STATE OF TENNESSEE
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Opinion No. 11-24

Controlled Substance Database

QUESTIONS

1. In light of Tenn. Code Ann. §§ 53-10-306 and -308, would the Controlled Substance Database Advisory Committee be authorized to provide a member of the General Assembly performing his or her legislative duties with a listing, by profession, of the top prescribers of controlled substances?

2. If the answer to Question 1 is "No," how might a member of the General Assembly obtain a listing, by profession, of the top prescribers of controlled substances?

3. If access to such information is not otherwise available to a legislator or legislative committee, may an appropriate legislative committee acting within its oversight capacity compel the production of such information by exercising its subpoena power under Tenn. Code Ann. § 3-3-108 and the Tennessee Constitution?

4. Would a legislator's use of such information, in the performance of his or her legislative duties, be restricted in any way?

OPINIONS

1. Assuming that the requested information can be extracted from the database, we think that the Committee could appropriately include the list of top prescribers in its reports to the Senate General Welfare, Health and Human Resources Committee and House Health and Human Resources Committee pursuant to Tenn. Code Ann. § 53-10-309.

2-3. In view of the answer to Question 1, these questions are pretermitted.

4. Because the listed information would identify the top prescribers only by their professions and would be contained in publicly-available report(s), concerns about possible breach of the Act's confidentiality provisions should not be an issue.

ANALYSIS

Enacted in 2002 and most recently amended in 2009, the Controlled Substance

Monitoring Act of 2002 is codified at Tenn. Code Ann. §§ 53-10-301 through 53-10-310. It establishes a controlled substance database that is attached administratively and for staffing purposes to the Board of Pharmacy, and a Controlled Substance Database Advisory Committee ("Committee") that is made up of several administrators of the health related boards and members of the health care professions having authority to prescribe controlled substances. Tenn. Code Ann. §§ 53-10-303(a), 53-10-304(a). The Board of Pharmacy and the Committee establish, administer, maintain and direct the functioning of the database. Tenn. Code Ann. § 53-10-304(b).

The purpose of the controlled substance database is to assist in research, statistical analysis and the education of health care practitioners concerning patients who, by virtue of their conduct in acquiring controlled substances, may require counseling or intervention for substance abuse, by collecting and maintaining data regarding all Schedules II, III and IV controlled substances dispensed in Tennessee and certain identified Schedule V controlled substances that demonstrate a potential for abuse. Tenn. Code Ann. § 53-10-304(c). Each dispenser of those controlled substances is required to submit specified information regarding those dispensings to the Committee on a monthly basis. The information required to be submitted includes: prescriber identifier; patient identifier; dispenser identifier; dispensing date; controlled substance dispensed identifier; quantity of controlled substance dispensed; strength of controlled substance dispensed; and estimated days supply. Tenn. Code Ann. § 53-10-305(a). The database must be maintained in such a manner as to facilitate use thereof for identification of prescribing practices and patterns of prescribing and dispensing controlled substances; and for identification of individuals or others who receive prescriptions for controlled substances and subsequently obtain dispensed controlled substances from a pharmacy in quantities or with a frequency inconsistent with generally recognized standards of dosage for that controlled substance, or by means of forged or otherwise false or altered prescriptions. Tenn. Code Ann. § 53-10-305(c).

The Act makes the information contained in the database broadly confidential. Tenn. Code Ann. § 53-10-306(a) provides, in pertinent part, that:

> (a) *Information sent to, contained in, and reported from the database in any format is confidential and not subject to title 10, chapter 7, regarding public records, and not subject to subpoena from any court* and shall be made available only as provided for in § 53-10-308 and to the following persons, and in accordance with the limitations stated and rules promulgated pursuant to this part, except that the information shall be subject to production pursuant to an order of a circuit or criminal court in a criminal investigation or pending prosecution subject to subsection (b):
>
> (1) Personnel of the committee specifically assigned to conduct analysis or research;
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> (2) Authorized committee, board, or department of health personnel

