

Unsustainable Covered Entities Report

HB 300

Executive Summary

House Bill 300, passed in the 82nd Regular Legislative Session, directed the Health and Human Services Commission (HHSC), in consultation with the Texas Health Services Authority (THSA) and the Texas Medical Board (TMB), to review issues regarding the security and accessibility of protected health information maintained by unsustainable covered entities. HHSC also asked for input from the Office of the Attorney General on this report due to their experience in bankruptcy litigation involving unsustainable covered entities.

This report is intended to meet the requirement of House Bill 300.¹ The report starts by describing specific issues with unsustainable covered entities and protected health information (PHI). Based on the agencies that were asked to contribute to the report, three distinct types of unsustainable covered entities were identified including abandoned covered entities, covered entities that enter into formal bankruptcy proceedings, and covered entities that address record retention and management through business associates agreements. For these types of covered entities, the report considers transfer and storage of protected health information, the method and duration of maintenance, the security of protected health information, access to an individual's own information, and the potential to fund and address liabilities for any oversight activities undertaken by the State of Texas.

The report concludes with some recommendations on each of these issues, and provides an appendix that includes relevant bankruptcy case examples and a brief summary of current law and administrative rules affecting the disposition of medical records of unsustainable covered entities.

¹ This report is limited to those covered entities identified by TMB, THSA, and OAG where protected health information records are most frequently an issue in cases where the entity becomes unsustainable. The definition of a covered entity in the State of Texas could include, depending on facts, a number of entities that come into contact with protected health information. This report does not address the issues identified by HB 300 for all potential covered entities in the State of Texas.

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1 Introduction

House Bill 300, passed in the 82nd Regular Legislative Session, established a number of new requirements relating to the handling of protected health information (PHI), enhanced some existing requirements, and directed state agencies to undertake several studies and reports.

Among the provisions to strengthen oversight and protection of health information, section 19 of the enacted legislation directed the Health and Human Services Commission (HHSC), in consultation with the Texas Health Services Authority (THSA) and the Texas Medical Board (TMB), to review and make recommendations regarding security and accessibility of protected health information maintained by unsustainable covered entities. HHSC also sought the input of the Office of the Attorney General (OAG), which has had experience in bankruptcies of entities that manage protected health information.

This report is intended to meet the requirements of House Bill 300, Section 19. The report starts by describing specific issues with unsustainable covered entities and PHI including the transfer and storage of PHI, the method and duration of maintenance, the security of PHI, access to an individual's own information, and the potential to fund any oversight activities undertaken by the State of Texas. The report includes some recommendations on each of these issues.

1.1 Definitions

The term "unsustainable covered entity" is broadly defined to include an entity that "ceases to operate," which does not necessarily mean the entity is not capable of safeguarding PHI. For purposes of this report it is presumed the requirement is to review covered entities that are not capable of or refuse to safeguard PHI because of some reason related to the cessation of operations. Thus, an analysis would be fact-dependent, and a covered entity may be considered unsustainable when their insolvency or incapacity compromises or potentially compromises the confidentiality, availability or integrity of protected health information, or when a covered entity no longer operates as a business by primarily engaging in offering health care facilities and/or services to the general public. This may include situations where the PHI or the entity itself is abandoned by the operator(s), the entity or an individual files for bankruptcy protection, or informally discontinues operation without adequately safeguarding PHI.

Under the Health Insurance Portability and Accountability Act (HIPAA), "covered entities" are health plans, health care clearinghouses, and health care providers who transmit PHI.² The definition of "covered entity" as used in Chapter 181 of the Texas Health and Safety Code is broader than the definition used in the federal HIPAA regulations:

"Covered entity" means any person who:

- (A) for commercial, financial, or professional gain, monetary fees, or dues, or on a cooperative, nonprofit, or pro bono basis, engages, in whole or in part, and with real or constructive knowledge, in the practice of assembling, collecting, analyzing, using, evaluating, storing, or transmitting protected health information. The term includes a business associate, health care payer, governmental unit, information or computer management entity, school, health researcher, health care facility, clinic, health care provider, or person who maintains an Internet site;

² 45 C.F.R. § 160.103.

