

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas
2 85th General Assembly
3 Regular Session, 2005
4

As Engrossed: H2/21/05 H3/11/05

A Bill

HOUSE BILL 1392

5 By: Representatives Bright, Wood, Borhauer, S. Prater
6
7

For An Act To Be Entitled

9 AN ACT TO AUTHORIZE USE OF ELECTRONIC MONITORING
10 DEVICES IN LONG-TERM CARE FACILITY RESIDENT
11 ROOMS; AND FOR OTHER PURPOSES.
12

Subtitle

14 RESIDENT CARE MONITORING ACT.
15
16

17 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
18

19 SECTION 1. Arkansas Code Title 20, Chapter 10 is amended to add an
20 additional subchapter to read as follows:

21 20-10-2001. Title.

22 This subchapter shall be known and may be cited as the "Resident Care
23 Monitoring Act."
24

25 20-10-2002. Definitions

26 As used in this subchapter:

27 (1) "Facility" means a long-term care facility which is required
28 to be licensed under § 20-10-204;

29 (2)(A) "Monitoring device" means a video or audio device
30 installed in the room of a resident which acquires visual images, activity,
31 or sounds occurring in the room.

32 (B) "Monitoring device" includes video surveillance
33 cameras, but does not include a still camera or any device used for the
34 nonconsensual interception of wire or electronic communications;

35 (3) "Office" means the Office of Long-Term Care of the Division
36 of Medical Services of the Department of Human Services;



1 (4) "Resident" means a person who is a resident of a facility;
2 and

3 (5) "Roommate" means a resident who occupies the same room as
4 the resident who has a monitoring device.

5
6 20-10-2003. Immunity of office or facility

7 (a) For purposes of this subchapter, the placement and use of a
8 monitoring device in the room of a resident is considered to be covert if:

9 (1) The placement and use of the device is not open and obvious;
10 and

11 (2) The facility is not informed about the device by the
12 resident, by a person who placed the device in the room, or by a person who
13 is using the device.

14 (b) The office and the facility may not be held civilly liable in
15 connection with the covert placement or use of a monitoring device in the
16 room of a resident.

17
18 20-10-2004. Required form on admission.

19 The office by rule shall prescribe a monitoring device information form
20 that must be completed and signed on a resident's admission to a facility by
21 or on behalf of the resident. The form must state:

22 (1) That a person who places a monitoring device in the room of
23 a resident or who uses or discloses a tape or other recording made by the
24 device may be criminally or civilly liable for any unlawful violation of the
25 privacy rights of another;

26 (2) That a person who covertly places a monitoring device in the
27 room of a resident or who consents or acquiesces in the covert placement of
28 the device in the room of a resident has waived any privacy right the person
29 may have had in connection with images or sounds that may be acquired by the
30 device;

31 (3) That a guardian or legal representative who uses or operates
32 a monitoring device on behalf of a facility resident is subject to criminal
33 penalties if that person knowingly fails to notify the facility administrator
34 or designated agent within twenty-four (24) hours of viewing or listening to
35 a tape or recording created by a monitoring device that the guardian or legal
36 representative reasonably believes constitutes evidence of resident

1 maltreatment; and

2 (4) The basic procedures that must be followed to request a
3 monitoring device.

4
5 20-10-2005. Monitoring device – Who may request.

6 (a) If a resident has capacity to request a monitoring device and has
7 not been judicially declared to lack the required capacity, only the resident
8 may request a monitoring device, notwithstanding the terms of any durable
9 power of attorney or similar instrument.

10 (b) If a resident has been judicially declared to lack the capacity
11 required for taking an action such as requesting a monitoring device, only
12 the guardian of the person of the resident may request a monitoring device
13 under this subchapter.

14 (c)(1) If a resident does not have capacity to request a monitoring
15 device but has not been judicially declared to lack the required capacity,
16 only the legal representative of the resident may request a monitoring device
17 under this subchapter.

18 (2) The resident’s physician shall make the determination
19 regarding the resident’s incapacity to request a monitoring device, and shall
20 record the determination in the resident’s medical record.

21 (3) When the resident’s physician determines the resident lacks
22 capacity to request a monitoring device, a person from the following list, in
23 order of priority, may act as the resident’s legal representative for the
24 limited purpose of requesting a monitoring device:

25 (A) An attorney-in-fact authorized by the terms of a valid
26 durable power of attorney to make health care decisions on behalf of the
27 resident;

28 (B) In the case of an unmarried patient under the age of
29 eighteen (18), the parents of the patient;

30 (C) The patient’s spouse;

31 (D) The patient’s adult child or, if there is more than
32 one (1), then a majority of the patient’s adult children participating in the
33 decision;

34 (E) The parents of a patient over the age of eighteen
35 (18);

36 (F) The patient’s adult sibling or, if there is more than

1 one (1), then a majority of the patient's adult siblings participating in the
2 decision;

3 (G) Persons standing in loco parentis to the patient; or

4 (H) A majority of the patient's adult heirs at law who
5 participate in the decision.

