

**OPINION NO. 91-038****Syllabus:**

1. R.C. 3719.13 does not confer upon the State Medical Board or its employees the authority to remove prescription records from the custody and control of a pharmacy or pharmacist that is responsible for maintaining those records.
2. 7 Ohio Admin. Code 4729-5-17(H) does not require a pharmacy or pharmacist that is responsible for maintaining drug dispensing or administering records to release such records to the State Medical Board or its employees.
3. The State Medical Board may not, pursuant to R.C. 4731.05(A), adopt and promulgate an administrative rule that purports to confer upon the Board or its employees the authority to remove prescription records from the custody and control of a pharmacy or pharmacist that is responsible for maintaining those records.

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**To: Raymond J. Albert, President, State Medical Board, Columbus, Ohio**  
**By: Lee Fisher, Attorney General, September 9, 1991**

**I. The Nature Of The Opinion Request**

Your predecessor requested an opinion whether the State Medical Board or its employees are authorized by existing Ohio law to collect prescriptions from pharmacies in conjunction with Board investigations, and, if not, whether the Board may lawfully acquire and confer such authority by the adoption of an administrative rule in accordance with the pertinent provisions of R.C. Chapter 119. His letter states as follows:

Traditionally, law enforcement agencies and administrative agencies, including the State Medical Board and the State Board of Pharmacy, have obtained completed, filled prescription forms which are needed as evidence in criminal or administrative proceedings, by removing them from the pharmacies having custody of same, and leaving with the pharmacies signed receipts reflecting their removal.

To our knowledge, no statutory provision explicitly authorizes the removal of prescription records from pharmacies without a valid warrant. However, Section 3719.13 of the Revised Code specifies who shall have authority to inspect such records pertaining to controlled substances. The Ohio General Assembly amended that section effective March 17, 1987, to provide that employees of the State Medical Board shall have authority to inspect such records for purposes of enforcing Chapter 4731. of the Revised Code.

The only purported authority we are aware of for law enforcement or regulatory officials to remove prescriptions from a pharmacy without a warrant is contained in Rule 4729-5-17[H], Ohio Administrative Code, a Board of Pharmacy rule, which requires pharmacists to release records to essentially the same class of officials listed in Section 3719.13 of the Revised Code. Rule 4729-5-17[H] has not been amended to incorporate the reference to Medical Board employees that was added to the statute in 1987. The Medical Board thus finds itself in a position where some pharmacists refuse to allow its employees to remove prescriptions which are needed as evidence, although those pharmacists would release the prescriptions to an agency or individual specifically listed in Rule 4729-5-17[H] of the Administrative Code.<sup>1</sup> (Footnote added.)

With respect to the foregoing matters, the State Medical Board has asked the following questions:

1. Can Rule 4729-5-17[H] of the Administrative Code be properly read, in conjunction with Section 3719.13 of the Revised Code or otherwise, to authorize the State Medical Board to obtain prescription records without a valid warrant or subpoena?
2. If Rule 4729-5-17[H] of the Administrative Code does not authorize the State Medical Board to obtain prescription records without a valid warrant or subpoena, could the Medical Board adopt a rule providing such authority pursuant to Section 4731.05(A) of the Revised Code?

## II. The Statutory Scheme At Issue

R.C. 3719.13, the provision to which your predecessor's letter first refers, appears within R.C. Chapter 3719, which comprises the uniform controlled substances act, and serves as the state law counterpart to the federal Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1242 (1970), 21 U.S.C.S. §§801-971 (1984 and Supp. 1990), as amended. *See State v. Reed*, 14 Ohio App. 3d 63, 64, 470 N.E.2d 150, 151 (Ross County 1983). Enacted in response to the increasing availability of narcotic drugs and other chemical substances that are particularly susceptible to abuse, *see* 21 U.S.C.S. §801 (1984); *State v. Reed*, 14 Ohio App. 3d at 63 and 64, 470 N.E.2d at 151; 1982 Op. Att'y Gen. No. 82-032 at 2-93 and 2-94, the provisions of both the Ohio law and the federal act regulate the various aspects of the production, distribution, sale, possession, dispensing, and administering of controlled substances, as defined and enumerated in 21 U.S.C.S. §§802 and 812 and R.C. 3719.01 and R.C. 3719.41 respectively, by manufacturers, wholesalers, pharmacists, and medical practitioners.