(B) comes into possession of protected health information;

(C) obtains or stores protected health information under this chapter; or

(D) is an employee, agent, or contractor of a person described by Paragraph (A), (B), or (C) insofar as the employee, agent, or contractor creates, receives, obtains, maintains, uses, or transmits protected health information.³

This report primarily pertains to HIPAA covered entities and in the context of cases that the THSA, TMB, and OAG have typically encountered. However, many organizations that use, collect, access, and disclose PHI as “covered entities” under the definition used in Chapter 181 of the Texas Health and Safety Code are not HIPAA-covered entities. The state law definition may include other types of businesses that may come into possession of protected health information under the normal course of business, but do not use that information for the purposes of health care related treatment, payment, or operations. Thus, the scope and variety of “unsustainable covered entities” for which issues could arise regarding the transfer, storage, security and accessibility of PHI is broader than it would be under HIPAA.

This report uses health care providers as examples of unsustainable or insolvent covered entities for which arrangements are necessary to safeguard and affect the orderly transfer, return, or destruction of PHI in its possession. This may include, but is not limited to, health care providers that become unsustainable due to: the death, illness, incapacity, or incarceration of the provider; revocation of the provider’s license to practice or operate; loss or expiration of lease property housing PHI; financial insolvency of the provider; bankruptcy of the provider; tax or other foreclosure; or the willful termination or abandonment of the provider’s practice.

³ [Tex. Health & Safety Code, § 181.001\(b\)\(2\).](#)

2 Issues with Unsustainable covered entities and Protected Health Information

2.1 Transfer and Storage of PHI

When a covered entity becomes unsustainable, transfer and storage of PHI is a critical concern. How to transfer and store PHI, however appears to be situation dependent, such as if there is a bankruptcy, or abandonment. The TMB has experience with physician abandonment, typically involving small or solo physician practices. Other covered entities may file for or be involuntarily placed into bankruptcy. These cases are adjudicated in federal bankruptcy court, subject to bankruptcy rules of procedure. The OAG represents state agencies in bankruptcy cases. Finally, an unsustainable entity may choose to manage closure through existing business associates agreements that may dictate the return or destruction of records to which the business associate maintains on the covered entities behalf.

2.1.2 Abandonment

The TMB often sees examples of physician practices that become unsustainable due to a physician's death or incapacitation. In these cases it is not uncommon that the practice lacks a plan to transfer or store PHI in its possession. Physicians are subject to both statutory and TMB regulatory requirements for the transfer and disposal of physicians' medical record, including TMB's right to appoint a custodian for a physician's medical records containing PHI—who must keep records for 90 days— and to issue a request for proposals (RFP) for an entity to function as the appointed record custodian for either all areas of the state or designated regions of the state.⁴

2.1.3 Disposition of Records in Bankruptcy Proceedings

When an entity that possesses or maintains PHI is no longer sustainable it may voluntarily or involuntarily be placed under bankruptcy protection in federal bankruptcy court. The Bankruptcy and Collections Division in the Office of the Attorney General (OAG) represents state agencies in federal court to protect the state's monetary and regulatory interests in bankruptcy cases. Section 19 of HB 300 requires HHSC to submit a recommendation for "the state agency to which the PHI maintained by an unsustainable covered entity should be transferred for storage." This language may imply that the Legislature is considering designating a state agency to become the depository of last resort for PHI. To the extent that an unsustainable entity that is in possession of or maintains PHI is also a debtor in bankruptcy, the state currently has the ability to require debtors-in-possession or bankruptcy trustees to comply with record retention requirements. A law or regulation requiring a state agency to take possession of and maintain PHI could potentially shift costs and responsibilities that are currently borne by the bankruptcy estate to the state and could shift liability for safeguarding PHI to the state.

