as will reasonably inform members of the affected community, its intentions to acquire or store protected health information and the purposes for which the information will be used. Such notice shall not identify any individual who is or may be the subject of protected health information. Where State or local law requires counseling services regarding a reportable disease, such counseling services shall include information that such disease is reportable to the public health agency and a description of the purposes for which the individual's protected health information will be used by such agency.

COMMENTS

This Section provides fundamental statutory language concerning the acquisition of protected health information by public health agencies. Subsection [a] states that protected health information shall only be acquired by a public health agency where the acquisition relates directly to a legitimate public health purpose and is reasonably likely to achieve such purpose. Whether the acquisition of protected health information is reasonably likely to achieve a legitimate public health purpose must be assessed consistent with the provisions of the Act and other governing law [including federal or state laws authorizing its acquisition or specifying a legitimate public health purpose], as well as the availability of resources or means to achieve the purpose.

This second requirement includes a showing that public health agencies have sufficient financial and personnel resources to accomplish the purpose for which the information is acquired. This may be shown at either the local or state level. For example, where a local public health agency acquires information concerning HIV status among infected individuals in the community, the fact that this information is forwarded to the [State public health agency] for the purposes of surveying HIV disease in the larger population justifies the local public health agency's acquisition of protected health information even though the local agency cannot alone accomplish the legitimate public health purpose (surveying HIV disease in the larger population).

In addition, the agency must consider whether the legitimate public health purpose cannot otherwise be achieved as well or better with non-identifiable information. Stated alternatively, it must be demonstrated that identifiable information is required to accomplish the legitimate public health purpose [note that "protected health information" is defined for the purposes of the Act in § 1-103(12) to include only personally-identifiable, health-related information]. Where such purposes can be achieved through the acquisition of non-identifiable information [defined for the purposes of the Act in § 1-103(10)], identifiable information cannot be justifiably acquired for the same purpose. This and other provisions of the Act encourage the acquisition, use, disclosure, and storage of non-identifiable health information in order to significantly abate individual privacy concerns.

Subsection [b] requires that protected health information not be secretly acquired by a public health agency. Public health agencies shall not covertly acquire health-related information about individuals. The acquisition of such information under open and fair information practices shall not be kept secret from those to whom the information relates. Individuals have a right to know that such information is acquired by public health agencies.

Subsection [c] supports the individual's and community's right to know what protected health information is acquired by public health agencies through notice requirements which public health agencies must adhere prior to the acquisition or storage of protected health information. Public notice prior to implementation of the acquisition or storage of protected health information should be provided in a State's administrative register and through means likely to reach the affected community (i.e. information and notices distributed through health care providers and facilities serving the affected community on an annual or biannual basis). Such notice, whether via the State's administrative register or otherwise, shall not identify any individual who is or may be the subject of protected health information.

Where State or local governments require health care providers to provide counseling services to individuals for some reportable diseases, this Subsection requires as part of these counseling services that the provider 1) inform the individual that the disease will be reported to a public health agency, and 2) briefly describe the legitimate public health purposes for which the individual's protected health information will be used by the agency.

Section 2-102. Subsequent Acquisition of Protected Health Information

A public health agency shall not acquire protected health information from another local, State, or federal public health agency unless the acquisition is consistent with the requirements of Section 2-101.

Some acquisitions of protected health information by public health agencies may occur through the original collection of health-related information about individuals through reporting requirements, public health research, or other information collection practices. However, public health agencies often acquire such information through existing sources or collections of protected health information held by other public health agencies at the federal, state, or local levels. This Section requires that the acquiring public health agency meet the same requirements for acquisition set forth in § 2-101 for these types of acquisitions. A similar provision concerning use of the information is set forth in § 3-101[b].

Thus, if a public health agency in County X wanted to compare its protected HIV data with similar data in County Y, County X would have to demonstrate that its acquisition of County Y's protected health information is justified under the three-part showing set forth in § 2-101.

ARTICLE III

USES OF PROTECTED HEALTH INFORMATION

Section 3-101. Uses Consistent With Original Legitimate Public Health Purposes

[a] In General. Protected health information shall be used by a public health agency solely for legitimate public health purposes that are directly related to the purpose for which the information was acquired. Providing access to protected health information to any person other than a public health agency or public health official is not a use.

[b] Subsequent Uses. A public health agency may use protected health information for legitimate public health purposes that are not directly related to the purpose for which the information was acquired provided that the agency meets the requirements of Section 2-101[a] and [c] before using such information.

[c] Research Use. A public health agency or official may use protected health information for public health, epidemiological, medical, or health services research provided that:

- (1) it is not feasible to obtain the informed consent of the individual who is the subject of the information;
- (2) identifiable information is necessary for the effectiveness of the research project;
- (3) the minimum amount of information necessary to conduct the research is used;
- (4) the research utilizing the protected health information will likely contribute to achieving a legitimate public health purpose;
- (5) the information is made non-identifiable at the earliest opportunity consistent with the purposes of the research project and expunged after the conclusion of the project; and
- (6) such uses are made pursuant to assurances of protections through the execution of a confidentiality agreement after review and approval of an institutional review board. The agreement shall require any person receiving such information to adhere to protections for the privacy and security of the information equivalent to or greater than such protections provided in this Act.

COMMENTS

Assuming that a public health agency justifiably acquires protected health information under Article II of the Act, this Section describes the ways in which the agency can use the information. Such uses are limited to legitimate public health purposes that are directly related to the purpose for the information was acquired as well as for public health, epidemiological, medical, or health services research under set proscriptions [stated below].

Furthermore, providing access to protected health information to any person other than a public health agency or public health official is not a use. Thus, where a public health agency uses protected health information in such a way that it allows others besides public health agencies or officials to access the information, a disclosure [as defined in § 1-103(5)] has occurred, and the provisions of the Act relating to disclosures of protected health information [Article IV] are applicable.

Should the agency want to subsequently use the information for legitimate public health purposes which are not directly related to the purpose for which it was acquired, it must justify such use under the standards for acquisition in § 2-101[a] and [c].

For example, where a public health agency justifiably acquires information about individuals with sexually-transmitted diseases for the purpose of surveillance of such diseases in the community, it may further use that information for additional public health activities which are directly related to surveillance and control of sexually-transmitted diseases. It may not use this information, however, for the purposes of matching individuals with sexually-transmitted diseases with persons with tuberculosis in the community absent a showing that the production of such information meets the acquisition standards in § 2-101[a] and [c].

Concerning the use of protected health information for public health and other research, Subsection [c] lists six (6) specific requirements which must be met before protected health information can be used for such purposes by public health agencies or officials. These standards are modeled after those set forth in federal regulations relating to human subject research (see 45 C.F.R. §§ 46.101-.404 (1996)). A public health agency or official must show that (1) it is infeasible, either financially or practically, to obtain the informed consent of the individual who is the subject of the information; (2) identifiable information is necessary for the effectiveness of the research project; (3) the minimum amount of information necessary to conduct the research is used (restating a subsequent requirement of § 3-102[b]); (4) the research utilizing the protected health information will likely contribute to achieving a legitimate public health purpose. This purpose may be similar to or different than the purpose for which the public health agency originally acquired the information; (5) the information is made non-identifiable at the earliest opportunity consistent with the purposes of the project and expunged [as defined in § 1-101(6)] after the conclusion of the research project (restating subsequent requirements in §§ 3-102[a], 3-104); and (6) such uses are made pursuant to assurances of protections through the execution of a confidentiality agreement after review and approval by an institutional review board. The agreement shall require any person receiving such information to adhere to protections for the privacy and security of the information equivalent to or greater than such protections provided in this Act. Provided these requirements are shown and satisfied, protected health information can be used by public health agencies or officials for a wide variety of health research needs.

Section 3-102. Scope of Uses

[a] In General. Non-identifiable health information shall be used by a public health agency whenever possible consistent with the accomplishment of legitimate public health purposes.

[b] Minimum Information. Any use of protected health information permitted by this Act shall be limited to the minimum amount of information which the public health official using the information reasonably believes is necessary to accomplish the legitimate public health purpose.

COMMENTS

Consistent with the purpose of the Act to protect individual privacy interests in health-related information, Subsection [a] requires that public health agencies use non-identifiable health information whenever possible consistent with the accomplishment of legitimate public health purposes. Although such determinations are largely left to the discretion of the public health agencies, this Section requires the use of non-identifiable information and thus strongly suggests that agencies utilize this type of information whenever possible. To the degree to which non-identifiable health information is used, the privacy and security protections in the Act do not apply because individual privacy interests are not implicated.

Where protected health information is used, Subsection [b] requires that its use be limited to the minimum amount of information which the public health official using the information reasonably believes is necessary to accomplish the legitimate public health purpose. Without constricting the ability of public health agencies to perform or accomplish legitimate public health purposes, this requirement means that public health officials must assess the amount of identifiable health information which is needed to accomplish a given legitimate public health purpose, and use only that amount of information. Thus, if a public health official, for example, has authority to compare rates of HIV infection among persons with tuberculosis, the use of protected health information which also includes other sexually-transmitted diseases contracted by individuals with HIV or tuberculosis is impermissible.