Certain provisions within R.C. Chapter 3719 impose recordkeeping and inventory control responsibilities upon medical practitioners, pharmacists, and pharmacy owners that possess, administer, or dispense controlled substances. *See, e.g.*, R.C. 3719.05(A) (each written prescription for a controlled substance shall be retained on file by the owner of the pharmacy in which it is filled for a two year period so as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of R.C. Chapters 2925 (drug offenses), 3719, or 4729 (pharmacists; dangerous drugs)); R.C. 3719.07(E) (describing records to be retained with respect to controlled substances received, administered, dispensed, or used by a medical practitioner); R.C. 3719.07(F) (describing records to be retained with respect to controlled substances compounded, mixed, produced, prepared, received,

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<sup>1</sup> In your letter you have referred to rule 4729-5-17(F). The provisions of 7 Ohio Admin. Code 4729-5-17, however, have been reorganized, and the provisions of former paragraph (F) of rule 4729-5-17 now appear in paragraph (H) thereof.

or dispensed by every manufacturer or wholesaler thereof); R.C. 3719.07(G) (describing records to be retained with respect to controlled substances received or dispensed by every owner of a pharmacy). *See also* R.C. 3719.28(A).

R.C. 3719.13 addresses the inspection of these prescriptions, orders, and records required by R.C. Chapter 3719 and stocks of controlled substances, and also limits the disclosure of information about those materials by persons having knowledge relating thereto. R.C. 3719.13 thus reads as follows:

Prescriptions, orders, and records, required by Chapter 3719. of the Revised Code, and stocks of dangerous drugs and controlled substances, shall be open for inspection only to federal, state, county, and municipal officers, and employees of the state board of pharmacy whose duty it is to enforce the laws of this state or of the United States relating to controlled substances. Such prescriptions, orders, records, and stocks shall be open for inspection by employees of the state medical board for purposes of enforcing Chapter 4731. of the Revised Code. No person having knowledge of any such prescription, order, or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders, or records relate is a party.

*See also* R.C. 3719.27 (persons required by R.C. Chapter 3719 to keep files or records shall, upon the written request of an officer or employee designated by the State Board of Pharmacy, make such files or records available to that officer or employee at all reasonable hours for inspection and copying).

Rule 4729-5-17, the second provision mentioned by your predecessor, has been promulgated pursuant to authorizations found in R.C. Chapter 4729. R.C. Chapter 4729 regulates the practice of pharmacy in Ohio, and also contains numerous provisions that govern, or pertain to, the possession, sale, purchase, distribution, and delivery of drugs, dangerous drugs, and poisons. R.C. 4729.01 establishes the State Board of Pharmacy as the governmental body responsible for overseeing the practice of pharmacy in Ohio, and for enforcing the provisions of R.C. Chapter 4729. R.C. 4729.25(A) ("[t]he state board of pharmacy shall enforce, or cause to be enforced, [R.C. Chapter 4729]"). *See also* R.C. 4729.63 (except as provided in R.C. 4729.25(B),<sup>2</sup> the State Board of Pharmacy shall enforce, or cause to be enforced, R.C. 4729.51-62, which set forth various licensing requirements and prohibitions applicable to the sale, distribution, and delivery of dangerous drugs in Ohio). In addition, the State Board of Pharmacy is empowered by R.C. 4729.26 to make such rules and regulations, "not inconsistent with the law, pertaining to the practice of pharmacy as may be necessary to carry out the purpose of and enforce [R.C. 4729.01-.37]." *See also* R.C. 4729.261 (pursuant to R.C. 4729.26 the State Board of Pharmacy "may adopt rules regulating the publication of price information pertaining to dangerous drugs"); R.C. 4729.66 (the State Board of Pharmacy may make such rules and regulations, "not inconsistent with the law pertaining to the purchase for resale, possession for sale, sale, and other distribution of dangerous drugs as may be necessary to carry out the purposes of and enforce [R.C. 4729.51-.62]").