Under applicable bankruptcy law, debtors-in-possession and bankruptcy trustees must "manage and operate... according to the requirements of the valid laws of the State."⁵ This includes compliance with state medical records retention laws and laws regarding PHI. Alternatively, bankrupt entities can dispose of patient records under provisions which require certain safeguards, including the maintenance

⁴ Relevant Statute and TMB Regulatory Requirements are in Appendix 4.2.

⁵ [28 U.S.C. § 959\(b\)](#)

of records for one year and the provision of individual notice to patients and insurance providers with instructions for claiming or disposing of patient records.⁶

The OAG has successfully used these laws on behalf of the state to urge that debtors must comply with record retention laws or otherwise provide for the proper disposition of records in numerous bankruptcy cases.⁷ Based on the OAG's litigation experience in this area, it is anticipated that statutorily establishing a state agency as a depository of last resort for medical records could—at least in the context of a formal bankruptcy proceeding in federal court—lead debtors-in-possession and bankruptcy trustees to seek to shift the burden of maintaining their medical records to the state in a bankruptcy liquidation involving a covered entity.⁸

2.1.4 The Potential Role of Data Use Agreements

When a HIPAA Covered entity, such as a health care provider, health plan or clearinghouse shares PHI with a third party for the third party to engage in a covered function on behalf of the covered entity, HIPAA requires a “business associate agreement” between the parties. Unsustainable covered entities that possess PHI could potentially handle the transfer and storage of PHI through existing legal agreements, such as a Data Use Agreement wherein the third-party agrees to use, disclose, create or maintain PHI on behalf of the Texas covered entity for a covered function. Prior to becoming unsustainable, the parties could mutually agree to contract for situations of unsustainability.⁹ Such entities may include Health Information Exchanges (HIEs), which typically transport and/or store PHI on behalf of other covered entities and are somewhat unique in that they generally are transporting or maintaining duplicative electronic information generated by participants in the HIE.

Pursuant to the federal Health Information Technology for Economic and Clinical Health (HITECH) Act, the definition of a HIPAA Business Associate (BA) subject to a Business Associate Agreement was expanded to specifically include HIEs. These agreements generally limit what the HIE is permitted to do with the PHI, apply certain safeguards to the HIE's handling of the PHI, and provide that on termination of the business associate agreement, the PHI of the covered entity held by the business associate is to be returned to the covered entity or destroyed to the extent feasible.¹⁰

Termination of the Business Associate Agreement can happen for many reasons. Some common examples in the context of HIE may include a covered entity's voluntary termination of its participation in the HIE, or the HIE's termination of the covered entity's participation for breach. As discussed above, in the event that the Business Associate Agreement is terminated, HIPAA regulations require that the BA return, destroy or safeguard PHI. Business Associate Agreements typically have no requirement that the BA assist the covered entity with the maintenance of PHI in the event of unsustainability specifically, or vice versa.

⁶ [11 U.S.C. § 351](#),

⁷ Please see Appendix 4.1 for examples.

⁸ In a bankruptcy reorganization, the state would likely argue that if continuing in business a Debtor is not an “unsustainable covered entity.” In the case of an asset sale, whether in Chapter 11 or Chapter 7, the buyer may wish to retain the medical records.

⁹ HIPAA does not require statements or agreements about unsustainability in HIPAA Business Associate Agreements.

¹⁰ [45 CFR § 164.504\(e\)\(2\)](#).

For HIEs that store PHI, at termination of the agreement, the PHI previously received from a covered entity would likely be destroyed, except perhaps to the extent that other covered entities had already incorporated such information into their own records. Any PHI that it was not feasible to destroy would continue to be subject to the original protections of the Business Associate Agreement.¹¹

2.2 Method and Duration of Maintenance

PHI transferred from an unsustainable covered entity should be maintained in a manner that is consistent with applicable federal and state legal requirements to safeguard the information.

