

Senate Bill No. 337

Passed the Senate September 11, 2009

Secretary of the Senate

Passed the Assembly September 11, 2009

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day
of _____, 2009, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 1280.15 of, and to add Division 109.5 (commencing with Section 130250) to, the Health and Safety Code, relating to public health.

LEGISLATIVE COUNSEL'S DIGEST

SB 337, Alquist. Health information.

(1) Existing law establishes provisions for the licensing and certification of clinics, health facilities, home health agencies, and hospices under the jurisdiction of the State Department of Public Health. Existing law requires these entities to prevent unlawful or unauthorized access to, and use or disclosure of, a patient's medical information, and authorizes the department to assess administrative penalties for violations. Existing law also requires these entities to report instances of unlawful or unauthorized access to, and use or disclosure of, a patient's medical information to the department and to the affected patient or patient's representative, as prescribed, within 5 days of detecting it.

This bill would specify that this period is 5 business days.

This bill would require a clinic, health facility, home health agency, or hospice to delay reporting to the affected patient or patient's representative the unlawful or unauthorized access to, and use or disclosure of, a patient's medical information beyond 5 business days, as specified, if a law enforcement agency or official provides a written or oral statement that compliance with that reporting requirement would impede the law enforcement agency's activities that relate to the unlawful or unauthorized access to, and use or disclosure of, a patient's medical information and specifying the date upon which the delay shall end, as prescribed.

(2) Existing law establishes the Office of Health Information Integrity within the California Health and Human Services Agency to ensure the enforcement of state law mandating confidentiality of medical information and to impose administrative fines for the unauthorized use of medical information.

This bill would, in addition, authorize the California Health and Human Services Agency to apply for federal health information

technology and exchange funding and would, if no application is made by that date, require selection of a state-designated qualified nonprofit agency for the purposes of submitting an application for federal health information technology and exchange funding.

This bill, in the event that the California Health and Human Services Agency applies for and receives federal health information technology and exchange funding, would create the California Health Information Technology and Exchange Fund in the State Treasury. The bill would require that all moneys in the fund be available, upon appropriation by the Legislature, for purposes related to health information technology and exchange. The bill would provide that the fund shall consist of, but would not be limited to, federal health information technology and exchange funding.

The people of the State of California do enact as follows:

SECTION 1. Section 1280.15 of the Health and Safety Code is amended to read:

1280.15. (a) A clinic, health facility, home health agency, or hospice licensed pursuant to Section 1204, 1250, 1725, or 1745 shall prevent unlawful or unauthorized access to, and use or disclosure of, patients' medical information, as defined in subdivision (g) of Section 56.05 of the Civil Code and consistent with Section 130203. The department, after investigation, may assess an administrative penalty for a violation of this section of up to twenty-five thousand dollars (\$25,000) per patient whose medical information was unlawfully or without authorization accessed, used, or disclosed, and up to seventeen thousand five hundred dollars (\$17,500) per subsequent occurrence of unlawful or unauthorized access, use, or disclosure of that patients' medical information. For purposes of the investigation, the department shall consider the clinic's, health facility's, agency's, or hospice's history of compliance with this section and other related state and federal statutes and regulations, the extent to which the facility detected violations and took preventative action to immediately correct and prevent past violations from recurring, and factors outside its control that restricted the facility's ability to comply with this section. The department shall have full discretion to

consider all factors when determining the amount of an administrative penalty pursuant to this section.

(b) (1) A clinic, health facility, home health agency, or hospice to which subdivision (a) applies shall report any unlawful or unauthorized access to, or use or disclosure of, a patient's medical information to the department no later than five business days after the unlawful or unauthorized access, use, or disclosure has been detected by the clinic, health facility, home health agency, or hospice.

(2) Subject to subdivision (c), a clinic, health facility, home health agency, or hospice shall also report any unlawful or unauthorized access to, or use or disclosure of, a patient's medical information to the affected patient or the patient's representative at the last known address, no later than five business days after the unlawful or unauthorized access, use, or disclosure has been detected by the clinic, health facility, home health agency, or hospice.

(c) (1) A clinic, health facility, home health agency, or hospice shall delay the reporting, as required pursuant to paragraph (2) of subdivision (b), of any unlawful or unauthorized access to, or use or disclosure of, a patient's medical information beyond five business days if a law enforcement agency or official provides the clinic, health facility, home health agency, or hospice with a written or oral statement that compliance with the reporting requirements of paragraph (2) of subdivision (b) would be likely to impede the law enforcement agency's activities that relate to the unlawful or unauthorized access to, and use or disclosure of, a patient's medical information and specifies a date upon which the delay shall end, not to exceed 60 days after a written request is made, or 30 days after an oral request is made. A law enforcement agency or official may request an extension of a delay based upon a written declaration that there exists a bona fide, ongoing, significant criminal investigation of serious wrongdoing relating to the unlawful or unauthorized access to, and use or disclosure of, a patient's medical information, that notification of patients will undermine the law enforcement agency's activities, and that specifies a date upon which the delay shall end, not to exceed 60 days after the end of the original delay period.

