

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
Third Reader

Senate Bill 666
Finance

(Senator Hough, *et al.*)

Health and Government Operations

Disclosure of Medical Records - Guardian Ad Litem - Victims of Crime or
Delinquent Acts

This bill requires a health care provider to disclose a medical record, without the authorization of the person in interest, to a guardian *ad litem* appointed by a court to protect the best interest of a minor or a disabled or elderly individual who is a victim of a crime or a delinquency act under specified circumstances. The bill also prohibits a health care provider from charging a fee when a medical record is requested by a court-appointed guardian *ad litem* in a criminal or juvenile delinquency court proceeding. Finally, the bill creates an exception to the general prohibition against redisclosing a medical record to another person, authorizing a guardian *ad litem* to do so under specified circumstances.

Fiscal Summary

State Effect: The bill is not anticipated to have a material impact on State operations or finances.

Local Effect: The bill is not anticipated to have a material impact on local government operations or finances.

Small Business Effect: Potential minimal.

Analysis

Bill Summary:

Required Disclosure by Health Care Provider

The medical record sought by the guardian *ad litem* must be requested for the sole purpose and use of the guardian *ad litem* in carrying out his or her official function to protect the best interests of the minor or the disabled or elderly individual in a criminal or juvenile delinquency court proceeding, as permitted under federal regulations pertaining to the disclosure of medical records for judicial and administrative proceedings.

Prohibition Against a Health Care Provider Charging a Fee

If a court-appointed guardian *ad litem* in a criminal or juvenile delinquency court proceeding makes a request for the disclosure of a medical record, as permitted under the bill, a health care provider may not charge a fee for the retrieval, copying, preparation, mailing, and cost of postage and handling of a medical record.

Redisclosure of a Medical Record

The bill creates an additional exception to the general prohibition against a person redisclosing a medical record to another person. The bill authorizes a medical record to be redisclosed if:

- the person to whom the medical record was disclosed is a guardian *ad litem* who received the medical record under the authority to require a health care provider to disclose a medical record without the authorization of the person in interest granted under the bill;
- a reasonable effort has been made to secure a qualified protective order in accordance with specified federal regulations pertaining to the disclosure of medical records for judicial and administrative proceedings; and
- the guardian *ad litem* determines that it is necessary to redisclose the medical record to carry out his or her duties as a guardian *ad litem* to protect the best interest of a minor or a disabled or elderly individual in a criminal or juvenile delinquency court proceeding.

Current Law: Generally, guardian *ad litem* refers to an attorney or other individual appointed by the court to protect the best interests of an incapacitated, handicapped, or minor individual in a particular suit or action. “Person in interest” means:

- an adult on whom a health care provider maintains a medical record;
- a person authorized to consent to health care for an adult;
- a personal representative of a deceased person;
- a minor, if the medical record concerns treatment to which the minor has the right to consent and has consented; or a parent, guardian, custodian, or representative of the minor designated by a court, in the discretion of the attending physician who provided the treatment to the minor, under specified circumstances;
- a parent of the minor generally, except if the parent's authority to consent to health care for the minor has been specifically limited by a court order or a valid separation agreement entered into by the parents of the minor, or another person authorized to consent to health care for the minor; or
- an attorney appointed in writing by a person meeting another definition of person in interest.

Required Disclosure by Health Care Provider

Statute requires a health care provider to disclose a medical record, without the authorization of the person in interest, under specified circumstances, to:

- a unit of State or local government or to a member of a multidisciplinary team assisting the unit of State or local government;
- a health professional licensing or disciplinary board;
- a health care provider or the provider's insurer or legal counsel;
- a medical review committee;
- another health care provider;
- specified parties involved in a court proceeding;
- grand juries, prosecution agencies, law enforcement agencies or their agents or employees;
- the Maryland Insurance Administration;
- a State or local child fatality review team;
- a local domestic violence fatality review team; or
- a local drug overdose fatality review team.

