

IN THE CIRCUIT COURT, SEVENTH  
JUDICIAL CIRCUIT, IN AND FOR  
VOLUSIA COUNTY, FLORIDA

MICHAEL H. LAMBERT,  
  
PLAINTIFF,

CASE NO.: 13-31402 CI CI  
DIVISION: PARSONS

VS.

R. J. LARIZZA, AS STATE  
ATTORNEY FOR THE SEVENTH  
JUDICIAL CIRCUIT OF THE  
STATE OF FLORIDA,

DEFENDANT.

---

**AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND TO  
DECLARE STATE STATUTES UNCONSTITUTIONAL**

COMES NOW, the Plaintiff, MICHAEL H. LAMBERT, through his undersigned counsel, and respectfully requests this Honorable Court to grant injunctive relief enjoining R. J. Larizza, State Attorney of the Seventh Judicial Circuit, and any of his employees or agents from reviewing, revealing, copying, distributing, or discussing his private privileged prescription medication history and for this Court to order Defendant to notify three thousand plus citizens that their confidential prescription records were published by Mr. Larizza's office. Further, Plaintiff prays that this Court will declare portions of F.S. §893.055 and F. S. §893.0551 to be unconstitutional. As grounds therefore, the Petitioner alleges that:

**JURISDICTION**

Plaintiff, MICHAEL H. LAMBERT, sues Defendant R. J. LARIZZA, as State Attorney of the Seventh Judicial Circuit of the State of Florida and alleges:

1. Plaintiff is a resident of Volusia County, Florida.
2. The acts to which this Complaint is directed occurred in Volusia County, Florida.

3. The Defendant, R. J. Larizza, is the State Attorney of the Seventh Judicial Circuit of the State of Florida, he maintains offices in Volusia County, Florida, and the actions upon which this Complaint is based occurred in Volusia County, Florida and were carried out by agents and employees of Mr. Larizza's office.

4. Plaintiff and 3,300 other Florida citizens will continue to suffer irreparable harm if the relief sought through this Complaint is not granted so long as those records of their confidential, private prescription histories remain in the Office of the State Attorney and in the custody and control of various law enforcement officers from the "Narcotics Task Force" and DEA who are not entitled to those records and who apparently have no regard for the sensitivity of such private and confidential prescription records.

5. Plaintiff has no other adequate remedy at law.

6. The relief sought herein would provide protection from future and continuing irreparable harm which, without a Court Order would continue for so long as said records are improperly in the custody and control of the State Attorney's Office and various law enforcement agencies, none of whom are entitled to those private, confidential records.

7. This Complaint should result in the issuance of an Injunction to protect the Plaintiff and other Florida citizens who are similarly situated.

8. There is great public interest in protecting the privacy and confidentiality of all citizens' prescription history records from unlawful or unwarranted government intrusion, scrutiny, and publication.

9. This Court has original jurisdiction to determine whether or not Florida's prescription drug monitoring program as set forth in F.S. 893.055 and F.S. 893.0551 is an unconstitutional

infringement upon the fundamental rights of the Plaintiff and other Florida citizens as protected under Article I, Sections 9, 12, and 23 of the Florida Constitution.

10. Article I of the Constitution of the State of Florida is the Declaration of Rights for all Florida citizens. Section 12 protects Florida citizens from unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and against the unreasonable interception of private communications by any means, shall not be violated.\*\*\*

**Article I, Section 12, Searches and Seizures**

11. Florida's Declaration of Rights also protects Florida citizens from unwarranted Government intrusion into their private lives and guarantees citizens due process.

Every natural person has the right to be let alone and free from government intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law. **Article I, Section 23**  
**Right of Privacy**

\*\*\*

No person shall be deprived of life, liberty, or property without due process of law. \*\*\* **Article I, Section 9 Due Process**

12. Florida's prescription drug monitoring program (authorized by F.S. 893.055 and 893.0551) violates Article I Sections 9, 12, and 23 of the Florida Constitution. Those laws, as written, and as applied in this case expose Plaintiff and all Florida citizens to unreasonable searches and seizures of confidential, personal information as well as violations of their constitutionally guaranteed right to privacy and due process.

13. F.S. 893.055 prohibits law enforcement agencies from having direct access to information in the Prescription Drug Monitoring Program database unless authorized by the Program Manager, his employee, or the contract entity who has control of the data base.

Criteria for the release of that protected confidential information is also found in that subsection:

“Prior to release the request shall be verified as authentic and authorized with requesting organization by the program manager, the program manager’s program and support staff, or as determined in rules by the department as being authentic and as having been authorized by the requesting entity.” (F.S. 893.055(7)(c)).

14. The requirements for approval of a law enforcement agency’s request for the confidential drug histories and personal data of citizens are:

(7)(c)(3) A law enforcement agency during active investigations regarding potential criminal activity, fraud, or theft regarding prescribed controlled substances.

-or-

F. S. 893.055(7)(f) The program manager, upon determining a pattern consistent with the rules established under paragraph (2)(d) and having cause to believe a violation of s. 893.13(7)(a)8., (8)(a), or (8)(b) has occurred, may provide relevant information to the applicable law enforcement agency.

