



**THE ATTORNEY GENERAL  
OF TEXAS**

April 25, 1988

**JIM MATTON  
ATTORNEY GENERAL**

Fred S. Brinkley, Jr., R.Ph.  
Executive Director/Secretary  
Texas Board of Pharmacy  
8505 Cross Park Drive,  
Suite 110  
Austin, Texas 78754-4533

Open Records Decision No. 493

Re: Whether information regarding negotiations about disciplinary action taken by the Texas State Board of Pharmacy against a licensee is available to the public under the Open Records Act, article 6252-17a, V.T.C.S. (RQ-1273)

Dear Mr. Brinkley:

You request reconsideration of Open Records Decision No. 474 (1987). That decision considered whether particular documents held by the Texas Board of Pharmacy were protected from required public disclosure by section 3(a)(1) of the Texas Open Records Act, article 6252-17a, V.T.C.S. Section 3(a)(1) of the act protects information deemed confidential by law, including statutory law. Section 17(q) of article 4542a-1, V.T.C.S., provides statutory confidentiality for the board's "investigative files." In Open Records Decision No. 474, this office determined that "investigative files" includes documents prepared for internal board use that relate to fact gathering by the board or that assess the validity of complaints. The decision concluded that the letters providing preliminary notice, letters setting up informal conferences, responses to these letters, proposed notice of hearing and charges, and the Agreed Board Orders are not within the scope of "investigative files." The decision also concluded that the specific documents submitted for review did not fall within the protection of sections 3(a)(3), 3(a)(8), 3(a)(11), or the common-law privacy aspect of section 3(a)(1).

You request reconsideration of our determination regarding the applicability of section 3(a)(8) because you

assert that if a proposed Agreed Board Order is not accepted by the board as a Final Order, the board's legal counsel will still have to "prosecute" the case. You argue that section 3(a)(8) protects all of the information in question during the pendency of this "prosecution" effort. The term "prosecution" in section 3(a)(8), however, applies to criminal prosecution, not to the board's administrative enforcement of the licensing laws. If the board's investigation reveals criminal conduct that the board intends to report to appropriate law enforcement officials, section 3(a)(8) would apply to that information if its release would unduly interfere with law enforcement efforts. Ex parte Pruitt, 551 S.W.2d 706, 710 (Tex. 1977).

You assert that section 3(a)(3) applies to the information in question because section 3(a)(3) applies to pending or reasonably anticipated litigation. Open Records Decision No. 474 acknowledged that litigation includes quasi-judicial administrative proceedings such as those administered by the board. See also Open Records Decision No. 301 (1982). In Open Records Decision No. 301, the attorney general determined that the staff of an administrative agency may act in an adversarial role in a contested case and that section 3(a)(3) can apply to the materials prepared by the staff in connection with the case. See also Open Records Decision No. 368 (1983). You indicate that proposed Agreed Board Orders are agreements between the board's staff, legal counsel, and licensees.

A governmental body cannot withhold information under section 3(a)(3) unless withholding the information is necessary to preserve the governmental body's strategy or interest in the litigation. Open Records Decision No. 474. When the parties to litigation have been provided with the information at issue, section 3(a)(3) does not protect it from further disclosure. Open Records Decision Nos. 349, 320 (1982). The parties at issue here have presumably seen the letters the board sent to them. You indicate, however, that a disciplinary case may involve two licensees, a pharmacist and a pharmacy, and that Agreed Board Orders entered into with one of the licensees may affect the other licensee but may not have been disclosed to the other licensee. You assert that releasing the Agreed Board Order in such circumstances could affect your negotiating position with the other licensee. Although we agree that section 3(a)(3) may apply in this type of situation, this does not warrant closing all Agreed Board Orders. Only those orders that would adversely affect the board's strategy with a

licensee in this double-licensee situation may be withheld. This determination must be made on a case-by-case basis upon review by this office of the orders in question. See V.T.C.S. art. 6252-17a, § 7(b) (governmental body shall submit documents to attorney general for review).

You also raise additional arguments for withholding information that relates to "impaired pharmacists." Section 27A of the Texas Pharmacy Act, article 4542a-1, V.T.C.S., provides for the investigation of reports that a pharmacist is suffering from or "impaired" by chemical abuse or mental or physical illness. Subsection (d) of section 27A provides:

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 the purposes of Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973, as amended (Article 6252-17a, Vernon's Texas Civil Statutes); provided, however, the board may disclose this confidential information only:

(1) in a disciplinary hearing before the board or in a subsequent trial or appeal of a board action or order;

(2) to the pharmacist licensing or disciplinary authorities of other jurisdictions; or

(3) pursuant to an order of a court of competent jurisdiction. (Emphasis added.)

This provision applies only to the records and proceedings of the board to investigate reports that a pharmacist is "impaired" by chemical abuse or mental or physical illness.

As indicated, section 3(a)(1) of the Open Records Act protects information deemed confidential by law, including statutory law. Subsection (d) of section 27A provides statutory confidentiality within the meaning of section 3(a)(1). Not all of the board's investigations, however, involve "impaired" pharmacists. Consequently, the board may withhold under these provisions only records relating

to proceedings of the board to investigate reports about "impaired" pharmacists. We have reviewed the documents you submitted for review and have determined that they may be withheld under section 3(a)(1) of the Open Records Act in conjunction with subsection 27A(d) of article 4542a-1.

#### S U M M A R Y

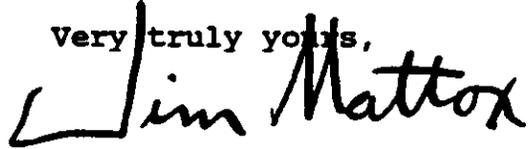
Open Records Decision No. 474 (1987) is an accurate statement of the law. The Texas Board of Pharmacy may withhold "investigative files," including documents prepared for internal board use that relate to fact gathering by the board's staff or that assess the validity of complaints, pursuant to section 3(a)(1) of the Texas Open Records Act, article 6252-17a, V.T.C.S., in conjunction with section 17(q) of article 4542a-1, V.T.C.S. This confidentiality for "investigative files" does not protect from disclosure correspondence between the board and licensees relating to informal conferences, proposed notice of hearings and charges, or Agreed Board Orders.

With regard to additional arguments you raise, section 3(a)(3) protects from disclosure these latter categories of information only when they are prepared by the board's staff and when withholding the information is necessary to preserve the board's strategy or interest with regard to licensees who have not seen the information. Section 3(a)(8) applies only if the board investigates violations of criminal law and the release of the investigations would unduly interfere with law enforcement.

Section 3(a)(1) of the Open Records Act in conjunction with subsection 27A(d) of article 4542a-1 protects from public disclosure records relating to proceedings

of the board to investigate reports about pharmacists "impaired" by chemical abuse or mental or physical illness.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, stylized "J" and "M".

J I M M A T T O X  
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