Section 3-103. Commercial Uses

Protected health information shall not be used by a public health agency or public health official for commercial purposes.

COMMENTS

This Section specifically prohibits the use of protected health information by a public health agency or official for commercial purposes. Protected health information is not an article, commodity, or good for sale or commercial exchange. Any use of this information in a commercial setting or for

financial gain is prohibited. Thus, a public health agency may not, for example, sell its HIV database to a pharmaceutical company.

Section 3-104. De-identifying Protected Health Information

Protected health information whose use by a public health agency no longer furthers the legitimate public health purpose for which it was acquired shall be expunged in a confidential manner.

COMMENTS

This Section requires that protected health information whose use by a public health agency no longer furthers the legitimate public health purpose for which it was acquired be expunged (as defined in § 1-101(6)) in a confidential manner. This Section rejects the view that there is an inherent value to having identifiable information. When the use of the information no longer serves a legitimate public health purpose, it must be permanently destroyed, deleted, or made non-identifiable. The requirement that these actions be done confidentially emphasizes that the expungement of identifiable information be done in such a way as to eliminate any chance of disclosure to others.

ARTICLE IV

DISCLOSURES OF PROTECTED HEALTH INFORMATION

Section 4-101. Non-Public Information

Protected health information is not public information, and may not be disclosed without the informed consent of the individual (or the individual's lawful representative) who is the subject of the information, except as provided in this Act.

COMMENTS

This Section affirms that although protected health information is held by governmental public health agencies, it is not to be considered public information. As a result, protected health information cannot be accessed via inspection or review by the general public as would, for example, many court records.

Furthermore, this Section declares the general rule concerning disclosures of protected health information outside public health agencies. Disclosures of such information are prohibited absent the informed consent of the individual (or the individual's lawful representative [i.e. parent, legal guardian, or a person's lawfully-appointed representative]) who is the subject of the information or as provided in the Act. Thus, although a public health agency may transfer protected health information to another public health agency via the requirements of Articles II and III, the agency may not transfer such information to non-public health agencies unless such transfers are allowed under the disclosure provisions of Article IV.

Section 4-102. Informed Consent

[a] Generally. For the purposes of this Act, informed consent means a written authorization for the disclosure of protected health information on a form substantially similar to one promulgated by the [*State public health agency*] which is signed in writing or electronically by the individual who is the subject of the information. This authorization shall be dated and shall specify to whom the disclosure is authorized, the general purpose for such disclosure, and the time period in which the authorization for the disclosure is effective.

[b] Revocation. An individual may revoke an authorization in writing at any time. The individual is responsible for informing the person who originally received the authorization that it has been revoked.

[c] Expiration. If the authorization does not contain an expiration date or has not previously been revoked, it automatically expires six months after the date it is signed.

[d] General Authorization. A general authorization for the disclosure of health-related information shall not be construed as written authorization pursuant to informed consent for the disclosure of protected health information unless such authorization also complies with this Section.

[e] Inability to Provide Informed Consent. When the individual who is the subject of protected health information is not competent or is otherwise legally unable to give informed consent for the disclosure of protected health information, written authorization under Subsection [a] may be provided by the individual's parents, legal guardians, or other persons lawfully authorized to make health care decisions for the individual. For the purposes of this Subsection, a minor under the age of [*to be inserted consistent with state law*] years is unable to give informed consent.

COMMENTS

This Section sets forth the Act's definition and other requirements concerning informed consent for disclosures of protected health information. General authorization for the release of medical records is insufficient to authorize the disclosure of protected health information. Rather, informed consent for the purposes of Article IV means a written and dated authorization for the disclosure of protected health information which is signed in writing or electronically by the individual who is the subject of the information. This authorization must be written on a form designed by the [*State public health agency*] or substantially similar thereto. It must specify (1) to whom the disclosure is authorized, (2) the general purpose for such disclosure, and (3) the time period in which the authorization for the disclosure is effective.

The first of these specifications is intended to allow the individual giving authorization and the public health agency receiving the authorization to know exactly who may receive the protected health information. The second specification is intended to allow the individual to know the purpose for disclosure. The final specification requires that the individual determine the time period which an authorization is effective. Absent an effective expiration date, the authorization automatically expires six months after the date it is signed.

Individuals may revoke their authorizations in writing at any time. However, the individual is responsible for informing the person who originally received the authorization that it has been revoked. Thus, if an individual revokes an authorization and informs only one of the two persons who hold the authorization, the person who has not been informed in writing of the revocation may lawfully proceed to obtain protected health information from the public health agency. Neither the agency which releases the information nor the person holding the authorization would be liable for a violation of the disclosure provisions of the Act.

If an individual is not competent or is otherwise legally unable to give informed consent for the disclosure of protected health information, written authorization can be provided by the individual's parents, legal guardians, or other persons lawfully authorized to make health care decisions for the individual [i.e. health care surrogate].

The Act does not attempt to set a uniform age in which a minor may be incompetent to provide information consent under this Section, but rather allows State Legislative bodies to set this minimal age consistent with state law.

Section 4-103. Scope of Disclosures

[a] Generally. Protected health information shall be disclosed with the informed consent of the individual who is the subject of the information to any person and for any purpose for which the disclosure is authorized pursuant to informed consent.

[b] Non-identifiable Information. Any disclosures of protected health information permitted by this Act shall be disclosed in a non-identifiable form whenever possible, consistent with the accomplishment of legitimate public health purposes, except when the disclosure is authorized through the informed consent of the individual who is the subject of the information.

[c] Minimum Information. Any disclosures of protected health information permitted by this Act shall be limited to the minimum amount of information which the person making the disclosure reasonably believes is necessary to accomplish the purpose of the disclosure, except when the disclosure is authorized through the informed consent of the individual who is the subject of the information.

[d] Accompanying Statement. Whenever disclosure of protected health information is made pursuant to this Act, such disclosures shall be accompanied or followed by [in cases of oral disclosures, within three days] a statement in writing concerning the public health agency's disclosure policy, which shall include the following or substantially similar language: "*This information has been disclosed to you from confidential public health records protected by state and federal law. Any further disclosure of this information in an identifiable form may be prohibited without the written informed consent of the person who is the subject of the information or as otherwise permitted by federal or state law. Unauthorized disclosure of this information may result in significant criminal or civil penalties, including imprisonment and monetary damages.*"

COMMENTS

This Section specifically requires public health agencies to disclose protected health information to any person and for any purpose authorized pursuant to the informed consent of the individual who is the subject of the information. If an individual wants his or her protected health information to be disclosed from a public health agency, the agency cannot refuse to disclose the information provided authorization is pursuant to lawful informed consent under § 4-102.

Concerning disclosures which may be allowed other than pursuant to informed consent, this Section provides two broad requirements: (1) information shall be disclosed in a non-identifiable form

whenever possible, consistent with the accomplishment of legitimate public health purposes; and (2) disclosures shall be limited to the minimum amount of information which the person making the disclosure reasonably believes is necessary to accomplish the purpose of the disclosure. Under this latter requirement, the standard of necessity is based on the subjective belief of the person making the disclosure, not on the objective views of others. This allows a person familiar with the protected health information to consider the amount of information needed to fulfill a disclosure request or requirement and to limit it to the minimal amount of information needed in an identifiable form.

Regardless of whether the disclosure is pursuant to informed consent, the Section requires all disclosures of protected health information made pursuant to this Act to be accompanied or followed by [in cases of oral disclosures, within three days] a written statement concerning the public health agency's disclosure policy. Mandatory language regarding this policy is set forth in Subsection [d]. The purpose of this requirement is to attach an affirmative notice of privacy protections to protected health information. By requiring this attachment for each and every disclosure, persons receiving the information are effectively notified of these protections, of the need to safeguard the information, and avoid further disclosures absent informed consent.

Section 4-104. Disclosures Without Informed Consent

Protected health information may be disclosed without the informed consent of the individual who is the subject of the information where such disclosures:

- [a] are made directly to the individual;
- [b] are made to appropriate federal agencies or authorities as required by federal or State law; or
- [c] are made to health care personnel to the extent necessary in a medical emergency to protect the health or life of the person who is the subject of the information from serious, imminent harm.

COMMENTS

This Section is the first of four (4) consecutive sections of the Act which set forth the narrow categories of allowable disclosures of protected health information absent specific authorization pursuant to informed consent of the individual who is the subject of the information [*see also* § 4-105. Disclosures for Criminal or Civil Purposes; § 4-106. Disclosures for Health Oversight Purposes; and § 4-107. Deceased Individuals].

This Section presents three (3) exceptions to the general rule that disclosures of protected health information must be made pursuant to informed consent. Protected health information may be disclosed without the informed consent of the individual who is the subject of the information where such disclosures: (1) are made directly to the individual; (2) are made to appropriate federal agencies or authorities as required by federal or State law; or (3) are made to health care personnel to the extent necessary in a medical emergency to protect the health or life of the person who is the subject of the

information from serious, imminent harm. The latter of these exceptions is meant to allow disclosures under extremely limited circumstances to health care personnel where the use of such information may protect the health or life of a person from serious and imminent harm.

