THE ATTORNEY GENERAL OF TEXAS

August 7, 1987

JIM MATTOX
ATTORNEY GENERAL

Honorable Fred S. Brinkley, Jr.
Executive Director/Secretary
Texas State Board of Pharmacy
8505 Cross Park Drive, Suite 110
Austin, Texas 78754

Open Records Decision No. 474

Re: Whether certain documents in the custody of the Board of Pharmacy are "investigative files" and therefore unavailable under the Open Records Act

Dear Mr. Brinkley:

The Board of Pharmacy has received a request for documents and correspondence relating to allegations of misconduct against a licensed pharmacist and a licensed pharmacy owned by the pharmacist and several other persons. You have submitted copies of the requested documents, and you contend that all of the documents are excepted from required public disclosure under the Open Records Act, article 6252-17a, V.T.C.S.

The investigation of the pharmacist and the pharmacy began when the board received a report that certain controlled substances had disappeared from the pharmacy. The board's investigators collected information, took statements, and made reports to the board. Ultimately, the board sent the pharmacist and the pharmacy letters notifying them that the board was considering disciplinary action against them. The letters advised that the pharmacist and the pharmacy could request an informal conference with board staff members for the purpose of demonstrating that there had been no violation of the law. The pharmacist requested an informal conference, and the board sent the pharmacist a copy of the proposed charges against him and the pharmacy. After the conference, two agreed board orders, one concerning the pharmacist and one concerning the pharmacy, were drafted. Both orders were signed and returned to the board. The agreed board orders will not become final orders unless the board adopts them.

You have submitted copies of the requested documents. They include information collected by board investigators; affidavits given to board investigators; reports submitted by board investigators; the preliminary notice letters; the proposed notices of hearing and charges; correspondence between the board and the licensees; and the proposed agreed board orders. You contend that all of the documents

are excepted from required disclosure under the Open Records Act and that only the final order, if adopted, will be available to the public. See V.T.C.S. art. 6252-17a, §6(12)(final opinions in the adjudication of cases are open); §6(15)(information regarded by agency policy as open is open). See also Open Records Decision No. 207 (1978).

Section 3(a)(1) of the Open Records Act excepts from public disclosure any "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Section 17(q) of the Texas Pharmacy Act, article 4542a-1, V.T.C.S., states:

> Board investigative files are not considered open records for purposes of Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973, as amended (Article 6252-17a, Vernon's Texas Civil Statutes [the Open Records Act]).

That provision, together with section 3(a)(1) of the Open Records Act, excepts from required disclosure any materials that can be properly characterized as "investigative files." You suggest that all of the documents submitted grew out of the investigation and are therefore part of an investigative file. We agree that information collected and compiled by investigators as well as reports made by the investigators to the board are within the scope of the exception. We disagree, however, that the preliminary notice letters; the letters informing the pharmacist and the pharmacy of the time, date, and place of the informal conference; the correspondence in response to those letters; the proposed notice of hearing and charges; or the agreed board orders are within the scope of the exception for "investigative files."

We think that an "investigative file" for purposes of section 17(q) includes documents relating to the gathering of facts and the assessment of the validity of the complaints against the licensees. The preliminary notice letter sent to the pharmacist and the pharmacy states that an "investigation" of the complaints against the licensees in question here "has produced evidence" indicating that violations of the Pharmacy Act have occurred. We do not think that the preliminary notice letter itself and the other documents sent to the pharmacist and the pharmacy are part of the "investigative file." Rather, they relate to the disposition of the complaint, based on the investigation. Furthermore, the bill analysis to the legislation that added section 17(q) to the Pharmacy Act states that the exception "provides for exemption of law enforcement records" and that "the Board is a quasi law enforcement agency." Bill Analysis to C.S.H.B. No. 1628, 67th Leg. (1981), on file in Legislative Reference Library. That legislative history indicates that the exception was intended to protect the records compiled by the board when it functions as a law

enforcement agency. Presumably the purpose of a law enforcement exception was to protect the board's ability to conduct investigations in secret and to keep its methods of investigation secret. The documents listed above have to do with the board's adjudicative function, rather than its investigative function, and, since they were sent to the subjects of the investigation, they are not secret. Therefore, we conclude that the exception in section 17(q) for board investigative files does not allow you to withhold those documents.

Section 3(a)(1) of the Open Records Act also protects information made confidential by common-law privacy. See generally Open Records Decision Nos. 438 (1986); 372 (1983). The two aspects of common-law privacy that might be relevant here are "public disclosure of private facts" and "false light" privacy. Release of information constitutes public disclosure of private facts if the information is highly intimate or embarrassing information about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 682 (Tex. 1976), cert denied, 430 U.S. 931 (1977). The preliminary notice letter states that the board has evidence that the pharmacist failed to maintain complete and accurate records concerning certain controlled substances, which would constitute a violation of the Texas Pharmacy Act. V.T.C.S. art. 4542a-1, §26. The proposed charges cite the failure to keep complete and accurate records of a controlled substance as the charge to be made against the pharmacist. In Open Records Decision No. 400 (1983) this office considered the availability of a report prepared by an agency of the city of Dallas in response to a complaint that an employee of the agency had engaged in illegal or improper activities. This office concluded that the requirement that there be no legitimate public interest in the information was not satisfied. The decision contained the following discussion:

> Both the courts and this office have frequently held that the name of a private citizen who is arrested and the reason(s) for the arrest are public information. See, e.g., Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). In our opinion, a city employee charged with engaging in illegal or improper activities during the course of her employment is not in a qualitatively different position under the Open Records Act from a citizen arrested and charged with a crime. Just as the arrestee's name and the reasons for the arrest may not be withheld from the public in the latter situation, we believe

> that the employee's name and the offenses alleged may not be withheld in the former. In this context, we note that the reasons favoring public disclosure in the former situation are even more compelling, since that situation involves a public employee rather than a private citizen.

Similarly, we think that allegations by a state regulatory agency that one of its licensees has engaged in illegal or improper activities are of legitimate public interest. Therefore, release of the various statements indicating that the board has evidence that the pharmacist has violated a particular law would not be a "public disclosure of private facts."

For similar reasons, the documents may not be withheld under the doctrine of false light privacy. A governmental body may withhold information on the basis of false light privacy if it finds that release of the information would be highly offensive to a reasonable person, that public interest in disclosure is minimal, and that there exists serious doubt about the truth of the information. Open Records Decision No. 438 (1986). The documents you submitted indicate that the board does not entertain serious doubts about the truth of the charges against the pharmacist. Thus, the doctrine of false light privacy is inapplicable.

Because you suggest that several other exceptions to the Open Records Act--3(a)(3), 3(a)(8), and 3(a)(11)--would allow you to withhold all of the documents you submitted to us, we will consider whether those exceptions allow you to withhold any of the remaining documents.

You contend that the remaining files are excepted from public disclosure by section 3(a)(8) of the Open Records Act. Section 3(a)(8) excepts

> records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to enforcement and prosecution.

V.T.C.S., art. 6252-17a, §3(a)(8). The purpose of this exception is to deny access to materials if release of the information would unduly interfere with law enforcement and prevention of crime. Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). This office has said that section 3(a)(8) may be invoked by any proper custodian of information relevant to an incident involving allegedly criminal conduct that is still

under active investigation or prosecution. Open Records Decisions Nos. 372 (1983); 286 (1981). None of the remaining documents you submitted would come within section 3(a)(8) because they would not unduly interfere with law enforcement or crime prevention. Therefore, you may not withhold any of the remaining documents under section 3(a)(8).

You also contend that the materials requested are excepted from disclosure by section 3(a)(11) of the Open Records Act. Section 3(a)(11) excepts:

> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency.

The purpose of section 3(a)(11) is to protect advice, opinion, and recommendations on policy matters in order to encourage open discussions concerning administrative action. Open Records Decision No. 464 (1987). None of the remaining documents are inter-agency or intra-agency communications. Rather, they are letters between the board and its licensees. Therefore, section 3(a)(11) is inapplicable.

Finally, you contend that the documents sought are excepted from disclosure by section 3(a)(3), which protects:

> information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision as a consequence of his office of employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

The applicability of section 3(a)(3) depends upon (1) whether litigation is either pending or reasonably anticipated and (2) whether the requested information "relates" to the pending or contemplated litigation. Open Records Decision No. 386 (1983). Additionally, withholding the information must be necessary to preserve the government's strategy or position in the litigation. Open Records Decision No. 467 (1987). This office has previously held that section 3(a)(3) is not limited to cases before the courts. Open Records Decision Nos. 368 (1983); 301 (1982). In Open Records Decision No. 301 we stated:

> [T]he section 3(a)(3) exception was designed to protect the interests of the state in adversary proceedings or in negotiations leading to the settlement thereof, and we have no doubt that 'litigation' encompasses proceedings conducted in quasi-judicial forums as well as strictly judicial ones. 'Litigation' has been defined by the dictionary to include 'a controversy involving adverse parties before an executive governmental agency having quasi-judicial powers and employing quasi-judicial procedures.' . . .
>
> We believe the litigation exception may be applied to records relating to a contested case before an administrative agency.

A disciplinary action before the board is a "contested case." See V.T.C.S. art. 4542a-1, §27 and V.T.C.S. art. 6252-13a, §18(a). However, we do not believe that the interests of the state would be protected by non-disclosure of the preliminary notice, proposed or formal charges, or the proposed agreed board orders. The other parties to potential litigation, the licensees under investigation, already know the contents of those documents.

In summary we conclude that you may withhold all of the investigative files. All of the remaining documents submitted for our review must be released.

SUMMARY

> Pharmacy Board "investigative files" are excepted from disclosure under the Open Records Act. V.T.C.S. art. 4542a-1, §17(q). Documents relating to the gathering of facts by the board and documents for internal board use that assess the validity of a complaint are within that exception. Documents sent to the subject of the investigation informing him that the board is considering disciplinary action and stating the nature of the complaint against him are not within the exception.

Very truly yours,

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