

**NAMSDL**



**National Alliance for Model State Drug Laws**

## **PRESCRIPTION MONITORING PROGRAMS, PHARMACY RECORDS AND THE RIGHT TO PRIVACY**

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One of the biggest issues facing Prescription Monitoring Programs (PMPs) is the right of a patient to keep his or her prescription records private. In 1977, the United States Supreme Court decided the case of *Whalen v. Roe*, 429 U.S. 589. The plaintiffs in *Whalen*, a group of physicians and patients, sued the State of New York challenging the constitutionality of its PMP statute. *Whalen* at 595. The New York statute required that all names and addresses of persons who received Schedule II drugs be recorded in a central database. *Id.* at 591. The statute provided access to the database to the Department of Health and its investigators, as well as providing that the records could be divulged “pursuant to judicial subpoena or court order in a criminal investigation or proceeding.” *Id.* at 595. The patients alleged that the “mere existence in readily available form about patients’ use of Schedule II drugs creates a genuine concern that that information will become publicly known and that it will adversely affect their reputations.” *Id.* at 600. Although the Court implicitly recognized a right to privacy in prescription records, it found that:

... neither the immediate nor the threatened impact of the patient-identification requirements of the New York State Controlled Substances Act of 1972 on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment.

*Id.* at 603-604. Further, the Court found that “the legislature’s enactment of the patient-identification requirement was a reasonable exercise of New York’s broad police powers.” *Id.* at 598.

The Court rejected the claim of the physician-plaintiffs that the statute affected their right to practice medicine free from unwarranted state interference, stating that “the prior statute required the doctor to prepare a written prescription identifying the name and address of the patient” and that any claim regarding possible disclosure of patient information was “derivative from, and therefore no stronger than, the patients’.” *Id.* at 604.

Since the decision in the *Whalen* case, the issue of a patient’s right to privacy in his or her prescription records has arisen in state and federal courts across the country with regard to PMPs and administrative and criminal investigatory searches of pharmacy records. Decided in 1987, the case of *New York v. Burger*, 482 U.S. 691, is extensively cited for the proposition that administrative searches of closely regulated industries do not require a search warrant.

The defendant, Joseph Burger, was the owner of a junkyard whose business entailed dismantling automobiles and selling their parts. *Burger* at 693. On November 17, 1982, five police officers entered the defendant’s premises for the purpose of conducting an inspection. *Id.* at 694-695. During the course of the inspection, the officers found that the defendant was in possession of stolen vehicles and arrested him. *Id.* at 695. The defendant moved to suppress the evidence based on the argument that the statute allowing inspections without a warrant was

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unconstitutional. *Id.* at 696. First emphasizing that commercial premises are protected by the Fourth Amendment prohibition against unreasonable searches and seizures, the Court found that in closely regulated businesses, the expectation of privacy is reduced. *Id.* at 699-702. The Court stressed that a warrantless inspection,

... even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met. First, there must be “substantial” government interest that forms the regulatory scheme pursuant to which the inspection is made. Second, the warrantless inspections must be “necessary to further [the] regulatory scheme” ... Finally, “the statute’s inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.” In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. To perform this first function, the statute must be “sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.” In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be “carefully limited in time, place, and scope.”

*Id.* at 702 (citations omitted). With this finding, the Court finally and specifically set out the parameters by which warrantless administrative searches could be undertaken. The Court further stated that,

[W]here the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment.

*Id.*

The holding in *Burger* has been used in numerous jurisdictions to justify warrantless searches of pharmacy records. The Kentucky Court of Appeals decided the case of *Thacker v. Commonwealth*, 80 S.W.3d 451, in 2002. The Defendant challenged a detective’s use of Kentucky’s prescription monitoring system, known as KASPER (Kentucky All-Schedule Prescription Electronic Reporting system), alleging that the use of the report violated his rights against unreasonable searches and seizures and confidentiality provisions of the Kentucky statute. *Id.* at 453-454. The court found that patients have a lessened expectation of privacy in pharmacy records because they “have long been subject to police inspection.” *Id.* at 455. Citing

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the *Burger* case, the court held that Kentucky has a substantial interest in regulating drugs and that the KASPER system reasonably advanced that interest. *Id.* In so holding, the court found that the administrative exception to the warrant requirement applied to use of the KASPER system, and, therefore, the detective's use of the KASPER system did not violate the defendant's rights under either the United States or Kentucky constitutions. *Id.*

The *Thacker* case was overruled in 2007 by the Supreme Court of Kentucky in the case of *Williams v. Commonwealth* to the extent that the *Thacker* court "found the administrative search exception to the warrant requirement to be applicable." *Williams v. Commonwealth*, 213 S.W.3d 682 (Ky. 2007). In the *Williams* case, the Lewis County Sheriff's Office began an investigation of Dr. Fortune J. Williams, defendant, due to numerous complaints of traffic problems at his office. *Id.* at 673-674. Due to the complaints, the sheriff's office "determined that numerous persons emerging from the clinic appeared to be under the influence of intoxicants and thus, began making arrests of those persons for driving under the influence." *Id.* at 674. The sheriff's office reported this information to the Attorney General, who contacted the Office of Drug Control, which office assigned an investigator to investigate. *Id.* The ODC investigator obtained a copy of the defendant's KASPER report and, after reviewing the report, set up a sting operation with an employee of the Attorney General's office. *Id.* At the conclusion of the sting operation, a complaint was filed with the Kentucky Board of Medical Licensure, which led to their involvement in the case. *Id.* On September 26, 2001, various members of the Board of Medical Licensure, Office of Drug Control, the Attorney General's office, and law enforcement staged a raid on the defendant's medical office for the purpose of seizing certain patient files. *Id.*

The defendant presented several issues for appeal in this case, including the constitutionality of the raid on his office and the constitutionality of the Kentucky PMP statute. The Kentucky Supreme Court found that, under the circumstances as presented in this case, the warrantless raid on the defendant's medical office was a violation of his Fourth Amendment rights. *Id.* at 678.

However, of particular interest to this memo, the court also found that the statute authorizing examination of KASPER reports by authorized personnel "does not constitute a 'search' under the Fourth Amendment or [the Kentucky Constitution] since citizens have *no reasonable expectation of privacy in this limited examination of and access to their prescription records.*" *Id.* at 682 (emphasis added). It, therefore, overruled *Thacker*, determining that "KRS §§218A.202(6)(a) & (b) [the KASPER statutes] are facially constitutional even without application of the administrative search exception to the warrant requirement." *Id.* The court explained its decision by stating that

a KASPER report conveys only limited data to a restricted number of persons. First, it does not report the dispensation of all substances by practitioners or pharmacists but only those substances classified as "Schedules II, III, IV, and V controlled substances." Second, nothing in a KASPER report discloses a patient's condition, treatment, or

communications with his or her physician, as the report merely conveys the patient's name, the drug dispensed, the date of dispensing, the quantity dispensed, the prescriber, and the dispenser. Finally, KASPER data is not available to the general public, but rather only to specified personnel who certify that they are conducting "a bona fide specific investigation involving a designated person."

*Id.* at 683 (citations omitted). In conclusion, the court stated that law enforcement access to KASPER data and reports does not "infringe upon or otherwise manipulate any well-recognized Fourth Amendment or [Kentucky constitution] freedoms." *Id.* at 683-684.

The Superior Court of Rhode Island, in an unreported case, also held that a criminal defendant had no expectation of privacy in his prescription records because "they were produced by medical personnel for their use in providing medical treatment. These were not defendant's personal papers created or kept by him [and he] ... can demonstrate neither ownership nor possession." *State v. Underwood*, No. K2/98-0485A, 1999 WL 47159, at \*4 (R.I.Super., Jan. 20, 1999). The court further found that the statutes of Rhode Island requiring that prescription records "be open to inspection" to public officers or employees engaged in enforcing the controlled substances act of Rhode Island "further undermines defendant's implicit argument that he had a reasonable expectation of privacy, protected by the Fourth Amendment, in his prescription records." *Id.* at \*5.

The Tenth Circuit Court of Appeals reached the opposite conclusion in the case of *Douglas v. Dobbs*, 419 F.3d 1097 (10<sup>th</sup> Cir. 2005). The Tenth Circuit specifically found that patients have a right to privacy in their prescription records as

[i]nformation contained in prescription records not only may reveal other facts about what illnesses a person has, but may reveal information relating to procreation – whether a woman is taking fertility medication for example – as well as information relating to contraception ... Thus, it seems clear that privacy in prescription records falls within a protected "zone of privacy" and is thus protected as a personal right either "fundamental" to or "implicit in the concept of ordered liberty."