When such confidential information is disclosed to a law enforcement agency, that law enforcement agency may disclose the confidential information received from the Department to a criminal justice agency “as part of an active investigation that is specific to a violation of 893.13(7)(a)8., s. 893.13(8)(a), or s. 893.13(8)(b).” (See: F.S. 893.0551(4)).

15. Florida Statute 893.055(1)(h) describes “active investigation” as “an investigation that is being conducted with a reasonable, good faith belief that it could lead to the filing of administrative, civil, or criminal proceedings, or that is ongoing and continuing and for which there is a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.” That vague and imprecise prerequisite for the release of the confidential information is an open invitation for law enforcement to conduct fishing expeditions in violation of Article I, Sections 9, 12, and 23 of the Florida Constitution.

16. The requirement that the law enforcement request be verified as authentic and authorized with the requesting organization “or as determined in the rules by the department as being authentic and as having been authorized by the requesting entity” F.S. 893.055(7)(c) provides little, if any, protection for the privacy or due process rights of Florida citizens.

17. Florida Statutes 893.055(7)(c)(3) likewise is a vague, overly broad, general pronouncement which allows any law enforcement agency to have access to every citizen’s personal prescription histories.

18. The Florida Supreme Court has held that the right of privacy is a fundamental right which demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on the privacy. See Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2<sup>nd</sup> 544 (Fla. 1985) @ 547; B.B. v. State, 659 So. 2<sup>nd</sup> 256 (Fla. 1995) @ 259.

19. Florida’s right to privacy is broader than the Federal right to privacy. The drafter’s of Florida’s 23rd Amendment rejected the use of the words “unreasonable” or “unwarranted” before the phrase “governmental intrusion” in order to make the privacy right as strong as possible since the people of this state exercise their prerogative and enacted an Amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution. The privacy right protection under this State’s Constitution is much broader in scope than our Federal Constitution.

### **HISTORICAL FACTS**

20. In 2012, agents of a State’s “Narcotics Task Force,” and the U. S. Drug Enforcement Administration (DEA) in Lake Mary, Florida, allegedly began an investigation into crimes concerning medical prescriptions involving persons other than the Plaintiff. That investigation led to several named suspects, not the Plaintiff. During the course of the

investigation the “Narcotics Task Force,” and/or DEA obtained Plaintiff’s confidential prescription drug history and personal information from the Manager of the Department of Health Prescription Drug Monitoring Program along with the names, private personal information, and prescription histories of over 3,300 Florida citizens for whom certain medications were prescribed by certain healthcare providers for a twelve-month period.

21. Despite having identified certain known suspects in their investigation, the request by law enforcement appears to have been a general request to obtain the prescription drug histories of any citizen in a certain area for whom certain controlled medications were prescribed over a twelve-month period.

22. As a result, the Manager of the Prescription Drug Monitoring Program, the Department of Health, provided those law enforcement agents with the twelve-month prescription histories of the Plaintiff and more than 3,300 other innocent Florida citizens.

23. Neither the Plaintiff nor any of those 3,300 citizens were suspects, they were not under investigation, nor were they targets of an ongoing criminal or civil investigation.

24. The Plaintiff, Michael H. Lambert, did not authorize government scrutiny or the publication of his protected prescription drug history and he did not give a Health Insurance Portability and Accountability Act (HIPAA) form to release his private, confidential records.

25. After the law enforcement agencies concluded their investigation, six identified suspects were arrested and their cases were forwarded to the Office of R. J. Larizza, State Attorney for the Seventh Judicial Circuit for review and potential prosecution by that office..

26. The six cases were assigned to Assistant State Attorneys Heatha Trigones, Laura Coln, and eventually Emmanuela Charles. Each prosecutor received from the law enforcement agents an investigative packet, which included the partial prescription history of the Plaintiff and

over 3,300 Florida citizens covering a period of twelve months. Those confidential prescription records were not relevant to any criminal or civil investigation.

27. Each of the defendants in the six criminal cases, through their counsel sought to participate in discovery, the State Attorney's Office, through its Assistant State Attorneys copied and forwarded to each of the six defendants respective attorneys, copies of the prescription medications histories and personal information of those 3,300 Florida citizens, including the Petitioner.

28. The Prescription Drug Monitoring Program with the Department of Health exists under Florida Statute 893.055 and collects records of all medical prescriptions filled within the state which records include:

- (a) Patient's full name;
- (b) Patient's complete home address;
- (c) Patient's telephone number;
- (d) Patient's insurance plan number;
- (e) Government-issued identification number;
- (f) Provider number;
- (g) DEA number;
- (h) Other unique identifying information or number.

That personal information was part of the data collected and unlawfully published in this case.