Section 4-105. Disclosures for Criminal or Civil Purposes

No protected health information shall be disclosed, discoverable, or compelled to be produced pursuant to subpoena, compelled testimony of public health officials or other persons who have knowledge of such information subsequent to its acquisition by the public health agency, in any civil, criminal, administrative, or other legal proceeding, except:

[a] Court Order. A public health agency or authorized public health official may seek a court order granting the disclosure of protected health information upon an application showing a clear danger to an individual or the public health that can only be averted or mitigated through a disclosure by the public health agency.

[b] Sealed Records and In Camera Proceedings. Upon receiving an application for an order authorizing disclosure pursuant to this Section, the court shall enter an order directing that all materials which are part of the application and decision of the court be sealed. Such materials shall not be made available to any person except to the extent necessary to conduct proceedings concerning the application, including any appeal. Such order shall further direct that all proceedings concerning the application be conducted *in camera*.

[c] Notification. Any individual about whom protected health information is sought and any person holding protected health information from whom disclosure is sought shall be notified of an application for its disclosure pursuant to this Section.

[d] Response or Appearance. Any individual about whom protected health information is sought and any person holding protected health information from whom disclosure is sought may file a written response to the application, or appear in person for the limited purpose of providing evidence on the statutory criteria for the issuance of an order pursuant to this Section. The court may grant an order without such notice or appearance where an application by a public health agency or authorized public health official requires immediate action to avert or mitigate a clear danger to the public health.

[e] Findings of Fact. In assessing clear danger under this Section, the court shall provide written findings of fact and shall weigh the need for disclosure against the privacy interests of the individual who is the subject of the protected health information and any legitimate public health purpose which may be curtailed by disclosure.

[f] Authorizing Order. An order authorizing disclosure of protected health information shall:

- (1) limit disclosure to that information which is necessary pursuant to the application;
- (2) limit disclosure to those persons who need the information and specifically prohibit re-disclosure to any other persons;
- (3) include any other measures which the court deems necessary to limit any disclosures not authorized by the order; and
- (4) conform to the other provisions of this Act to the extent possible.

COMMENTS

This Section generally prohibits the disclosure of protected health information by public health officials or others in civil, criminal, administrative, or other legal proceedings, subject to a narrow exception. This general prohibition specifically applies to public health officials. It also applies to other persons who have knowledge of such information subsequent to its acquisition by the public health agency. Thus, while the general prohibition against disclosure of protected health information in a legal proceeding would apply to a health researcher who obtained the information from an existing database stored by a public health agency or a person who gained knowledge of such information through unauthorized access, it would not apply to persons who had knowledge of the protected health information prior to the agency's acquisition of the information. For example, this Section would not prohibit compelled testimony of a physician who diagnosed an individual with HIV and reported the diagnosis to public health authorities. Although the physician has knowledge of protected health information, her knowledge pre-dated the acquisition of the information by the public health agency.

For those to whom the Section applies, it provides that no protected health information shall be disclosed, discoverable, or compelled to be produced pursuant to subpoena, or compelled testimony in any civil, criminal, administrative, or other legal proceeding, except, as stated in Subsection [a], where a public health agency or authorized public health official seeks a court order granting the disclosure of protected health information upon an application showing a clear danger to an individual or the public health that can only be averted or mitigated through a disclosure by the public health agency. This exception is meant to be narrow and seldom employed. The disclosure of protected health information in a legal proceeding cannot be made simply because there is a demonstrable, important need for the disclosure. Rather, this exception requires a clear danger to an individual or the public health that can only be averted or mitigated via disclosure of protected health information by a public health agency.

Subsection [b] requires that applications for disclosure of protected health information by public health agencies be sealed by the court against review by the general public, made available only to those persons who need the information to conduct the review proceeding, and that all proceedings concerning the application be conducted *in camera* [in closed chambers]. This final requirement affirms that the public not be present during these proceedings.

Notice of an application for the disclosure of protected health information in a legal proceeding under Subsection [c] must be provided to any individual who is the subject of the protected health information which potentially will be disclosed as well as any known person holding protected health

information from whom disclosure is sought. These persons have the opportunity pursuant to Subsection [d] to file a written response to the application, or appear in person during the court's *in camera* proceeding to provide evidence on the statutory criteria for the issuance of an order pursuant to this Section. The notice requirement and opportunity to file a response or appear in person can be avoided where an application by a public health agency or authorized public health official requires immediate action to avert or mitigate a clear danger to the public health.

Subsection [e] requires that in assessing clear danger under § 4-105[a], the court shall provide written findings of fact and balance the need for disclosure against the privacy interests of the individual who is the subject of the protected health information and any legitimate public health purpose which may be curtailed by disclosure. While this balance must be reached on a *per se* basis, the court must generally consider the infringement on individual privacy interests and potential harms to legitimate public health purposes which may result from the disclosure.

Any order authorizing disclosure of protected health information shall, pursuant to Subsection [f], limit disclosure to that information which is necessary pursuant to the application, limit disclosure to those persons who need the information, specifically prohibit re-disclosure to any other persons, include any other measures which the court deems necessary to limit any disclosures not authorized by the order, and conform to the Act when possible.

Section 4-106. Disclosures for Health Oversight Purposes

A public health agency may disclose protected health information to a health oversight agency to enable the agency to perform a health oversight function authorized by law if:

- [a] the public health agency itself is the focus of the oversight inquiry;
- [b] the protected health information is not removed from the premises, custody, or control of the public health agency; and
- [c] the health oversight agency does not record the names or other identifying information of individuals who are the subjects of protected health information.

COMMENTS

Although a public health agency may disclose protected health information to a health oversight agency [as defined in § 1-103(7)] for health oversight functions authorized by law, this Section sets three (3) limitations on these types of disclosures: (1) the public health agency itself is the focus of the oversight inquiry; (2) the protected health information is not removed from the premises, custody, or control of the public health agency; and (3) the health oversight agency does not record the names or other identifying information of individuals who are the subjects of protected health information. Provided these three limitations are observed, such disclosures are permitted.

Section 4-107. Deceased Individuals

[a] Generally. Nothing in this Act shall prohibit the disclosure of protected health information:

- (1) in a certificate of death, autopsy report, or related documents prepared under applicable laws or regulations;
- (2) for the purposes of identifying a deceased individual;
- (3) for the purposes of determining a deceased individual's manner of death by a chief medical examiner or the examiner's designee; or
- (4) to provide necessary information about a deceased individual who is a donor or prospective donor of an anatomical gift.

[b] Deceased Rights. The rights of a deceased individual as provided by this Act may be exercised for a period of [two] years after the date of death by one of the individuals in the following order of priority, subject to any written limitations or restrictions by the decedent:

- (1) an executor or administrator of the estate of a deceased individual, or one soon to be appointed in accordance with a will or other legal instrument;
- (2) a surviving spouse or domestic partner;
- (3) an adult child;
- (4) a parent; or
- (5) another person authorized by law to act for the individual decedent.

COMMENTS

Despite the general prohibition on disclosures of protected health information, this Section recognizes the potential need to disclose protected health information in a certificate of death, autopsy report, or related documents, for the purposes of identifying a deceased individual or determining a deceased individual's manner of death by a chief medical examiner or the examiner's designee, or to provide necessary information about a deceased individual who is a donor or prospective donor of an anatomical gift.

Although such disclosures concerning persons who are deceased are allowed, the rights of a deceased individual as provided by this Act are not extinguished by the person's death. Rather, the deceased individual's rights provided through this Act may be exercised for a period of [two] years after death by at least one individual. Absent any written limitations or restrictions issued by a person prior to death, the individual having authority to exercise the decedent's rights is designated in the following order of priority: (1) an existing or soon-to-be-appointed executor or administrator of the decedent's estate; (2) a surviving spouse or domestic partner; (3) an adult child; (4) a parent; or (5) another person authorized by law to act for the individual decedent [i.e. a legally-appointed guardian].

Section 4-108. Secondary Disclosures

No person to whom protected health information has been disclosed pursuant to this Act shall disclose the information to another person except as authorized by this Act. This Section shall not apply to:

- [a] the individual who is the subject of the information;
- [b] the individual's parents, legal guardians, or other persons lawfully authorized to make health care decisions for the individual where the individual who is the subject of the information is unable to give legal consent under Section 4-102; or
- [c] any person who is specifically required by federal or state law to disclose the information.

COMMENTS

Where the Act allows for disclosures of protected health information under §§ 4-103, 4-104, 4-105, 4-106, and 4-107, this Section limits the authority of persons receiving such information to further disclose the information to others. Specifically, this Section imposes the same disclosure requirements on recipients of protected health information as it does public health agencies. No person to whom protected health information has been disclosed pursuant to this Act shall disclose the information to another person except as authorized by this Act. Thus, for example, a health researcher who receives protected health information from a public health agency is restricted from disclosing that information to others outside the context in which it is disclosed absent the informed consent of the individual who is the subject of the information or some other exception as stated in the Act.