*Douglas* at 1102 (citations omitted). However, in footnote 3 of the opinion, the court stated that the "right to privacy is not absolute ... as it is 'well settled that the State has broad police powers in regulating the administration of drugs by the health professions'." *Id.* at 1102, n.3 (citing *Whalen* at 97, n.30). Further, the right to privacy may be diminished by state law "which in this case must be tempered by the fact that New Mexico apparently requires pharmacies to make these records available to law enforcement." *Id.* at 1102 (citations omitted).

The Tenth Circuit did not reach the question of whether a warrant was necessary to receive the plaintiff's prescription records in *Douglas*; however, numerous other courts have.

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The Supreme Court of Vermont determined that the defendant in the case of *State v. Welch* had an expectation of privacy in her prescription records that “derives from her expectation that those records cannot be arbitrarily disclosed.” *State v. Welch*, 624 A.2d 1105, 1109 (Vt. 1993). However, the court found that the inspection of the defendant’s prescription records was valid as an exception to the warrant requirement. *Id.* at 1112. The court addressed two primary questions, “first, whether the inspection of defendant’s prescription records was justified as an exception to the warrant requirement, and second, whether authority for a warrantless inspection may be used to gather criminal evidence regarding an individual’s prescription activity.” *Id.* at 1110.

The court began by determining that the state has a great interest “in regulating pharmacies and controlling the illicit use of drugs.” *Id.* As far back as 1904, Vermont has required that pharmacists keep records of “the kind and quantity of the article sold, and the time when, and the name of the person to whom such sale is made, which record shall be open to all health officers, members of the state board of health and state officials who may wish to examine same’.” *Id.* at 1110-1111 (citing 1904, No. 143, § 13). The court stated that “the Legislature has consistently recognized the state’s interest in regulating the drug industry and that official access to prescription records is critical to effective drug enforcement.” *Id.* at 1111. As such, the court found, using the *Burger* standard, that the “pharmaceutical industry qualifies as a ‘pervasively regulated industry’.” *Id.*

The court next held that the statute permitting a warrantless inspection of prescription records “reasonably serves the achievement of” the state’s interest in regulating drugs. *Id.*

Recognizing the privacy interest of the individual, the Legislature has appropriately limited inspections to specifically authorized federal and state officers and prohibited disclosure of knowledge obtained during an inspection, except in connection with a criminal prosecution or licensing proceeding.

*Id.* at 1111-1112. Further, the court discussed the fact that this case differed from *Whalen* in that Vermont (at that time) did not have central reporting system as New York did, but stated “[t]hese differences ... are *differences in implementation and do not affect the reasonableness of warrantless inspection as a form of regulation.*” *Id.* at 1112 (emphasis added). Additionally, the court found, as did the Supreme Court in *Burger*, that the regulations “permitting warrantless inspections were not only reasonable but were also necessary.” *Id.* Specifically, “in order for the deterrent function of the regulations to be effective, ‘unannounced, even frequent, inspections are essential’.” *Id.* (quoting *Burger* at 710). The court stated that although patients are not in a position “to alter or hide pharmacy records, this does not affect the need for official authority to inspect those records without a warrant. To hold otherwise would place investigators in the curious position of having to secure a warrant in order to examine records which it is unlawful for the pharmacist to refuse to provide.” *Id.*

In examining the third *Burger* criterion, the requirement that the statute ““must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers’,” the court found that the Vermont statutes “performed these functions.” *Id.* (quoting *Burger* at 703). Pharmacists are charged with the knowledge that their records are open for inspection upon obtaining a license; the statutes have limited the authority to inspect to “authorized federal and state officers;” and the statutes have “limited the scope of those inspections to required records” and certain enforcement provisions only. *Id.* Therefore, the court held that warrantless inspection of the defendant’s prescription records was reasonable. *Id.*

The next question the court addressed was whether or not the exception to the warrant requirement extended to criminal investigations or if it was limited to administrative inspections. *Id.* The court held that it was not so limited. *Id.* (*Cf.*, *Commonwealth v. Frodyma*, 436 N.E.2d 925 (Mass. 1982) and *State v. Penn*, 576 N.E.2d 790 (Ohio 1991) which limit the warrant exception to administrative inspections only.) The court, again relying on the Supreme Court’s decision in *Burger*, stated that “administrative regulations ‘may have the same ultimate purpose as penal laws’, and that the inspecting officers in [*Burger*] acted within their regulatory authority when they examined vehicle parts to ascertain if the vehicles had been stolen.” *Id.* at 1113 (quoting *Burger* at 713). The court, therefore, held that the officer’s powers of enforcement “allowed him to look at prescription records in furtherance of his investigation.” *Id.*

Similarly, the Supreme Court of Connecticut reversed a trial court’s determination that prescription records received by law enforcement without a warrant were obtained in violation of the defendant’s constitutional rights. *State v. Russo*, 790 A.2d 1132, 1136 (Conn. 2002).<sup>1</sup> This case involves a defendant who was charged with forging prescriptions for controlled substances. *Id.* Law enforcement officers obtained certain prescription records of the defendant from various pharmacies, and the defendant sought to have those records suppressed based on his expectation of privacy in his prescription records and that obtaining those records without a warrant violated his Fourth Amendment rights. *Id.*

Like Vermont, Connecticut has a statute which provides that “[p]rescriptions ... shall be open for inspection only to federal, state, county and municipal officers, whose duty it is to enforce the laws of this state or of the United States relating to controlled substances ...” *Id.* at 1141 (quoting General Statutes § 21a-265). The court “[found] it apparent that the legislature intended for both criminal law enforcement officials and regulatory personnel to have access to prescription records in connection with the lawful discharge of their duties,” and specifically noted “the absence in § 21a-265 of any limitation on access to [prescription] records by law enforcement personnel who have obtained a search warrant. We conclude that the legislature did not intend such a limitation because if it had, it easily could have expressed that intent.” *Id.* at 1142. Further, the court explained that § 20-626(b)(6) “authorizes pharmacists to provide

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<sup>1</sup> This case includes a well-reasoned discussion of *Whalen v. Roe* and is worth reading in its entirety for its conclusions on the right to privacy in prescription records and *Whalen*’s application to criminal investigations. © 2011 Research is current as of October 28, 2011. In order to ensure that the information contained herein is as current as possible, research is conducted using both nationwide legal database software and individual state legislative websites. Please contact Heather Gray at (703) 836-6100, ext. 114 or hgray@namsdl.org with any additional updates or information that may be relevant to this document. This document is intended for educational purposes only and does not constitute legal advice or opinion. Headquarters Office: THE NATIONAL ALLIANCE FOR MODEL STATE DRUG LAWS, 215 Lincoln Ave. Suite 201, Santa Fe, NM 87501.

prescription records to ‘any individual, the state or federal government or any agency thereof or court pursuant to a subpoena ...’” *Id.* at 1144 (quoting General Statutes § 20-626). “It would have been illogical,” the court states, “for the legislature to require state and federal law enforcement officials to obtain a search warrant for prescription records under § 21a-265 ... and, at the same time, broadly authorize the dissemination of those records under § 20-626(b)(6) to any person ... pursuant to a subpoena.” *Id.* (emphasis in original).

The *Russo* court distinguished this case from *Burger* in that the rights at issue in *Burger* were the rights of the proprietor to be free of unwarranted searches and seizures, not the rights of the vehicle owners or, as in this case, patients in their prescription records. *Id.* at 1146. This distinction led to the second question the *Russo* court then addressed – whether the statute allowing law enforcement access to prescription records upon consent of the pharmacist in charge of those records “gives rise to an unconstitutional invasion of the defendant’s privacy rights by having authorized pharmacists to release” those records. *Id.*

The court held that a patient does have a reasonable expectation of privacy in his or her prescription records and, further, the expectation “that his or her prescription records or information contained therein will not be disseminated publicly.” *Id.* at 1148. However, the court stated that “the reasonableness of a person’s expectation that his or her personal or intimate medical information will not be disclosed depends upon the circumstances underlying the particular disclosure.” *Id.* The court found that “this case is controlled by” *Whalen* and, specifically, that the facts of *Whalen* were indistinguishable from the facts in this case. *Id.* at 1149-1150.

Our statutory scheme, like the New York statutory scheme considered in *Whalen*, safeguards the privacy interests of persons who obtain prescriptions for controlled substances by restricting access to those records to a limited class of persons; including public officials responsible for the enforcement of the federal and state drug laws. Both states’ regimes prohibit the dissemination of such information to the general public.

*Id.* at 1150-1151 (citations omitted). The court further found that “the expectation of privacy that the public has in [prescription records] in contrast to other types of information that are not subject to such intensive review and regulation, necessarily is reduced drastically.” *Id.* at 1151-1152. The court affirmatively stated that,

[A] person does not have an *objectively reasonable* expectation that records of his or her prescriptions for controlled substances will not be disclosed to law enforcement personnel, subject to safeguards against further dissemination of those records, upon an appropriate request for those records by such personnel.