The HITECH Act made clear that a business associates storing PHI must comply with certain provisions of the HIPAA security rule.¹² The HIPAA security rule is made up of a number of safeguards that are intended to be either “required” or “addressable.” Those safeguards that are required must be implemented as indicated in the rule. Those safeguards that are addressable are not required, but any decision not to implement the recommended safeguard must be documented and an equivalent alternative safeguard must be implemented if reasonable and appropriate. However, Health and Safety Code Ch. 181 only incorporates the HIPAA Privacy rule for entities subject to HIPAA (not all Texas covered entities) and did not include the Security (45 CFR 164 subpart B) and Breach Notice (subpart D) requirement for any entity because reference is only made to the HIPAA Privacy regulations (subparts A and E).

Such HIPAA security safeguards include, as examples, establishment of policies and procedures for access control and authorization, monitoring and reviewing of system access for security incidents or breaches, virus protection, encryption, password management procedures related to disposal of PHI and re-use of media devices, data integrity requirements, automatic log-off of systems and disaster recovery and back up procedures. Please note that this is not an exhaustive list of the security rule safeguards but rather is meant to be illustrative. Additionally, the HIE or business associate must document the policies and procedures implemented and any required activity or assessment taken to comply with the security rule and maintain such documentation for six years from the date of creation or the date in when a policy or procedure was last in effect, whichever is later.

The documentation maintained in connection with the HIPAA security rule would also be required to be maintained in accordance with state and federal law requirements, including HIPAA requirements applicable only to HIPAA covered entities the business associates.

2.3 Security of PHI

House Bill 300, Section 19, asked that HHSC consider issues regarding the security of PHI and secure transfer methods. The HIPAA security rule also governs the specific safeguards applicable to PHI during transfer or storage.

To the extent that PHI is being transferred by or from the unsustainable covered entity to another entity, the receiving entity should be familiar with and able to implement, if not made subject to relevant, applicable federal and state laws, federal and state regulations applicable to the data or the unsustainable covered entity, or comply with industry best practices with respect to the transfer and subsequent storage of PHI. The specifics of these best practices and safeguards are based on the

¹¹ Ibid

¹² [HIPAA Security Rule](#)

characteristics of the data and system before and after transfer, and are subject to continuous change given the nature of technological innovation and advancements.

2.4 Individual Access to PHI

Numerous state and federal laws govern an individual's right to access their PHI. These rights were expanded by House Bill 300, Section 6, which now requires health care providers using an electronic health records system to provide individuals with access to certain records in electronic form in a shorter time-frame than provided under HIPAA.¹³

In the case of an unsustainable HIE, if an individual requests access to any PHI that is stored by the HIE, the HIE would refer the individual to the provider that is the originator of the record.

2.5 Funding

To the extent that an "unsustainable covered entity" is also a debtor in bankruptcy, the OAG works through the bankruptcy process in an effort to urge debtors to comply with record retention laws and seeks to designate some of the funds of the bankruptcy estate for costs associated with the disposition of medical records. While these efforts have met with moderate success as demonstrated by the case summaries provided in the appendix to this report, the OAG estimates that only a small sub-set of unsustainable covered entities enter the bankruptcy process, and the settlements that result are often the result of arduous negotiation and litigation.

In the case of business associates agreements, costs generally fall to the parties of those agreements.

However, if the Texas Legislature were to designate a state agency to become the depository of last resort for medical records, an obligation that does not presently exist under applicable state law, it could result in costs, responsibilities and potential liabilities to the state. Similar statutory designations have occurred without associated funding and the result is that the agency has found it challenging to comply with the requirements to take possession of the PHI.¹⁴

3 Recommendations

3.1 Transfer and Storage of PHI

OAG staff suggested that legislative proposals relating to the disposition of PHI of unsustainable covered entities should be analyzed to consider the potential impacts to the state's present ability to address many of these issues under existing federal bankruptcy law. OAG also notes that if the Legislature were to consider imposing special conditions or limitations on bankrupt entities, the Legislature should be aware of applicable bankruptcy law¹⁵ prohibiting governmental units from discriminating against debtors due to their bankrupt status so as to avoid possible federal pre-emption issues.

