spotlight

No. 400 – September 30, 2010

The Pill Police

North Carolina law enforcement has access to private health records

KEY FACTS: **• There has been significant public attention and concern regarding a proposal by the North Carolina Sheriffs' Association that would allow sheriffs to have access to patients' prescription information for painkillers and controlled substances.**

• The bigger issue is that the state *already* collects this information and law enforcement, specifically the State Bureau of Investigation, *already* has access to it.

• The drugs tracked under the state law include medicines such as painkillers used by cancer patients as well as medications used in the treatment of mental health. Even children did not escape the excessive scope of the law. For example, if a child is prescribed Ritalin, his personal information is included in the system.

• The state is taking a shotgun approach to address the problem of prescription drug abuse and misuse. There are more than 53 million prescriptions in the state database, yet the state has identified patterns of abuse, based on an informal estimate, in 50-60 situations since 2007. To take such intrusive action to find a small number of "abuses" is a gross violation of privacy rights.

• The public should not be fearful of engaging in legal activities. Furthermore, the public should not have to worry about seeking necessary medical treatment at the expense of giving away sensitive personal information to the state. A trade-off between relieving pain and protecting personal privacy is a choice the public should never have to make.

• North Carolina should eliminate the database. The entire database system is an overreaction. The incredible intrusion into the lives of citizens greatly outweighs the limited benefit, if any, that exists from such a database.

• Under the current statute, an individual who improperly uses the health data is subject only to civil penalties and liability, which is completely inappropriate given how intrusive a violation it would be for an individual to improperly disclose someone else's health records. As HHS recommended to the legislature's Joint Legislative Health Care Oversight Committee, improper use should be made a felony.

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There has been significant public attention and concern regarding a proposal by the North Carolina Sheriffs' Association that would allow sheriffs to have access to patients' prescription information for painkillers and controlled substances.[1]

While this proposal is alarming, the bigger issue is the state *already* collects this information and law enforcement, specifically the State Bureau of Investigation (SBI), *already* has access to it.[2] This Spotlight will provide background on current law, in part because its existence will come as a surprise to most people. The report will then explain why the legislature needs to eliminate this egregious violation of privacy.

Background on the Law

In 2005, the legislature passed a massive budget bill.[3] Buried within it was a section allowing the state's Department of Health and Human Services (HHS) to develop a database containing individuals' prescriptions for a wide range of drugs.[4]

Generally, the purpose of the legislation was to address the abuse and misuse of prescription drugs. This abuse of prescription drugs has resulted in a significant increase in accidental overdoses. From 2003-09, unintentional deaths due to overdoses from the types of drugs covered in the statute rose from 466 to 826.[5] Another concern was the problem of doctor shopping, which according to the Drug Enforcement Agency is:

> The visit by an individual—who may or may not have legitimate medical needs—to several doctors, each of whom writes a prescription for a controlled substance. The individual will visit several pharmacies, receiving more of the drug than intended by any single physician, typically for the purpose of feeding an addiction.[6]

The drugs tracked under the state law include medicines such as painkillers used by cancer patients as well as medications used in the treatment of mental health. Even children did not escape the excessive scope of the law. For example, if a child is prescribed Ritalin, his personal information is included in the system.[7]

Retail pharmacies are required to submit prescription data to the state database (see Table 1 to learn who must provide data to HHS).[8] The database became operational in 2007.[9]

Most states (35) now have these types of programs in operation, referred to as prescription drug monitoring programs (PMPs), in one form or another. There are another eight states that have passed laws to implement these programs.[10]

Table 1. Who is Required to Submit Data to the North Carolina Department of Health and Human Services?

By state law, all persons and entities defined as "dispensers" must provide data to the DHHS database.