*Id.* at 1152 (emphasis in original).

Additionally, the court squarely rejected the defendant's argument that there is a distinction between access to prescription records by regulatory personnel and access by law enforcement. *Id.* at 1152-1153. In so doing, the court stated:

[T]he United States Supreme Court expressly acknowledged that the prescription information submitted to the state database by prescribing physicians was subject to review by state officials *authorized to investigate violations of the laws governing the dispensing of prescription medication*, but nevertheless concluded that the statutory scheme did not contravene the patients' privacy rights. In so holding, the court drew no distinction between the patients' rights vis-à-vis the investigators, on the one hand, and the patients' rights vis-à-vis the regulatory personnel of the New York department of health, on the other hand. Moreover, the court in *Whalen* noted that the central reporting system at issue in that case was established to prevent *criminal misconduct by doctors, pharmacists and patients*.

*Id.* at 1153 (emphasis in original). The court further stated that "although an individual legitimately may expect that his records of prescriptions for controlled substances will not be disclosed to the *general public* ... that same individual cannot reasonably expect that certain government officials responsible for safeguarding public health and safety *will* be permitted to review those records while other government officials with the same responsibility *will not*." *Id.* at 1154 (emphasis in original). In conclusion, the court held that "[i]n light of the state's strong interest in regulating and policing the distribution of potentially harmful drugs ... and in light of the restrictions that the statutory scheme places upon the disclosure of prescription information and records, the conclusion is inescapable that the defendant's privacy rights were not violated" when his prescription records were obtained without a warrant by law enforcement officers involved in a criminal investigation. *Id.* at 1155.

The Court of Appeals of Washington also held that the State Pharmacy Board was not required to have a warrant to search a person's prescription records as "pharmacy records are open to inspection by the Board under state statutes, and those statutes do not violate federal or state constitutional privacy protections." *Murphy v. State*, 62 P.3d 533, 535 (Wash.App. 2003).

Patrick Murphy was the Sheriff of Snohomish County, Washington. *Id.* In 1995, the Board of Pharmacy began an investigation into Murphy when his pharmacist contacted a narcotics officer to ask "what she should do about questionable prescriptions written for someone in law enforcement" after discovering that Murphy had filled several prescriptions for Percocet in a short period of time. *Id.* Law enforcement contacted the Board of Pharmacy, and a Board investigator was assigned to compile Murphy's prescription data. *Id.* The investigator "visited 39 Snohomish county pharmacies and reviewed their prescription records" without a warrant. *Id.* at 535-536. Washington law requires that pharmacies keep records of all

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prescriptions and “requires pharmacists to make those records available for inspection by the Board or other law enforcement.” *Id.* at 536 (citations omitted). Eventually, Murphy was arrested and criminal charges were filed which were subsequently dismissed when the trial court “ruled that the Board violated Murphy’s right to privacy by examining his prescription records without a warrant.” *Id.* Murphy filed a civil suit for negligence by the Board in disclosing his prescription records to a prosecuting attorney for the State. *Id.* at 535. The trial court in the civil suit found that a warrant was required to search prescription records, and the Court of Appeals reversed that finding. *Id.*

In making its decision, the court first looked at whether the Washington statute “regulating pharmacies give[s] the Board and other law enforcement agencies the authority” to inspect prescription records and, if so, whether “that grant of authority runs afoul of the right to privacy guaranteed by the federal and state constitutions.” *Id.* at 537. The statute in question specifically states that “[t]he record of prescriptions shall be open for inspection by the board of pharmacy or any officer of the law.” *Id.* (citing RCW 18.64.245) (emphasis in original).

[B]y indicating that the records shall be “open for inspection,” the legislature clearly contemplated unrestricted access by the appropriate law enforcement personnel. Further, the Pharmacy statute specifically states that prescription records are “open for inspection” by officers who are “authorized to enforce” the provisions of chapter 69.41 RCW. That chapter does not just regulate pharmacists and doctors, but also makes it a crime for patients to possess certain drugs without a prescription or obtain prescriptions by deceit. Thus, the legislature clearly intended that pharmacy records be available for the enforcement of all prescription drug laws – not just those that regulate pharmacists and doctors, but also those that criminalize certain behavior by patients. Because the purpose of the record-keeping requirement is to regulate behavior by those dispensing and using prescription drugs, we interpret the plain language of the pharmacy statute to allow warrantless access for that purpose.

*Id.* at 538 (citations omitted).

The court next addressed the question of whether a warrantless search of prescription records violated constitutional privacy protections. *Id.* The court determined that patients “have a limited expectation of privacy in the information compiled by pharmacists regarding their prescriptions;” however, since “patients know or should know that their purchase of such drugs will be subject to government regulation and scrutiny” the statute allowing warrantless inspection of such records “does not violate constitutional privacy protections.” *Id.* Further, the court stressed that “[p]harmacies and drug stores selling narcotics have been required to retain records of sales and make them available to law enforcement since as early as 1891” and, “[g]iven this long history of government scrutiny” patients “should reasonably expect that their

prescription records will be available to appropriate government agents, subject to safeguards against unauthorized further disclosure.” *Id.* at 541.

The state of Florida first addressed the question of whether a warrant is required to search and/or seize prescription records from a pharmacy in the case of *Gettel v. State*, 449 So.2d 413 (Fl.App. 2 Dist., 1984). In that case, the defendant pharmacist appealed his conviction for filling forged prescriptions based on ineffective assistance of counsel for his defense counsel’s failure to file a motion to suppress the prescriptions seized from his pharmacy without a warrant. *Gettel* at 413-414. The Second District Court of Appeal held that the defendant was not entitled to relief as, even if his counsel had filed a motion to suppress, it would not have been granted. *Id.* at 414. The court based its ruling on Florida Statutes § 893.07 which “requires every person who dispenses controlled substances to maintain certain records of each substance sold and to make those records” available to law enforcement for the purpose of inspection and copying for a period of at least two years. *Id.*

Recently, there have been multiple cases out of the First and Second District Courts of Appeals for Florida addressing this issue. In *State v. Carter*, the First District Court of Appeal determined that §893.07 “does not require pharmacies to notify the patient or to withhold [prescription records] until a warrant is presented” and, therefore, reversed the trial court’s grant of defendant’s motion to suppress those records finding that the release of such records did not violate the defendant’s constitutional rights. *State v. Carter*, 23 So.3d 798, 799-800 (Fla.App. 1 Dist., 2009). It further held that, “[t]he enactment of section 893.07 was an extension of the warrantless search and seizure power by the Legislature ‘as part of a major legislative revision of the Florida drug abuse laws’.” *Id.* at 800 (quoting *Gettel* at 414).

The defendant also raised the issue of whether the federal Health Insurance Portability and Accountability Act (HIPAA) provided a basis for suppression of the records. *Id.* at 800. The court found that it did not, stating,

HIPAA addresses privacy in “protected health information” by regulating the release of such information by specified “covered entities:” health plans, health care clearinghouses, and certain health care providers. “Covered entities” do not include law enforcement officers or prosecutors, and the conduct of these officials is not governed by HIPAA.

*Id.* (citations omitted). The court further went on to say that there was no violation of HIPAA as, “[a]mong the permitted disclosures are ‘as otherwise required by law’ *or* ‘[i]n compliance with ... an authorized investigative demand’.” *Id.* at 801 (citations omitted) (emphasis in original). The court explained that §893.07 “requires pharmacies to produce, for inspection and copying by law enforcement officers, records of controlled substances sold and dispensed. Thus, a pharmacy’s provision of records to investigating police officers in compliance with section 893.07, Florida Statutes, also comports with HIPAA.” *Id.*

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The Second District Court of Appeal of Florida also addressed the constitutionality of obtaining a patient's prescription records from a pharmacy without a warrant in the case of *State v. Tamulonis*. The defendant, Lori Tamulonis, was charged with obtaining or attempting to obtain a controlled substance by fraud. *State v. Tamulonis*, 39 So.3d 524, 525 (Fla.App. 2 Dist., 2010). The defendant filed a motion to suppress, which was granted, on the basis that the law enforcement officers should have obtained a subpoena or search warrant prior to being given her prescription records. *Id.* The court of appeals reversed the trial court, adopting the holding in *Carter*, and specifically finding that §893.07 of the Florida Statutes "is narrowly tailored." *Id.* at 528.

First, the statute only applies to controlled substance records. Second, the records do not convey information about a patient's medical condition. Finally, such data is not available to the general public, but only to "law enforcement officers whose duty it is to enforce the laws of this state relating to controlled substances."

