

work in the following manner. On or before an established date each month, wholesalers would be required to file with the Division of Beverage their front line prices on every brand and size of brand being sold by them to retailers. Copies of those prices would also be sent to all other wholesalers in the state. Within a set period of time subsequent to said filing a wholesaler would be permitted to amend his file schedule in order to meet lower competing prices filed by other wholesalers. Such amended schedules would be required to remain in effect during the entire posting period, presumably about thirty days. Prices could not be raised or lowered during this period.

Administrative agencies which are created by statute have only such powers as the statute confers upon them. *Edgerton v. International Company, Inc.*, 89 So.2d 488 (Fla. 1956); *Keating v. State*, 167 So.2d 476 (1 D.C.A. Fla., 1964). There are no provisions in Ch. 561, F. S., or any other Florida statute empowering the Division of Beverage or the Department of Business Regulation to fix prices on alcoholic beverages for thirty days or any other period of time. The only provision of Ch. 561 even related to the price of alcoholic beverages is the "Tied House Evil Law," §561.42(1), F. S., which provides:

. . . No licensed vendor shall accept, directly or indirectly, any gift or loan of money or property of any description or any rebates from any such licensed manufacturer or distributor . . .

In AGO 073-196 we held that the power of the department to enforce §561.42, F. S., did not authorize it to promulgate rules requiring that all discounts given on quantity purchases bear a reasonable relationship to the actual cost savings which accrued to a wholesaler. That holding was based upon the fact that §561.42 (6) excepted from its scope discounts in the usual course of business. The phrase "discounts in the usual course of business" is defined in §561.01(13), F. S. 1971:

. . . "discount in the usual course of business" shall mean a cash discount given simultaneously at the time of sale; provided, however, the same discounts shall be offered to all vendors buying similar quantities.

We pointed out in that opinion that §561.42 was, by virtue of the above definition, self-executing, and that no authority was given to the division or the department to set limitations in the enforcement of this section.

It appears equally clear to me that there is nothing in §561.42 or elsewhere in Ch. 561, F. S., that would authorize the department to adopt "price-posting" regulations which would include a freeze on prices.

073-419—November 14, 1973

TERMINATION OF PREGNANCIES

CONFIDENTIALITY OF RECORDS

To: *R. J. Fegers, Attorney, South Broward Hospital District, Hollywood*

Prepared by: *James M. Wallace, Assistant Attorney General*

QUESTION:

May records of pregnancy terminations maintained by a hospital district pursuant to §458.22(4), F. S., be revealed to the following persons or committees without violating the provisions of confidentiality found in §458.22(4)(b): The joint commission on accreditation of hospitals; insurance carriers which pay benefits for the abortion procedure involved; the surgical audit and tissue committees of the hospital; the medical records committee of the hospital; a special

committee which would be formed to review procedures for future policy on medical procedure for recommendations regarding the termination of pregnancies; or any person to whom the patient has duly granted a written consent or release?

SUMMARY:

In §458.22(4)(b), F. S., which provides that records pertaining to the termination of pregnancies maintained by an approved facility are to be privileged information and deemed to be confidential and shall not be revealed except upon the order of a court of competent jurisdiction in a civil or criminal proceeding—the word “revealed” should be construed in such a way as it is ordinarily and commonly understood. In such a construction, confidentiality of the medical records should not be deemed to have been violated where disclosure is to one who has participated in the preliminary preparation of the data contained therein or its maintenance or in other such essential and internal administrative bodies of the hospital, such as the surgical audit and tissue committees, the medical records committee, or a special committee to review procedures for future policy on medical procedure recommendations for pregnancy terminations.

These examples set out above serve to demonstrate that within the meaning of §458.22(4)(b), F. S., the hospital, in fact, has not revealed the patient's confidential records in the sense that the information has not passed from the hospital.

It is also noteworthy that under this section and under the statutory rule of *expressio unius est exclusio alterius*, the patient may not authorize the hospital to reveal such records; and the only circumstance upon which they may be revealed is “upon the order of a court of competent jurisdiction in a civil or criminal proceeding.”

It should be noted that under the provisions of §458.16, F. S., the patient may authorize the attending physician to disclose such information or records as he may have to a person authorized to receive the same by the patient or by the patient's guardian, curator, or personal representative, but only upon the written authorization of the patient.

Section 458.22(4), F. S., provides as follows:

(4) REPORTING PROCEDURE.—

(a) The director of any medical facility in which pregnancy is terminated pursuant to this section shall maintain a record of such procedures. Such record shall include the date the procedure was performed, the reason for same, and the period of gestation at the time the procedure was performed. A copy of such record shall be filed with the department of health and rehabilitative services, which shall be responsible for keeping such records in a central place from which statistical data and analysis can be made.

(b) Records maintained by an approved facility pursuant to this section shall be privileged information and deemed to be a confidential record and shall not be revealed except upon the order of a court of competent jurisdiction in a civil or criminal proceeding.

Section 458.22(6)(c), F. S., provides that:

(c) Any person who violates any provision of subsections (3) and (4) of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

However, Section 458.22(7), F. S., states that:

(7) The provisions of this section shall not apply to the performance of a procedure which terminates a pregnancy in order to deliver a live child.