There are certain persons who are entitled under the Act to disclose protected health information which they have received from public health agencies without restriction, including the individual who is the subject of the information and the individual's parents, legal guardians, or other persons lawfully authorized to make health care decisions for the individual where the individual who is the subject of the information is unable to give legal consent under § 4-102. As well, any person who is specifically required by federal or state law to disclose the information may make a disclosure. This Act cannot preempt federal laws requiring the disclosure of information or subsequent state laws which may explicitly preempt the requirements of this Section.

Section 4-109. Record of Disclosures

- [a] Generally. A public health agency shall establish a written or electronic record of any of its disclosures of protected health information authorized by this Act. This record shall be treated as protected health information for the purposes of this Act.
- [b] Information Recorded. The record of disclosures shall include the following information:

- (1) the name, title, address, and institutional affiliation, if any, of the person to whom protected health information is disclosed;
- (2) the date and purpose of the disclosure;
- (3) a brief description of the information disclosed; and
- (4) the legal authority for the disclosure.

[c] Maintenance. This record shall be maintained by the public health agency for a period of ten years, even if the protected health information disclosed is no longer in the agency's possession.

COMMENTS

A public health agency shall prepare a record of its disclosures of protected health information which must contain the following information: (1) the person to whom protected health information is disclosed; (2) the date and purpose of the disclosure; (3) a brief description of the information disclosed; and (4) the legal authority for the disclosure [for example, that the disclosure is authorized pursuant to a Section of this Act, other State law, or federal law]. The record itself contains highly-sensitive information and shall be treated as protected health information for the duration of the time it is maintained by the public health agency. The Act recommends maintaining the record for ten years, even if the protected health information which was disclosed is no longer in the agency's possession.

ARTICLE V**SECURITY SAFEGUARDS AND RECORD RETENTION****Section 5-101. Duty to Hold Information Secure**

[a] Generally. Public health agencies have a duty to acquire, use, disclose, and store protected health information in a confidential manner which safeguards the security of the information.

[b] Security Measures. Public health agencies and other persons who are the recipients of protected health information disclosed by any agency, other than the individual (or the individual's lawful representative) who is the subject of the information, shall take appropriate measures to protect the security of such information, including:

- (1) maintaining such information in a physically secure environment, including:
 - [i] minimizing the physical places in which such information is used or stored; and
 - [ii] prohibiting the use or storage of such information in places where the security of the information may likely be breached or is otherwise significantly threatened;
- (2) maintaining such information in a technologically secure environment;
- (3) identifying and limiting the persons having access to such information to those who have a demonstrable need to access such information;
- (4) reducing the length of time that such information is used or stored in a personally-identifiable form to that period of time which is necessary for the use of the information;
- (5) eliminating unnecessary physical or electronic transfers of such information;
- (6) expunging duplicate, unnecessary copies of such information;
- (7) developing and distributing written guidelines consistent with this Act concerning the preservation of the security of such information;
- (8) assigning personal responsibility to persons who acquire, use, disclose, or store such information for preserving its security;
- (9) providing initial and periodic security training of all persons who acquire, use, disclose, or store such information;
- (10) thoroughly investigating any potential or actual breaches of security concerning such information;
- (11) imposing disciplinary sanctions for any breaches of security when appropriate; and

(12) undertaking continuous review and assessment of security standards.

[c] Display of Written Protections. Wherever protected health information is made accessible to public health officials on the premises of a public health agency, there shall be prominently displayed a notice in writing concerning the agency's disclosure policy, which shall include the following or substantially similar language: "*Protected health information contains health-related information about individuals which may be highly-sensitive. This information is entitled to significant privacy protections under federal and state law. The disclosure of this information outside public health agencies in an identifiable form is prohibited without the written consent of the person who is the subject of the information, unless specifically permitted by federal or state law. Unauthorized disclosures of this information may result in significant criminal or civil penalties, including imprisonment and monetary damages.*"

[d] Individuals on Agency Premises. All public health officials or other persons having authority at any time to acquire, use, disclose, or store protected health information shall:

- (1) be individually informed of their personal responsibility for preserving the security of protected health information;
- (2) execute a confidentiality statement prior to entering the premises, or as soon thereafter as possible, pursuant to their review of written guidelines consistent with this Act concerning the preservation of the security of such information;
- (3) fulfill their personal responsibility for preserving the security of protected health information to the degree possible; and
- (4) report to the public health information officer any known security breaches or actions which may lead to security breaches.

[e] Individual Identity. The identity of any person making a report under Subsection [d](4) shall not be revealed, without the consent of the person making the report, to anyone other than investigating public health officials or law enforcement officers.

[f] CDC Security Guidelines for HIV/AIDS Data. Notwithstanding any other provisions of this Act, protected health information concerning HIV or AIDS shall be secured in accordance with written standards promulgated by the federal Centers for Disease Control and Prevention of the Department of Health and Human Services, as amended.

COMMENTS

This Section sets forth the general duty of public health agencies to acquire, use, disclose, and store protected health information in a confidential manner which safeguards the security of the

information. The scope of this duty relating to ensuring the security of protected health information is further delineated in proceeding Subsections.

Public health agencies and other persons who are the recipients of protected health information disclosed by any agency, other than the individual (or the individual's lawful representative) who is the subject of the information, shall take appropriate measures to protect the security of such information.

While the extent and degree of these measures depend on the agency or person holding the information and available resources, they include (1) maintaining such information in a physically secure environment. The physical places in which such information is used or stored shall be as few as possible. Such information shall not be used or stored in places where the security of the information may likely be breached or is otherwise significantly threatened; (2) maintaining such information in a technologically secure environment. This may include, depending on available resources, utilizing techniques such as encryption or audit trails to minimize the potential for unauthorized access to electronic uses or storage of such information; (3) identifying and limiting the persons that have access to such information to those who have a demonstrable need to access such information; (4) reducing the length of time that such information is used or stored in a personally-identifiable form to that period of time which is necessary for the use of the information; (5) eliminating unnecessary physical or electronic transfers of such information; (6) expunging duplicate, unnecessary copies of such information; (7) developing and distributing written security guidelines; (8) assigning personal responsibility to each person who acquires, uses, discloses, or stores such information for preserving its security; (9) providing initial and periodic security training of all persons who acquire, use, disclose, or store such information; (10) investigating any potential or actual security breaches; (11) imposing disciplinary sanctions for any breaches of security when appropriate [this is particularly relevant to public health agencies]; and (12) continuously reviewing and assessing security standards.

In addition, the Act requires public health agencies to prominently display a written notice concerning the agency's disclosure policy anywhere protected health information may be accessible to others. Specific, common-sense language for this notice is stated in Subsection [c]. Additional language may be drafted for the purposes of addressing each public health agency's specific security measures and standards governing the disclosure of protected health information, but the general statement must be consistent with this Subsection and the Act.

Furthermore, Subsection [d] requires that public health officials or other persons having authority to acquire, use, disclose, or store protected health information shall (1) be individually informed of their personal responsibility for preserving the security of protected health information; (2) execute a confidentiality statement prior to entering the premises, or as soon thereafter as possible, pursuant to their review of written guidelines consistent with this Act concerning the preservation of the security of such information; (3) be responsible for preserving the security of the information to the degree possible; and (4) report to the public health information officer [established in § 5-102] any known security breaches or actions which may lead to security breaches. The identity of any person making such a report shall not be revealed, without the consent of the person making the report, to anyone other than investigating public health officials or law enforcement officers.

Finally, Subsection [f] requires that protected health information concerning HIV or AIDS-related data shall be secured in accordance with written standards promulgated by the federal Centers for Disease Control and Prevention of the Department of Health and Human Services, as amended. Protected health information concerning one's HIV or AIDS status is highly-sensitive, and justifies any additional protections, if any, required by CDC which are more protective of the privacy and security of the information. It may also be the case that CDC mandatorily requires adherence to such standards as a condition for receipt of federal HIV-related funds by State and local public health departments.

Section 5-102. Establishment of Public Health Information Officer

[a] Generally. Public health agencies shall appoint or designate a public health official as the agency's "public health information officer."

[b] Responsibilities. The public health information officer has overall responsibility for preserving the security of all protected health information consistent with this Section and the Act. This person shall report directly to the highest ranking public health official at the agency.

[c] Duties. The public health information officer shall perform all duties as required by this Section and the Act, including:

- (1) monitoring the acquisition, use, disclosure, and storage of protected health information to ensure such activities are conducted in a physically and technologically secure environment;
- (2) developing and implementing written policies and guidelines to preserve the security of protected health information, including a model confidentiality statement pursuant to Section 5-101[d](2);
- (3) coordinating the assignment of personal responsibility to each person who acquires, uses, discloses, or stores such information for preserving its security;
- (4) acting as the agency's principal investigator for each investigation of any security breach;
- (5) recommending disciplinary sanctions for any security breaches to the highest ranking public health official at the agency who shall be responsible for issuing and implementing any sanctions;
- (6) coordinating with federal, state, or local authorities, where appropriate, in the investigation of any security breach; and
- (7) preparing any report required pursuant to Section 5-103.

COMMENTS

Each public health agency shall appoint or designate a public health official as the agency's "public health information officer." This person might be an existing official of the agency or a person hired and commissioned specifically for the position depending on the size and resources of the agency in the agency's discretion.