Pursuant to the foregoing rulemaking directive, the State Board of Pharmacy has adopted and promulgated a comprehensive set of regulations intended to facilitate compliance with and enforcement of the provisions of R.C. Chapter 4729, as well as certain provisions of R.C. Chapter 3719. Those regulations appear at 7 Ohio Admin. Code Chapters 4729-1 through 4729-19. As pertains herein, 7 Ohio Admin. Code Chapter 4729-5 addresses, *inter alia*, specific administrative duties and responsibilities that must be fulfilled by individual pharmacists and pharmacies in conjunction with the practice of pharmacy and the rendition of pharmaceutical

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<sup>2</sup> R.C. 4729.25(B) states that nothing in R.C. Chapter 4729 shall be construed to require the State Board of Pharmacy to enforce minor violations of that chapter if the Board determines that the public interest is adequately served by a notice or warning to the alleged offender.

services. Rule 4729-5-17 in particular enumerates recordkeeping requirements that must be followed with respect to the dispensing of drugs pursuant to prescription. Those requirements are set forth in paragraphs (A) through (E) of rule 4729-5-17. As a general matter, those provisions require a pharmacist who dispenses a drug pursuant to prescription to record, and retain in a readily retrievable form, the following information: date of dispensing; the name, strength, and dosage of the drug dispensed; directions for use of the drug dispensed; the date when the practitioner issued the prescription; the full name and address of the patient for whom the drug was prescribed; the total number of refills authorized by the prescribing practitioner; and the serial number assigned to and recorded on the original prescription preserved on file at the pharmacy pursuant to R.C. 4729.37.<sup>3</sup>

The circumstances in which the foregoing information may be open to inspection, and the conditions under which any of that information may be released or otherwise divulged, are thereafter described in paragraphs (F), (G), and (H) of rule 4729-5-17. Paragraph (F) first states that, "[a]ll records of dispensing drugs shall be readily available, and promptly produced, upon request for inspection by a board of pharmacy officer, agent, and/or inspector during regular business hours." Paragraph (G) of rule 4729-5-17 then states that, "[r]ecords of dispensing or administration of drugs are not a public record," and that a person "having custody of, or access to, such records shall not divulge the contents thereof, or provide a copy thereof, to anyone," except individuals within the categories listed in subparagraphs (1) through (6) thereof. Finally, paragraph (H) of rule 4729-5-17 authorizes the release of drug dispensing or administering records in connection with specific investigations of possible drug law violations. Rule 4729-5-17(H) thus states, in part, as follows:

Records of dispensing or administering drugs which may be required as evidence of a violation shall be released to a *member, inspector, agent, or investigator of the board of pharmacy or any state, county, or municipal officer whose duty is to enforce the laws of this state or the United States relating to drugs and who is engaged in a specific investigation involving a designated person or drug* upon his request. Such person shall furnish a receipt to the person having legal custody of the records. (Emphasis added.)

### III. The State Medical Board Has No Authority Under Current Law To Remove Prescriptions Absent A Valid Warrant Or Subpoena

I shall now consider the State Medical Board's particular questions. The Board has asked whether rule 4729-5-17(H) may be read in conjunction with R.C. 3719.13 to authorize the Board to obtain prescription records without a valid warrant or subpoena. According to your predecessor's letter, this question has been prompted by, and is thus specifically directed at, those situations in which a pharmacist refuses to furnish original prescription records to State Medical Board employees who, without a warrant or subpoena, have requested the production of such records in connection with investigations or disciplinary actions that have been undertaken or are otherwise being pursued by the Board. Notwithstanding such refusal, the Board wishes to know whether Board employees are empowered by the terms of R.C. 3719.13 and rule 4729-5-17(H) to remove prescription records from the custody and control of a pharmacy or pharmacist in the manner previously described in your predecessor's letter.

<sup>3</sup> R.C. 4729.37 states as follows:

A copy of an original prescription may only be filled in accordance with the rules and regulations adopted by the state board of pharmacy.

Prescriptions received by word of mouth, telephone, telegraph, or other means of communication shall be recorded in writing by the pharmacist and the record so made by the pharmacist shall constitute the original prescription to be filled by the pharmacist. All prescriptions shall be preserved on file at the pharmacy for a period of three years, subject to inspection by the proper officers of the law.

The General Assembly has, in R.C. Chapter 4731, established the State Medical Board as the agency of state government responsible for overseeing the practice of medicine and surgery in Ohio, and for enforcing the provisions of R.C. Chapter 4731 that pertain thereto. See R.C. 4731.01; R.C. 4731.05(A). Thus, as a creature of statute, the State Medical Board may exercise only those powers, and undertake only those activities, expressly authorized by statute, or such others as are necessarily to be implied in order to effect those that have been expressly authorized. *State ex rel. Copeland v. State Medical Board*, 107 Ohio St. 20, 140 N.E. 660 (1923). See generally *Dayton Communications Corp. v. Public Utilities Commission of Ohio*, 64 Ohio St. 2d 302, 414 N.E.2d 1051 (1980); *Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 325 N.E.2d 693 (1975).