6
7 20-10-2006. Monitoring device--Form of request -- consent of other
8 residents in room.

9 (a) A resident or the guardian or legal representative of a resident
10 who wishes to install or use a monitoring device in the resident's room must
11 make the request to the facility on a form prescribed by the office.

12 (b) The form prescribed by the office shall comply with all
13 requirements for the release of protected health information under the Health
14 Insurance Portability and Accountability Act of 1996.

15 (c) The form prescribed by the office must require the resident or the
16 resident's guardian or legal representative to:

17 (1) Release the facility from any civil liability for a
18 violation of the resident's privacy rights in connection with the use of the
19 monitoring device; and

20 (2) Obtain the consent of the resident's roommate(s), using a
21 form prescribed by the office, if the resident resides in a multiperson room.

22 (d) Consent under Subsection (c)(3) may be given only by:

23 (1) The resident's roommate or roommates;

24 (2) The guardian of a person described by subsection (d)(1), if
25 the person has been judicially declared to lack the required capacity; or

26 (3) The legal representative who under § 20-10-2005(c)(3) may
27 request a monitoring device on behalf of a person described in subsection
28 (d)(1) of this section.

29 (e) The resident or the guardian or legal representative of a resident
30 may withdraw a request or consent to the use of a monitoring device at any
31 time.

32 (f) The form prescribed by the office must condition the consent of
33 the resident's roommate on the roommate also releasing the facility from any
34 civil liability for a violation of the roommate's privacy rights in
35 connection with the use of the electronic monitoring device.

36 (g) The resident's roommate may:

1 (1) When the monitoring device is a video surveillance camera,
2 condition consent on the camera being pointed away from the consenting
3 resident;

4 (2) Condition consent on the use of an audio monitoring device
5 being limited or prohibited; and

6 (3) Withdraw consent to the use of a monitoring device at any
7 time.

8 (h) If a monitoring device is being used in the room of a resident and
9 another resident is moved into the room who has not yet consented to the use
10 of a monitoring device, use of the monitoring device must cease until the new
11 resident has consented in accordance with this section.

12 (i) The office may adopt rules prescribing the place or places that a
13 form signed under this section must be maintained and the period of which it
14 must be maintained.

15 (j) Use of a monitoring device:

16 (1) May not commence until all request and consent forms
17 required by this section have been completed and returned to the facility;

18 (2) Must be conducted in accordance with any limitation placed
19 on the monitoring as a condition of the consent given by or on behalf of any
20 roommate of the resident; and

21 (3) Must cease upon the withdrawal of consent by the resident or
22 the resident's guardian or legal representative or upon the withdrawal of the
23 consent of the roommate or the roommate's guardian or legal representative.

24
25 20-10-2007. Monitoring device – General provisions.

26 (a) A resident shall have the option of requesting a monitoring device
27 at any time.

28 (b)(1) A facility shall accommodate the request of a resident or the
29 guardian or legal representative of a resident to use a monitoring device
30 upon satisfaction of the requirements of § 20-10-2006, and if the
31 installation or operation of the monitoring device does not place an undue
32 burden on the facility.

33 (2) The office shall promulgate rules defining what constitutes
34 an “undue burden” for purposes of this section.

35 (c) A resident or the guardian or legal representative of a resident
36 who uses a monitoring device shall post and maintain a conspicuous notice at

1 the entrance of the resident's room. The notice must state that a monitoring
2 device is in use in that room, and must specify whether the device monitors
3 visual activity, auditory activity, or both.

4 (d) The resident or the resident's guardian or legal representative
5 must pay for all costs associated with the installation, maintenance, and
6 operation of the monitoring device.

7 (e) The facility may require that installation and use of a monitoring
8 device be conducted in a manner that is safe for residents, employees, or
9 visitors who may be moving about the room.

10 (f) The monitoring device shall be installed and operated in plain
11 view.

12 (g)(1)(A) The resident or the guardian or legal representative of a
13 resident who requests a monitoring device must, when any sound, image, or
14 other information acquired by a monitoring device is transmitted over an
15 electronic communications network, implement reasonable technical security
16 measures to guard against unauthorized access.

17 (B) The office shall establish guidelines for technical
18 security measures to guard against unauthorized access.

19 (2) A facility may not be held civilly liable in connection with
20 any unauthorized access to a communications network containing sounds,
21 images, or other information acquired by a monitoring device, or any
22 subsequent unauthorized use or disclosure resulting from the unauthorized
23 access.

24 (h) A facility may, but is not required to, place a resident in a
25 different room to accommodate a request to install or use a monitoring
26 device.