The public health information officer has overall responsibility for preserving the security of all protected health information and shall report directly to the highest ranking public health official at the agency. While the scope of responsibilities and duties of the public health information officer may vary from agency to agency, specific statutory duties include: (1) monitoring the acquisition, use, disclosure,

and storage of protected health information; (2) developing and implementing written policies and guidelines to preserve the security of protected health information, including a model confidentiality statement pursuant to § 5-101[d](2); (3) coordinating the assignment of personal responsibility to each person who acquires, uses, discloses, or stores such information for preserving its security; (4) acting as the agency's principal investigator for security breaches; (5) recommending disciplinary sanctions for any security breaches to the highest ranking public health official at the agency who shall be responsible for issuing and implementing any sanctions; (6) coordinating with federal, state, or local authorities in the investigation of any security breach; and (7) preparing reports required pursuant to § 5-103.

Section 5-103. Issuance of Public Reports

[a] Agency Security Report. Public health agencies shall prepare on an annual basis a report concerning the status of security protections of protected health information, which shall be distributed to the public health information officer for the [*State public health agency*]. The report shall be prepared in accordance with guidelines issued by the public health information officer for the [*State public health agency*].

[b] Comprehensive Security Report. The public health information officer for the [*State public health agency*] shall prepare a summary report on the status of security protections of protected health information for all public health agencies in the [*State*] within ninety days of the date in which reports required under this Section are requested. This report shall be issued to the [*State Legislative Body*] with any recommendations for amendments to the Act or other relevant state laws which may improve the security of protected health information.

[c] Report Information. Reports prepared under this Section shall not contain any protected health information. Reports prepared under this Section are public information.

COMMENTS

In order to administratively and legislatively monitor security issues which arise from the acquisition, use, disclosure, or storage of protected health information, this Section requires public health agencies to prepare an annual report concerning the security status of protected health information. The report shall be prepared consistent with guidelines issued by the public health information officer for the [*State public health agency*].

All security reports from public health agencies within a state shall be distributed to the public health information officer for the [*State public health agency*] who shall prepare a state-wide summary report on the status of security protections of protected health information. This report shall be prepared within ninety (90) days of the original date of request for such reports from public health agencies by the [*State public health agency*]. The state-wide, summary report shall be issued to the [*State Legislative Body*] with any recommendations of the [*State public health agency*] for amendments to the Act in order to better protect the security of protected health information.

Since reports prepared under this Section are public information, these reports shall not contain any protected health information.

ARTICLE VI

FAIR INFORMATION PRACTICES

Section 6-101. Individual Access to Protected Health Information

[a] Opportunity to Inspect. Within fourteen days of the receipt of a request to review protected health information, a public health agency shall provide the requestor an opportunity during regular business hours to inspect copies of such information in the possession of the public health agency which concerns or relates to the requestor.

[b] Copies Furnished. Within ten days of the receipt of a request for copies of a requestor's protected health information, a public health agency shall provide without charge copies of protected health information in the possession of the agency which the requestor is authorized to inspect pursuant to this Section.

[c] Explanations. Upon request, the public health agency shall provide an explanation of any code, abbreviation, notation, or other marks appearing in the protected health information. A public health agency is not responsible for producing or reformulating protected health information, solely for the purposes of clarification, in other than its original form.

COMMENTS

Articles II, III, IV, and V of the Act set forth fundamental protections for individual privacy by limiting the acquisition, use, and disclosure of protected health information, and requiring substantial security protections for this information. In this Article, Section, and subsequent sections, the Act empowers individuals with rights to access their protected health information and request that a public health agency correct, amend, or delete erroneous, incomplete, or false information.

In this Section, public health agencies are specifically required to allow individuals to inspect their protected health information within fourteen days of the receipt of a request [as defined in § 1-103(17)]. Requestors [as defined in § 1-103(18)] shall be allowed to inspect copies of their protected health information in the possession of the public health agency during regular business hours. Copies of protected health information shall be provided without charge to a requestor within ten days of the receipt of a request.

Protected health information in the possession of public health agencies may contain codes, abbreviations of medical terminology or other terms, notations, or other marks which the requestor cannot or does not understand for any number of reasons. Upon request, the public health agency shall provide an explanation of any code, abbreviation, notation, or other marks appearing in the protected health information to the extent of the agency's knowledge of the information. The agency, however, is not responsible for producing or reformulating protected health information, solely for the purposes of clarification, in other than its original form. Thus, for example, where protected health information features numeric codes, the public health agency may have to explain the meaning of those codes, but

does not have to physically redraft the information with these meanings plainly stated for the benefit of the requestor.

Section 6-102. Limitations Concerning Individual Access to Protected Health Information

[a] Reasonable Limitations. Reasonable limitations may be placed on the time, place, and frequency of any inspection and copying requests. A public health agency may ask to review the protected health information with the requestor upon inspection, although such review shall not be a prerequisite to providing the information.

[b] Information Related to Other Persons. Any information contained in the protected health information of the requestor that relates to the health status or other confidential information of other persons shall be deleted for the purposes of inspection and copying.

[c] Unrelated Information. Any information contained in the protected health information of the requestor that is not related to the requestor's health status may be deleted for the purposes of inspection and copying.

[d] Withholding Information. A public health agency may deny a requestor the opportunity to inspect protected health information in the possession of the agency or may deny a request for copies of such information if:

- (1) the public health agency can show via clear and convincing evidence that the review of the protected health information will cause substantial and identifiable harm to the requestor or others which outweighs the requestor's right to access the information;
- (2) a parent or legal guardian has requested access to protected health information concerning an individual over the age of [*to be inserted consistent with State law*] who is the subject of the information and the individual objects to such access of the information within seven days of receipt of written notice of the request by the public health agency in possession of the information; or
- (3) the information is compiled principally in anticipation of, or for use in, a legal proceeding.

[e] Request Denials. If a public health agency denies a request to inspect or copy protected health information, it shall notify the requestor in writing of the reasons for denying such request, including that the agency does not possess any protected health information which is subject to the request.

[f] Appeals. A requestor may appeal such decisions under administrative review procedures as promulgated by the [*State public health agency*] consistent with state or local law.

COMMENTS

The prior Section [§ 6-101] sets forth affirmative requirements for public health agencies to allow requestors [as defined in § 1-103(18)] to inspect their protected health information, as well as provide copies of the same. This Section sets forth some limitations on these practices.

This Section generally authorizes public health agencies to set reasonable limitations on the time, place, and frequency of any inspection and copying requests. While the reasonableness of these limitations may be questioned on appeal, it is the intent of this Section to allow agencies some discretion over the inspection and copying of protected health information, provided this discretion is not exercised inconsistent with the Act.

Whenever a person requests to inspect his or her protected health information, a public health agency may ask to review the protected health information with the requestor upon inspection. While this review shall not be a prerequisite to providing the information, and thus the requestor can decline this review without being denied the right to inspect, this opportunity to review is designed to allow public health agencies the ability to discuss potentially sensitive health information (such as HIV status) with the requestor.

Any information contained in the protected health information of the requestor that relates to the health status or other confidential information of other persons *shall* be deleted for the purposes of inspection and copying. This requirement protects the privacy of other persons whose health status or other confidential information may be part of the requestor's protected health information. In addition, any information contained in the protected health information of the requestor that is not related to the requestor's health status *may* be deleted by the public health agency for the purposes of inspection and copying. The Act specifically governs protected health information: it does not otherwise allow individuals access to other information which is in the possession of public health agencies. However, other federal and state privacy and "freedom of information" laws may allow individuals to access this information.

Complete denials of inspection or copying requests are very limited. A public health agency may deny a requestor the opportunity to inspect protected health information in the possession of the agency or may deny a request for copies of such information if: (1) the public health agency can show via clear and convincing evidence that the review of the protected health information will cause substantial and identifiable harm to the requestor or others which outweighs the requestor's right to access the information; (2) a parent or legal guardian has requested access to protected health information concerning an individual over the age of [*to be inserted consistent with state law*] who is the subject of the information and the individual objects to such access of the information within seven days of receipt of written notice of the request by the public health agency in possession of the information. This provision requires public health agencies to notify such minors of a written request by the minor's parent or legal guardian prior to allowing inspection or copying; or (3) the information is compiled principally in anticipation of, or for use in, a legal proceeding.

For any denial of a request to inspect or copy protected health information, the public health agency shall notify the requestor in writing of the reasons for denying such request, including that the agency does not possess any protected health information which is subject to the request. A requestor

may appeal such denials. These denials shall be administrated on appeal consistent with administrative review procedures promulgated by the [*State public health agency*] in accordance with State or local law, particularly the State's version of the Administrative Procedures Act.

Section 6-103. Accuracy of Information

[a] Generally. Public health agencies shall reasonably ensure the accuracy and completeness of protected health information.

[b] Corrections. After inspection or review of copies of protected health information pursuant to Section 6-101, a requestor may request that the public health agency correct, amend, or delete erroneous, incomplete, or false information.