### **LAW AND ARGUMENT**

29. Florida's prescription monitoring program requires all doctors and pharmacists to provide detailed personal and prescription information to the Department of Health who maintains a list of every controlled substance prescription prescribed to every patient within the

State of Florida along with detailed personal information about the citizen for whom the drug was prescribed. (See F.S. 893.055)

30. The system established by the Department of Health is mandated to be consistent with the Health Insurance Portability and Accountability Act (HIPAA) as it pertains to protecting confidential health information (PHI) and compliant with all state and federal privacy and security laws and regulations. (See F.S. 893.055(2)(a))

31. The confidential data collected and disclosed included the patient's name, the patient's full address, the patient's date of birth, the medications prescribed to the patient, including dosages, location of the issuing pharmacy and the date on which the prescriptions were filled.

32. Law enforcement agencies are specifically prohibited from direct access to the data base unless a law enforcement officer or agent makes a specific, verified as authentic, request from the Program Director regarding potential criminal or civil proceedings involving prescribed medications. (See F.S. 893.0557(c)(3); 893.055(7)(c)3; and 893.0551(3)(c))

33. The request by law enforcement, in addition to being verified as authentic, must be for a specific violation of law. (See F.S. 893.0551(3)(c))

34. If law enforcement agents or the State Attorney's Office obtain requested confidential information, they too must protect the information and comply with all relevant State and Federal Privacy and Security laws and regulations, including the Health Insurance Portability and Accountability Act (HIPAA). (See 893.055(7)(e) and 893.0551(5) & (6))

35. F.S. 893.055(1) is entitled "Public Records Exemption for the Prescription Drug Monitoring Program." Within that statute is confirmation that citizen's information contained



within the records held by the Department of Health under F.S. 893.055 is confidential and exempt from Section 119.07(1) and Section 24(a) Article I of the Florida Constitution.

36. That statute, however, allows the Department of Health to disclose such confidential and exempt information to a law enforcement agency that has initiated an active investigation of **a specific violation of F.S. 893.13(7)(a)8; s. 893.13(8)(a); or s. 893.13(8)(b)** and a law enforcement agency may disclose the confidential and exempt information received from the Department of Health to a criminal justice agency in Section 119.011, as part of that active investigation of the **specific violation(s)**.

37. F.S. 893.055(1)(5) states “any agency or person who obtains such confidential and exempt information pursuant to this section must maintain the confidential and exempt status of that information.”

38. The statute provides criminal sanctions for anyone who willfully violates the privacy protections, a felony of the third degree. (See F.S. 893.055(1)(6))

39. It is criminal per se, and a first degree misdemeanor for anyone in the Department of Health, law enforcement, or a criminal justice agency, as defined in Section 119.011, to reveal any information obtained per Chapter 893, other than in a criminal prosecution or administrative hearing. (See F.S. 893.13(7)(a)6 & (c)).

40. In Hunter v. State, 630 So. 2<sup>nd</sup> 72, 74 (Fla.5<sup>th</sup> DCA 1994) the Fifth District Court of Appeal held that a patient’s medical records enjoy a confidential status via the right to privacy contained within Article I, Section 23 of the Florida Constitution. The Court further went on to state that first tier Courts must act as a shield to protect a patient’s privacy rights and that the Florida Constitution has a very strict prohibition against government intrusion into the private

lives of its citizens and by implication, their medical records. (Analogous to prescription records.)

41. Neither the Plaintiff, nor any of the other 3,300 plus citizens who had their prescription records and personal data given by the Department of Health to the Narcotics Task Force and DEA, were or are in targets of an investigation.

42. The Prescription Drug Monitoring Program does not adequately protect citizens against improper disclosure. The Program Manager of the Prescription Drug data base should never grant a general generic request for any government agents to obtain the prescription records of "everyone" who was prescribed certain medications.

43. The State Attorney should be a gatekeeper of such privileged personal information, and not the source of a deliberate or careless publication of the confidential, private, prescription and personal records of citizens, unrelated to a specific criminal prosecution or investigation.

44. The State Attorney reviewed, copied, and gave one year's worth of privileged, confidential patient prescription and private information of approximately 3,300 Florida citizens, including the Plaintiff, to criminal defense attorneys representing defendants charged with criminal violations.

45. The disclosures made by the State Attorney to each of those defendants' attorneys included the names, dates of birth, home addresses, prescriptions prescribed, pharmacies where prescriptions were filled, and the dates the prescriptions were filled by each of those innocent citizens.

46. In Doctor v. State, 596 So. 2<sup>nd</sup> 442, 447 (Fla. 1992), the Florida Supreme Court held that law enforcement officers are charged with knowledge of the law and expected to not only enforce it, but also obey it. A claimed misunderstanding or misapprehension of the law is

inexcusable. Here, the publication of private, privileged prescription and personal information is totally unacceptable and unlawful.

47. In State v. Rutherford, 707 So. 2d 1129, 1132 (Fla. 4<sup>th</sup> DCA 1997), the Court addressed the failings of a prosecutor to properly follow the law in obtaining a defendant's medical records, as follows:

"This case does not involve the errors of police officers with limited legal training, but of prosecutors who have had the benefit of law school and on-the-job experience and who have taken an oath to uphold the Florida Constitution. See R. Regulating Bar 3-4.7. The requisite procedures for obtaining hospital records – notice to the patient and judicial review – are not complex. The state's required showing under **Hunter** to obtain the records – that are relevant to a pending criminal investigation – is not onerous..."