**A. R.C. 3719.13 Does Not Expressly Authorize The Removal Of Prescription Records From A Pharmacy**

R.C. 3719.13 does not explicitly confer upon the State Medical Board or its employees the authority to remove prescription records from the custody or control of a pharmacy or pharmacist that is responsible for compiling and maintaining those records. As I have indicated previously, R.C. 3719.13 permits the inspection of prescriptions, orders, and records required by R.C. Chapter 3719, as well as stocks of dangerous drugs and controlled substances, by the classes of persons listed in that section. R.C. 3719.13 first provides that such prescriptions, orders, records, and stocks "shall be open for inspection only to federal, state, county, and municipal officers, and employees of the state board of pharmacy whose duty it is to enforce the laws of this state or of the United States relating to controlled substances." The second sentence of R.C. 3719.13 then provides that such prescriptions, orders, records, and stocks "shall be open for inspection by employees of the state medical board for purposes of enforcing [R.C. Chapter 4731]." R.C. 3719.13 contains no express statement regarding the removal of such items. In particular, there is no explicit directive in R.C. 3719.13 that employees of the State Medical Board may remove prescription records from a pharmacy. Thus, any authority on the part of the Board or its employees in that respect must exist, if at all, by implication.

**B. The Power To Remove Prescription Records From A Pharmacy Over The Pharmacy's Objection Cannot Be Reasonably Implied From R.C. 3719.13**

The plain language of R.C. 3719.13 states that prescriptions, orders, and other records required by R.C. Chapter 3719 shall be open for inspection by employees of the State Medical Board for purposes of enforcing R.C. Chapter 4731. Dictionary definitions indicate that the terms "inspect" and "inspection" are commonly and ordinarily understood as denoting a close or critical examination or scrutiny undertaken for the purpose of ascertaining the condition or quality of that which is being examined, or verifying or obtaining other particular information relative to either that matter, or other matters. See, e.g., *Webster's New World Dictionary* 729 (2d college ed. 1978) (stating that "inspect," the transitive verb, means "to look at carefully; examine critically, esp. in order to detect flaws, errors, etc." or "to examine or review (troops, etc.) officially"); *Black's Law Dictionary* 797 (6th ed. 1990) (wherein the following entry appears for the term "[i]nspection": "To examine; scrutinize; investigate; look into; check over; or view for the purpose of ascertaining the quality, authenticity or conditions of an item, product, document, residence, business, etc."). See also R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). Pursuant to R.C. 3719.13, therefore, employees of the State Medical Board are entitled to carefully examine and scrutinize a pharmacy's prescriptions and other records for purposes of enforcing R.C. Chapter 4731. In no sense, however, is there any necessary connection between that activity and the ability to remove prescriptions from the pharmacy premises. In particular, the removal of such items by Board employees is not essential to the ability of Board employees to peruse and critically examine those records. See generally *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 470, 423 N.E.2d 105, 113 (1981) (the ability of a public agency to perform a particular function "may be fairly implied where it is reasonably related to the duties of the public agency"). It follows, therefore, that authority on the part of State Medical Board employees to remove prescription records from the custody and control of a pharmacy or pharmacist cannot be implied from the language of R.C. 3719.13.

**C. Administrative Rule 4729-5-17(H), As Presently Drafted, Does Not Authorize Medical Board Employees To Remove Prescription Records From Pharmacy Premises Over The Objection Of The Pharmacy**

Unlike R.C. 3719.13, rule 4729-5-17(H) does authorize the release of drug dispensing or administering records, but only in the manner and circumstances described. Specifically, the language of rule 4729-5-17(H) provides that, upon request, such records shall be released to either (1) a member, inspector, agent, or investigator of the State Board of Pharmacy, or (2) any state, county, or municipal officer whose duty is to enforce the laws of Ohio or the United States relating to drugs and who is engaged in a specific investigation involving a designated person or drug. As noted in your predecessor's letter, the foregoing categories of persons are almost identical to those enumerated in the first sentence of R.C. 3719.13 as being entitled to inspect prescription records pertaining to controlled substances. However, whereas R.C. 3719.13 provides that prescriptions required by R.C. Chapter 3719 shall be open for inspection to, *inter alia*, "employees" of the State Board of Pharmacy, rule 4729-5-17(H) states that the records of dispensing or administering drugs shall be released to, *inter alia*, a "member," "inspector," "agent," or "investigator" of the State Board of Pharmacy.