[c] Duty to Correct. The public health agency shall correct, amend, or delete erroneous, incomplete, or false information within fourteen days of a request provided that it determines that such modification is reasonably supported. The requestor has the burden of proving that information needs to be corrected, amended, or deleted.

[d] Written Notification. The requestor shall be notified in writing of any corrections, amendments, or deletions made, or, in the alternative, the reasons for denying any request in whole or part.

[e] Appeals. A requestor may appeal any decision of a public health agency denying a request to correct, amend, or delete erroneous, incomplete, or false information under administrative review procedures as promulgated by the [*State public health agency*] consistent with State or local law.

[f] Retention of Statement. A brief, written statement from the requestor challenging the veracity of the protected health information shall be retained by the public health agency for as long as the information is possessed. The public health agency shall make a notation of the disputed entries in the requestor's protected health information, including the original language and the requestor's proposed change. This statement shall be provided to any person who is authorized to receive the protected health information.

[g] Subsequent Notifications. A public health agency shall take reasonable steps to notify all persons indicated by the requestor, or others for which known acquisitions or disclosures have previously been made, of corrections, amendments, or deletions made to protected health information.

COMMENTS

This Section generally requires public health agencies to reasonably ensure the accuracy and completeness of protected health information. The reasonableness standard is set forth to allow public

health agencies some degree of flexibility in maintaining the accuracy and completeness of protected health information. Under this standard, however, a public health agency cannot justify its failure to make corrections, amendments, or deletions of erroneous, incomplete, or false information which is brought to the attention of the agency by a requestor [as defined in § 1-103(18)] under Subsection [b]. Rather, the public health agency must correct, amend [as defined in § 1-103(3)], or delete erroneous, incomplete, or false information within fourteen days of a request provided that it determines that such modification is reasonably supported. The requestor has the burden of proving that information needs to be corrected, amended, or deleted through the production of information or support for the action requested.

The requestor shall be notified in writing by the public health agency of any corrections, amendments, or deletions made. Alternatively, the reasons for denying any request in whole or part shall also be provided in writing. A requestor may appeal any denial decisions of a public health agency under administrative review procedures as promulgated by the [State public health agency] consistent with State or local law.

Regardless of any action taken, the public health agency shall retain a brief, written statement from the requestor challenging the veracity of the protected health information for as long as the information is possessed. Disputed entries in the requestor's protected health information, including the original language and the requestor's proposed change, shall be noted by the public health agency. This statement shall be provided to any person who is authorized to receive the protected health information. It essentially becomes part of the protected health information.

Whenever corrections, amendments, or deletions are made to protected health information, a public health agency shall take reasonable steps to notify all persons indicated by the requestor, or others for which known acquisitions or disclosures have previously been made.

Section 6-104. Appeals

[a] Generally. In the event that administrative appeals have been exhausted pursuant to Section 6-102[f] or Section 6-103[e], the requestor may appeal decisions of the public health agency in the State or local court having appropriate jurisdiction.

[b] Court Determination. The court shall determine whether there exists a reasonable basis for the action or decision of the public health agency pursuant to an *in camera* review of the relevant protected health information, the administrative record, and other admissible evidence.

[c] Relief. Individual relief is limited to a judgment requiring the public health agency to make available the requested information to the requestor for inspection or copying or to correct, amend, or delete erroneous, incomplete, or false information.

COMMENTS

This Section allows requestors [as defined in § 1-103(18)], who have exhausted their right to administrative appeals under § 6-102[f] or § 6-103[e] to appeal decisions of the public health agency in

State or local courts having appropriate jurisdiction. Appellate procedures following administrative review shall generally be followed consistent with State or local law. The court shall determine whether there exists a reasonable basis for the action or decision of the public health agency pursuant to an *in camera* review [in closed chambers without the public present] of the relevant protected health information, the administrative record, and any other admissible evidence.

Individual relief pursuant to appeals under this Article is limited to a judgment requiring the public health agency to make available the requested information to the requestor for inspection or copying or to correct, amend, or delete erroneous, incomplete, or false information as requested. Individual damages shall not be awarded solely pursuant to an appeal of such decisions.

ARTICLE VII**CRIMINAL SANCTIONS AND CIVIL REMEDIES****Section 7-101. Criminal Penalties**

[a] Public Health Officials Generally. Any public official who, knowing or in reckless disregard of the fact that protected health information is protected by this Act, intentionally acquires or uses such information in violation of this Act, or discloses such information to a person not lawfully entitled to receive it, is guilty of a felony. Upon conviction, the official is punishable by a fine not to exceed [\$5,000] or imprisonment for a period not to exceed [three] years, or both.

[b] Unlawful Disclosures. Any person who, knowing or in reckless disregard of the fact that protected health information is protected from disclosure by this Act, intentionally discloses such information to a person or entity not lawfully entitled to receive it is guilty of a misdemeanor. Upon conviction, the person is punishable by a fine not to exceed [\$5,000] or imprisonment for a period not to exceed one year, or both.

[c] Unlawful Access. Any person who by any unlawful means, including bribery, fraud, theft, false pretenses, or other misrepresentation of identity, purpose of use, or entitlement to information, inspects, copies, examines, or obtains protected health information in violation of this Act is guilty of a felony. Upon conviction, the person is punishable by a fine not to exceed [\$50,000] or imprisonment for a period not to exceed [*five*] years, or both, for each offense.

[d] Commercial Gain or Malicious Harm. Any person who acts in violation of this Act under Subsections [a-c] of this Section for the purposes of commercial gain, or with intent to cause malicious harm, shall be guilty of a felony. Upon conviction, the person is punishable by a fine not to exceed [\$50,000] or imprisonment for a period not to exceed [*five*] years, or both, for each offense.

[e] Enhanced Penalties. The maximum penalties described in Subsections [a-d] shall be doubled for every subsequent conviction of any person arising out of a violation or violations related to a set of circumstances that are different from those involved in the previous violation or set of related violations described in Subsections [a-d].

[f] Statute of Limitations. Any action under this Section is barred unless the action is commenced within [*three*] years after the cause of action accrues.

[g] Separate Offense. Each violation of this Act is a separate and actionable offense.

COMMENTS

Subsection [a] makes it a felony for any public health official [as defined in § 1-103(15)] to knowingly or in reckless disregard acquire, use, or disclose protected health information in violation of this Act provided the official knew or should have known that the act committed is prohibited. Since public health officials are primarily affected by and responsible for obeying and enforcing the Act, this Subsection specifically provides for their criminal punishment for violations of the Act. This includes officials who, knowing or in reckless disregard of the fact that protected health information is protected from disclosure by this Act, intentionally disclose such information to a person not lawfully entitled to receive it. It may also include officials who are directly responsible for preventing violations through enforcing reasonable security measures or other mechanisms, and who through their own reckless disregard of their supervisory responsibilities facilitate or allow violation to occur. Thus, for example, where a supervisor's employee violates the Act and the supervisor is knowledgeable of the circumstances leading up to the violation and the violation itself, the supervisor may be held criminally responsible for the violation along with the employee. It is not the intention of this Subsection, however, to declare that a public health information officer under § 5-102 is a superior or supervisory officer over each public health official within the public health agency. This determination must be made on a case-by-case basis. While each State may determine the terms of punishment, the Act suggests that upon conviction, the official be punished by a fine not to exceed \$5,000 or imprisonment for a period not to exceed three years, or both, for each offense. The actual extent of the monetary fine and/or imprisonment is subject to judicial discretion.

Subsection [b] makes it a misdemeanor for any person [as defined in § 1-103(10)] to knowingly or in reckless disregard disclose protected health information in violation of the disclosure provisions of Article IV of the Act, provided the individual knew or should have known that the disclosure is prohibited. Although public health officials are "persons" as defined in the Act, actions of such officials in violation of the disclosure provisions of the Act would be properly prosecuted under Subsection [a]. It is not the intent of the Act that a public health official be prosecuted under Subsection [a] and [b] for the same violation of the disclosure provisions of the Act. As stated above, each State may set its own terms for punishment, although the Act suggests a convicted person be punished by a fine not to exceed \$5,000 or imprisonment not to exceed one year, or both, for each offense.

Subsection [c] makes it a felony for any person, including public health officials, to inspect, copy, examine, or obtain protected health information through any unlawful means, including bribery, fraud, theft, false pretenses, or other misrepresentation of identity, purpose of use, or entitlement to information. This Subsection covers all levels of personal misrepresentations, from the simplest case of an individual posing *in persona* as one entitled to access the information [such as an adult falsely posing as the lawful guardian of a minor] to more complicated cases where an individual, for example, utilizes without authorization an encryption code to access computerized databases of protected health information. Upon conviction, the Act suggests punishing the person by a fine not to exceed \$50,000 or imprisonment for a period not to exceed five years, or both, for each offense.

Subsection [d] creates enhanced criminal penalties for any person who violates the Act under Subsections [a-c] for the purposes of commercial gain, or with intent to cause malicious harm. This Subsection requires a factual determination that the motivation for the criminal activities was for the purposes of commercial gain, or that the intent of the person committing the act was to cause malicious harm to an identifiable individual or group of persons. Provided this determination can be made, the

person convicted shall be guilty of a felony, punishable by a fine which the Act suggests should not exceed \$50,000 or imprisonment for a period not to exceed five years, or both, for each offense.