(2) If the statement of the law enforcement agency or official is made orally, then the clinic, health facility, home health agency, or hospice shall do the following:

(A) Document the oral statement, including, but not limited to, the identity of the law enforcement agency or official making the oral statement and the date upon which the oral statement was made.

(B) Limit the delay in reporting the unlawful or unauthorized access to, or use or disclosure of, the patient's medical information to the date specified in the oral statement, not to exceed 30 calendar days from the date that the oral statement is made, unless a written statement that complies with the requirements of this subdivision is received during that time.

(3) A clinic, health facility, home health agency, or hospice shall submit a report that is delayed pursuant to this subdivision not later than five business days after the date designated as the end of the delay.

(d) If a clinic, health facility, home health agency, or hospice to which subdivision (a) applies violates subdivision (b), the department may assess the licensee a penalty in the amount of one hundred dollars (\$100) for each day that the unlawful or unauthorized access, use, or disclosure is not reported, following the initial five-day period specified in subdivision (b). However, the total combined penalty assessed by the department under subdivision (a) and this subdivision shall not exceed two hundred fifty thousand dollars (\$250,000) per reported event.

(e) In enforcing subdivisions (a) and (d), the department shall take into consideration the special circumstances of small and rural hospitals, as defined in Section 124840, and primary care clinics, as defined in subdivision (a) of Section 1204, in order to protect access to quality care in those hospitals and clinics. When assessing a penalty on a skilled nursing facility or other facility subject to Section 1423, 1424, 1424.1, or 1424.5, the department shall issue only the higher of either a penalty for the violation of this section or a penalty for violation of Section 1423, 1424, 1424.1, or 1424.5, not both.

(f) All penalties collected by the department pursuant to this section, Sections 1280.1, 1280.3, and 1280.4, shall be deposited into the Internal Departmental Quality Improvement Account, which is hereby created within the Special Deposit Fund under

Section 16370 of the Government Code. Upon appropriation by the Legislature, moneys in the account shall be expended for internal quality improvement activities in the Licensing and Certification Program.

(g) If the licensee disputes a determination by the department regarding a failure to prevent or failure to timely report unlawful or unauthorized access to, or use or disclosure of, patients' medical information, or the imposition of a penalty under this section, the licensee may, within 10 days of receipt of the penalty assessment, request a hearing pursuant to Section 131071. Penalties shall be paid when appeals have been exhausted and the penalty has been upheld.

(h) In lieu of disputing the determination of the department regarding a failure to prevent or failure to timely report unlawful or unauthorized access to, or use or disclosure of, patients' medical information, transmit to the department 75 percent of the total amount of the administrative penalty, for each violation, within 30 business days of receipt of the administrative penalty.

(i) Notwithstanding any other law, the department may refer violations of this section to the Office of Health Information Integrity for enforcement pursuant to Section 130303.

(j) For purposes of this section, the following definitions shall apply:

(1) "Reported event" means all breaches included in any single report that is made pursuant to subdivision (b), regardless of the number of breach events contained in the report.

(2) "Unauthorized" means the inappropriate access, review, or viewing of patient medical information without a direct need for medical diagnosis, treatment, or other lawful use as permitted by the Confidentiality of Medical Information Act (Part 2.6 (commencing with Section 56) of Division 1 of the Civil Code) or any other statute or regulation governing the lawful access, use, or disclosure of medical information.

SEC. 2. Division 109.5 (commencing with Section 130250) is added to the Health and Safety Code, to read:

**DIVISION 109.5. CALIFORNIA HEALTH INFORMATION
TECHNOLOGY AND EXCHANGE ACT**

130250. The Legislature finds and declares all of the following:

(a) Health information technology provides tools that can improve the quality, safety, and value of health care services. However, the full benefit of health information technology cannot be realized until electronic health record systems supporting the secure exchange of individual health records are in place and used by health care providers, payers, patients, and other individuals throughout the state, and across state boundaries.

(b) There is a need to promote secure electronic health data exchange among payers, health care providers, consumers of health care, researchers, and governmental agencies.

