Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

April 27, 1993

Mr. Fred S. Brinkley, Jr., R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
8505 Cross Park Drive, Suite 110
Austin, Texas 78754-4594

Open Records Decision No. 614

Re: Application of section 27A of the Texas Pharmacy Act, V.T.C.S. article. 4542a-1, relating to program to aid impaired pharmacists and pharmacy students; availability of records under section 27A (RQ-430)

Dear Mr. Brinkley:

You request an opinion regarding provisions of the Texas Pharmacy Act (the "act"), article 4542a-1, V.T.C.S., governing the release of information relating to disciplinary actions taken by the Texas Board of Pharmacy (the "board"). Specifically, you ask us three questions:

1. How should the agency notify complainants when the resolution of their complaint involves a confidential order?

2. What procedure should be used to respond to inquiries about a pharmacist who is the subject of a confidential order?

3. Are "impaired" orders entered before June 18, 1983, now confidential under Section 27A, or do they remain public records subject to disclosure?

You inquire about the board's duty to withhold or disclose information under provisions of the act that apply only to specific records of the board. Section 17(m) of the act provides as follows:

> The board shall maintain an office where permanent records are kept and preserve a record of its proceedings. The board shall maintain an information file about each complaint filed with the board relating to a licensee. If a written complaint is filed with the board relating to a licensee, the board shall, at least semiannually, notify the parties to the complaint as to the status of the complaint until final disposition, unless the notification would jeopardize an undercover investigation.

V.T.C.S. art. 4542a-1, § 17. However, section 27A(d) of the act makes certain information confidential,[1] providing as follows:

> (d) The records and proceedings of the board, its authorized agents, or any pharmaceutical organization committee as set out in Subsections (a) and (b) of this section shall be confidential and are not considered open records for purposes of [the Texas Open Records Act, article 6252-17a, V.T.C.S.][2]; provided, however, the board may disclose this confidential information only:
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> (1) in a disciplinary hearing before the board or in a subsequent trial or appeal of a board action or order;
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> (2) to the pharmacist licensing or disciplinary authorities of other jurisdictions; or
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> (3) pursuant to an order of a court of competent jurisdiction.

Id. § 27A (footnote added).

The board may institute disciplinary action under section 27A if a pharmacist or pharmacy student has "developed an incapacity of a nature that prevents a pharmacist from engaging in the practice of pharmacy with reasonable skill, competence, and safety to the public" or has "a drug or alcohol dependency." *See id.* §§ 26, 27A(a), (b). Although section 17(m) requires the board to notify the parties to the complaint as to the status of the complaint "at least semiannually," unless such notification would interfere with an undercover investigation, section 27A prohibits the board from disclosing its records and proceedings under that provision. Open Records Decision No. 493 (1988).

You advise us that inquiries, *e.g.*, from potential employers of pharmacists, are directed to the board for the purpose of establishing whether a pharmacist or pharmacy student has been the subject of prior disciplinary action by the board. You are concerned, however, that where information relating to the status of a disciplinary action is requested together with the resulting disciplinary order, confirmation of the fact that a person has

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[1]Section 17(q) of the act provides that "[b]oard investigative files are not considered open records for purposes of [the Open Records Act]." *See also* Open Records Decision Nos. 493 (1988); 474 (1987).

[2]The Texas Open Records Act, article 6252-17a, V.T.C.S., gives the general public access to information held by governmental bodies:

> [a]ll information collected, assembled, or maintained by or for governmental bodies . . . is public information and available to the public during normal business hours . . . .

V.T.C.S. art. 6252-17a, § 3(a). Section 3(a)(1) of the Open Records Act excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." *Id.* § 3(a)(1).

been the subject of prior disciplinary action by the board and subsequent refusal to disclose the terms of the resulting disciplinary order is in itself confirmation that the person was the subject of disciplinary action under section 27A of the act. In other words, you claim that nondisclosure of certain information reveals the substance of the information.

Disclosing the status of a disciplinary action, without also disclosing its details, reveals only that the disciplinary action was instituted under section 27A. Moreover, the fact that a disciplinary action is instituted under section 27A is not made confidential by law.

Subsections (a) and (b) of Section 27A provide as follows:

> (a) Any person or pharmaceutical peer review committee may report relevant facts to the board relating to the acts of any pharmacist in this state or student of pharmacy who is enrolled in the professional sequence of an accredited pharmacy degree program approved by the board if the person or peer review committee has knowledge relating to the pharmacist or pharmacy student which might provide grounds for disciplinary action as specified in Subdivision (4) or (7) of Subsection (a) of Section 26 of this Act.
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> (b) Any committee of a professional society comprised primarily of pharmacists, its staff, or any district or local intervenor participating in a program established to aid pharmacists or eligible pharmacy students impaired by chemical abuse or mental or physical illness may report in writing to the board the name of the impaired pharmacist or pharmacy student together with pertinent information relating to the impairment. The board may report to any committee of such professional society or the society's designated staff information which it may receive with regard to any pharmacist or pharmacy student who may be impaired by chemical abuse or mental or physical illness.

V.T.C.S. art. 4542a-1, § 27A. Subdivisions (4) and (7) of subsection (a) of section 26 provide for refusal to issue pharmacy licenses or revocation of licences to persons who have:

> (4) developed an incapacity of a nature that prevents a pharmacist from engaging in the practice of pharmacy with reasonable skill, competence, and safety to the public . . . [and]
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> . . . .
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> (7) a drug or alcohol dependency.