48. F.S. 893.055 and F.S. 893.0551 violate the constitutional rights of Plaintiff and the other 3,300 Florida citizens whose prescription histories were disclosed and published. Those statutes, as written, violate Article I, Section 9 which guarantees every Florida citizen due process of law. Those statutes are arbitrary and capricious in that there is no opportunity for a citizen to contest unwarranted intrusions into his prescription history and personal data. Those statutes constitute an unwarranted encroachment by the government which interferes with, and negates, citizens' fundamental rights as guaranteed under Article I, Sections 9, 12, and 23 of the State Constitution. The vagueness and overly broad language of the supposed limiting criteria for law enforcement to obtain this sensitive and protected information will not withstand the strict scrutiny test required for a law that directly infringes upon a Florida citizen's personal rights and liberties as guaranteed under the State Constitution. The offending statutes have not been narrowly tailored to avoid the type of harm occasioned in this case.

49. Plaintiff and more than 3,300 other innocent Florida citizens have had their personal rights and liberties blatantly violated by the office of R. J. Larizza, State Attorney, “the Narcotics Task Force/DEA”, and by the Florida Department of Health.

50. The law, as written, is so imprecise that it invites arbitrary and indiscriminate government intrusion into protected and very private, sensitive, personal information which could easily result in the widespread release and publication of such information, as occurred in this case. The statute does not clearly define what “ongoing investigation” really is. The law is so vague, that it leaves an ordinary person necessarily guessing at the meaning, and the language is subject to different interpretations as to the application of the law.

51. There are no objective guidelines and standards expressed within the statutes to protect law abiding citizens from having their private and very personal prescription drug information scrutinized and discussed by government agents and to whomever they might disclose that information.

52. These statutes, as written, pose a high risk of depriving citizens of their constitutional rights as guaranteed under Article I, Sections 9, 12, and 23 of the Constitution of the State of Florida, without a scintilla of evidence that the citizen has or may be engaged in any illegal activity whatsoever.

### **RELIEF SOUGHT**

WHEREFORE, Plaintiff respectfully prays that this Honorable Court will grant Plaintiff a prohibitive/mandatory injunction as follows:

1. Direct the Defendant to immediately recall, collect, and place under seal all prescription history records of the Plaintiff, as well as the prescription history records of the

other 3,300 plus Florida citizens which records Defendant received from law enforcement agents at the time Defendant received Plaintiff, Michael H. Lambert's, prescription history records.

2. Direct the Defendant to immediately request that any, and all, law enforcement agencies and any other person, known to the Defendant, who may have copies of the Plaintiff, Michael H. Lambert's prescription history records and/or the prescription history records of the other 3,300 plus Florida citizens surrender those records to the Defendant to be delivered to the Court under seal to be protected from further unlawful scrutiny.

3. Prohibit the Defendant, and his employees or agents from disseminating, publishing or providing to any other person or agency the Plaintiff, Michael H. Mr. Lambert's prescription history records or the prescription history records of the other 3,300 plus citizens whose records were provided to the Defendant at the time Defendant received the Plaintiff, Michael H. Lambert's records.

4. Direct the Defendant to secure any copies whether printed, taped, disc copied, or stored in the hard drive of computers at any of his offices, or otherwise, any and all copies of the Plaintiff, Michael H. Lambert's prescription history records, as well as the prescription history records of the other 3,300 plus Florida citizens.

5. Direct the Defendant to immediately notify in writing, via certified letter, each of the 3,300 plus Florida citizens whose prescription history records were delivered to the Defendant at the time Defendant received the Plaintiff, Michael H. Lambert's prescription history records.

6. Direct the Defendant to instruct every member of his office who may have seen the Plaintiff, Michael H. Lambert's prescription history records and any of the other 3,300 plus citizens' prescription history records, to not further discuss or reveal any part of those prescription records to any other person or entity.

7. Direct the Defendant to provide an Affidavit as to the number of these DVDs his office copied, serial numbers of the computers upon which they were copied, the full name and addresses to whom copies of the Plaintiff's prescription history records, as well as the 3,300 other Volusia County citizens were sent, where all of those discs are now, and if any were destroyed, by whom, when, and where.

8. Declare the below specified parts of F. S. 893.055 and F.S. 893.0551 to be unconstitutional...

**893.055. Prescription drug monitoring program**

(1) As used in this section, the term:

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(h) "Active investigation" means an investigation that is being conducted with a reasonable, good faith belief that it could lead to the filing of administrative, civil, or criminal proceedings, or that is ongoing and continuing and for which there is a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future. (emphasis supplied)

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(j) "Program manager" means an employee of or a person contracted by the Department of Health who is designated to ensure the integrity of the prescription drug monitoring program in accordance with the requirements established in paragraphs (2)(a) and (b). (emphasis supplied)

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(2) ...The department shall establish policies and procedures as appropriate regarding the reporting, accessing the database, evaluation, management, development, implementation, operation, storage, and security of information within the system. (emphasis supplied)