*Id.*

In the time since the *Carter* and *Tamulonis* cases were decided, the District Court of Appeal of Florida for the Second District has decided at least six other cases on this issue: *State v. Yutzy*, 43 So.3d 910 (Fla.App. 2 Dist., 2010) (trial court's grant of suppression motion reversed); *State v. Shukitis*, 60 So.3d 406 (Fla.App. 2 Dist., 2010) (same); *State v. Herc*, 67 So.3d 266 (Fla.App. 2 Dist., 2011) (same, remanded on other grounds); *Hendley v. State*, 58 So.3d 296 (Fla.App. 2 Dist., 2011) (court affirmed trial court's denial of motion to suppress prescription records obtained without a warrant, subpoena or notice to patient); *State v. Albritton*, 58 So.3d 894 (Fla.App. 2 Dist., 2011) (trial court's grant of suppression motion reversed); *Lamb v. State*, 55 So.3d 751 (Fla.App. 2 Dist., 2011) (court affirmed trial court's denial of motion to suppress prescription records obtained from pharmacies, reversed and remanded on other grounds).

Following this flurry of cases, the Florida legislature addressed the issue of whether a warrant is required for an inspection of pharmacy records in the 2011 legislative session by amending § 893.07 which now explicitly states that, "[l]aw enforcement officers are not required to obtain a subpoena, court order, or search warrant in order to obtain access to or copies of such records." Fla. Stat. Ann. § 893.07.

The Criminal Court of the City of New York, Kings County, in a case that predates *Burger*, denied a defendant pharmacy's motion to suppress records seized during an administrative audit and criminal investigation. *People v. Curco Drugs, Inc.*, 350 N.Y.2d 74, 76-77 (N.Y. Crim. Ct., 1973). The defendant moved to suppress on the basis that the statute allowing administrative inspection of the defendant's premises without a warrant was "unconstitutional in that it violates defendant's Fourth Amendment right to privacy." *Id.* at 78. The defendant further argued that "the inspections ... are arbitrary, the procedures are not

specifically delineated, and the statute is too overbroad and general in giving the state the authority at any time and without reason to inspect the defendant's records." *Id.*

The court disagreed, stating initially that "[t]he importance of the defendant's interest in obtaining the protection of the Fourth Amendment must be balanced against the public interest of the Health Department in making an inspection without a warrant." *Id.* at 83. In balancing those interests, the court stated,

[H]ere the officers knew about the violations and the obtaining of a warrant would not have seriously undermined the act's purpose of deterring violations. Clearly, it would have been only a minimal interference with their duties to obtain a warrant. On the other hand, I find that the defendant's interest in asserting the Fourth Amendment right is similarly weak. The defendant clearly knew his books which, by statute he is required to maintain, would be subject to inspection by the Health Department at any time. On balancing these interests, I find, despite the minimal inconvenience involved, it would be a meaningless formality to require the Health Department inspectors to obtain a warrant to inspect records which, by statute, they have a legal right to search anyhow.

*Id.* at 84.

In a case decided in the year following *Curco Drugs*, the Second Circuit U.S. Court of Appeals reversed a lower court's finding that two New York statutes authorizing non-forcible searches of orders, prescriptions, or records which related to certain controlled substances were not "sufficiently limited to justify that failure to obtain a warrant." *Terraciano v. Montanye*, 493 F.2d 682, 684 (2d Cir. 1974). The statutes at issue, §§3350 and 3390 of the New York Public Health Law, granted access to prescription records to peace officers and officers, agents, inspectors and representatives of the department of health. *Id.* at 683. This case arose from the inspection by an investigator with the State Narcotic Control Bureau of the defendant-pharmacist's records of "narcotics, accepted narcotic preparations and depressant and stimulant drugs." *Id.* Defendant ultimately plead guilty but reserved the right to appeal based on the trial court's denial of his motion to suppress the prescription records. *Id.* The District Court for the Western District of New York granted the defendant's petition for habeas corpus based on the above stated grounds, and the Second Circuit reversed. *Id.*

The Second Circuit determined that, even though the statutes did not specifically "limit entries for inspection to business hours," the statutes were "not so seriously deficient" in their limitations on time, place and scope "as to render [the search] unconstitutional," finding that the statutes "were limited to orders, prescriptions or records relating to narcotic, depressant and stimulant drugs, which other New York statutes required to be kept on the premises" and that it

was the “policy of the Health Department to perform inspections only during business hours’.” *Id.* at 685 (quoting *Curco Drugs* at 84).

Division 2 of the Court of Appeals of Arizona reached the same conclusion in the case of *Mendez v. Arizona State Board of Pharmacy*, 628 P.2d 972 (Ariz. Ct. App. 1981). This case involved a search of a pharmacist’s records without a warrant. *Id.* at 973. The court held that, “where a statutory regulatory scheme specifically authorizes warrantless searches, and such regulatory inspections further an urgent governmental interest, the inspection may proceed without a warrant” and without any violation of defendant’s Fourth Amendment rights. *Id.* at 974-975.

In *Stone v. City of Stow*, the Supreme Court of Ohio addressed the question of whether statutes allowing the authorities to obtain prescription records without a warrant violate the United States and Ohio constitutions. *Stone v. Stow*, 593 N.E.2d 294, 297 (Ohio 1992). The statutes in question permitted the inspection of prescriptions, orders and records “only to federal, state, county, and municipal officers, and employees of the state board of pharmacy whose duty it is to enforce the laws of this state or of the United States relating to controlled substances.” *Id.* at 297, n.1. The plaintiffs in the case, doctors, patients, and a pharmacist, sued to enjoin enforcement of the statutes. *Id.* at 295.

The court first addressed the issue of the plaintiff/appellants’ right to privacy and whether the statutes violated any provision of the United States or Ohio constitutions. *Id.* at 297. Relying primarily on the Supreme Court’s decision in *Whalen*, the Ohio Supreme Court found that there was “no significant threat . . . to appellants’ right of privacy.” *Id.* at 299. The appellants argued that the Ohio statutes were distinguishable from the New York statute in several respects. *Id.* at 298. First, the appellants argued that the “Ohio provisions impermissibly go beyond the New York scheme” by allowing police officers to have access to the records where the New York statute only allowed access by employees of the health department. *Id.* at 298-299. The court found that “the fact of police initiation, alone” did not require “a finding that appellants’ privacy rights have been violated.” *Id.* at 299. The court stressed that

[i]n *Whalen*, the United States Supreme Court made clear that whatever privacy rights were implicated in that case related to the disclosure of the information to the *general public*. In the case at bar, as in *Whalen*, disclosure of the information to the public is legally prohibited.

*Id.* (emphasis in original).

As to the appellants’ second argument, that the safeguards included in the Ohio statutes were not as protective as those in *Whalen*, the court stated, “all that the record reveals is that unauthorized disclosure may occur” and that such a threat “was also present in *Whalen*, but was not viewed as significant enough to cause the New York statute to be declared unconstitutional.”

*Id.* Therefore, the court determined that there was no “unreasonable invasion of privacy rights” in this case. *Id.*

The appellants’ final argument with regard to invasion of privacy centered on a person’s right to autonomy in making personal decisions. *Id.* Appellants claimed that the “involvement of police officers in the collecting of the information” acted as a deterrent to “the patients’ right to choose the most effective medical treatment available.” *Id.* The court disagreed, specifically finding that the statutes in question were sufficiently limited in scope so as to adequately safeguard a patient’s privacy. *Id.*

Appellants next challenged the statutory scheme under the Fourth Amendment protections against unreasonable searches and seizures. *Id.* The court affirmatively stated that, “the Fourth Amendment protects only against searches which are *unreasonable*.” *Id.* at 300 (emphasis in original).

For that reason, no warrant is required to conduct a search if the person being searched has no reasonable expectation of privacy in the object of the search. An administrative search may be conducted without a warrant if the statute authorizing the search does not interfere with a reasonable expectation of privacy protected by the Fourth Amendment.

*Id.*

Addressing this question first in relation to the pharmacist appellant, the court held that a pharmacist, as someone in a pervasively regulated business, “has a reduced expectation of privacy in the prescription records he or she keeps.” *Id.* Further, the court found that the “statutory and administrative scheme providing for warrantless searches of prescription records satisfies the standards as set forth” in *Burger*. *Id.* Specifically, the court found that,

It is clear that the state has a substantial interest in regulating prescription drugs; that the regulatory scheme created by the statutory and administrative provisions at issue serves that interest; and that the inspection scheme provides an adequate substitute for a warrant, because these provisions are “sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.” Finally, the time, place, and scope elements of the scheme are sufficiently limited so that the warrantless search procedure is reasonable. The files must be made available for inspection at reasonable hours only. Access is limited to officials who are “engaged in a specific investigation involving a designated person or drug.” Only certain Schedule II and Schedule IV drugs alleged to have a high potential for abuse are the objects of these searches.