Defined As a Dispenser	Not Defined As a Dispenser
State law defines a dispenser as: *"A person who delivers a Schedule II through Schedule V controlled substance to an ultimate user in North Carolina."*[†] That includes: • Retail Pharmacies	• Licensed Hospitals or Long-term Care Pharmacies • Wholesale Distributors • Physicians and Dentists • Weight Loss Clinics • Pain Clinics

[†] Schedule II-Schedule V is a classification system for drugs.
Source: North Carolina General Statute § 90-113.63(b)

The reason for such an impressive-seeming number of states is a familiar story — the federal government intruded once again into state matters. In 2002, Congress started appropriating money for the Harold Rogers PMP grant program that awards money to states to establish their own PMP.[11] Ever since, most states have been more than happy to do whatever was needed to get those federal dollars.

As the PMP Center of Excellence, a joint project between the United States Bureau of Justice Assistance and Brandeis University, explained:

> BJA [Bureau of Justice Assistance], through its Harold Rogers PMP grant program, has played a *central role* in the growth of PMPs.[12] [Emphasis added]

Access by Law Enforcement

Currently, other than through a lawful court order, there are two primary means for law enforcement to gain access to health records (see Table 2 to learn who may access health records):

1. *HHS must provide access to the database records to State Bureau of Investigation (SBI) agents working in the Diversion and Environmental Crimes Unit who are involved in a "bona fide specific investigation."*[13]

   Because there is no definition of "bona fide," the term has little real meaning. The only real requirement is that there must be some "specific investigation." It is also troubling that the statute defers such a sensitive decision — whether law enforcement can access health records — to bureaucrats at HHS, not a court.

2. *If HHS finds a pattern of prescription abuse, it is* required *to report those patterns to the Attorney General (AG).*[14]

   There is no definition for what constitutes a pattern that necessitates sending information to the AG. It could mean almost anything HHS bureaucrats want it to.

   According to William Bronson, Program Manager of HHS's Drug Control Unit, HHS *currently* starts paying attention to possible abuses if an individual has 10 or more prescribers or receive prescriptions from 5 or more pharmacies within a 90-day period.[15]

Access by Medical Professionals

The current law allows doctors and pharmacists voluntarily to access the database if they want to ensure that patients are not abusing medication.[16]

Only 10 percent of pharmacists and 20 percent of doctors have registered to use the system[17] — it certainly does not appear to be serving any doctor/patient or pharmacist/patient objectives.

Analysis of the Law

Shotgun Approach

The state, without court-approved warrants, should not be searching private health records. To take such intrusive action to find a small number of "abuses" is a gross violation of privacy rights.

While he did not claim to have a precise number, Mr. Bronson estimated that HHS, through the identification of suspicious patterns, has referred only about 50-60 cases to the AG since North Carolina's prescription drug monitoring program began in 2007.[18]

Table 2. Who Gets Access to Personal Prescription Information Through DHHS?

*All of the following **shall** be granted access by DHHS:*

- Persons authorized to prescribe or dispense controlled substances for the purpose of providing medical or pharmaceutical care for their patients.
- An individual who requests the individual's own controlled substances reporting system information.
- Special agents of the North Carolina State Bureau of Investigation who are assigned to the Diversion & Environmental Crimes Unit and whose primary duties involve the investigation of diversion and illegal use of prescription medication and who are engaged in a bona fide specific investigation related to enforcement of laws governing licit drugs. The SBI shall notify the Office of the Attorney General of North Carolina of each request for inspection of records maintained by the Department.
- Primary monitoring authorities for other states pursuant to a specific ongoing investigation involving a designated person, if information concerns the dispensing of a Schedule II through V controlled substance to an ultimate user who resides in the other state or the dispensing of a Schedule II through V controlled substance prescribed by a licensed health care practitioner whose principal place of business is located in the other state.
- To a court pursuant to a court order in a criminal action.
- The Division of Medical Assistance for purposes of administering the State Medical Assistance Plan.
- Licensing boards with jurisdiction over health care disciplines pursuant to an ongoing investigation by the licensing board of a specific individual licensed by the board.
- In the event that the Department finds patterns of prescribing medications that are unusual, the Department shall inform the Attorney General's Office of its findings. The Office of the Attorney General shall review the Department's findings to determine if the findings should be reported to the SBI for investigation of possible violations of State or federal law relating to controlled substances.

The following **may** *be granted access by DHHS:*

- The Department may provide data to public or private entities for statistical, research, or educational purposes only after removing information that could be used to identify individual patients who received prescription medications from dispensers.