In the event that an entity becomes unsustainable and the entity's data use agreements with another party permits or requires transfer of the obligations to another entity, then the other entity could assume obligations under the data use agreement with respect to PHI. The THSA has developed a model

¹³ Tex. Health & Safety Code § 181.102.

¹⁴ See information about Adoption Services Associates, Inc., case no. 12-51274 in appendix.

¹⁵ 11 U.S.C. § 525

Business Associates Agreement that could allow for the transfer of such obligations should an HIE become unsustainable, however, it would only be possible if the covered entity consented. This component in data use agreements could make clear how such transfer of responsibility would be handled and may be considered for inclusion in such agreements, but legislating requirements in existing agreements may be considered a costly and inefficient solution.

Alternate approaches to ensuring the maintenance of PHI held by an unsustainable covered entity might include approaches analogous to the unclaimed property process managed by the Comptroller's office or contracting with a third party to maintain records. Both of these options would likely have a cost to the state. The state would also presumably become responsible to adequately safeguard PHI on behalf of the unsustainable covered entity, which could result in additional costs and potential liabilities. The state may also require covered entities to contract with a third party or otherwise make plans for record retention should they become unsustainable. However, an unsustainable covered entity would not likely be able to fund that service. This may be enabled through a fee assessed to all covered entities by the state to facilitate third party retention.

Another alternative could be similar to the financial assurance mechanisms required of oil and gas drilling operators by the Railroad Commission. This option might require the posting of bonds by covered entities. This approach could be used to minimize costs associated with transference and management of PHI for unsustainable covered entities regardless of existing agreements and possible legal proceedings, but any legislation would need to carefully consider implications for entities that are considered covered entities under the broader state law definition.

3.2 Method and Duration of Maintenance

Federal Law, under HIPAA, requires that records be maintained until termination or when return is requested. Medicaid has similar requirements.

State law does not appear to address a consistent period of time pursuant to which a covered entity is required to maintain PHI records under a business associate agreement. Presumably this is because the expectation is that such records would be returned or destroyed on termination of the business associate agreement.

3.3 Security of PHI

Security best practices, should be followed, but are in constant flux. The National Institute of Standards and Technology (NIST) maintains, and regularly updates, a number of security publications that may be applicable, depending on the system characteristics, including publications related to appropriate physical destruction and decommissioning, interconnections between systems, business continuity planning, secure data transport, data center operations, and much more.¹⁶ It is recommended that any statutory changes consider NIST publications as guidance on information security management issues and recognize the evolving nature of data security.

3.4 Individual Access to PHI

Regardless of how the records of an unsustainable entity are managed, it is presumed that individuals or their legally authorized representatives, about whom the records relate would want the right to know about a covered entity's unsustainable status, to know where PHI about them has been transferred, if at

¹⁶ NIST Health Information Technology <http://www.nist.gov/healthcare/index.cfm>

all, and to have prompt access to their PHI. If a state agency is designated as a repository of last resort it is recommended that individuals maintain those rights to the extent practicable. However, it should be noted that the provision of services to permit patient access and retrieval of records may carry with it associated costs and liabilities, (for instances, HIPAA covered entities are subject to individual rights of access amendment of PHI and Texas law provides access to PHI).¹⁷

3.5 Funding

Storing and securing PHI is a critical function of any entity that undertakes that responsibility. Given the experience of the state has had in litigation involving bankrupt entities and the costs associated with storing and securing the entities' records, this report recommends that if an agency is designated as a repository of last resort, then adequate funding associated with that requirement should be provided to the extent available so that the agency may meet its obligations to the people of the State of Texas. Limitations of liability, to the extent available, should be considered to protect state agencies from individual or other liability. Any legislation should consider whether or not the state is performing a HIPAA covered-function (versus a non-covered function) to evaluate the extent to which it could be subject to federal regulation, liability and oversight under HIPAA.

¹⁷ See, e.g., Tex. Health & Safety Code § 241.154 (permitting hospitals to charge a retrieval and processing fee for copies of medical records).