> engaged in analysis of controlled substances prescription information as a part of the assigned duties and responsibilities of their employment;
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> (3) A licensed health care practitioner having authority to prescribe or dispense controlled substances, to the extent the information relates specifically to a current patient of the practitioner, to whom the practitioner has prescribed or dispensed or is prescribing or dispensing or considering prescribing or dispensing any controlled substance;
>
> (4) A licensed pharmacist having authority to dispense controlled substances to the extent the information relates specifically to a current patient to whom that pharmacist has dispensed, is dispensing or considering dispensing any controlled substance; or
>
> (5) Personnel of the following entities actively engaged in analysis of controlled substances prescription information as a part of their assigned duties and responsibilities related directly to TennCare:
>
> (A) The office of inspector general;
> (B) The Medicaid fraud control unit;
> (C) The Tennessee bureau of investigation; and
> (D) The bureau of TennCare's chief medical officer, associate chief medical directors, director of quality oversight, and associate director of pharmacy.

(Emphasis added). Additionally, upon compliance with the limitations and restrictions set out in Tenn. Code Ann. § 53-10-308(b) and (c), the Committee may release confidential information from the database regarding practitioners, patients, or both, to a manager of any investigations or prosecution unit of a board, committee, or other governing body that licenses practitioners and is engaged in any investigation, an adjudication, or a prosecution of a violation under any state or federal law that involves a controlled substance. Tenn. Code Ann. § 53-10-308(a). The Committee is required to maintain identification of each person who requests or receives information from the database; the information provided to each person; and the date and time the information is requested or provided. Tenn. Code Ann. § 53-10-305(d)(2).

The Act cautions that any person who knowingly uses, releases, publishes, or otherwise makes available to any other person or entity any information submitted to, contained in, or obtained from the database for any purpose other than those specified in the Act is guilty of a Class A misdemeanor. Tenn. Code Ann. § 53-10-306(f).

You inquire whether the Committee is authorized under the Act to provide a legislator with a list of the top prescribers of controlled substances, by profession. We understand that the desired list would identify those individual prescribers only by profession, not by name.

Analysis of this inquiry requires that we construe the requirements and limitations of the Act. "The most basic principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995). In construing statutory language, one must "assume that the legislature used each word in the statute purposely, and that the use of these words conveys some intent and has a meaning and purpose." *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998). Thus, "[w]here the words of the statute are clear and plain and fully express the legislature's intent, there is no room to resort to auxiliary rules of construction, and we need only enforce that statute as written." *Id.* (citing *Roberson v. University of Tennessee*, 912 S.W.2d 746, 747 (Tenn. Ct. App. 1995), and *In re Conservatorship of Clayton*, 914 S.W.2d 84, 90 (Tenn. Ct. App. 1995)).

We believe that the Act's strongly-expressed confidentiality provisions and comprehensive detailing of the persons and entities to whom the Committee may provide confidential information from the database evidence a legislative intention to exclude those who are not included. The only provisions that allow legislative access to the information are found in Tenn. Code Ann. § 53-10-309. These provide for an annual report by the Committee to the Senate General Welfare, Health and Human Resources Committee and to the House Health and Human Resources Committee.[1] Assuming that the requested list of top prescribers could be extracted from the database, we think that the Committee could appropriately include the list in its report to these legislative committees. Such information would seem to fit within Tenn. Code Ann. § 53-10-309's directive that reports prepared by the Committee include information about the outcome of the program with respect to its effect on distribution and abuse of controlled substances, including recommendations for improving control and prevention of diversion of controlled substances in Tennessee.

Because the listed information would identify the top prescribers only by their professions and would be contained in publicly-available report(s)[2], concerns about possible breach of the Act's confidentiality provisions should not be an issue.

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[1] Tenn. Code Ann. § 53-10-309 provides that:

> The committee shall report annually on the outcome of the program with respect to its effect on distribution and abuse of controlled substances, including recommendations for improving control and prevention of diversion of controlled substances in this state. The committee shall also file an annual report with the general welfare, health and human resources committee of the senate and the health and human resources committee of the house of representatives starting on or by February 1, 2008, and each year thereafter to include a monthly analysis about tracking the individuals or entities that access the database and the security measures taken to ensure that only authorized persons or entities access the database.

[2] We note, for example, that the 2010 Controlled Substance Monitoring Database Report to the General Assembly is posted on the Tennessee Department of Health's website.
See http://health.state.tn.us/boards/Controlledsubstance/applications.shtml (last visited on March 4, 2011).

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