Rule 4729-5-17(H) does not, by its express terms, provide that drug dispensing or administering records shall be released to a "member," "inspector," "agent," "investigator," or "employee" of the State Medical Board. Thus, whether rule 4729-5-17(H) imposes an obligation upon the custodian of such records to release them to a member or employee of the State Medical Board will, in part, depend upon the extent to which the individual Board member or employee qualifies as a "state officer" under that regulation.

Several considerations I believe are controlling in this instance argue against the conclusion that members or employees of the State Medical Board are "state officer[s]" for purposes of rule 4729-5-17(H). In particular, the larger context within which that term appears in both R.C. 3719.13 and rule 4729-5-17(H), and specific principles of statutory construction applicable thereto, persuade me that a member or employee of the State Medical Board should not be considered a "state officer" under rule 4729-5-17(H). First, rule 4729-5-17(H) itself provides that drug dispensing or administering records shall be released, when so requested, to a "member, inspector, agent, or investigator" of the State Board of Pharmacy, or to any "state, county, or municipal officer" having a responsibility to enforce the laws of Ohio or the United States pertaining to drugs and engaged in a specific investigation regarding a designated person or drug. By making separate, explicit references to a member, inspector, agent, or investigator of the State Board of Pharmacy on the one hand, and, on the other hand, any state, county, or municipal officer, the State Board of Pharmacy appears to have distinguished its members, inspectors, agents, and investigators from the latter category of "state officer[s]." Otherwise, rule 4729-5-17(H)'s separate reference to a "member, inspector, agent, or investigator" of the State Board of Pharmacy would be needlessly redundant. Rule 4729-5-17(H) thus reflects an understanding on the part of the State Board of Pharmacy that a "member," "inspector," "agent," or "investigator" of the Board does not come within the category of "state officer" described therein. By analogy, therefore, it follows that members and other personnel of the State Medical Board are also not included within the category of "state officer[s]" described in rule 4729-5-17(H). In that regard the various duties, powers, and responsibilities conferred upon a member or employee of the State Medical Board may reasonably be said to be analogous, in their general character and scope, to such duties, powers, and responsibilities as have been granted to or imposed upon a member or other personnel of the State Board of Pharmacy. Accordingly, as it is logically concluded that a member, inspector, agent, or investigator of the State Board of Pharmacy is not a "state officer" for purposes of rule 4729-5-17(H), the same conclusion applies to a member or employee of the State Medical Board.

This conclusion also finds support in the language of R.C. 3719.13. Since as validly adopted administrative regulations have the same force and effect as legislative enactments, *see, e.g., Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St. 3d 46, 554 N.E.2d 97 (1990) (syllabus, paragraph one) ("[a]dministrative rules enacted pursuant to a specific grant of legislative authority are to be given the force

and effect of law"), such regulations are subject to the principles of construction ordinarily applied to statutory provisions. *See, e.g., State ex rel. Miller Plumbing Co. v. Industrial Commission*, 149 Ohio St. 493, 496-97, 79 N.E.2d 553, 555 (1948) ("[t]he orders of the Industrial Commission formulating rules for specific safety requirements have the effect of legislative enactments and are, therefore, subject to the ordinary rules of statutory construction"); *accord State ex rel. Cunningham v. Industrial Commission*, 30 Ohio St. 3d 73, 75, 506 N.E.2d 1179, 1181 (1987). One such principle is that statutory provisions that address the same subject matter or employ the same terms are *in pari materia*, and thus should be construed together and harmonized if at all possible. *Bobb v. Marchant*, 14 Ohio St. 3d 1, 469 N.E.2d 847 (1984); *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956); *Volan v. Keller*, 20 Ohio App. 2d 204, 253 N.E.2d 309 (Jefferson County 1969). Insofar as R.C. 3719.13 and rule 4729-5-17(H) both address access by certain governmental personnel to records compiled and maintained by pharmacists and pharmacies, and in so doing employ similar terminology, those two provisions should be construed together, and in a like fashion, if possible. As in the case of rule 4729-5-17(H), R.C. 3719.13 makes separate and explicit reference to the various categories of government personnel entitled to inspect prescription records required by R.C. Chapter 3719. R.C. 3719.13 permits inspection of those records by (1) federal, state, county, and municipal officers; (2) employees of the State Board of Pharmacy; and (3) employees of the State Medical Board. Again, lest the statutory language be needlessly redundant, R.C. 3719.13 demonstrates an intention on the part of the General Assembly that personnel of both the State Board of Pharmacy and the State Medical Board are to be distinguished from those state officers whose duty it is to enforce the laws of Ohio or the United States relating to controlled substances. To the extent that its language mirrors that of R.C. 3719.13, rule 4729-5-17(H) should be similarly interpreted.