A written request for disclosure or written confirmation by the health care provider of an oral request that justifies the need for disclosure must be inserted in the medical record of the patient or recipient, and documentation of the disclosure must also be inserted in the medical record of the patient or recipient.

Prohibition Against a Health Care Provider Charging a Fee

Generally, a health care provider may charge a fee for the retrieval, copying, preparation, mailing, and actual cost of postage and handling of a medical record that is required to be disclosed to specified parties. However, if a government unit or agency makes a request for the disclosure of a medical record, a health care provider may not charge the government unit or agency a fee.

Redisclosure of a Medical Record

A person to whom a medical record is disclosed may not redisclose the medical record to any other person unless the redisclosure is:

- authorized by the person in interest;
- otherwise permitted by statute;
- permitted under specified provisions concerning child abuse or neglect reports and records; or
- merely information concerning the presence and general health condition of a patient who has been admitted to a health care facility or who is currently receiving emergency health care in a health care facility.

Federal Health Insurance Portability and Accountability Act

In addition to restrictions in State law, federal law and regulations restrict the ability of a health care provider to disclose a medical record (also referred to as protected health information) without the authorization of the person in interest. Generally, federal law and regulations preempt state law with respect to protected health information confidentiality. However, the federal Health Insurance Portability and Accountability Act (HIPAA) and its standards do not preempt state law if the state provision (1) relates to the privacy of individually identifiable health information and (2) is “more stringent” than HIPAA’s requirements.

Under HIPAA regulations, a health care provider is required to treat a personal representative of an individual *as the individual* for the purposes of disclosure of protected health information and may be required to disclose an individual’s protected health information to a personal representative without the individual’s consent. For example, if a person has the authority to act on behalf of an individual who is an adult or an emancipated minor with respect to making health care decisions, a health care provider is required to treat the person as a personal representative and disclose the protected health information. Likewise, generally, when a parent, guardian, or other person acting in place of the parent has the authority to act on behalf of an unemancipated minor in making health

care decisions, a health care provider must treat that person as the personal representative of the individual and disclose the protected health information. However, if a person is not authorized to make health care decisions, that person likely does not qualify as a personal representative for purposes of the disclosure of protected medical information.

For attorneys or parties in a judicial or administrative proceeding in which protected health information is sought, a health care provider *may* disclose protected health information without the authorization of the person in interest in response to (1) a court order or (2) a subpoena or discovery request accompanied by a court order, if the health care provider receives assurances that the person in interest has been given sufficient notice of the request, or the health care provider receives assurances that the person seeking the information has made a reasonable effort to secure a qualified protective order.

A qualified protective order is an order of a court or administrative tribunal, or a stipulation by the parties to the litigation or administrative proceeding, that (1) prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which the information was requested and (2) requires the health care information to be returned to the health care provider or destroyed at the end of the litigation or proceeding.

Additionally, a health care provider is authorized, under exigent circumstances, to use or disclose protected health information if the health care provider believes in good faith that the use or disclosure is “necessary to prevent or lessen a serious or imminent threat to the health or safety of a person or the public” and the disclosure is made to a person “reasonably able to prevent or lessen the threat.”

Additional Comments: The Administrative Office of the Courts (AOC) advises that it is unclear whether the bill intends to require a criminal or juvenile delinquency court to appoint a guardian *ad litem* for a minor or a disabled or elderly individual in all cases and notes that there is no existing procedure for regularly appointing a guardian *ad litem* in such instances. AOC further advises that a victim of a crime, whether a minor or a disabled or elderly individual, is not a party to a juvenile delinquency or criminal proceeding.

Additional Information

Prior Introductions: None.

Cross File: HB 233 (Delegate Barron, *et al.*) - Health and Government Operations.

Information Source(s): Maryland Department of Aging; Judiciary (Administrative Office of the Courts); Maryland Department of Disabilities; Department of Health and

Mental Hygiene; Department of Human Resources; Department of Juvenile Services;
Department of Legislative Services

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Analysis by: Nathan W. McCurdy

Direct Inquiries to:
(410) 946-5510
(301) 970-5510