(c) Health information exchange necessarily includes the sharing of private health records and information of individuals. Establishing the security of individual privacy rights and confidentiality of personal health and medical records is of paramount importance to creating public confidence in any broad-based electronic health records system. Ensuring transparent accountability, governance, and oversight are critical components to maintaining the public's trust.

(d) The American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5) includes within it the Health Information Technology for Economic and Clinical Health Act (the HITECH Act). The HITECH Act provides an unprecedented opportunity for California to develop a statewide health information technology infrastructure to improve California's health care system. It includes provisions and federal funding to encourage the adoption and meaningful use of health information technology and exchange.

(e) Section 3013 of ARRA provides federal grant funds to facilitate and expand the electronic movement and use of health information among organizations according to nationally recognized standards.

(f) Lack of a timely and available health information exchange jeopardizes the ability of the state and providers to access available federal Medicaid and Medicare incentive payments.

130251. (a) The California Health and Human Services Agency or one of the departments under its jurisdiction may apply for federal funds made available through the federal American Recovery and Reinvestment Act of 2009 (Public Law 111-5) for health information technology and exchange.

(b) In the event that the California Health and Human Services Agency or one of the departments under its jurisdiction elects not to submit an application described in subdivision (a), the Governor shall designate a qualified nonprofit entity to be the state-designated entity for the purposes of health information exchange, pursuant to the requirements set forth in ARRA.

(c) The agency or state-designated entity shall execute tasks related to accessing federal stimulus funds made available through ARRA, and facilitate and expand the use and disclosure of health information electronically among organizations according to nationally recognized standards and implementation specifications while protecting, to the greatest extent possible, individual privacy and the confidentiality of electronic medical records.

(d) The agency or state-designated entity shall develop a plan to ensure that health information exchange capabilities are available, adopted, and utilized statewide so that patients do not experience disparities in access to the benefits of this technology by age, race, ethnicity, language, income, insurance status, geography, or otherwise.

(e) The agency or state-designated entity shall create a plan for a self-sustaining funding mechanism that does not include use of General Fund moneys that shall cover all reasonable costs of the administration of health information exchange when federal ARRA funds expire or are exhausted.

(f) The state-designated entity shall continually meet any conditions for being so designated as determined by the Secretary of California Health and Human Services. Failure to comply with this subdivision may result in the entity losing its designation.

(g) As a condition of receiving the state designation, the state-designated entity shall comply with all of the following requirements:

(1) It shall be subject to oversight by the California Health and Human Services Agency.

(2) (A) It shall be governed by a board with a diverse composition from multiple types of organizations from multiple regions throughout the state. The governing board shall include, at a minimum, all of the following:

(i) The Secretary of California Health and Human Services on his or her designee.

(ii) The Chair of the Senate Committee on Health or his or her designee.

(iii) The Chair of the Assembly Committee on Health on his or her designee.

(iv) At least two consumer representatives, one of whom shall have expertise in privacy and security of health information.

(B) The majority of the board shall be comprised of nongovernmental employees.

(3) If the board convenes workgroups or subcommittees, the workgroups or subcommittees shall be comprised of representatives from multiple types of organizations from multiple regions throughout the state, and meetings of any workgroup or subcommittee shall be held in an open, public, and transparent way.

(4) It shall have nondiscrimination and conflict-of-interest policies that demonstrate a commitment to open, fair, and nondiscriminatory participation by stakeholders.

(h) The state-designated entity shall report to the California Health and Human Services Agency and the Legislature on its progress and activities at least annually.

130255. (a) In the event that the California Health and Human Services Agency applies for and receives federal funds made available through the federal American Recovery and Reinvestment Act of 2009 (Public Law 111-5) for health information technology and exchange, as outlined in subdivision (a) of Section 130251, the California Health Information Technology and Exchange Fund is hereby created in the State Treasury.

(b) All moneys in the California Health Information Technology and Exchange Fund shall be available, upon appropriation by the Legislature, for purposes related to health information technology and exchange.

(c) The California Health Information Technology and Exchange Fund shall consist of, but is not limited to, federal funds made available through ARRA for health information technology and exchange. Notwithstanding Section 16305.7 of the Government Code, any interest and dividends earned on deposits in the fund shall be retained in the fund for purposes of this division.

(d) It is the intent of the Legislature that the activities associated with health information exchange be funded solely through the following:

- (1) Federal funds.
- (2) Private contributions identified by the state, the state-designated entity, or any relevant advisory panel convened by the California Health and Human Services Agency.
- (3) Funds generated by the self-sustaining funding mechanism to be established by the California Health and Human Services Agency or one of its departments, or the state-designated entity.

Approved _____, 2009

Governor