*Id.* at 300-301 (citations omitted). The court further held that the mere fact of the involvement of police officers in administrative searches “does not mean that the ‘administrative search’ exception is inapplicable.” *Id.* at 301.

This is not a situation in which the police officers are attempting to use warrantless administrative searches to uncover evidence of general criminality. Rather, in this situation, an administrative scheme set up to track particular often-abused Schedule II and IV drugs is also being used to detect the abuse of those very drugs. No *general* criminality is at issue in this case.

*Id.* (citations omitted) (emphasis in original).

As to the Fourth Amendment claims of the physicians and patients in this case, the court determined that they “have no reasonable expectation of privacy in prescription records” as any privacy interest they may have “is limited to the right not to have the information disclosed to the general public. Disclosures to police officers, or to officials of the State Pharmacy Board, do not violate that right.” *Id.*

In an unreported case, the Ohio Court of Appeals, Second District, took a different view of a police officer’s right to inspect pharmacy records without a warrant, holding that in order to survive a constitutional challenge on Fourth Amendment grounds, a warrantless search of pharmacy records must have “‘an independent administrative justification’.” *State v. Jarvis*, No. 16388, 1998 WL 57342, at \*4 (Ohio App. 2 Dist., Feb. 13, 1998) (citations omitted). The defendant in this case, pharmacist Richard L. Jarvis, appealed his conviction for trafficking in controlled substances and the denial of his motion to suppress records seized from his pharmacy as the result of a warrantless search by police officers. *Id.* at \*1. The facts of this case involve a compliance agent for the Ohio State Board of Pharmacy and a detective with the Dayton Police Department who jointly conducted a compliance inspection of the defendant’s pharmacy, during which the inspectors became suspicious of the defendant and which culminated in a criminal investigation of the defendant. *Id.* at \*2. The defendant appealed the denial of his motion to suppress based on violations of his Fourth Amendment rights. *Id.* The court upheld the warrantless search finding that there was an independent administrative justification for the search and, further, that the inspectors were “not required to ignore evidence of other criminality” discovered during such an administrative search. *Id.* at \*5.

The Ninth District Court of Appeals of Ohio reversed a trial court’s grant of a defendant’s motion to suppress prescription records received by detectives of the Akron Police Department. *State v. Otterman*, No. 21005, 2002 WL 31387056 \*1 (Ohio App. 9 Dist., Oct. 23, 2002). The defendant’s prescription records were received from several pharmacies without a warrant or subpoena in connection with an investigation into his abuse of Percocet. *Id.* Relying on the decisions in *Whalen* and *Stone*, the court reversed the trial court’s decision to suppress those records. *Id.* at \*2.

The Seventh District Court of Appeals of Ohio also addressed the question of whether a search of prescription records violated a defendant's constitutional right to privacy in the case of *State v. Desper*, 783 N.E.2d 939 (Ohio App. 7 Dist., 2002). An administrative inspector with the State Board of Pharmacy was conducting an investigation into the possible misuse of oxycodone in Jefferson County, Ohio. *Id.* at 942. During the course of his investigation, he requested and received directly from pharmacies without a warrant the prescription records of 1,000 to 1,500 patients with prescriptions for oxycodone. *Id.* The investigator narrowed his focus and eventually came to determine that the defendant, David Desper, was abusing oxycodone and criminal charges followed. *Id.* The trial court suppressed the pharmacy records, and the Court of Appeals reversed. *Id.* at 943.

The court pointed out that the Ohio Supreme Court had previously upheld the constitutionality of the statutes allowing access to prescription records without a warrant. *Id.* at 944 (citing *Stone*). However, the court determined that it must "decide whether discovery of the penal violations was incidental to, rather than the purpose of, the administrative search." *Id.* The court turned to the *Burger* criteria in order to make its decision, namely 1) that the search must be made in a pervasively regulated business; 2) that there must be a substantial government interest; 3) that the inspection be necessary to further the regulatory scheme; and 4) that "the inspection scheme adequately substitutes for a warrant requirement." *Id.* at 945-946. As to the first prong, the court stated that both the United States and Ohio Supreme Courts have previously ruled that pharmacies are pervasively regulated businesses. *Id.* at 945 (citing *Whalen* and *Stone*). As to the second and third criteria, the court relied on the *Stone* decision, stating that the government does have a "substantial governmental interest in regulating prescription drugs," and, further, that the "inspection furthered the regulatory scheme." *Id.* at 946 (citing *Stone*). With regard to the fourth criterion, the limitations as to time, place and scope, the court stated that this case involved a specific investigation into a particular drug, the inspections could only take place during business hours, and access was limited. *Id.* (citing *Stone*).

However, the court found that "at the point that the State Board of Pharmacy narrowed the search to ten patients ... the search stopped being an administrative search and a criminal investigation commenced." *Id.* The court held that "any evidence sought after that point would require a search warrant." *Id.*

In *State v. Penn*, a case decided by the Ohio Supreme Court prior to its decision in *Stone* and not overruled by *Stone*, the court held that "the board cannot act as a surrogate for the police to obviate the constitutional duty of obtaining a search warrant." *State v. Penn*, 576 N.E.2d 790, 794 (Ohio 1991). This case involved a joint inspection by police and an investigator from the State Board of Pharmacy. *Id.* at 791. Based on its determination, under the facts of the case, that the search was initiated to search for general criminal activity, the court upheld the lower court's grant of defendant's motion to suppress. *Id.* at 794. It stands to reason given the cases cited above that had law enforcement been searching for specific evidence regarding a specific drug rather than a general search of the entire pharmacy premises, the decision in this case would have come out differently.

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Few jurisdictions have held that a search warrant is required for search and seizure of prescription records. In 2009, the Supreme Court of Louisiana reversed a lower court's denial of defendant's motion to suppress prescription records obtained by law enforcement pursuant to a judicial subpoena. *State v. Skinner*, 10 So.3d 1212 (La. 2009).<sup>2</sup> The defendant was charged with obtaining prescriptions for controlled substances through fraud or doctor shopping. *Id.* at 1212-1213. The District Attorney filed a motion and received an order for production of the defendant's prescription records which were subsequently turned over by the pharmacies where she had her prescriptions filled. *Id.* at 1213. The court specifically found that the holding in *Whalen* did not diminish "a person's Fourth Amendment privacy interest to permit warrantless governmental intrusion during the course of a criminal investigation." *Id.* at 1218.

[W]e find that the right to privacy in one's medical and prescription records is an expectation of privacy that society is prepared to recognize as reasonable. Therefore, absent the narrowly drawn exceptions permitting warrantless searches, we hold a warrant is required to conduct an investigatory search of medical and/or prescription records. We are not prepared to extend *Whalen*, which balanced the individual's privacy interest against the state's reasonable exercise of its regulatory power, to find Louisiana allows warrantless searches and seizures of its citizens' medical and pharmacy records for criminal investigative purposes.

*Id.* See also, *State v. Doyle*, No. 18-65985, 1990 WL 265227 (Conn.Super., Dec. 5, 1990), finding that warrant is required to search records for criminal activity; and, *Commonwealth v. Slaton*, 556 A.2d 1343 (Pa.Super. 1989), finding warrant required as legislature required consent or warrant to search pharmacy records.

In summary, the majority of jurisdictions have held that patients have an expectation of privacy in their prescription records but that, due to the pharmaceutical industry being pervasively regulated, such an expectation is consequently reduced. What this means in the context of prescription monitoring programs is that, as the United States Supreme Court said in *Whalen*, the mere fact that such information is in readily available form does not "constitute an invasion of any right or liberty protected by the Fourteenth Amendment." *Whalen* at 604.

Every state across the country requires that prescription records be kept by pharmacists, and most allow access to those records to certain officials without a warrant. (See Appendix B.) In most cases, states have imposed stricter conditions on access to prescription records by law enforcement via the state PMP than are imposed by state pharmacy statutes. For example, Florida allows law enforcement to go from pharmacy to pharmacy and request and receive copies of patient prescriptions without a warrant, but does not allow law enforcement to have

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<sup>2</sup> The court found that the failure of the District Attorney in this case to follow the correct procedure in obtaining the subpoena was not dispositive. *Skinner* at 1214, n.3.

direct access to the prescription monitoring database or to receive information from the database without approval of the program manager (see cases cited above and Florida Statutes § 893.07 and § 893.055).

