



STATE OF ARKANSAS  
ATTORNEY GENERAL  
LESLIE RUTLEDGE

Opinion No. 2016-082

November 2, 2016

Nathaniel W. Smith M.D., M.P.H.  
Director and State Health Officer  
Arkansas Department of Health  
4815 West Markham  
Little Rock, AR 72205-3867

Dear Dr. Smith:

You have requested my opinion on the following questions concerning the Prescription Drug Monitoring Program (PDMP) Act, which is codified at Ark. Code Ann. §§ 20-7-601 through -614 (Repl. 2014):

1. Can an insurance company have access to information that would verify if providers are in their networks and registered users of the PDMP?
2. Can the Department [of Health] provide prescriber information to public or private entities for statistical, research, or educational purposes?

**RESPONSE**

These questions cannot be answered with a simple “yes” or “no.” The answers must instead be conditional. The answer to your first question depends upon whether the information that would provide verification regarding dispensers<sup>1</sup> is

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<sup>1</sup> The word “providers” in your question presumably refers to “dispensers” who are required under the act to submit to the Arkansas Department of Health certain information regarding each controlled substance dispensed. See Ark. Code Ann. §§ 20-7-603(3) (defining “dispenser”) and 20-7-604(b), (c).

part of the controlled substances database created under the PDMP Act. The answer to your second question depends upon whether the prescriber information could be used to identify individual patients or persons who received prescriptions from dispensers.

## DISCUSSION

### ***Question 1: Can an insurance company have access to information that would verify if providers are in their networks and registered users of the PDMP?***

The controlled substances database created under the PDMP Act, and all information and records maintained as part of the database, are “privileged and confidential” and exempt from disclosure under the Arkansas Freedom of Information Act:

(a) Prescription information submitted to the Department of Health under this subchapter is *confidential and not subject to the Freedom of Information Act* of 1967, § 25-19-101 et seq.

(b)(1) The controlled substances database created in this subchapter and all information contained in the controlled substances database and any records maintained by the Department of Health or by an entity contracting with the Department of Health that is submitted to, maintained, or stored as a part of the controlled substances database is *privileged and confidential, is not a public record*, and is not subject to subpoena or discovery in a civil proceeding.<sup>2</sup>

This statute clearly calls for the nondisclosure of information contained in the controlled substances database and records maintained by the Department of Health “that [are] submitted to, maintained, or stored” as part of the database. In stating that the database “is not a public record,” the statute expresses the legislature’s intention that the database be closed to the public. Indeed, the statute further specifies who may have access to information in the database.<sup>3</sup>

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<sup>2</sup> Ark. Code Ann. § 20-7-606 (emphasis added).

<sup>3</sup> *Id.* at § 20-7-606(b)(2). The list includes law enforcement, regulatory bodies, the Department of Human Services, and the Arkansas State Police under certain specified circumstances. *Id.* See also Ark. Code Ann. § 20-7-607(b) (further addressing the release of PDMP information).

The Arkansas Freedom of Information Act (FOIA) incorporates this nondisclosure provision by stating that all public records are open to public inspection “[e]xcept as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise.”<sup>4</sup> Consequently, the custodian of the database does not have discretion to disclose information and records that are part of the database.<sup>5</sup>

It is therefore my opinion that the answer to the above question depends upon whether the information that would provide verification with regard to dispensers is part of the controlled substances database created under the PDMP Act. If the information is part of the database, then the answer to your question is “no.”

***Question 2: Can the Department [of Health] provide prescriber information to public or private entities for statistical, research, or educational purposes?***

The answer to this question depends upon whether the prescriber information “could be used to identify individual patients or persons who received prescriptions from dispensers”:

The department may provide information to public or private entities for statistical, research, or educational purposes *after encrypting or removing the patient’s name, street name and number, patient identification number, month and day of birth, and prescriber information that could be used to identify individual patients or persons who received prescriptions from dispensers, or both.*<sup>6</sup>

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<sup>4</sup> Ark. Code Ann. § 25-19-105(a)(1) (Supp. 2015).

<sup>5</sup> Cf. John J. Watkins & Richard J. Peltz, THE ARKANSAS FREEDOM OF INFORMATION ACT 112 (Arkansas Law Press, 5th ed., 2009) (noting that the custodian does not have discretion to disclose records that are exempt from disclosure under the FOIA, unless the exemption confers discretion).

<sup>6</sup> Ark. Code Ann. § 20-7-607(d) (emphasis added).

The answer to your question is therefore “no” if the prescriber information could be used to identify patients or those who received prescriptions.<sup>7</sup>

Sincerely,



LESLIE RUTLEDGE  
Attorney General

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<sup>7</sup> The particular concern with protecting patient information is also reflected in the requirement that the Department “establish and enforce policies and procedures to ensure that the privacy and confidentiality of patients are maintained....” Ark. Code Ann. § 20-7-606(d).