It follows, therefore, that members or employees of the State Medical Board are not "state officer[s]" for purposes of rule 4729-5-17(H). Thus, that rule does not require a pharmacy or pharmacist that is responsible for maintaining drug dispensing or administering records to release its records to the State Medical Board or its employees.

#### **IV. The State Medical Board Has No Authority To Adopt An Administrative Regulation Authorizing Its Employees To Remove Prescription Records From Pharmacies Absent A Warrant Or Subpoena**

In its second question the State Medical Board asks whether it may, pursuant to R.C. 4731.05(A), adopt and promulgate an administrative rule authorizing the Board to obtain prescription records, absent a warrant or subpoena therefor. R.C. 4731.05(A) provides, in pertinent part, that the State Medical Board "shall adopt rules in accordance with [R.C. Chapter 119] to carry out the purposes of [R.C. Chapter 4731]." Such rules as have been adopted by the Board presently appear at 7 Ohio Admin. Code Chapters 4731-1 through 4731-14, and address various matters otherwise governed by R.C. Chapter 4731. *See, e.g.,* 7 Ohio Admin. Code Chapters 4731-1 (limited practitioners); 4731-3 (licensure by examination and endorsement); 4731-4 (physician's assistants); 4731-5 (administration of examinations); 4731-6 (medical and osteopathic licensure); 4731-11 (controlled substances).

It is my opinion that R.C. 4731.05(A) does not authorize the State Medical Board to adopt and promulgate an administrative rule that purports to confer upon the Board or its employees the authority to remove prescription records from the custody and control of a pharmacy or pharmacist that is responsible for maintaining those records. As I have already indicated, R.C. 4729.01 establishes the State Board of Pharmacy as the arm of state government responsible for enforcing the provisions of R.C. Chapter 4729 that regulate the practice of pharmacy in Ohio, and all aspects thereof. R.C. 4729.26 further grants the State Board of Pharmacy the authority to adopt rules and regulations, not inconsistent with law, pertaining to the practice of pharmacy as may be necessary to carry out the purpose of and enforce R.C. 4729.01-.37. Moreover, with respect to controlled substances in particular, R.C. 3719.28(A) requires the State Board of Pharmacy to adopt rules for the administration and enforcement of R.C. Chapter 3719 and "prescribing the manner of keeping and the form and content of records to be kept by persons authorized to

manufacture, distribute, dispense, conduct research in, prescribe, administer, or otherwise deal with controlled substances." Such rules shall be designed, *inter alia*, to "[a]id the state board of pharmacy and state, local, and federal law enforcement officers in enforcing the laws of [Ohio] and the federal government dealing with drug abuse and control of drug traffic." R.C. 3719.28(A)(2). Thus, pursuant to R.C. 3719.28(A) and R.C. 4729.26, the State Board of Pharmacy has, in its adoption of rule 4729-5-17, spelled out the specific recordkeeping requirements applicable to pharmacists who dispense drugs pursuant to prescription, including, in paragraph (H) thereof, the circumstances in which, and the persons to whom, drug dispensing records or information shall be released. As I have concluded previously, rule 4729-5-17(H), as it is presently drafted, does not require the release of those records to the State Medical Board or its employees.