Subsection [e] allows the doubling of the maximum penalties described in Subsections [a-d] for every subsequent conviction of any person under this Act, provided their subsequent convictions arise out of a violation or violations related to a set of circumstances that are different or distinguishable in place, manner, or time from those acts which led to the previous violation or set of related violations. Thus, the maximum penalties may be doubled for persons convicted of a violation of this Act (after previously being convicted of a violation of the Act) which is based on actions distinct from those which support the subsequent conviction.

Subsection [f] requires that any action under this Section be commenced within a recommended three years after the cause of action accrues. Thus, if a disclosure violation occurred on January 1, 2000, prosecutors would have until January 1, 2003 to prosecute the person who violated the Act.

Subsection [g] confirms that each violation of this Act is a separate and actionable offense. A series of violations of the Act which occur over time would thus be considered separately for the purposes of assessing criminal charges and penalties. Thus, if a public health official disclosed protected health information in an unauthorized manner on January 1, 2000, March 1, 2000, and May 1, 2000, these offenses would be considered three separate offenses, even if the disclosures were substantially similar in place and manner, or made to the same person.

Section 7-102. Civil Enforcement

The [*State Attorney General*] or other appropriate State or local law enforcement official may maintain a civil action to enforce this Act. Relief may be ordered by the court as authorized in Section 7-103 of this Act.

COMMENTS

This Section permits an appropriate law enforcement official to bring a civil action to enforce the terms of the Act. Of course, actions by such officials against public health agencies may likely be unnecessary where the law enforcement official may have political remedies to compel compliance with the Act. Regardless, there may be instances where judicial recourse is needed. Thus, for example, the State Attorney General [*or its functional equivalent*] may bring an action to enforce disclosure requirements against a person who receives protected health information and subsequently attempts or succeeds in disclosing the information in an unauthorized manner. Such actions, if successful, may be addressed by the court through the same types of civil relief as allowed in § 7-103, consistent with existing theories of recoveries by State or local governments.

Section 7-103. Civil Remedies

[a] Generally. Any person aggrieved by:

- (1) the failure to impose and maintain adequate safeguards for the confidentiality and security of protected health information;

- (2) the failure to supervise persons responsible for the acquisition, use, disclosure, or storage of protected health information;
- (3) the disclosure of protected health information in violation of this Act; or
- (4) any other violation of this Act,

may maintain an action for relief as provided in this Section.

[b] Appropriate Relief. The court may order a public health agency, public health official, or other persons to comply with this Act and may order any other appropriate civil or equitable relief, including an injunction to prevent non-compliance.

[c] Compensatory and Punitive Damages. If the court determines that there is a violation of this Act, the aggrieved person is entitled to recover damages for losses sustained as a result of the violation. The measure of damages shall be the greater of the aggrieved person's actual damages, or liquidated damages of [\$1,000] for each violation, provided that liquidated damages shall not exceed [\$10,000] for any particular claim.

[d] Punitive Damages. If the court determines that there is a violation of this Act which results from wilful or grossly negligent conduct, the aggrieved person may recover punitive damages not to exceed [\$10,000], exclusive of any other loss, for each violation from the offending party.

[e] Attorney Fees. If the aggrieved person prevails, the court may assess reasonable attorney's fees and all other expenses reasonably incurred in the litigation against the non-prevailing parties.

[f] Joint and Several Liability. Responsible parties are jointly and severally liable for any compensatory damages, attorney's fees, or other costs awarded.

[g] Statute of Limitations. Any action under this Section is barred unless the action is commenced within [one] year after the cause of action accrues or was or should reasonably have been discovered by the aggrieved person or the person's lawful representative.

[h] Separate Offense. Each violation of this Act is a separate and actionable offense.

[i] Pre-existing Remedies. Nothing in this Section limits or expands the right of an aggrieved person or the person's lawful representative to recover damages under any other applicable law.

COMMENTS

Subsection [a] allows any person [as defined in § 1-103(10)] who is aggrieved by a violation of this Act to file an action in court of appropriate jurisdiction against the responsible party or parties on one of four theories of liability: (1) the failure to impose and maintain adequate safeguards for the confidentiality and security of protected health information; (2) the failure to supervise persons responsible for the acquisition, use, disclosure, or storage of protected health information; (3) the disclosure of protected health information in violation of this Act; or (4) any other violation of this Act.

The allowance of aggrieved parties to sue those responsible in civil court is consistent with standard conceptions of constitutional and statutory standing. The burden of proof concerning the claim of violation rests with the aggrieved person, unless stated otherwise in the Act. Depending on traditional state practice, the option of a jury trial may or may not be guaranteed.

Subsection [b] generally allows the court to order a public health agency, public health official, or other persons who have acted in violation of the Act to comply with the Act and assign any other appropriate civil or equitable relief, including an injunction to prevent non-compliance. Specific types of relief allowed are set forth in Subsections [c], [d], and [e], although the court retains the discretion to allow other relief.

Subsection [c] provides that where the court, whether via a jury or bench trial, determines that a violation of the Act has occurred, the aggrieved person is entitled to recover damages for losses sustained as a result of the violation. The measure of damages shall be the greater of the aggrieved person's actual damages, or liquidated damages in the suggested amount of \$1,000 for each violation. Liquidated damages shall not exceed the suggested amount of \$10,000 for any particular claim of an aggrieved person.

Subsection [d] allows an aggrieved person to recover punitive damages not to exceed a statutory cap [as suggested in the Act, \$10,000], exclusive of any compensatory damages, for each violation where such results from wilful or grossly negligent conduct. Punitive damages would be assessed only against the responsible party which acted wilfully or in a grossly negligent manner in violation of the Act.

Subsection [e] allows an aggrieved person to collect reasonable attorney's fees and all other expenses reasonably incurred in the litigation against the non-prevailing parties, provided the aggrieved person succeeds in the civil action. The allowance for attorney's fees and reasonable expenses is meant to encourage the Act's self-enforcement mechanisms by facilitating an aggrieved person's opportunity to bring a claim.

Subsection [f] clarifies that responsible parties are jointly and severally liable for any damages awarded, other than punitive damages. Stated simply, responsible parties whose violation of the Act contributes to the same injury suffered by an aggrieved person are each individually liable for the injury. Thus, under principles of tort recovery, each responsible party may have to contribute to the relief ordered by the court.

Subsection [g] assigns a statutory limitations period to the bringing of a civil action under this Section. Any civil action is barred unless brought within, as the Act suggests, one year after the cause of action accrues or was or should reasonably have been discovered by the aggrieved person or the person's lawful representative. This statute of limitations incorporates a "discovery" prong in order to allow for the bringing of civil actions for violations of the Act which may not be reasonably discovered by the aggrieved person or the lawful representative until well after the date it occurs. Thus, if a violation occurred on January 1, 2000 and was immediately discovered, an aggrieved person would have until

January 1, 2001 to bring an action against the responsible party. If, however, the discovery of the disclosure violation by the aggrieved person or the person's lawful representative did not occur until June 1, 2000, and that discovery could not have reasonably been made prior thereto, the statute of limitations would be tolled an additional six months. As a result, a civil action could be brought as late as June 1, 2001.

Subsection [h] confirms that each violation of this Act is a separate and actionable offense. A series of violations of the Act which occur over time would thus be considered separately for the purposes of assessing civil actions and damages. Violations of this Act involving multiple incidents of disclosure of the same information, or involving multiple persons identified in the information, shall be deemed actionable as to each incident and as to each person identified.

Subsection [i] confirms that while this Section allows for statutory source of civil remedies under the Act, the Section does not preclude the bringing of a claim on tort or other theories besides those provided in the Act.

Section 7-104. Immunities

[a] Disclosure Pursuant to Informed Consent. No person shall be subject to criminal sanction or civil liability under this Act as a result of disclosing protected health information pursuant to valid informed consent under Section 4-102.

[b] Supervisory Officers. No public health official who is a superior or supervisory officer over a public health official who violates any part of this Act shall be subject to civil remedies under this Act on the theory of vicarious liability, provided the superior or supervisory official:

- (1) had no prior actual or constructive knowledge of the violation or actions leading to the violation; and
- (2) was not otherwise directly responsible for ensuring against the occurrence of the violation.

[c] Absence of Accompanying Language with Disclosures. No person, other than a public health official, shall be subject to criminal sanction or civil liability as a result of disclosing protected health information in violation of this Act where the original disclosure of information was not accompanied by language required under Section 4-103[d]. This Subsection, however, shall not release from criminal sanction or civil liability the public health official or other person who failed to include such language in the prior disclosure.

[d] Parent or Guardian. No person who is the parent or legal guardian of a minor, or an individual's legally-appointed guardian, shall be subject to criminal sanction or civil liability under this Section as a result of disclosing protected health information which relates to the individual, provided such parent or guardian lawfully obtained such information in accordance with this Act.

