

**OPINION NO. 91-040****Syllabus:**

1. Employees of the State Dental Board who serve as investigators therefor are not "state officers" for purposes of R.C. 3719.13.
2. Absent a valid warrant or subpoena therefor, 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 prescriptions for controlled substances to the State Dental Board or its investigators or other employees.

**To: Omar P. Whisman, Executive Director, State Dental Board, Columbus, Ohio**  
**By: Lee Fisher, Attorney General, September 13, 1991**

You have requested an opinion regarding the authority of the State Dental Board to inspect and collect from pharmacies prescriptions for controlled substances in conjunction with disciplinary investigations undertaken by the Board pursuant to R.C. 4715.03(D) and R.C. 4715.30(A)(6). R.C. Chapter 4715 regulates the practice of dentistry and dental hygienics in Ohio, and in R.C. 4715.02 the General Assembly has established the State Dental Board as the governmental body responsible for overseeing the practice of those two professions and for administering and enforcing the provisions of R.C. Chapter 4715 that pertain thereto. R.C. 4715.03(D) thus provides, in part, that the Board shall administer and enforce the provisions of R.C. Chapter 4715, and "investigate evidence which appears to show that any person has violated any provision of [R.C. Chapter 4715]." Thereafter, the Board is authorized to conduct disciplinary proceedings pursuant to R.C. Chapter 119 if, following investigation, the Board "determines that there are reasonable grounds to believe that a violation of [R.C. Chapter 4715] has occurred." *Id.* R.C. 4715.30 in turn enumerates the various bases upon which the State Dental Board may initiate disciplinary proceedings against a person who holds a license or certificate issued under R.C. Chapter 4715. In particular, R.C. 4715.30(A)(6) states that a license or certificate holder is subject to disciplinary action for "[s]elling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes, or conviction of violating any law of this state or the federal government regulating the possession, distribution, or use of any drug."

It is my understanding that in conducting disciplinary investigations pursuant to R.C. 4715.30(A)(6), the State Dental Board may wish to examine prescriptions for controlled substances that have been written by certificate or license holders who are the subjects of such investigations. The law imposes an obligation upon dispensing pharmacists or pharmacies to retain prescriptions on file for specified periods of time. *See* 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 (controlled substances), or 4729 (pharmacists; dangerous drugs)); R.C. 3719.07(G)(2) (describing records to be retained by every owner of a pharmacy with respect to controlled substances dispensed thereby, and directing that such records shall be kept for a period of two years); R.C. 4729.37 (all prescriptions filled by a pharmacist "shall be preserved on file at the pharmacy for a period of three years, subject to inspection by the proper officers of the law"). Insofar as prescriptions for controlled substances are retained on file at dispensing pharmacies, the State Dental Board would like its investigators to have the opportunity to examine, and, if necessary, remove such prescriptions when conducting disciplinary investigations of particular certificate or license holders under R.C. 4715.03(D) and R.C. 4715.30(A)(6). You have indicated, however, that the Board is uncertain whether the Board or its investigators may engage in either of those activities absent the issuance of a warrant therefor by a court of law.

Accordingly, you have asked the following questions:

1. Do dental board investigators, as peace officers, fall into the definition of state officer whose duty it is to enforce the laws of this state pursuant to Section 3719.13 of the Revised Code?

2. Can the Ohio State Dental Board inspect and collect prescription records of controlled substances without a valid warrant?

**State Dental Board Investigators Are Not  
State Officers For Purposes Of R.C. 3719.13**

In your first question you have asked whether State Dental Board investigators, as peace officers, qualify as state officers whose duty it is to enforce the laws of Ohio for purposes of R.C. 3719.13. R.C. 3719.13 authorizes the inspection of prescriptions, orders, and records required by R.C. Chapter 3719<sup>1</sup> and stocks of controlled substances, and restricts the disclosure of information that pertains to such records. R.C. 3719.13 states 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. (Emphasis added.)

Pursuant to R.C. 3719.13, therefore, federal, state, county, and municipal officers and employees of the State Board of Pharmacy whose duty it is to enforce the laws of Ohio or of the United States relating to controlled substances are entitled to inspect prescriptions, orders, and records required by R.C. Chapter 3719, and stocks of dangerous drugs and controlled substances. R.C. 3719.13 also permits the inspection of those prescriptions, orders, records, and stocks by employees of the State Medical Board for purposes of enforcing R.C. Chapter 4731, the provisions of which address the practice of medicine and surgery in Ohio.