The jurisdictions have resolved the question of whether *Whalen* and *Burger* authorize an administrative exception to the warrant requirement for criminal investigatory purposes in different ways, so there is no clear answer on that point. However, most cases turn on the language of the statute authorizing the search. If the statute allows law enforcement access to prescription records without a warrant (*see supra*, *State v. Russo* and *State v. Tamulonis* specifically), courts have upheld the constitutionality of the statute based on a reduced expectation of privacy in those records.

## APPENDIX A TABLE OF CASES

*Whalen v. Roe*, 429 U.S. 589 (1977)  
*New York v. Burger*, 482 U.S. 691 (1987)  
*Thacker v. Commonwealth*, 80 S.W.3d 451 (Ky.App. 2002)  
*Williams v. Commonwealth*, 213 S.W.3d 682 (Ky. 2007)  
*State v. Underwood*, No. K2/98-0485A, 1999 WL 47159 (R.I.Super., Jan. 20, 1999)  
*Douglas v. Dobbs*, 419 F.3d 1097 (10<sup>th</sup> Cir. 2005)  
*State v. Welch*, 624 A.2d 1105 (Vt. 1993)  
*Commonwealth v. Frodyma*, 436 N.E.2d 925 (Mass. 1982)  
*State v. Penn*, 576 N.E.2d 790 (Ohio 1991)  
*State v. Russo*, 790 A.2d 1132 (Conn. 2002)  
*Murphy v. State*, 62 P.3d 533 (Wash.App. 2003)  
*Gettel v. State*, 449 So.2d 413 (Fl.App. 2 Dist., 1984)  
*State v. Carter*, 23 So.3d 798 (Fla.App. 1 Dist., 2009)  
*State v. Tamulonis*, 39 So.3d 524 (Fla.App. 2 Dist., 2010)  
*State v. Yutzy*, 43 So.3d 910 (Fla.App. 2 Dist., 2010)  
*State v. Shukitis*, 60 So.3d 406 (Fla.App. 2 Dist., 2010)  
*State v. Herc*, 67 So.3d 266 (Fla.App. 2 Dist., 2011)  
*Hendley v. State*, 58 So.3d 296 (Fla.App. 2 Dist., 2011)  
*State v. Albritton*, 58 So.3d 894 (Fla.App. 2 Dist., 2011)  
*Lamb v. State*, 55 So.3d 751 (Fla.App. 2 Dist., 2011)  
*People v. Curco Drugs, Inc.*, 350 N.Y.S.2d 74 (N.Y. Crim. Ct., 1973)  
*Terraciano v. Montanye*, 493 F.2d 682 (2d Cir. 1974)  
*Mendez v. Arizona State Board of Pharmacy*, 628 P.2d 972 (Ariz. Ct. App. 1981)  
*Stone v. City of Stow*, 593 N.E.2d 294 (Ohio 1992)  
*State v. Jarvis*, No. 16388, 1998 WL 57342 (Ohio App. 2 Dist., Feb. 13, 1998)  
*State v. Otterman*, No. 21005, 2002 WL 31387056 (Ohio App. 9 Dist., Oct. 23, 2002)  
*State v. Desper*, 783 N.E.2d 939 (Ohio App. 7 Dist. 2002)  
*State v. Skinner*, 10 So.3d 1212 (La. 2009)  
*State v. Doyle*, No. 18-65985, 1990 WL 265227 (Conn.Super., Dec. 5, 1990)  
*Commonwealth v. Slaton*, 556 A.2d 1343 (Pa.Super. 1989)

## APPENDIX B

### STATUTORY ACCESS TO PRESCRIPTION/PHARMACY RECORDS

	Pharmacy Records Access	PMP Access by Law Enforcement
Alabama	ADC 680-X-2-.30: records open for inspection to State Board of Pharmacy and its drug inspectors; federal, state, county and municipal officers whose duty it is to enforce controlled substances laws	§20-2-91: Local, state and federal law enforcement authorities “whose duty it is to enforce the laws of this state or of the United States relating to controlled substances”; requires affidavit stating probable cause for the requested information and must be pursuant to an active investigation
Alaska	§17.30.020: peace officer may enter premises at reasonable times and in a reasonable manner to inspect records	§17.30.200: Local, state and federal law enforcement authorities; requires search warrant, subpoena, or order establishing probable cause
Arizona	§32-1964: records open for inspection at all times by the board, its agents and officers of the law in the performance of their duties	§36-2604: open to local, state and federal law enforcement; requires written statement that the information is necessary for an open investigation or complaint; the Board or its designee may provide the information to law enforcement or a criminal justice agency if it has reason to believe illegal conduct has occurred without a request from law enforcement to provide such information; pursuant to a lawful order of a court of competent jurisdiction
Arkansas	§17-95-102: records open for inspection by proper enforcement authority	§20-7-606: open to certified law enforcement officer; requires search warrant based on probable cause; local, state and federal law enforcement and prosecutorial officials engaged in the administration, investigation, or enforcement of the laws governing controlled substances
California	Bus. & Prof. §4081: records open for inspection at all times during business hours by authorized officers of the law	Health & Safety §11165: open to appropriate local, state, and federal persons or agencies for criminal purposes as determined by the Department of Justice
Colorado	§12-22-319: board shall make inspections	§12-22-705: open to law enforcement

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	and cooperate with and exchange information with enforcement agencies regarding controlled substances	officials; must be specific to an individual and part of a bona fide investigation; requires official court order or subpoena
Connecticut	§21a-261: records open to Commissioner of Consumer Protection and his agents and shall have access to and be allowed to copy any records upon request	ADC 21a-254-6; §21a-265; §21a-274; §20-578; and §20-626: open to investigative or law enforcement agencies for “criminal purposes”; municipal, county, state or federal officers whose duty is to enforce the laws regarding controlled substances; Commissioners of Public Health and Consumer Protection may exchange investigative information with state’s attorneys and other agencies that enforce the law regarding controlled substances; must be relative to a violation of the law regarding controlled substances; pharmacy may provide pharmacy records to any government agency with authority to review the information or to any individual, the state or federal government, or a court pursuant to a subpoena
Delaware	24 § 2534: agent of the board may inspect and copy records during business hours	16 § 4798: the Office of Controlled Substances shall notify and provide prescription information to law enforcement if there is reasonable cause to believe illegal conduct has occurred without a request from law enforcement to provide such information; local, state and federal law enforcement and prosecutorial officials engaged in the “administration, investigation, or enforcement of the laws governing controlled substances”; requires bona fide specific drug related investigation, report of suspected criminal activity involving controlled substances by an identified suspect, and must be relevant and material to the investigation, limited in scope, and include identifying information only if non-identifying information could not be used
Florida	§893.07: records open for inspection and copying by law enforcement officers	§893.055: open to law enforcement agencies; requires active investigation of

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	whose duty it is to enforce the laws of Florida regarding controlled substances without a subpoena, court order, or search warrant	potential criminal activity, fraud or theft of controlled substances; no direct access to the database; the program manager may provide the information to law enforcement if it has reason to believe illegal conduct has occurred without a request from law enforcement to provide such information
Georgia	<p>§16-13-42: unlawful for pharmacy to refuse entry for inspection</p> <p>§16-13-46: the State Board of Pharmacy, the director of the Georgia Drugs and Narcotics Agency or drug agents may inspect records pursuant to an administrative inspection without a warrant only if a) they are granted consent by the owner or operator of the premises; b) the situation presents imminent danger to health or safety; c) if the inspection involves a conveyance and it is impractical to obtain a warrant; d) any other exceptional or emergency circumstances where time or opportunity for a warrant is lacking; or e) in all other situations where a warrant is not constitutionally required</p>	§16-13-60: to local, state, or federal law enforcement or prosecutorial officials pursuant to the issuance of a search warrant
Hawaii	<p>§461-13: records shall be open for inspection at all times by the board of pharmacy and other law enforcement officers</p> <p>§329-52: administrators and administrative agents may inspect at reasonable times and within reasonable limits and in a reasonable manner upon presenting proper credentials; may copy any and all records without a warrant</p>	§329-104: open to county, state, or federal law enforcement officers or investigative agents, U.S. Attorneys, county prosecuting attorneys, or the attorney general; requires that the Administrator must have “reasonable grounds” to believe that the disclosure would be in furtherance of an ongoing criminal investigation or prosecution
Idaho	§54-1727: board and its representatives may inspect records; court may order release or disclosure of records; doesn’t limit the authority of the board to inspect even though records may contain confidential information	§37-2726: open to local, state and federal law enforcement; requires that it be a specified duty of their employment to enforce the law regulating controlled substances; prosecuting attorneys, deputy prosecutors, and special prosecutors of a county or city, and special assistant attorneys general; requires that they be engaged in