COMMENTS

Subsection [a] clarifies what is implicit in the language of the Act itself, that is, a person has not violated the Act by disclosing protected health information pursuant to the valid informed consent of the individual [or lawful representative] who is the subject of the information. As a result, no criminal sanction or civil liability under this Act may be assessed against a person who has disclosed in this manner, regardless of the consequences of that disclosure. It is the individual's responsibility pursuant to allowing for the disclosure of their protected health information to absorb the foreseeable or unforeseeable consequences of the disclosure.

Subsection [b] limits the civil liability of supervisory public health officials for the acts of their employees or others under their authority. The Subsection declares that a supervisory public health official shall not be subject to civil remedies under the Act on the theory of vicarious liability, provided the supervisory official (1) had no prior actual or constructive knowledge of the violation or actions leading to the violation; and (2) was not otherwise directly responsible for ensuring against the occurrence of the violation. Thus, for example, where a supervisor's employee acts in violation of the Act without the knowledge of the supervisor of any of the circumstances leading up to the violation or the violation itself, and the supervisor is not otherwise directly responsible for preventing the violation through enforcing reasonable security measures or other mechanisms, the supervisor cannot be held liable for the unlawful actions of the employee. It is not the intention of this Subsection to declare that a public health information officer under § 5-102 is a superior or supervisory officer over each public health official within the public health agency. This determination must be made on a case-by-case basis.

Subsection [c] releases from criminal and civil liability any person, other than public health officials [who are charged with knowledge of the Act in large part because of the need for such officials to be fully aware of the terms of the Act], who discloses protected health information which violates this Act where the original disclosure of information was not accompanied by language required pursuant to § 4-103[d]. Provided it can be shown that disclosures of protected health information were not accompanied with the required language, individuals who receive and subsequently disclose the information, even where such disclosure is otherwise in violation of the Act, are released from liability. However, public health officials or other persons who fail to include such language in making a disclosure are not released from liability.

Subsection [d] grants criminal and civil immunity to the parent or legal guardian of minors or a person's legally-appointed guardian from any disclosure of protected health information which relates to the individual minor or ward, provided such parent or guardian lawfully obtained such information in accordance with this Act. The premise underlying this Subsection is that the relationships between parents and children and guardians and their wards are such that subsequent disclosures of protected health information may be needed to protect the safety, health, or welfare of the child or ward [or for other reasons underlying these relationships], and thus a parent or guardian may not be held liable for any disclosures.

7-105. Administrative Procedure Act Applicable

Any action of a public health agency made pursuant to this Act, including but not limited to public notice given, or determinations made, under Sections 2-101 and 3-101, concerning acquisition and use of protected health information, shall be governed by the State

[*Administrative Procedure Act (APA)*]. The courts of this State shall have jurisdiction to review final agency actions in accordance with the APA, and may stay or permanently enjoin any such action that fails to comport with the requirements of the Model State Public Health Privacy Act.

COMMENTS

This Section requires that any action of a public health agency pursuant to this Act [the Model State Public Health Privacy Act] be governed by the State's Administrative Procedure Act (APA) [or a comparable statutory enactment of another name] to the extent that the APA applies. This includes public notice requirements or determinations made under Sections 2-101 and 3-101 concerning the acquisition or use of protected health information. This Section further authorizes courts within the State to review final agency actions [as defined consistent with the APA] in accordance with the APA. A reviewing court having jurisdiction has the power to stay or permanently enjoin actions of a public health agency that fails to comport with the Model State Public Health Privacy Act. Consistent with this Section, as well, a reviewing court may exercise any further prospective relief allowed pursuant to the State's APA.

ARTICLE VIII

MISCELLANEOUS PROVISIONS

Section 8-101. Titles

This Act may be cited as the Model State Public Health Privacy Act. For the purposes of this Act, titles and subtitles of Articles, Sections, and Subsections are instructive, but not binding.

COMMENTS

For purposes of clarification, the second clause of this Section restates what is characteristically viewed as a tenet of State law interpretation, that is, the law is comprised of the language stated within the text of the provisions of each Article, Section, and Subsection. For the purposes of this Act, titles and subtitles of Articles, Sections, and Subsections are deemed instructive. They are not to be considered part of the law itself, and thus are not binding on a court or other body interpreting the law.

Section 8-102. Uniformity Provision

This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among States enacting it.

COMMENTS

The purpose of the Act is to create a model law to govern the acquisition, use, disclosure, and storage of protected health information by public health agencies. This provision requires that a court or other body interpreting or applying the Act construe its provisions so as to make uniform the law concerning this general subject matter among those States which enact it in exact or substantially similar form.

Section 8-103. Severability

The provisions of this Act are severable. If any provision of this Act or its application to any person or circumstances is held invalid in a federal or State court having jurisdiction, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application.

COMMENTS

This is a standard severability clause which has been utilized in countless state and local enactments of law. It is similar to a provision in the Uniform Health-Care Information Act, § 9-103, drafted by the National Conference of Commissioners on Uniform State Laws in 1985. The clause, simply stated, allows other provisions of the Act to remain valid despite the invalidity of other provisions as determined by a federal or State court having jurisdiction.

Section 8-104. Repeals

The following acts, laws, or parts thereof, are explicitly repealed with the passage of this Act:

- (1) *[To be inserted in each state considering passage of the Act]*
- (2) *[To be inserted in each state considering passage of the Act]*
- (3) *[To be inserted in each state considering passage of the Act] . . .*

COMMENTS

To the extent to which a State legislative body determines the passage of this Act may effectively repeal prior lawful enactments, it may explicitly state these provisions in this Section. The failure to explicitly state those lawful enactments which are repealed with the passage of the Act does not mean that prior inconsistent laws are not repealed. Rather, under § 8-106[b], prior conflicting state laws are preempted.

Section 8-105. Saving Clause

This Act does not explicitly preempt other laws or regulations which preserve to a greater degree the privacy and security protections of protected health information as set forth in this Act, provided such laws or regulations are consistent, and do not otherwise restrict or interfere, with the operation or enforcement of the provisions of the Act.

COMMENTS

Where the Act and its provisions are viewed as providing a basic floor of privacy and security protections for protected health information, this provision allows other laws at the State or local level to provide more protections so long as such protections are consistent with the Act and do not interfere

with the operation or enforcement of the Act. Thus, for example, depending on local public health conditions, which can differ substantially across regions, additional privacy protections could apply.

Section 8-106. Conflicting Laws

[a] Federal Supremacy. This Act does not restrict any person from complying with federal law or regulations.

[b] Prior Conflicting Acts. In the event of a conflict between this Act and other State or local laws or regulations concerning protected health information or administrative procedures pursuant to the [State Administrative Procedure Act], the provisions of this Act apply.

COMMENTS

Subsection [a] is included to clarify that no State law can take precedence or preempt federal law or regulations in any form under the Supremacy Clause, U.S. CONST. Art VI [2]. To the extent that federal public health agencies legally require or obligate State public health agencies or officials to act in ways which are inconsistent with the provisions of this Act, such requirements are lawful. In our constitutional federalist system, neither this nor any State law can restrict persons from complying with appropriate federal law or regulations.

Subsection [b] recognizes that this Act may be passed in States which have previously enacted privacy and confidentiality laws or regulations concerning health information in general, genetic information, or health information used in medical or health services research. These laws may feature provisions which are inconsistent with the provisions of this Act. Where, however, health information is acquired, used, disclosed, or stored by public health agencies, the provisions of this Act apply to the exclusion of other, inconsistent laws. As well, where this Act requires procedures which exceed those required in the State's Administrative Procedures Act [or similar enactment by another name], the provisions of this Act control, despite the language in § 7-105.

Section 8-107. Reports and Effective Date

[a] Initial Reports. No later than [*six*] months after the date of enactment, the highest ranking public health official at each public health agency shall prepare and submit a report to the [*State public health agency*] concerning the effect of this Act on each agency.

[b] Comprehensive Report. No later than [*nine*] months after the date of enactment, the [*State public health agency*] shall issue a comprehensive report to the [*State Legislative Body*] on behalf of each public health agency concerning the effect of this Act, including any recommendations for legislative amendments.

[c] Effective Date. The provisions of this Act shall be effective one year after the date of its enactment.

COMMENTS

Subsection [a] requires the highest ranking official at each public health agency to prepare and submit a report to the [*State public health agency*] concerning the effect of this Act on the agency. This report is intended to offer a final opportunity prior to the effective date of the Act for public health agencies to address their legal, financial, policy, and other concerns about the enactment of the Act. The content and nature of these reports may be left to the discretion of each agency, or the [*State public health agency*] may administratively prescribe a format for these reports.

These reports shall be examined and consolidated by the [*State public health agency*] under Subsection [b] toward the production of a comprehensive report to be submitted to the [*State Legislative Body*] for its consideration at least three months before the effective date of the Act. This comprehensive report may include non-binding recommendations for amendments to the Act. The [*State Legislative Body*] may act to amend the Act based on this report and its recommendations.

Regardless of whether the legislative body chooses to amend the Act, its provisions under Subsection [c] take effect one year after the date of its enactment. This delayed effective date is meant to allow public health agencies at the State and local levels sufficient opportunity to respond to its passage, to organize its informational records, to advise staff, to mobilize resources, and otherwise prepare for the enforcement of the Act itself.