\*\*\*

(b) The department, \*\*\* shall adopt rules as necessary concerning the presorting, accessing the database, evaluation, management, development, implementation, operation, security, and storage of information within the system. (emphasis supplied)

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(d) The program manager shall work with professional health care licensure boards and the stakeholders listed in paragraph (b) to develop rules appropriate for identifying indicators of controlled substance abuse. (emphasis supplied)

\*\*\*

(7)(b) Confidential and exempt information in the database shall be released only as provided in paragraph (c) and s. 893.0551. (emphasis supplied)

\*\*\*

(c) The following entities shall not be allowed direct access to information in the prescription drug monitoring program database but may request from the program manager, and when authorized by the program manager, the program manager's program and support staff, information that is confidential and exempt under s. 893.0551. Prior to release, the request shall be verified as authentic and authorized with the requesting organization by the program manager, the program manager's program and support staff, or as determined in rules by the department as being authentic and as having been authorized by the requesting entity: (emphasis supplied)

\*\*\*

(3) A law enforcement agency during active investigations regarding potential criminal activity, fraud, or theft regarding prescribed controlled substances.

\*\*\*

(f) The program manager, upon determining a pattern consistent with the rules established under paragraph (2)(d) and having cause to believe a violation of s. 893.13(7)(a)8., (8)(a), or (8)(b) has occurred, may provide relevant information to the applicable law enforcement agency. (emphasis supplied)

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**893.0551. Public records exemption for the prescription drug monitoring program**

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(a) "Active investigation" has the same meaning as provided in s. 893.055.

\*\*\*

(e) "Law enforcement agency" has the same meaning as provided in s. 893.055.

\*\*\*

(3) The department shall disclose such confidential and exempt information to the following entities after using a verification process to ensure the legitimacy of that person's or entity's request for the information: (emphasis supplied)

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(c) A law enforcement agency that has initiated an active investigation involving a specific violation of law regarding prescription drug abuse or diversion of prescribed controlled substances. The law enforcement agency may disclose the confidential and exempt information received from the department to a criminal justice agency as defined in s. 119.011 as part of an active investigation that is specific to a violation of prescription drug abuse or prescription drug diversion law as it relates to controlled substances. A law enforcement agency may request information from the department but may not have direct access to its database. (emphasis supplied)

\*\*\*

(4) The department shall disclose such confidential and exempt information to the applicable law enforcement agency in accordance with s. 893.055(7)(f). The law enforcement agency may disclose the confidential and exempt information received from the department to a criminal justice agency as defined in s. 119.011 as part of an active investigation that is specific to a violation of s. 893.13(7)(a)8., s. 893.13(8)(a), or s. 893.13(8)(b). (emphasis supplied)

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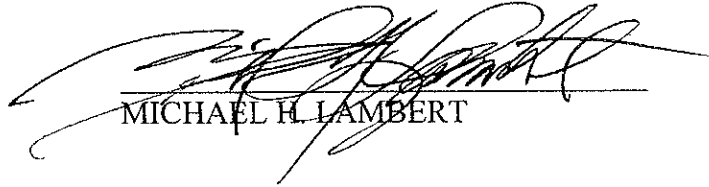
and direct that the personal prescription histories and personal information collected per those statutes be protected and not disseminated or provided to any law enforcement officer, agency, or entity.

9. **CONSTITUTIONAL QUESTION:** Do the above specified portions of F.S. 893.055 and 893.0551 violate Article I, Sections 9, 12, and 23 of the Florida Constitution?

Plaintiff prays that the Court order the Defendant to pay all costs incurred in this action and reasonable attorneys' fees incurred in the prosecution of this cause.



I, MICHAEL H. LAMBERT, am the Plaintiff in this cause and I swear the facts are true and correct as reflected in this Amended Complaint.

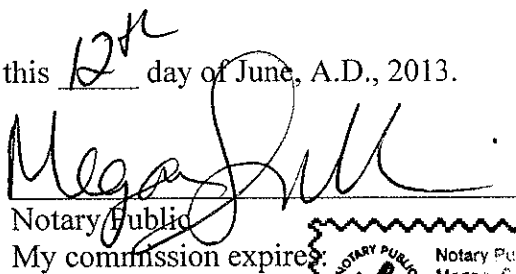
  
MICHAEL H. LAMBERT

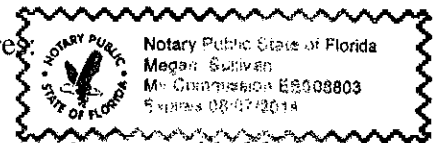
STATE OF FLORIDA  
COUNTY OF VOLUSIA

SWORN TO AND SUBSCRIBED before me this 12<sup>th</sup> day of June, A.D., 2013.

Proof of identification:


personally known

  
Notary Public  
My commission expires:



I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by hand delivery to R. J. Larizza, State Attorney, 7<sup>th</sup> Judicial Circuit, 251 North Ridgewood Avenue, Daytona Beach, Florida, 32114 on this 12<sup>th</sup> day of June, A.D., 2013.