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		enforcing the law regulating controlled substances; pursuant to a court order; the board shall identify possible violations of controlled substances laws and report the information to the appropriate law enforcement agency for further investigation or enforcement purposes
Illinois	720 § 570/502: records open for inspection with administrative warrant or administrative subpoena	720 § 570/318: Law enforcement officer who is authorized to receive the information and approved by the Department to receive the information; requires that the officer be engaged in the investigation or prosecution of a criminal violation involving a controlled substance; prosecuting attorney, Attorney General, deputy Attorney General, or investigators working for the Attorney General; requires an investigation, adjudication or prosecution of a controlled substance law violation; release of confidential information requires a written request from all requestors stating the following: 1) believes a violation of state or federal law involving controlled substances has occurred; and 2) the information is reasonably related to the investigation, adjudication or prosecution of the violation; for receipt of prescription information only: to prosecuting attorneys, Attorney General, deputy Attorney General, or investigators from the Attorney General's office or to Illinois law enforcement officers; must be authorized and approved to receive the information; information must be reviewed by Department employee to ensure further investigation is warranted before it is released
Indiana	§25-26-13-25: records open for inspection to any member of the board or its duly authorized agent or representative	§35-48-7-11-1: Local, state or federal law enforcement officer; requires that the information concern an individual or proceeding involving the diversion or

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		<p>misuse of controlled substances; requires that the information assist in an investigation or proceeding; prosecuting attorney, attorney general, deputy attorney general, or investigator with the attorney general's office; must be engaged in an investigation, adjudication or prosecution of a controlled substance law violation; Law enforcement officer who is authorized and approved to receive information regarding practitioners; requires that the information be reviewed by a member of the board who is licensed in the same profession or the board's designee; the member or designee must certify that further investigation is warranted; the Board may provide the information to law enforcement if it has reason to believe illegal conduct has occurred without a request from law enforcement to provide such information</p>
Iowa	<p>§80.33: upon request of a designated peace officer, pharmacy shall permit officer to inspect and copy records at reasonable times</p>	<p>§124.553: Pursuant to an order, subpoena or other legal means of compulsion based upon a determination of probable cause; must be in the course of a specific investigation of a specific individual, not limited to law enforcement; Local, state and federal law enforcement or prosecutorial officials; requires order, subpoena or other legal means of compulsion based upon a determination of probable cause; must be in the course of a specific investigation of a specific individual; requires written request signed by the requesting officer or that officer's superior; must be accompanied by an order, subpoena or warrant requiring a determination of probable cause</p>
Kansas	<p>§65-1642: records open for inspection to members of the board, secretary of health and environment, duly authorized agents or employees of the board or secretary,</p>	<p>§65-1685: Local, state and federal law enforcement and prosecutorial officials who are engaged in the administration, investigation or enforcement of</p>

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	and other proper authorities	controlled substances laws; persons authorized by grand jury subpoena, inquisition subpoena or court order in a criminal action
Kentucky	<p>§217.155: cabinet or its authorized agent shall have free access at all reasonable times to inspect and examine papers</p> <p>§217.215: state board of pharmacy, its agents or inspectors have the same powers of inspection and enforcement as cabinet</p>	<p>§218A.202: Kentucky or federal peace officer whose duty it is to enforce the law relating to drugs and who is engaged in a bona fide specific investigation involving a specific person; Grand jury subpoena; Judge, probation or parole officer who is administering a diversion or probation of a criminal defendant who violated a criminal substance law or who is a documented substance abuser who is eligible to participate in the drug diversion or probation program</p>
Louisiana	§37:1229: records open for inspection by the board or its authorized agents or employees during hours of operation	<p>§40:1007: Local, state or federal law enforcement or prosecutorial officials who are engaged in the administration, investigation or enforcement of controlled substances laws; requires one of the following: court order, warrant, subpoena or summons; grand jury subpoena; administrative request, including administrative subpoena or summons, a civil or authorized investigative demand or similar legal process; Must be relevant and material to a law enforcement inquiry; Request must be limited in scope and specific; Limited information or information that does not identify a specific patient could not reasonably be used</p>
Maine	32 § 13723: records open for inspection to board, board's representatives, federal and state law enforcement whose duty it is to enforce the laws regarding controlled substances or to enforce the conditions of probation or other court ordered supervision, and other law enforcement officers authorized by the board, the Attorney General, or district attorney for the purpose of inspecting, investigating, and gathering evidence in violation of laws	With a court order

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	or rules; must have receipt of a complaint before beginning investigatory search	
Maryland	Health Occ. §12-413: records open for inspection to the Secretary, the Board or their agents during business hours, and may, with law enforcement, inspect at any time with a warrant	§21-2A-06: to a state, local or federal law enforcement agency on issuance of a subpoena for the purpose of furthering a bona fide investigation
Massachusetts	94C § 9: records open for inspection by the commissioner during reasonable business hours	94C § 24A and 105 C.M.R. 700.012 : Local, state and federal law enforcement or prosecutorial officials working with the executive office of public safety who are engaged in the administration, investigation or enforcement of prescription drug laws and in connection with a bona fide specific controlled substance or additional drug-related investigation; Personnel of the United States attorney, office of the attorney general, or a district attorney in connection with a bona fide specific controlled substance or additional drug-related investigation; duly authorized representative of a law enforcement agency acting in accordance with official duties in conducting a bona fide criminal investigation or prosecution; requests for records shall go through the Attorney General's Office, or the Massachusetts State Police Diversion Investigative Unit, or the United States DEA for notification and approval prior to being submitted to the Department; the department shall provide prescription information to law enforcement if it has reason to believe a violation of law has occurred without a request from law enforcement to provide such information
Michigan	§333.7507: Department of Commerce may inspect with administrative warrant or subpoena	§333.7333a: Municipal, state or federal employee or agent whose duty is to enforce drug laws; Municipal, state or federal employee or agent who is the holder of a search warrant or subpoena; must be for bona fide drug-related criminal investigatory or evidentiary

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		purposes
Minnesota	§151.06: Board of Pharmacy can enter and inspect and make copies of records	§152.126: Local, state and federal law enforcement with search warrant
Mississippi	§73-21-107: the board or its representatives may inspect records after stating their purpose and presenting credentials	§§73-21-127 and 41-29-187: Local, state and federal law enforcement engaged in the administration, investigation or enforcement of drug laws; Judicial authorities under grand jury subpoena or court order; Attorneys for the Mississippi Bureau of Narcotics may subpoena records from any person, firm or corporation relevant to any felony involving controlled substances laws; Subpoena will only be issued upon a showing of probable cause that the records are relevant to the investigation; the Board shall provide the information to law enforcement if it reasonably suspects illegal conduct has occurred without a request from law enforcement to provide such information
Missouri	§338.150: any person authorized by the Board of Pharmacy can enter and inspect all open premises §195.375: prescription records are open for inspection only to federal, state, county and municipal officers whose duty it is to enforce the law regarding controlled substances	No PMP currently
Montana	§37-7-201: the board can request the department inspect records to determine if laws are being violated and shall cooperate with law enforcement regarding the enforcement of laws; misdemeanor to refuse entry for inspection	§37-7-1506: a peace officer employed by a federal, tribal, state, or local law enforcement agency pursuant to an investigative subpoena
Nebraska	§28-414: records shall be open for inspection to the department and law enforcement without a warrant §28-428: can obtain administrative warrant where consent to entry is refused or where there is reason to believe consent would be refused	Regulations not yet in place for the Nebraska PMP
Nevada	§453.261: can inspect with administrative	§§453.1545 and 453.151: Pursuant to a

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	warrant	court order; the Board and Division may exchange information with governmental officials concerning the use and abuse of controlled substances; the Board and Division will compile and make drug information available for law enforcement purposes; data will not contain identifying information; the Board or Division shall report relevant information to law enforcement if it reasonably suspects illegal conduct has occurred without a request from law enforcement to provide such information
New Hampshire	§318-B:12: records open for inspection by law enforcement, board representatives and investigators, all peace officers, the Attorney General, and all county attorneys whose duty it is to enforce the law regarding controlled substances	No PMP currently
New Jersey	§45:14-48: board may inspect at reasonable hours to determine if laws are being violated and shall cooperate with law enforcement	§45:1-46: Municipal, state or federal law enforcement pursuant to a court order certifying that the officer is engaged in a bona fide specific investigation of a designated practitioner or patient; grand jury subpoena; the division shall provide the information to law enforcement if it determines that illegal conduct may have occurred without a request from law enforcement to provide such information
New Mexico	§30-31-32: may inspect with administrative warrant	ADC 16.19.29: Local, state and federal law enforcement or prosecutorial officials engaged in an ongoing investigation of an individual regarding drugs; metropolitan, district, state or federal courts under grand jury subpoena or criminal court order; the board inspectors shall provide the information to law enforcement if it has reasonable cause to believe a violation of law has occurred without a request from law enforcement to provide such information; Board must have received a complaint before inspecting the prescription records
New York	Pub. Health Law §3370: records shall be	Public Health Law §3371 and 10 ADC