27
28 20-10-2008. Use of a tape or recording in a judicial or administrative
29 proceeding or by the office.

30 (a) No court or administrative agency, nor the office, may admit into
31 evidence a tape or recording created through the use of a monitoring device,
32 including covert monitoring devices, or take or authorize action based on the
33 tape or recording unless:

34 (1) If the tape or recording is a video tape or recording, the
35 tape or recording shows the time and date that the events acquired on the
36 tape or recording occurred;

1 (2) The contents of the tape or recording are continuous, and
2 have not been edited or artificially enhanced; and

3 (3) If the contents of the tape or recording have been
4 transferred from the original format to another technological format, the
5 transfer was done by a qualified professional and the contents of the tape or
6 recording were not altered.

7 (b)(1) A facility shall not be required to disclose a tape or
8 recording to the office unless the office requests to view or copy a tape or
9 recording in connection with an investigation into allegations of resident
10 maltreatment.

11 (2) Any request by the office to view or copy a tape or
12 recording in connection with an investigation into allegations of resident
13 maltreatment shall be limited to the resident who is the subject of the
14 allegations and to the time period during which the maltreatment is believed
15 to have occurred.

16
17 20-10-2009. Use of tape or recording created by a monitoring device in
18 civil action against a facility.

19 No tape or recording created by a monitoring device may be admitted or
20 used in a civil action against a facility, owner, or management company
21 unless the facility, owner, or management company seeks to admit or use the
22 tape or recording.

23
24 20-10-2010. Request by facility or facility employee for copies of
25 tapes or recordings.

26 (a) Upon written request by a facility, a person in possession of
27 tapes or recordings created by a monitoring device installed in that facility
28 shall provide a copy at the facility's expense.

29 (b) Upon written request by a facility employee accused of maltreating
30 a resident, the person in possession of tapes or other recordings of the
31 resident created by a monitoring device installed in that facility shall
32 provide a copy to the facility employee at that employee's expense.

33 (c) A person who provides a copy of a tape or recording to a facility
34 or employee in accordance with subsection (a) or (b) shall also provide
35 written certification that the copy meets the requirements of § 20-10-
36 2008(a).

1 (d) A person in possession of tapes or other recordings of the
2 resident created by a monitoring device installed in a facility shall, prior
3 to erasing, obliterating, or otherwise disposing of a tape or recording,
4 notify the facility in writing and permit the facility to purchase a copy of
5 the tape or recording.

6
7 20-10-2011. Reporting of suspected maltreatment.

8 (a) For purposes of the duty to report resident maltreatment under §
9 5-28-203, no facility employee shall be deemed to have reasonable cause to
10 suspect resident maltreatment by virtue of possession of a tape or recording
11 created by a monitoring device unless:

12 (1) The employee has independent knowledge of the alleged
13 maltreatment; or

14 (2) The employee actually views the tape or recording and
15 reasonably believes that maltreatment has occurred; or

16 (b)(1) A guardian or legal representative who uses or operates a
17 monitoring device on behalf of a facility resident shall, within twenty-four
18 (24) hours of viewing or listening to a tape or recording created by a
19 monitoring device that the guardian or legal representative reasonably
20 believes constitutes evidence of resident maltreatment, notify the facility
21 administrator or that person's designated agent.

22 (2) For purposes of the duty to report suspected adult
23 maltreatment in accordance with this section, a guardian or legal
24 representative who uses or operates a monitoring device on behalf of a
25 facility resident is considered to have viewed or listened to a tape or
26 recording created by the monitoring device on or before the 30th day after the
27 date the tape or recording is created.

28 (3) A guardian or legal representative who knowingly fails to
29 notify the facility administrator or designated agent in the time and manner
30 provided in this subsection is guilty of a violation, and shall be punished
31 as provided by law.

32
33 20-10-2012. Criminal acts.

34 (a) A person who intentionally hampers, obstructs, tampers with, or
35 destroys a monitoring device installed in a resident's room in accordance
36 with this subchapter or a tape or recording made by the device is guilty of a

1 Class A misdemeanor;

2 (b) A person who uses or discloses a tape or recording created by a
3 monitoring device without the consent of the resident depicted in the tape or
4 recording or that resident's guardian or legal representative is guilty of a
5 Class A misdemeanor, unless the tape is used or disclosed under the following
6 circumstances:

7 (1) For health care operations, as defined in the Health
8 Insurance Portability and Accountability Act of 1996;

9 (2) For public health activities, as described in the Health
10 Insurance Portability and Accountability Act of 1996;

11 (3) For health oversight purposes, as described in the Health
12 Insurance Portability and Accountability Act of 1996; or

13 (4) To report suspected abuse, neglect, or maltreatment to law
14 enforcement officials, the office, Adult Protective Services, or other
15 government authority authorized by law to receive reports of abuse or
16 neglect.

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18 /s/ Bright, et al
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