Citation: NC General Statutes, §90-113.64(c-e).

That number is miniscule in comparison to the approximately 53 million prescriptions for painkillers and controlled substances in North Carolina[19] — it demonstrates this excessively overbroad approach to addressing the misuse of drugs.

When addressing the problem of accidental overdoses, there are admittedly significant concerns. Nevertheless, there are many other disconcerting societal problems that may, even in a very small way, be minimized if the state had access to sensitive private records of all individuals, but even so, the sacrifice of individual rights should never be the go-to solution.

While such a law is likely constitutional,[20] that in itself does not make the privacy concerns any less important. The state is gathering an excessive amount of sensitive information that will serve no purpose other than to subject

those individuals to possible violations of their privacy.

The public should not be fearful of engaging in legal activities. Furthermore, the public should not have to worry about seeking necessary medical treatment at the expense of giving away sensitive personal information to the state. A trade-off between relieving pain and protecting personal privacy is a choice the public should never have to make.

The Information Collected Tells the State About More Than Just Drugs

When the state collects data on what painkillers and controlled substances people take, what it learns is not just about the medicines. It also learns about what diseases people may have.

If a child is taking Ritalin, the state knows that the child has Attention Deficit Disorder (ADD). Other drugs could inform the state that someone has mental illnesses, serious chronic conditions, epilepsy, insomnia, and more.[21]

The Negative Impact on Seeking Medical Help

There already is a significant stigma for taking medicine related to certain illnesses, such as depression, and many people already ignore treatment for mental health illnesses.[22] By allowing the state to see what medicines are being taken, the problem will likely only worsen.

According to the *Greensboro News & Record*, "Bronson [from HHS] said studies were conducted when the database was approved in 2005 and after it went into effect in 2007, with no evidence people were less likely to seek treatment."[23]

Even accepting that studies support this conclusion, it would make sense that the program would have little impact if people were unaware that the state is collecting their health records.

There should be an aggressive information campaign, which would include a clear notice from dispensers of painkillers and controlled substances to all patients, that the state is collecting private prescription data. After a reasonable amount of time, the state should conduct a study to investigate whether the PMP program has an impact on individuals seeking necessary treatment.

Government Abuse

Given the limited oversight that exists within the statute, the government would likely abuse having access to such an incredible amount of sensitive information. The potential for abuse is easy to see in light of the recent State Bureau of Investigation (SBI) scandal, where the SBI withheld or distorted evidence in about 200 cases that otherwise could have helped the defendants.[24]

The SBI scandal should *not* impose a black eye on all law enforcement; however, it is an important reminder why putting blind faith in the government and allowing it to have far too much private information on individuals is nothing short of a recipe for disaster.

Recommendations

Primary Recommendation: North Carolina Should Eliminate the Database

The entire database system is an overreaction. The incredible intrusion into the lives of citizens greatly outweighs the limited benefit, if any, that such a database offers.

Even apart from all of the problems discussed earlier in the report, the database is simply putting the cart before the horse. There are so many things short of taking this extreme action that could be done first to address any problems that may exist.

Primarily, the problem of prescription drug abuse and misuse is a medical issue and could be solved only when physicians better educate themselves about the risks associated with substance use and abuse and educate their patients about how to minimize the risks associated with taking these powerful drugs.

According to Dr. Janet Woodcock of the Food and Drug Administration (FDA):

> Many errors are … caused by lack of information needed by prescribers at the point of care, or by patients or consumers at the point of use, as well as by procedural and process errors – for example, dispensing the wrong drug or the wrong strength of drug.[25]

There are other factors as well that could be addressed by the medical community with significant results. An increase in the prescription of pain medicine could explain the increase of accidental overdoses.[26] There also is evidence that many of the overdoses are often associated with the use of a combination of controlled prescription substances.[27]

Private solutions to prescription abuse also are a much better option than government intervention — private actors do not have the ability to use sensitive personal data and implement public policy through the force of government. Private actors can be sued more easily than the government, thereby giving citizens better protection against abuse.