Id. § 26(a). Clearly, a disciplinary action instituted under section 27A of the act may be the result of a wide range of factors. Thus, revealing information about the status of a

disciplinary action without also revealing the details of the action does not *necessarily* reveal that the disciplinary action was the result of drug or alcohol dependency or any other specific reason. Disclosure of such information reveals only that the individual was the subject of a disciplinary action under section 27A, the details of which are made confidential by law and the causes of which could be one or more of a number of possibilities.

In *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), the United States Supreme Court held that certain documents relating to the disciplining of United States Air Force Academy cadets were subject to public disclosure under the federal Freedom of Information Act, 5 U.S.C. § 552, rejecting the argument that disclosure was barred in any case in which it could not be guaranteed that disclosure would not lead someone to guess the substance of information made confidential. *See also* Open Records Decision No. 165 (1977). The court noted that the protection afforded individuals under the federal act "was directed at threats to privacy interests more palpable than mere possibilities." 425 U.S. at 380, n.19. Granted, while knowledge of the fact that a disciplinary action was instituted under section 27A might lead one to a number of different conclusions regarding the subject of the investigation and the substance of information made confidential by section 27A(d), such conclusions are not certain and are no more palpable than mere possibilities. Indeed, this office has held on numerous occasions that, while the content of a document or communication might be confidential, the fact of the document or communication itself is not protected from disclosure. *See, e.g.*, Attorney General Opinion H-223 (1974) (fact that a taxpayer requested reconsideration of his tax status is public even though information concerning his status is made confidential by statute); Open Records Decision No. 88 (1975) (fact of whether or not a person had filed an accident report is public, even though the content of the report is made confidential by statute); *see also* Open Records Decision Nos. 212, 188 (1978); 102 (1975); 40 (1974). We conclude, therefore, that information indicating that a disciplinary action was conducted under section 27A of the Texas Pharmacy Act is not made confidential by section 27A(d) and must be made available to the public.

Finally, we address your third query, namely, whether "impaired" orders issued before the effective date of section 27A are now confidential under section 27A of the act. Acts 1983, 68th Leg., ch. 600, at 3836, added section 27A to the act. Section 27A introduced new provisions relating to disciplinary actions taken by the board, to facts and reports received by the board, and to reporting by peer group review committees. V.T.C.S. art. 4542a-1, § 27A(a), (b).[3] Prior to adoption of section 27A, no provisions made confidential the terms of "impaired" orders issued under section 26 of the act.

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[3]Section 27A(d) applies to information provided by entities listed in subsections (a) and (b), which provide:

> (a) Any person or pharmaceutical peer review committee may report relevant facts to the board relating to the acts of any pharmacist in this state or student of pharmacy who is enrolled in the professional sequence of an accredited pharmacy degree program approved by the board

When a statute is expressed in clear and unambiguous language, the statute must be applied as it reads. *City of Van Alstyne v. State*, 246 S.W.2d 671 (Tex. Civ. App.--1952, writ ref'd n.r.e.); *see also Tonroy v. City of Lubbock*, 242 S.W.2d 816 (Tex. Civ. App. 1975, writ ref'd n.r.e.). Section 27A was added to the act for the purpose, *inter alia*, of making the terms of certain disciplinary actions confidential. Our reading of the statute and understanding of its legislative history indicate no legislative intent limiting the scope of section 27A(d) to "impaired" orders issued after adoption of section 27A. The statute unambiguously protects the terms of *all* "impaired" orders issued under section 26 of the act. Other Texas statutes relating to public records have been construed to apply to records made before, as well as after, adoption of the statute, even where express language to that effect is lacking. *See, e.g., Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (holding that the Open Records Act applies to records generated before the act's adoption). Accordingly, we conclude that the terms of "impaired" orders issued prior to June 18, 1983, are excepted from required public disclosure by section 3(a)(1) of the Open Records Act in conjunction with section 27A(d) of the Texas Pharmacy Act and must not be released.

(footnote continued)

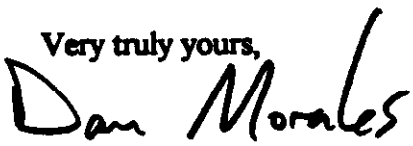
> if the person or peer review committee has knowledge relating to the pharmacist or pharmacy student which might provide grounds for disciplinary action as specified in Subdivision (4) or (7) of Subsection (a) of Section 26 of this Act.
>
> (b) Any committee of a professional society comprised primarily of pharmacists, its staff, or any district or local intervenor participating in a program established to aid pharmacists or eligible pharmacy students impaired by chemical abuse or mental or physical illness may report in writing to the board the name of the impaired pharmacist or pharmacy student together with the pertinent information relating to the impairment. The board may report to any committee of such professional society or the society's designated staff information which it may receive with regard to any pharmacist or pharmacy student who may be impaired by chemical abuse or mental or physical illness.

V.T.C.S. art. 4542a-1, § 27A.

SUMMARY

Section 27A(d) of the Texas Pharmacy Act, V.T.C.S. article 4542a-1, does not prohibit the release of information indicating the status of a complaint, irrespective of whether the release of this information reveals that disciplinary action was instituted under section 27A. The terms of "impaired" orders issued prior to June 18, 1983, are excepted from required public disclosure by section 3(a)(1) of the Open Records Act in conjunction with section 27A(d) of the Texas Pharmacy Act.

Very truly yours,



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