Respectfully submitted:

  
JOHN W. TANNER, ESQUIRE  
FLORIDA BAR NO. 0106174  
428 North Halifax Avenue  
Daytona Beach, Florida 32114  
(386) 239-8991  
Counsel for the Plaintiff

IN THE CIRCUIT COURT, SEVENTH  
JUDICIAL CIRCUIT, IN AND FOR  
VOLUSIA COUNTY, FLORIDA

CASE NO.:  
DIVISION:

MICHAEL H. LAMBERT,

PLAINTIFF,

VS.

R. J. LARIZZA, AS STATE  
ATTORNEY FOR THE SEVENTH  
JUDICIAL CIRCUIT OF THE  
STATE FLORIDA,

DEFENDANT.

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**COMPLAINT FOR INJUNCTIVE RELIEF**

COMES NOW, the Plaintiff, MICHAEL H. LAMBERT, through his undersigned counsel, and respectfully requests this Honorable Court to grant injunctive relief enjoining R. J. Larizza, State Attorney of the Seventh Judicial Circuit, and any of his employees or agents from reviewing, revealing, copying, distributing, or discussing his private privileged prescription medication history and for this Court to order Defendant to notify three thousand plus citizens that their confidential prescription records were published by Mr. Larizza's office. As grounds therefore, the Petitioner alleges that:

**JURISDICTION**

Plaintiff, MICHAEL H. LAMBERT, sues Defendant R. J. LARIZZA, as State Attorney of the Seventh Judicial Circuit of the State of Florida and alleges:

1. Plaintiff is a resident of Volusia County, Florida.
2. The acts to which this Complaint is directed occurred in Volusia County, Florida.

3. The Defendant, R. J. Larizza, is the State Attorney of the Seventh Judicial Circuit of the State of Florida, he maintains offices in Volusia County, Florida, the actions upon which this Complaint is based occurred in Volusia County, Florida and were carried out by agents and employees of Mr. Larizza's office.

4. Plaintiff will continue to suffer irreparable harm if the relief sought through this Complaint is not granted in that records of his confidential, private prescription history remain in the Office of the State Attorney as well as in the custody and control of various law enforcement officers from the "Narcotics Task Force" and DEA who apparently have no regard for the sensitivity of such private and confidential medical records.

5. Plaintiff has no other adequate remedy at law.

6. The relief sought herein would provide protection from future and continuing irreparable harm which, without a Court Order would likely continue for so long as said records are improperly in the custody and control of the State Attorney's Office and various law enforcement agencies.

7. This Complaint should result in the issuance of an Injunction to protect the Plaintiff and other citizens who are similarly situated.

8. There is great public interest in protecting the privacy and confidentiality of citizens' medical and prescription records from unwarranted government scrutiny, intrusion, and publication.

### **HISTORICAL FACTS**

9. In September, 2012 agents of a State's "Narcotics Task Force," and the U. S. Drug Enforcement Administration (DEA) in Lake Mary, Florida, began an investigation into crimes concerning medical prescriptions involving a named suspect, not the Petitioner.

10. As the investigation progressed, it led to four or five additional known-named suspects, not the Petitioner. During the course of the investigation the “Narcotics Task Force,” and/or DEA requested information from the Manager of the Department of Health Prescription Drug Monitoring Program to supply them with the names of all persons for whom certain medications were prescribed by certain healthcare providers for a twelve-month period.

11. Despite having identified certain known suspects in their investigation, the request was not specific to only those known-named individuals, but was directed to the various types of controlled medications that were prescribed.

12. As a result, the Manager of the Prescription Drug Monitoring Program with the Department of Health provided those law enforcement agents with the twelve-month prescription history of over 3,300 Florida citizens.

13. Those 3,300 citizens were not suspects, under investigation; nor were they targets of an ongoing criminal or civil investigation.

14. The Petitioner, Michael H. Lambert, was not approached to authorize distribution of his protected prescription drug history and he did not give a Health Insurance Portability and Accountability Act (HIPAA) form to release his private, confidential records.

15. Once the law enforcement agencies had concluded their investigation in January of 2013 the six identified known suspects were arrested and their cases were forwarded to the Office of State Attorney R. J. Larizza, Seventh Judicial Circuit for review and potential prosecution.

16. The six cases were assigned to Assistant State Attorneys Heatha Trigones and Emmanuela Charles. Each prosecutor received from the law enforcement agents an investigative packet, which included the partial prescription history of over 3,300 Florida citizens covering for

a period of twelve months. Those confidential medical records were in no way relevant to any criminal or civil investigation.

17. Each of the defendants in the six criminal cases, through their counsel sought to participate in discovery, the State Attorney's Office, through its Assistant State Attorneys copied and forwarded to each of the six defendants respective attorneys, copies of the prescription medications histories of those 3,300 Florida citizens, including the Petitioner.

18. The Prescription Drug Monitoring Program with the Department of Health exists under Florida Statute 893.055 and collects records of all medical prescriptions filled within the state which records include:

- (a) Patient's full name;
- (b) Patient's complete home address;
- (c) Patient's telephone number;
- (d) Patient's insurance plan number;
- (e) Government-issued identification number;
- (f) Provider number;
- (g) DEA number;
- (h) Other unique identifying information or number.