A private third-party data clearinghouse could serve the same role that HHS is serving. In addition, pharmacists could develop their own networks to exchange information. There *may* be some legal constraints to such actions, however, under laws such as the Health Insurance Portability and Accountability Act (HIPAA),[28] a federal privacy law protecting health records — the HIPAA issue is unclear.[29]

Admittedly, the medical community may be able to do only so much to address the problem of prescription drug abuse and misuse, but they need at least to be given the opportunity to address these problems first. Furthermore, even if problems of abuse remain in spite of their best efforts, it would not justify the massive intrusion into one of the most personal aspects of the lives of North Carolinians.

Secondary Recommendations: Assuming the Database Still Exists

No Access by Law Enforcement

A public shocked to learn that the sheriffs wanted access to the health records would be even more shocked to learn that the SBI already has access to those records. In the event that the database is not eliminated, law enforcement should not be given access to it. This in no way prevents law enforcement from gaining access to records through a court order connected to a specific investigation.

It is bad enough that a state database exists and the public has to worry about HHS staff accessing private health information. The problem is much worse when people know that taking care of their personal health could land them in trouble with law enforcement. At a minimum, there will be understandable fear that law enforcement officials will be able to scour health records for no other reason that to send people to jail.

This is not to minimize the problem of doctor shopping and other abuses to get unnecessary medicine. If the state is concerned about accidental overdoses, the medical community, not the law enforcement community, should take the lead.

Sending people to jail is a very roundabout way to prevent the abuse and misuse of prescription medicine. Scaring people into not seeking out additional pain medicine is difficult to see as being particularly effective (especially if they do not even know about this database).

Many of the individuals engaged in doctor shopping have developed addictions[30] or have more pressing concerns,

such as unbearable pain, that are far more pressing than the risk of going to jail. It also is an inhumane way to treat people that may be suffering, not out of weakness, but from the ravages of disease.

No Access by Anyone Other than Pharmacists, Physicians, and Patients

If the database must still exist, there are a few situations under existing law where it may be appropriate for third parties to have access to health records. For example, pharmacists and other dispensers of medication could have access to health records for the sole purpose of treating their patients.[31] Additionally, patients themselves should also retain access to their own records.[32]

HHS could be allowed to provide data for research purposes if the personal information is removed.[33] Unlike existing law, the agency could be allowed to do analysis for patterns of abuse to serve the medical community, but not to provide that information to the Attorney General.[34]

Impose Criminal Penalties

Under the current statute, an individual who improperly uses the health data is subject only to civil penalties and liability.[35] That penalty is completely inappropriate given how intrusive a violation it would be for an individual to disclose someone else's health records improperly. As HHS recommended to the legislature's Joint Legislative Health Care Oversight Committee, improper use should be made a felony.[36]

Furthermore, the statute should make it clear that an *individual* means anyone inside or outside government. Victims of this abuse also should be allowed to sue the government and its employees for damages.

Conclusion

There is a disconcerting disregard for privacy in North Carolina. The legislature passed this 2005 law allowing state access to health records, and recently it required law enforcement to collect DNA samples on arrestees, which would include many innocent people.[37]

Law enforcement, of course, is going to want this easy access to sensitive private information. The more information they have, the easier it may be for them to do their job, but this ease will come at the expense of violating the rights of the innocent. There is never going to be perfect safety in a free state. When the legislature passes such laws, it may help with safety, but it also does away with freedom — it is on the path to creating a police state.

When the legislature comes back next year, it should strongly support law enforcement, but it should do so recognizing that safety should not come at the expense of freedom. North Carolina should get rid of the health record database and get back to regaining the public trust, not snooping on its citizens.

