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Executive Director/Secretary  
Austin

August 26, 1992

Dan Morales  
Office of the Attorney General  
209 W. 14th St.  
Price Daniel, Sr., Building, 7th Floor  
Austin, Texas 78701

Attention: Madeline Johnson, Opinions Committee

Dear Ms. Johnson:

The Texas State Board of Pharmacy is requesting your opinion on how to comply with the confidentiality provisions in Section 27A of the Texas Pharmacy Act, without providing misleading information to the public. Specifically, what procedure should be used to respond to inquiries about a pharmacist who is the subject of a confidential order? Confidential orders involve pharmacists impaired by chemical or alcohol abuse, and are confidential by statutory mandate under Section 27A of the Texas Pharmacy Act.<sup>1</sup>

Handwritten notes: RO 430 ID # 17185 MBJ

<sup>1</sup> Section 27A(d) of the Texas Pharmacy Act requires that orders relating to impaired pharmacists be kept confidential. It provides:

Sec. 27A. Program to Aid Impaired Pharmacists or Pharmacy Students; Reporting; Confidentiality; Immunity; Funding.

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(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 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:

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The agency receives a number of inquiries from potential employers of pharmacists, and others, about whether a pharmacist has been the subject of prior disciplinary action by the Board. The qualifications of a pharmacist are particularly important to potential employers because the health and welfare of consumers is at issue. With the majority of these inquiries, the answer is "no." In these cases, the agency can simply give the inquirer the correct answer.

However, in some cases, the answer is "yes." That is, the pharmacist has been the subject of a prior disciplinary order. These orders are divided into two types: (1) confidential orders under Section 27A of the Texas Pharmacy Act; and (2) public orders.

If the inquiry involves a pharmacist who has been the subject of a public disciplinary order, the inquiry is referred to appropriate agency personnel for complete disclosure of the terms of the order.

The agency seeks your advice on how to handle inquiries relating to "impaired" pharmacists and their confidential orders. One option is for the agency to tell the inquirer that the pharmacist in question has not been the subject of any prior disciplinary action. Although this method would comply with the Texas Pharmacy Act confidentiality provisions, it is at odds with the agency's desire to provide truthful and accurate information to the public, and it raises the issue of liability exposure. If an employer hires an "impaired" pharmacist based on the agency's response, is the agency subject to potential liability for the actions of the pharmacist?

A second option is to explain that an order exists, but that it is confidential and the terms of the order may not be revealed. The problem with this approach is that the only kind of confidential order under the Texas Pharmacy Act is an "impaired" order under Section 27A. Therefore, this response would arguably violate the confidentiality requirements of the Texas Pharmacy Act.

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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;
  - (2) to the pharmacist licensing or disciplinary authorities of other jurisdictions; or
  - (3) pursuant to an order of a court of competent jurisdiction.

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A third option is to explain the distinction between public and confidential orders to every inquirer. Under this approach, each inquirer would be told that the pharmacist in question has not been the subject of a public order (unless the pharmacist was the subject of a public order). The problem with this approach is that it calls into question the qualifications of every pharmacist, even those who have not been the subject of disciplinary action. This answer implies that the pharmacist in question may be the subject of a confidential order. A potential employer could decide not to hire a pharmacist who is not the subject of any order, based on the implication of this response.

A related question is how the agency should notify complainants when the resolution of their complaint involves a confidential order. Section 17(m) of the Texas Pharmacy Act requires that complainants be notified of the status of their complaints.<sup>2</sup> When a complaint is resolved through a public order, the complainant is notified of the terms of that order. However, when a complaint is resolved through a confidential order, the complainant is simply told that the complaint was resolved to the satisfaction of the Board. No details are provided to complainants and they are not told that a licensee was the subject of a confidential order. Does this procedure comply with the notification mandated by Section 17(m)? If not, what procedure may the agency use to satisfy both 27A and 17(m)?

Finally, Section 27A became effective June 18, 1983. "Impaired" orders entered before that date were public orders and information about those orders was freely released before June 18, 1983. At least one pharmacist has asked the agency to consider his pre-1983 "impaired" order as a confidential order, as of June 18, 1983, and to stop releasing information about the order. The

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<sup>2</sup> Section 17(m) of the Texas Pharmacy Act provides:

Sec. 17. Board Responsibilities.

\* \* \* \*

- (m) 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.

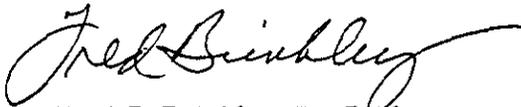
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Act does not contain a "grandfather" provision. Are "impaired" orders entered before June 18, 1983 now confidential under Section 27A, or do they remain public records subject to disclosure?

Please advise us on what procedures will most effectively protect the agency from liability exposure while also complying with the confidentiality provisions of the Texas Pharmacy Act.

Thank you for your assistance.

Sincerely,



Fred S. Brinkley, Jr., R.Ph.  
Executive Director/Secretary

FSB/BP/dp

cc: Carol Fisher, R.Ph.  
Director of Adjudication  
and Legal Support Services

Cathy Stella  
Director of Operations

Michelle Dains  
Assistant Attorney General