The records of hospitals supported by public moneys are usually considered to be public records. Attorney General Opinion 072-59. However, §458.22(4)(b) and (6)(c), *supra*, demonstrates most vigorously that those records of such publicly supported hospitals relating to the termination of pregnancies, as therein defined, "shall not be *revealed* except upon the order of a court of competent jurisdiction in a civil or criminal proceeding." (Emphasis supplied.)

This phraseology employed by the legislature seems to be of particular importance, especially in having chosen the word "revealed" rather than such words or phrases as "furnished," "made available," or "open for inspection." The very essence of the word "reveal" imports that the thing involved has not previously been disclosed or known to the particular person in question. In this sense, the confidentiality of such medical records is not completely absolute, but has reference only to those persons who, by the nature of things, would not have had the detailed knowledge of those medical facts which the hospital has compiled.

This construction has, of course, a very special application to your question as it relates to the "revealing" of such records to the surgical audit and tissue committees of the hospital, the medical records committee of the hospital, and the patient, her representatives, or her agents.

Section 458.22(4)(a), *supra*, very clearly requires that the director of any medical facility in which pregnancies are terminated shall make and keep records thereof and that such records shall contain, at the minimum, the date the procedure was performed, the reason for the termination, and the period of gestation at the time the pregnancy was terminated. Further, the Department of Health and Rehabilitative Services is charged with the licensure and regulation of hospitals and has set forth in detail the contents required in all medical records pursuant to its rules and regulations as published in the Florida Administrative Code, to wit:

10D-28.11 Medical Records Department. The hospital shall have a medical records department with administrative responsibility for medical records. A current and complete medical record shall be maintained for every patient admitted for care in the hospital.

* * * * *

(3) Content—Medical records shall contain the original of the following information: identification data; chief complaint; present illness; past history; family history; physical examination; provisional diagnosis; clinical laboratory reports; x-ray reports; consultation reports; medical and surgical treatment notes and reports; tissue reports; physician and nurse progress notes; final diagnosis; discharge summary; and autopsy findings when performed.

The express provisions of §458.22(4)(a), *supra*, and this rule require that, as a matter of law, a hospital licensed by the Department of Health and Rehabilitative Services must maintain a medical records department or committee and that such a committee is charged with the administrative responsibility for record keeping. To do otherwise would be contrary to law and, therefore, the medical records committee of the hospital would not be among that group of persons to whom the information in such medical records would not have been previously disclosed.

Further, the requirements of Rule 10D-28.11(3), *supra*, inextricably contemplate that clinical laboratory reports, medical and surgical treatment notes and reports, and tissue reports, when applicable, will be contained in the medical records maintained in the medical records maintained by the committee. I cannot foresee how such reports and tissue analysis could be made by the surgical and

tissue committees of the hospital without reference to the other necessary data also contained and maintained in the medical records of the committee. Under such circumstances it would also appear that the surgical audit and tissue committees of the hospital would not fall among that group of persons to whom the revelation of such records could not be made. As your correspondence relates, the effective operation of the hospital for the care and treatment of its patients is heavily dependent upon internal administration and review by committees.

If the prohibition set forth in §458.22(4)(b), *supra*, were to apply to these types of committees upon which the hospital must rely, then in effect the prohibition must be read in such a way that the hospital may not "reveal" such medical records to itself. Obviously, such a construction would be neither feasible nor consistent with the purposes for which this law was designed.

With regard to those persons or commissions who are in fact strangers to the hospital and to its internal administration, such as agents or representatives of the patient, the joint commission on the accreditation of hospitals, or insurance carriers which pay benefits for the pregnancy termination procedure, the law is clear and explicit on its face that the *hospital* may not reveal such records nor make such a disclosure "except upon the order of a court of competent jurisdiction in a civil or criminal proceeding." Section 458.22(4)(b), F. S.

Here, I believe, the statutory maxim of *expressio unius est exclusio alterius* must be given application, in that this section provides for disclosure only under one circumstance, *i.e.*, upon the order of a court of competent jurisdiction in a civil or criminal proceeding and upon no other circumstance whatsoever.

With regard to that class of persons to whom *the hospital* may not furnish records of the termination of a pregnancy, it should be noted that the patient, upon her written authorization, may authorize her attending *physician* to furnish such information as she may deem necessary to those persons. Section 458.16, F. S., provides:

Any doctor or other practitioner of any of the healing sciences making a physical or mental examination of, or administering treatment to any person, shall upon request of such person, his guardian, curator or personal representative in the event of his death, furnish copies of all reports made of such examination or treatment. Such reports shall not be furnished to any person other than the patient, his guardian, curator, or personal representative, except upon the written authorization of the patient

073-420—November 15, 1973

RETIREMENT

TRANSFER FROM PARTICIPATION IN STATE RETIREMENT SYSTEM TO ANNUITY PROGRAM

To: Charles E. Miner, General Counsel, Department of Education, Tallahassee

Prepared by: James D. Whisenand, Assistant Attorney General

QUESTIONS:

1. Do existing Florida statutes authorize the Board of Regents or university administration to apply funds in the amount of a consenting employee's present contribution to the state retirement fund to an annuity program with a corresponding reduction in the employee's salary?

2. If question 1 is answered in the affirmative, does the respective university or the Board of Regents have the authority to contract with its employees to provide the described annuity program?