### **LAW AND ARGUMENT**

19. Florida has enacted a prescription monitoring program wherein the Department of Health maintains a list of certain prescriptions prescribed to all patients within the State of Florida. (See F.S. 893.055)

20. The system so established by the Department of Health, is mandated to be consistent with the Health Insurance Portability and Accountability Act (HIPAA) as it pertains to protecting

health information (PHI) and compliant with all state and federal privacy and security laws and regulations. (See F.S. 893.055(2)(a) and attached HIPAA form).

21. The confidential data collected included the patient's name, the patient's full address, the patient's date of birth, the medications prescribed to the patient, including dosages, issuing pharmacy and the date on which the prescriptions were filled.

22. Law enforcement agencies are specifically prohibited from direct access to the data base unless a law enforcement officer or agent makes a specific, verified as authentic, request from the Program Director regarding potential criminal or civil proceedings regarding prescribed medications. (See F.S. 893.0557(c)(3), 893.055(7)(c)3 and 893.0551(3)(c)).

23. The request by law enforcement, in addition to being verified as authentic, must be for a specific violation of law. (See F.S. 893.0551(3)(c)).

24. If law enforcement agents obtain requested data, they too must preserve and comply with all relevant State and Federal Privacy and Security laws and regulations, including the Health Insurance Portability and Accountability Act (HIPAA).

25. F.S. 893.055(1) is entitled "Public Records Exemption for the Prescription Drug Monitoring Program." Within that statute is confirmation that patient's information contained within the records held by the Department of Health under F.S. 893.055 is confidential and exempt from Section 119.07(1) and Section 24(a) Article I of the Florida Constitution.

26. That statute, however, allows the Department of Health to disclose such confidential and exempt to a law enforcement agency that has initiated an active investigation involved a **specific violation of law regarding prescription drug use...** and a law enforcement agency may disclose the confidential and exempt information received from the Department of Health to

a criminal justice agency in Section 119.011, as part of an active investigation that is **specific to a violation of prescription drug abuse...**".

27. F.S. 893.055(1)(5) states "any agency or person who obtains such confidential and exempt information pursuant to this section must maintain the confidential and exempt status of that information."

28. As a safeguard to insure that the private, privileged, exempt information regarding patient's prescription records is maintained, the statute incorporates a criminal provision that anyone who willfully violates the privacy protections commits a felony of the third degree. (See F.S. 893.055(1)(6).

29. It is criminal per se a first degree misdemeanor for anyone in either the Department of Health, law enforcement, or a criminal justice agency, as defined in Section 119.011, to reveal any information obtained per Chapter 893 other than in a criminal prosecution or administrative hearing. (See F.S. 893.13(7)(a) & (c)).

30. Section 123 of the Florida Statutes entitled "Right to Privacy"

In pertinent part it states "every natural citizen has the right to be left alone and free from government intrusion into the person's private life..."

31. In *Hunter v. State*, 630 So. 2<sup>nd</sup> 72 (Fla.5<sup>th</sup> DCA 1994) the Fifth District Court of Appeal held that a patient's medical records enjoy a confidential status via the right to privacy contained within Article I, Section 23 of the Florida Constitution. The Court further went on to state that first tier Courts must act as a shield to protect a patient's privacy rights and that the Florida Constitution has a very strict prohibition against government intrusion into the private lives of its citizens and by implication, their medical records. (at p.74).

32. Neither the Plaintiff, nor any of the other 3,000 plus citizens who had their prescription records given by the Department of Health to the Narcotics Task Force and DEA, were or are in any way targets of an investigation.

33. In each step created by the Prescription Drug Monitoring Program, there is supposed to be security protecting against improper disclosure. The Program Manager of the Prescription Drug data base should never grant a generic request for the prescription records of “everyone” who was prescribed certain medications.

34. If law enforcement agents were to have obtained such information appropriately, and forwarded it to a criminal justice agency; Section 119.011 Florida Statutes requires that agency to insure and protect the confidentiality of the information.

35. The State Attorney should be a gatekeeper of such privileged medical information, and not be the source of deliberate or careless publication of the confidential, private, prescription records of citizens, unrelated to a criminal prosecution.

36. The State Attorney reviewed, copied, and gave one year’s worth of privileged, confidential patient prescription information of approximately 3,300 Florida citizens to attorneys representing defendants charged with criminal violations.

37. The disclosures made by the State Attorney to each of those defendants’ attorneys included the full names, dates of birth, full home addresses, prescriptions prescribed, pharmacy where prescriptions are filled, and the date the prescriptions were filled by each of those innocent citizens.

38. In Doctor v. State, 596 So. 2<sup>nd</sup> 442, (Fla. 1992 at 447), the Florida Supreme Court held that law enforcement officers are charged with knowledge of the law and expected to not only enforce it but also obey it. Therefore a claimed misunderstanding or misapprehension of the law



is inexcusable. Here, the publication of private, privileged medical information is totally unacceptable and unlawful.