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End Notes

1. Lynn Bonner, "Sheriffs wants lists of patients using painkillers," *The News & Observer*, September 8, 2010, *www.newsobserver.com/2010/09/08/669723/lists-of-pain-pillpatients-sought.html*.
2. N.C. Gen. Stat. § 90-113.60-66.
3. North Carolina General Assembly, Session Law 2005-276, *www.ncga.state.nc.us/gascripts/ BillLookUp/BillLookUp.pl?Session=2005&BillID=S622*.
4. N.C. Gen. Stat. § 90-113.63; see also N.C. Gen. Stat. § 90-90; § 90-91; § 90-92; § 90-93.
5. PowerPoint presentation by William Bronson, Program Manager of DHHS Drug Control Unit, to the Joint Legislative Health Care Oversight Committee, North Carolina General Assembly, September 7, 2010.
6. Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion Control (DEA), "Prescription Drug Abuse: What is Being Done

to Address This New Epidemic?," Congressional Testimony before the House Subcommittee on Criminal Justice Drug Policy and Human Resources, July 26, 2006.

7. *Op. cit.*, note 4.
8. N.C. Gen. Stat. § 90-113.63(b).
9. *Op. cit.*, note 1.
10. "Status of Prescription Drug Monitoring Programs (PDMPs)," Alliance of States with Prescription Monitoring Programs, *www.pmpalliance.org/pdf/pmpstatusmap2010.pdf.*
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12. "Addressing the Problem," PMP Center of Excellence, *www.pmpexcellence.org/content/ addressing-problem*.
13. N.C. Gen. Stat. § 90-113.64(c)(3).
14. N.C. Gen. Stat. § 90-113.64(e).
15. Telephone conversation with William Bronson, Program Manager of DHHS Drug Control Unit (Division of Mental Health, Development Disabilities and Substance Abuse Services), September 2010.
16. N.C. Gen. Stat. § 90-113.64(c)(1).
17. *Op. cit.*, note 1; note 15.
18. *Op. cit.*, note 15.
19. *Op. cit.*, note 1.
20. *Whalen v. Roe*, 429 U.S. 589 (1977), *www.law.cornell.edu/supct/html/historics/USSC_CR_0429_ 0589_ZO.html*. In this United States Supreme Court case, the court held that it was constitutional for a state to collect private prescription information.
21. *Op. cit.*, note 4.
22. Edlin Mari, "Lack of education affects behavioral health medication compliance," *Managed Healthcare Executive*, February 1, 2008. *http://managedhealthcareexecutive.modernmedicine.com/mhe/Pharmacy+Benefit/Lack-of-education-affects-behavioral-health-medica/ArticleStandard/Article/detail/489468*.
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24. See, e.g., Mandy Locke, Joseph Neff, and J. Andrew Curliss, "Scathing SBI audit says 230 cases tainted by shoddy investigations," *The News & Observer*, August 27, 2010, *www.newsobserver.com/2010/08/19/635632/scathing-sbi-audit-says-230-cases.html*; Chris Swecker and Michael Wolf, *An Independent Review of the SBI Forensic Laboratory*, August 25, 2010, *http://ncdoj.gov/getdoc/0a92ee81-0667-4935-b2d3-221d4f586c61/Independent-Review-of-SBI-Forensic-LAB.aspx*.
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26. *Op. cit.*, note 5.
27. "Study Analysis 01," PMP Center of Excellence, p. 8, *www.pmpexcellence.org/sites/all/pdfs/ COE_rpt_dr_shopping_6.pdf*.
28. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191.
29. After a careful review of the regulations and a discussion with the United States Department of Health and Human Services (Region 4 Office) regarding HIPAA's application to the exchange of information, as discussed in the report, the legal issues remain unclear.
30. *Op. cit.*, note 6.
31. *Op. cit.*, note 16.
32. N.C. Gen. Stat. § 90-113.64(c)(2)
33. N.C. Gen. Stat. § 90-113.64(d)
34. N.C. Gen. Stat. § 90-113.64(e). Under existing law, the information can be provided to the Attorney General.
35. N.C. Gen. Stat. § 90-113.65
36. *Op. cit.*, note 5.
37. See, e.g., General Assembly of North Carolina, Session Law 2010-94, *www.ncga.state.nc.us/ Sessions/2009/Bills/House/PDF/H1403v8.pdf*; Daren Bakst, "Taking DNA from the innocent: bill would be a major step toward Big Brother government," June 10, 2010, *www.johnlocke.org/research/ show/spotlights/243*.