4 Appendix

4.1 Summary of Bankruptcy Precedent Concerning Disposition of PHI from the Office of the Attorney General

It is estimated that only a small sub-set of “unsustainable covered entities” file for bankruptcy protection. The information presented here relates only to “unsustainable covered entities” in the specific context of bankruptcy litigation, and does not address “unsustainable covered entities” in other contexts.

Under applicable bankruptcy law, debtors-in-possession and bankruptcy trustees must “manage and operate. . . according to the requirements of the valid laws of the State.” 28 U.S.C. § 959(b). This includes compliance with state medical records retention laws. Alternatively, bankrupt entities can dispose of patient records under the provisions of 11 U.S.C. § 351, which requires certain safeguards, including the maintenance of records for one year and the provision of individual notice to patients and insurance providers with instructions for claiming or disposing of patient records. The Office of the Attorney General’s Bankruptcy and Collections Division (OAG) has successfully used these laws on behalf of the state to urge that debtors must comply with record retention laws or otherwise provide for their proper disposition in a myriad bankruptcy cases, as demonstrated by the following examples:

- *In re Sadler Clinic, PLLC*, case no. 12-34546 (Bankr. S.D. Tex.) - On behalf of the Texas Medical Board, the OAG negotiated with the pre-conversion Debtor’s counsel for the retention of the medical records. The Debtors lacked sufficient assets to maintain the records for the full statutory retention period of seven (7) years, but were able to get their secured creditor to agree to a carve-out to finance the retention of the records for a shorter two-year period. The Texas Medical Board agreed that the Debtor would transfer the records to a custodian for a two-year retention period, provided that written notice of this shortened period and the location of the records was provided to all doctors formerly affiliated with the Debtor and that publication notice was given to the general public. The transfer, retention and ultimate destruction of the records cost the Chapter 7 Trustee over \$270,000.
- *In re Bastrop Blackhawk, LLC*, case no. 11-10273 (Bankr. W.D. Tex.) - The Debtor operated a 15-bed acute care hospital that ceased to operate in 2010 and had in excess of 42,000 medical records, in both paper and electronic form and including x-rays and slides. As the Debtor had no unencumbered assets, the OAG, on behalf of the state, successfully argued to the bankruptcy court that the secured creditors, Stillwater National Bank and Hitachi Capital, for whose benefit the case was being prosecuted, should bear the cost of retaining the medical records in accordance with applicable medical records retention laws. After considerable negotiation with the parties – including objections to post-petition financing, objections to bid procedures, and the filing of a motion to dismiss – Hitachi agreed to subsidize the costs of transferring the medical records to Richards Memorial Hospital (an affiliate of the Debtor) who would maintain the records for the applicable retention period.
- *In re Merit Lancaster Hospital*, case no. 08-31988-HDH-7 (Bankr. N.D. Tex.) – The Debtor hospital ceased operations in February of 2008 and filed for bankruptcy a few months later. The OAG was involved in protracted negotiations with the Chapter 7 Trustee and the United States

Trustee's Office about what to do with the approximately seven hundred (700) boxes of patient medical records since the estate is administratively insolvent with two secured creditors. The OAG recently reached an agreement with the Chapter 7 Trustee under which Iron Mountain, a multinational commercial records warehouse custodian, will organize, inventory, and remove the records from the hospital. The agreement requires Iron Mountain to destroy records more than ten years old or those documents that are not patient records, store the records for the full statutory period (10 years), manage the release of records to authorized persons pursuant to a record request form, and then finally destroy the records upon the expiration of the retention period in 2018. The Trustee recently received authorization from the bankruptcy court to prepay for the costs of the retention and destruction services in the amount of \$96,062.

