



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 9, 1993

Mr. Bob Dickson
Executive Director
Texas Commission on Alcohol and Drug Abuse
720 Brazos, Suite 403
Austin, Texas 78701-2506

OR93-040

Dear Mr. Dickson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19894.

The Texas Commission on Alcohol and Drug Abuse ("TCADA") received a request for correspondence concerning hearings on the alleged violations by Starlite Village, Inc. ("Starlite") of licensure standards governing chemical dependency treatment facilities.¹ Specifically, the request is for:

1. Notice to Starlite Village, Inc. of intent to revoke license.
2. Response from Starlite Village.
3. Hearing notice sent to Starlite.
4. Request(s) that April 12 [hearing] by the director be closed to the public.
5. Action on that request.

You contend that sections 3(a)(1) and 3(a)(3) except the information from disclosure. You have submitted for our review several documents you say relate to the request. However, because the request specifically pertains to only five of those documents, we will not consider the applicability of the 3(a) exceptions you raised to the remainder of the records. We also note that TCADA does not have any information responsive to item five; you are not required to disclose information that does not exist or

¹Starlite is a licensed drug treatment facility as defined in section 464.001(5) and (6) of the Health and Safety Code.

to prepare new information responsive to a request. *See* Open Records Decision No. 572 (1990).

You contend that the requested information is excepted by Section (3)(a)(1) in conjunction with section 464.010(e) of the Health and Safety Code.² Section 3(a)(1) excepts from disclosure information deemed confidential by statutory or constitutional law or judicial decision. Section 464.010(e) provides

All records made by the commission during its investigation of alleged abuse or neglect are confidential and may not be released except that the release may be made:

- (1) on court order;
- (2) on written request and consent of the person under investigation or that person's authorized attorney; or
- (3) as provided by Section 464.011.

Section 464.011 provides:

Unless prohibited or limited by federal or other state law, the commission may make its licensing and investigatory records that identify a client available to a state or federal agency or law enforcement authority on request and for official purposes.

The legislature, in enacting section 464.010(e), intended to provide for confidentiality of investigatory records. *See* Bill Analysis at 7, S.B. 601, 69th Leg. (1985). Similarly, section 464.011 provides for disclosure of investigatory records to other state agencies if the agency agrees to keep names of clients in the drug treatment facility under investigation confidential.³ *See* Bill Analysis, H.B. 1085, 70th Leg. (1987). The requested documents consist of correspondence between TCADA and Starlite concerning Starlite's alleged violations of licensure standards and notices of hearings. We do not agree that investigatory records include the preliminary Notice of Intent to Revoke License letter, the letters informing Starlite of the time, place and date of the hearing, and Starlite's

²You also contend that federal law, specifically 42 U.S.C. sections 290dd-3, 290ee-3 and 42 C.F.R. part 2 makes information that identifies patients confidential. However, none of the requested documents contain identities of patients.

³Senate Bill 601 amended the predecessor statute governing investigations of drug treatment facilities by adding the confidentiality provision. *See* Acts 1985, 69th Leg., ch. 632, § 10, at 2337. House Bill 1085 added language to the confidentiality provision of the predecessor statute to provide for limited disclosure of investigation records. *See* Acts 1987, 70th Leg., ch. 770 § 6, at 2743. A nonsubstantive codification repealed and replaced the predecessor statute with sections 464.010(e) and 464.011 of the Health and Safety Code. *See* Acts 1989, 71st Leg., Ch. 678 § 1, at 2884.

responses to the notices. *See* Open Records Decision No. 474 (1987). Rather, these documents relate to the disposition of the alleged violations, based on the investigation. *See id.* We note, however, that several Reports of Investigation are attached to the letter from TCADA informing Starlite of the time and place of the hearing, dated August 25, 1993. Reports of Investigations of a drug treatment facility conducted under Chapter 464 of the Health and Safety Code are confidential by law. Attorney General Opinion No. JM-1178. Section 3(a)(1) of the Open Records Act and section 464.010(e) of the Health and Safety Code only prohibit the disclosure of the Reports of Investigations attached to the letter from TCADA dated August 25, 1992. These statutes do not prohibit disclosure of the preliminary notice letter, the letters informing Starlite of the time, place and date of the hearing and charges, and Starlite's responses to the notices.

You also argue that section 3(a)(3) excepts the requested information from disclosure because you conducted the August 12, 1993 hearing pursuant to the Administrative Procedure and Texas Register Act ("APTRA"), and because TCADA and Starlite are currently involved in settlement negotiations concerning the alleged violations. This office acknowledges that a hearing conducted pursuant to APTRA is litigation for purposes of the Open Records Act and therefore subject to section 3(a)(3). Open Records Decision No. 588 (1991). We note, however, that once information has been obtained by all parties to the litigation, no section 3(a)(3) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). TCADA and Starlite are opposing parties to the APTRA litigation, clearly any correspondence between them is not subject to section 3(a)(3) because both parties have seen the correspondence.

We have marked those documents we think are specifically responsive to the request. You must release the marked documents, with the exception of the Records of Investigation attached to the letter from TCADA to Starlite dated August 25, 1992.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Opinion Committee

LRD/CAB/le

Ref.: ID# 19894

Enclosures: marked documents