The General Assembly, in its enactment of R.C. 3719.28 and R.C. 4729.26, has expressed its judgment that the primary responsibility for defining and describing the circumstances in which a pharmacist shall release prescription records under his control properly rests with the State Board of Pharmacy. Indeed, such action on the part of the General Assembly is both reasonable and logical in view of the fact that the compilation and maintenance of prescription records is an important aspect of the practice of pharmacy. On the other hand, there is nothing within the statutory scheme to indicate that the General Assembly has conferred a similar responsibility upon the State Medical Board. Accordingly, the State Medical Board may not adopt and promulgate an administrative rule that attempts to either regulate or otherwise affect an area in which the State Board of Pharmacy has exclusive jurisdiction, or articulate a policy that conflicts with or differs from lawfully enacted policies of the State Board of Pharmacy.<sup>4</sup> A rule promulgated by the State Medical Board

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<sup>4</sup> In 1962 Op. Att'y Gen. No. 3039, p. 422 one of my predecessors concluded in the syllabus paragraph thereof that R.C. 3719.05, R.C. 3719.26 (barbiturate recordkeeping, since repealed), and R.C. 3719.27 would not authorize an inspector of the State Board of Pharmacy

to remove from the records to be kept by a pharmacist under the provisions of those sections, a prescription for narcotics or barbiturates for use as evidence, except when such evidence is taken as a result of lawful search incident to a lawful arrest of the pharmacist so required to keep such records, for a violation of the law which would cause such records to be useful as evidence.

My predecessor first noted that the statutory provisions in question did not, by their express language, confer such authority upon an inspector of the State Board of Pharmacy. He also found nothing within those provisions from which to infer such authority. Rather, he indicated that the availability of a subpoena or warrant as an alternative means by which a Board inspector could obtain the subject records supported the conclusion that such authority was not granted by implication. 1962 Op. No. 3039 at 426. Additionally, he stated that, "since there is no provision in Chapter 3719., Revised Code, which relieves the pharmacist of the obligation of maintaining such records, if the pharmacist were to turn said records over to an inspector, such pharmacist would be in violation of the criminal provisions of Section 3719.99, Revised Code." *Id.* at 427.

1962 Op. No. 3039 did not address the question whether the State Board of Pharmacy, pursuant to its rulemaking powers under R.C. Chapters 3719 and 4729, could enact and promulgate an administrative rule that authorizes pharmacies or pharmacists to release certain records in their custody and control to such persons and in such circumstances as might be designated by the Board. In this instance I am of the opinion that rule 4729-5-17(H), to the extent that it provides for such release, is a lawful exercise of the rulemaking authority conferred upon the State Board of Pharmacy by R.C. Chapters 3719 and 4729. I, thus, do not believe that a pharmacy or pharmacist that releases drug dispensing or administering records in accordance with the specific terms of rule 4729-5-17(H) would



requiring the release of prescription records by a pharmacy or pharmacist to members or employees of the Board would, however, have precisely that effect. Thus, I must advise you that, while the State Board of Pharmacy may adopt a rule authorizing the State Medical Board to physically remove prescription records from a pharmacy despite the objections of the pharmacy, the State Medical Board may not adopt and promulgate such a rule pursuant to R.C. 4731.05(A).

Based upon the foregoing, it is my opinion, and you are advised that:

1. R.C. 3719.13 does not confer upon the State Medical Board or its employees the authority to remove prescription records from the custody and control of a pharmacy or pharmacist that is responsible for maintaining those records.
2. 7 Ohio Admin. Code 4729-5-17(H) does not require a pharmacy or pharmacist that is responsible for maintaining drug dispensing or administering records to release such records to the State Medical Board or its employees.
3. The State Medical Board may not, pursuant to R.C. 4731.05(A), adopt and promulgate an administrative rule that purports to confer upon the Board or its employees the authority to remove prescription records from the custody and control of a pharmacy or pharmacist that is responsible for maintaining those records.

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thereby find itself subject to criminal prosecution under R.C. 3719.99 for violating the record maintenance provisions of R.C. 3719.05 and R.C. 3719.27, or that a court would be inclined to characterize such conduct on the part of the pharmacy or pharmacist as a failure to comply with the mandates of those provisions. See R.C. 2901.04(A) ("[s]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused"); *Leet v. City of Eastlake*, 7 Ohio App. 2d 218, 223, 220 N.E.2d 121, 124 (Lake County 1966) ("a penal statute must be reasonably clear and precise, and a conviction under it can be upheld only if it is within both the spirit and the *letter* of the statute") (emphasis in original).