- *In re Bellaire General Hospital LP*, case no. 05-30089 (Bankr. S.D. Tex.) – The Texas Health and Human Services Commission (HHSC) agreed to pay the Chapter 7 Trustee \$43,000 to settle a disproportionate share claim with the bankruptcy estate on the express material condition that the bulk of the settlement funds be used to retain a records management company to contact patients to advise them of the opportunity to retrieve their records, publish notice of the opportunity to retrieve records, and ultimately dispose of 21,000 patient files and over 40,000 patient films. A complicating factor in this case was that no index correlating the hospital's patient ID number to a name existed due to the fact that the hard drives on which the index was maintained were erased by a secured creditor who foreclosed on the hospital's computers, requiring the records management company to recreate the index in order to facilitate patient access to the records.
- *In re Adoption Services Associates, Inc.*, case no. 12-51274-rbk (Bankr. W.D. Tex. - San Antonio Division) – Adoption Services Associates, Inc., ("ASA"), an adoption agency, filed for Chapter 7 bankruptcy. The agency's adoption records consist of approximately 65 three- or four-drawer file cabinets that are currently being housed at a commercial self-service storage facility in San Antonio. The bankruptcy Trustee has requested that the Department of State Health Services (DSHS) take custody of the records pursuant a statutory requirement to do so under Section 42.045(c) of the Texas Human Resources Code, which recites in pertinent part:

“(c) If a child-placing agency terminates operation as a child-placing agency, it shall, after giving notice to the department, transfer its files and records concerning adopted children, their biological families, and their adoptive families to the Bureau of Vital Statistics or, after giving notice to the Bureau of Vital Statistics, to a facility licensed by the department to place children for adoption...”

DSHS has received notice of the request and acknowledged that the law requires them to take the records, but has not yet assumed custody of the records.

4.2 Relevant TMB Statutory/Rule Requirements

4.2.1 Medical Practice Act, Occ. Code, Chapter 159¹⁸

Sec. 159.0061. APPOINTMENT OF CUSTODIAN OF PHYSICIAN'S RECORDS.

(a) The board by rule shall establish conditions under which the board may temporarily or permanently appoint a person as a custodian of a physician's billing or medical records. In adopting rules under this section, the board shall consider the death of a physician, the mental or physical incapacitation of a physician, and the abandonment of billing or medical records by a physician.

(b) The rules adopted under this section must provide for:

- (1) the release of the billing or medical records by an appointed custodian in compliance with this chapter; and
- (2) a fee charged by the appointed custodian that is in addition to the copying fee governed by Section 159.008.

4.2.2 TAC, Title 22, Chapter 165^{19, 20}

165.4. Appointment of Record Custodian of a Physician's Records.

(a) The board may appoint a temporary or permanent custodian for medical records abandoned by a physician when a person or entity applies with the board to be appointed record custodian.

(b) The records will be considered abandoned if they are without custodial care for a minimum of two weeks without alternative arrangements being made by the physician, the physician's legal guardian, or by the executor of the physician's estate.

(c) The record custodian appointed by the board shall take custody of and maintain the confidentiality of the physician's records, to include available medical records and billing records, according to the provisions of board rules and state statutes.

(d) The appointed record custodian shall provide the records, or copies of the records, to the patient or to the patient's designee according to board rules and state statutes. In addition to the reasonable copying fee defined in board rules, the appointed record custodian may charge an additional fee of \$25.00 per patient record.

(e) The appointed record custodian shall retain care of the records for no less than 90 days and shall publish appropriate notice of pending destruction of the records for no less than 30 days prior to destruction of the records.

(f) Destruction of medical records shall be done in a manner that ensures continued confidentiality.

(g) The board may publish a Request for Bids for one entity to function as the appointed record custodian for all areas of the state. If a sole statewide contractor is not selected, the board may publish a Request for Bids for entities to function as regional appointed record custodian or a custodian may be appointed on a case by case basis.

¹⁸ Added by Acts 2001, 77th Leg., ch. 984, Sec. 6, eff. June 15, 2001.

¹⁹ Source Note: The provisions of this §165.4 adopted to be effective May 21, 2000, 25 TexReg 4349; amended to be effective September 19, 2002, 27 TexReg 8769; amended to be effective September 14, 2003, 28 TexReg 7703.

²⁰ Italics added to emphasize the most relevant parts.