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	available for inspection and copying during business hours by any officer or employee of the department, or any officer or employee of the state charged with regulating or licensing pharmacies	80.107: court order or subpoena in a criminal investigation or proceeding
North Carolina	§90-85.36: records available to member or designated employee of the board and any person authorized by a subpoena	§90-113.74: Special agents of the North Carolina Bureau of Investigation assigned to the Diversion & Environmental Crimes Unit whose primary duties involve the investigation of diversion and illegal use of prescription drugs engaged in a bona fide specific investigation related to drugs; must notify the Office of the Attorney General of each request to inspect the records; to a court pursuant to a lawful court order in a criminal action; if the Department finds a pattern of behavior regarding prescribing controlled substances, it shall report that information to the Attorney General for a determination of whether it should be reported to the SBI for investigation into violations of state or federal law
North Dakota	§19-03.1-33: may inspect only with administrative warrant or subpoena	§19-03.5-03: Local, state and federal law enforcement or prosecutorial officials engaged in the enforcement of controlled substance laws and for the purpose of investigation or prosecution of drug-related activity or probation compliance of an individual; judicial authorities under grand jury subpoena, court order or equivalent judicial process for criminal investigation of controlled substance law violations
Ohio	§4729.37: prescription records to be kept for three years subject to inspection by proper officers of the law §3719.27: must allow inspection upon written request of officer/employee of state board of pharmacy at all reasonable hours §3719.13: prescription records open for inspection only to federal, state, county and municipal officers and employees of	§§4729.79, 4729.80 and ADC 4729-37-08: Local, state or federal officer whose duties including enforcing drug laws pursuant to active investigation related to specific person; must complete request form including active case number and approval by agency or department supervisor; Grand jury subpoena; the Board shall review the information and, if a violation of law may have occurred,

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	the State Board of Pharmacy whose duty it is to enforce the law regarding controlled substances	notify the appropriate law enforcement agency for an investigation
Oklahoma	63 § 2-502: records open for inspection to specifically designated or assigned state, city and municipal officers whose duty it is to enforce the law regarding controlled substances	63 § 2-309D: Investigative agents of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control, United States DEA Diversion Group Supervisor; Grand jury; at the discretion of the Director of the OK Bureau of Narcotics and Dangerous Drugs Control, the information may be disclosed to municipal, county, state or federal agents, district attorneys and the Attorney General in furtherance of criminal investigations or prosecutions
Oregon	§689.155: state board of pharmacy can enter and examine records at reasonable hours, can regularly inspect a pharmacy, and assist law enforcement in enforcing laws	§431.966: Local, state or federal law enforcement pursuant to a court order based on probable cause; must be engaged in an authorized drug-related investigation of a specific person
Pennsylvania	35 § 780-112: records open for inspection by property authorities 35 § 780-124: officer or employee designated by the secretary shall state his purpose, present credentials and give written notice of inspection authority which may be an administrative warrant where necessary	18 § 9102 and 35 § 780-137: Any court or governmental agency with its principal function being the administration of criminal justice; Secretary may exchange information with government officials concerning the use and abuse of controlled substances
Rhode Island	§21-28-3.17: all records open for inspection by director of health and authorized agents	ADC 31-2-1:3.0: Law enforcement or investigative agencies for criminal purposes
South Carolina	§44-53-490: Department of Health and Environmental Control shall inspect premises no less than once every three years ADC 61-4, Pt. 3: records open for inspection and copying by authorized employees of Bureau of Drug Control	§44-53-1650: Drug control may release the information to law enforcement or other agencies if there is reasonable cause to believe there has been a violation of law; local, state or federal law enforcement or prosecutorial officials engaged in the administration, investigation or enforcement of drug laws and involved in a bona fide specific drug-related investigation of a designated person; grand jury subpoena
South Dakota	§36-11-64: board of pharmacy may	§§34-20E-7 and 34-20E-12: Local, state

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	inspect during business hours §36-4-22.1: board of examiners may inspect any place where medicine is practiced, including any medical or drug records, can copy those records, during business hours; misdemeanor to refuse inspection	and federal law enforcement or prosecutorial officials engaged in the enforcement of controlled substance laws for the purpose of investigation or prosecution of drug-related activity or probation compliance of an individual; judicial authority pursuant to a grand jury subpoena, court order or equivalent judicial process for investigation of criminal violation of controlled substances laws; the board may notify law enforcement if it has reason to believe illegal conduct has occurred without a request from law enforcement to provide such information
Tennessee	§53-14-111: the board, its officers, agents and employees shall periodically inspect premises, including records; an applicant for a license is deemed to have consented to such inspections §53-11-406: records open for inspection only to federal, state, county and municipal officials whose duty it is to enforce the law regarding controlled substances	§53-10-306 and ADC 1140-11-.02: - district attorney general pursuant to an order of a circuit or criminal court for purposes of criminal investigation or pending prosecution; application for order must include an affidavit stating the specific information sought relative to a specific individual and the nature of the offense; affidavit can be by the district attorney general or other law enforcement officer, but only the district attorney general may request the order; order must be issued on probable cause that a violation of criminal law has occurred and that the information will be of material assistance
Texas	Occ. §556.051: board or its representative may inspect Occ. §556.053: person authorized by the board may inspect and copy records Occ. §556.101: warrant not required to inspect the books or records with an administrative subpoena Health & Safety §481.181: director may enter at reasonable times to inspect, copy and verify correctness of records	Health & Safety §481.076, ADC 37 § 13.84 and 37 § 13.97: Law enforcement or prosecutorial official engaged in the administration, investigation or enforcement of controlled substances laws; must periodically submit a “proper need and return of information” report to the director showing that the need for the information is ongoing; must also document the use of the information and provide the status of the investigation or prosecution
Utah	§58-17b-103: division may inspect records,	§58-37f-301 and ADC R156-37: Division

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	including prescription records, during regular business hours	personnel assigned to conduct investigations related to controlled substances laws; local, state and federal law enforcement, state and local prosecutors engaged in enforcing laws regulating controlled substances and related to a current investigation involving controlled substances; database manager may release the information at his discretion when the information may reasonably constitute a basis for investigation relative to a violation of state or federal law
Vermont	18 § 4211: records open for inspection to federal or state officials whose duty it is to enforce the law regarding controlled substances 18 § 4218: the Dept. of Public Safety, its agents, inspectors, representatives and authorized peace officers, and state's attorneys shall have, at all times, access to all orders, prescriptions, etc.	18 § 4282, 18 § 4284 and ADC 12-5-21:3 and 4: the Commissioner of Health may release information to a trained law enforcement officer at his discretion if he reasonably suspects there is fraudulent or illegal activity by a provider or dispenser
Virginia	§54.1-3308: board members and their agents have power to inspect pharmacies during business hours §54.1-3405: agents designated to conduct drug diversion investigations shall have access to inspect and copy records at reasonable times	§54.1-2523 and 18 VAC 76-20-50: agent of the Department of State Police designated to conduct drug diversion investigations relevant to a specific investigation of a specific recipient, dispenser or prescriber and pursuant to written request which includes a case number, time period, and specific person being investigated; grand jury or special grand jury; agent of the United States DEA with authority to conduct drug diversion investigations relevant to a specific investigation of a specific dispenser or prescriber
Washington	§18.64.245: records open for inspection to board of pharmacy or any officer of the law	§70.225.040: Local, state and federal law enforcement or prosecutorial officials pursuant to a bona fide specific investigation involving a designated person; grand jury subpoena or court order
West Virginia	§60A-5-502: inspection may require administrative warrant or subpoena	§60A-9-5 and ADC 15-8-7: West Virginia State Police who are specifically

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		authorized to receive the information; authorized agents of local law enforcement who are members of a drug task force; United States DEA; court order; for all requestors: must be related to a specific person who is under investigation
Wisconsin	ADC Phar. 8.02: records open for inspection to authorized persons §961.52: may require administrative warrant	§146.82: Court order; county department, sheriff or police department or district attorney; limited to investigation of threatened or suspected child abuse or neglect where suspect is identified by name; health care provider can release the information to the agency without a request for the information; Department of Corrections, Department of Justice, or district attorney for use in the prosecution of any proceeding or evaluation if the records involve or relate to an individual who is the subject of the proceeding or evaluation
Wyoming	§33-24-136: records open for inspection by agents of the board §35-7-1046: may require administrative warrant or subpoena	§35-7-1060: the Board shall report any information to law enforcement that it reasonably suspects may relate to fraudulent or illegal activity