

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



DAN FRIEDMAN
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 30, 2013

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

Re: *House Bills 942 and 1396 and Senate Bill 624*

Dear Governor O'Malley:

We have reviewed and hereby approve House Bill 942 and Senate Bill 624, identical bills entitled "Identity Fraud - Health Information and Health Care Records" for constitutionality and legal sufficiency. In doing so we have concluded that the title to the bill meets the requirements of Maryland Constitution Article III, § 29. We write to discuss an interpretive issue with the bills. We also write to discuss the interaction between the bills and House Bill 1396, "Criminal Law - Theft-Related Crimes - Penalties" which we also hereby approve for constitutionality and legal sufficiency.

House Bill 942 and Senate Bill 624 amend Criminal Law Article § 8-301, which relates to identity theft, to add health care identification numbers, medical identification numbers, unique biometric data (including fingerprint, voice print, retina or iris image or other unique physical representation), and digital signatures to the "personal identifying information" protected by the law, to add access to medical information or medical care to the intents covered by the law, and to add the cost of clearing the victim's record or history related to health information or health care to the amounts for which restitution may be ordered.

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The only information referenced by the short title to House Bill 942 and Senate Bill 624 is "health information and health care records." Every portion of the title that mentions the expansion of the identity theft law also contains this reference. The bill, however, also expands the section to cover "biometric data, including fingerprint, voice print, retina or iris image or other unique physical representation, and digital signature," which are not ordinarily considered health information or health care records. Nevertheless, it is our view that this additional expansion is included in the title, which states that the bill alters a definition, and is "generally relating to identity fraud." Thus, we conclude that the title satisfies the constitutional requirement.

House Bill 1396 makes changes in the penalties for various theft-related crimes. As relevant to House Bill 942 and Senate Bill 624, it amends Criminal Law ("CL") Article, § 8-301(g), which currently imposes a fine of up to \$25,000 and imprisonment of up to 15 years for an act of identity theft where the "benefit, credit, good, service, or other thing of value" is at least \$500, to impose a fine of up to \$10,000 and up to 10 years imprisonment where the value is at least \$1,000 but less than \$10,000, a fine of up to \$15,000 and imprisonment of up to 15 years if the value is at least \$10,000 but less than \$100,000, and a fine of up to \$25,000 and imprisonment of up to 25 years if the value is \$100,000 or more. It also increases the value under which the offense is a misdemeanor rather than a felony from \$500 to \$1,000 and lowers the potential fine from \$5,000 to \$500, while retaining the potential period of imprisonment at 18 months.

There is no direct conflict between House Bill 942 and Senate Bill 624 and House Bill 1396. While the bills make different amendments to CL § 8-301(g)(1) and (2), the changes can easily be incorporated together. Moreover, while new CL § 8-301(g)(1)(ii) and (iii) in House Bill 1396 do not include the reference to health care information or health care that have been amended into CL § 8-301(g)(2) and what is now CL § 8-301(f)(1)(i), it is our view that, when read with the remainder of the law, the "other thing of value" language can be read to include both health care information and health care until such time as this omission can be corrected.

Finally, the definition of "health information" in House Bill 942 and Senate Bill 624 provides that it is "created or received by" certain entities. Among these are a "health care carrier" and a "health care clearinghouse." Neither term is defined in the bill. The definitions of "health care" and "health information" were added by identical committee amendments on each side. The Floor Report for the Judicial Proceedings Committee states that the amendment in question "alters the definition of 'health care' and 'health information' to conform with the definitions under the federal Health Insurance Portability and Accountability Act of 1996." This explanation provides a definition of the term "health care clearinghouse," which does not otherwise appear in State law. *See* 42 U.S.C. § 1320d(2)¹ and 45 C.F.R. § 160.103.² The term "health care carrier," however, is not used in the federal law, which uses the term "health plan." Nor is the term "health care carrier" one that is used in the Code, in any regulation in COMAR, or in any Maryland case. And the term "carrier" itself has different meanings in different parts of the Insurance Article. *See e.g.*, Insurance Article, §§ 15-1009(a),³ 15-10A-01(c),⁴ and 15-1201(c).⁵ It is possible that this substitution was made because "health plan" does

¹ The term "health care clearinghouse" means a public or private entity that processes or facilitates the processing of nonstandard data elements of health information into standard data elements.

² *Health care clearinghouse* means a public or private entity, including a billing service, repricing company, community health management information system or community health information system, and "value-added" networks and switches, that does either of the following functions: (1) Processes or facilitates the processing of health information received from another entity in a nonstandard format or containing nonstandard data content into standard data elements or a standard transaction[;] (2) Receives a standard transaction from another entity and processes or facilitates the processing of health information into nonstandard format or nonstandard data content for the receiving entity.

³ (a) In this section, "carrier" means: (1) an insurer; (2) a nonprofit health service plan; (3) a health maintenance organization; (4) a dental plan organization; or (5) any other person that provides health benefit plans subject to regulation by the State.

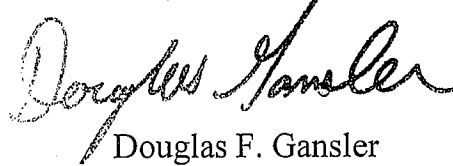
⁴ (c) "Carrier" means a person that offers a health benefit plan and is: (1) an authorized insurer that provides health insurance in the State; (2) a nonprofit health service plan; (3) a health maintenance organization; (4) a dental plan organization; or (5) except for a managed care organization as defined in Title 15, Subtitle 1 of the Health - General Article, any other person that provides health benefit plans subject to regulation by the State.

⁵ (c) "Carrier" means a person that: (1) offers health benefit plans in the State covering eligible employees of small employers; and (2) is: (i) an authorized insurer that provides health

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not carry the same meaning in State law as in federal law, and that the intent was to cover the same entities as are covered by the federal law. The language used does not, however, make this clear. While this lack of clarity does not affect the facial validity of the bill, it could render the law vague as applied in specific cases. For this reason, we recommend that the language be clarified in the next session.

Very truly yours,

A handwritten signature in cursive script, reading "Douglas F. Gansler". The signature is written in dark ink and is positioned above the printed name and title.

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro

insurance in the State; (ii) a nonprofit health service plan that is licensed to operate in the State; (iii) a health maintenance organization that is licensed to operate in the State; or (iv) any other person or organization that provides health benefit plans subject to State insurance regulation.