39. In a concurring opinion in State v. Rutherford, 707 So. 2d 1129 (Fla. 4<sup>th</sup> DCA 1997 at 1132) the Court addressed the failings of a prosecutor to follow the law as follows:

“this case does not involve the errors of police officers with limited legal training but of prosecutors who have had the benefit of law school and on-the-job experience and who have taken an oath to uphold the Florida Constitution. See Regulating Bar 3-4.7. The requisite procedures for obtaining hospital records – notice to the patient and judicial review are not complex, the state’s required showing under Hunter to obtain the records that are relevant to a pending criminal investigation – is not onerous...”

### **RELIEF SOUGHT**

WHEREFORE, Plaintiff respectfully prays that this Honorable Court will grant Plaintiff a prohibitive/mandatory injunction as follows:

Direct the Defendant to immediately recall, collect, and place under seal all medical and or prescription records of the Plaintiff as well as those of the other 3,000 plus Florida citizens which Defendant received from law enforcement agents at the time Defendant received Mr. Lambert’s prescription history records.

Direct the Defendant to immediately request that any and all law enforcement agencies and/or other persons or parties who have copies of Mr. Lambert’s prescription history records as well as those of the other 3,300 plus citizens, surrender said records to the Defendant to be sealed and protected from further public or law enforcement scrutiny.

Direct the Defendant to immediately notify in writing each of the 3,300 plus Florida citizens whose prescription history records were published by Defendant to any party including, but not limited to the attorneys representing the six criminal Defendants who have been charged and are being prosecuted by the Defendant’s office in Volusia County, Florida.

Plaintiff prays that the Court order the Defendant to pay all costs incurred in this action.

I, MICHAEL H. LAMBERT, am the Plaintiff in this cause and I swear the facts are true and correct as reflected in the Complaint.

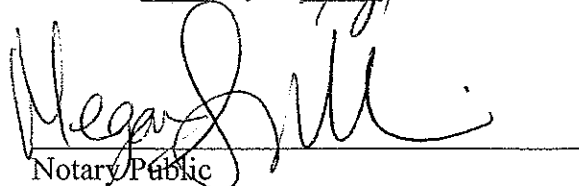
  
MICHAEL H. LAMBERT

STATE OF FLORIDA  
COUNTY OF VOLUSIA

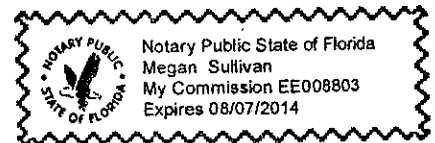
SWORN TO AND SUBSCRIBED before me this 31<sup>st</sup> day of May, A.D., 2013.

Proof of Identification:


personally known

  
Notary Public

My commission expires:



Dated this 31<sup>st</sup> day of May, A.D., 2013 in Daytona Beach, Volusia County, Florida.

  
JOHN W. TANNER, ESQUIRE  
COUNSEL FOR THE PLAINTIFF  
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Florida Bar Number 0106174

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June 12, 2013

The Honorable William F. Parsons  
Chief Judge, Seventh Judicial Circuit  
125 East Orange Avenue  
Daytona Beach, Florida 32114

Re: Michael H. Lambert vs. R. J. Larizza, as State  
Attorney of the Seventh Judicial Circuit  
Case No. 13-31402 CI CI Complaint for Injunctive Relief

Dear Judge Parsons:

On May 31, 2013 I filed the above-referenced action for injunctive relief against State Attorney R. J. Larizza.

On or about June 3, 2013 that case was assigned to you. I promptly called your judicial assistant, Ms. Poulin, and was given a hearing time on the case before you for June 10<sup>th</sup>. Later the same day, your judicial assistant called and advised me that you recused yourself from hearing the case and that it would be reassigned.

My office has inquired daily as to who the new judge is so that I could obtain an expedited hearing time. Ms. Poulin, has also inquired several times. It has been more than a week since I was told you were off the case, yet no new judge has been assigned.

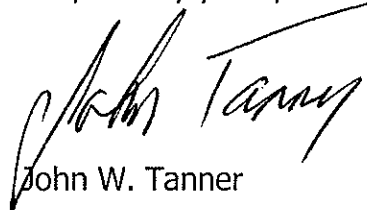
As of this date, no judge has been assigned to handle this case. This is a matter of urgency, and time is of the essence. The harm to Mr. Lambert, the Plaintiff, and to more than three thousand other Florida citizens is continuous and ongoing.

The Honorable William F. Parsons  
Chief Judge, Seventh Judicial Circuit  
June 12, 2013  
Page 2

I appreciate that if you have recused yourself, you may no longer act on this case; however, action must occur by someone. I contact you simply because the case seems to be in limbo though last with you. Any assistance or direction is appreciated. If there is another day of inaction, I will be compelled to seek Mandamus through the District Court.

Thanking you in advance, I am, as always,

Respectfully yours,



John W. Tanner

JWT/gaj

cc: R. J. Larizza, State Attorney  
Seventh Judicial Circuit

Hand Delivered 6/12/13