Conspicuously absent from R.C. 3719.13 is any express statement that members, investigators, or other employees of the State Dental Board are similarly entitled to inspect prescriptions, orders, and records pertaining to controlled substances. Thus, in accordance with the pertinent language of R.C. 3719.13,

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<sup>1</sup> R.C. Chapter 3719...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.

prescriptions for controlled substances shall be open for inspection to State Dental Board investigators only if it can be concluded that those investigators are "state officers" whose duty it is to enforce the laws of Ohio or of the United States relating to controlled substances.

You refer to the Board investigators as "peace officers," a characterization prompted by the decision of the Ohio Supreme Court in *State v. Colvin*, 19 Ohio St. 2d 86, 249 N.E.2d 784 (1969). In that case, the Court considered, *inter alia*, whether State Dental Board investigators are "[p]eace officer[s]," as defined in R.C. 2935.01(B), for purposes of the affidavit filing requirement then imposed upon peace officers by R.C. 2935.09.<sup>2</sup> The Court first noted that the General Assembly's use of the word "includes" in R.C. 2935.01(B), *see* note two, *supra*, disclosed its intent not to exclude other classes of officers to whom it may have granted enforcement powers, but which were not expressly mentioned in R.C. 2935.01(B). *State v. Colvin*, 19 Ohio St. 2d at 92, 249 N.E.2d at 788. The Court then stated that, in order to determine whether those investigators were peace officers, it would be necessary to consider the extent of the enforcement powers, if any, granted those individuals by R.C. Chapter 4715. In that regard, the Court stated that R.C. 4715.05 designates the Secretary of the State Dental Board as the officer in whom is vested ultimate responsibility for effecting the enforcement of R.C. Chapter 4715's provisions. Additionally, R.C. 4715.04 authorizes the Board to employ "such assistants, inspectors, investigators, and clerical help as it deems necessary to enforce" R.C. Chapter 4715. From this, the Court reasoned that Board investigators could properly be characterized as agents of the Board or its Secretary, and, thus, entitled to exercise the enforcement powers and duties enumerated in R.C. Chapter 4715, if and as delegated or assigned to them. *State v. Colvin*, 19 Ohio St. 2d at 93, 249 N.E.2d at 788 ("[i]nvestigators for the State Dental Board are the enforcement agents, under the supervision of the secretary of the board, charged with the responsibility of enforcing the statutes regulating the practice of dentistry and ferreting out violators thereof"). Accordingly, the Court held that, for purposes of R.C. 2935.09, State Dental Board investigators are "peace officers" who may file

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<sup>2</sup> R.C. 2935.09 states the following:

In all cases not provided by sections 2935.02 to 2935.08, inclusive, of the Revised Code, in order to cause the arrest or prosecution of a person charged with committing an offense in this state, a peace officer, or a private citizen having knowledge of the facts, shall file with the judge or clerk of a court of record, or with a magistrate, an affidavit charging the offense committed, or shall file such affidavit with the prosecuting attorney or attorney charged by law with the prosecution of offenses in court or before such magistrate, for the purpose of having a complaint filed by such prosecuting or other authorized attorney.

The version of R.C. 2935.01(B) considered by the Court in *State v. Colvin*, 19 Ohio St. 2d 86, 249 N.E.2d 784 (1969), read as follows:

As used in [R.C. Chapter 2935]:

....  
 "Peace officer" includes a sheriff, deputy sheriff, marshal, deputy marshal, member of the organized police department of any municipality, a police constable of any township, and, for the purpose of arrests within those areas, and for the purposes of Chapter 5503 of the Revised Code, and the filing of and service of process relating to those offenses witnessed or investigated by them, includes the superintendent and patrolmen of the State Highway Patrol.

R.C. 2935.01(B) has since been amended several times for the purpose of adding language that explicitly enumerates other categories of law enforcement personnel included as peace officers under that section.

affidavits to initiate prosecutions of persons who violate the laws regulating the practice of dentistry.

Although the conclusion that State Dental Board investigators are "peace officers" may reflect a correct reading of the statutory provisions at issue in *State v. Colvin*, I do not believe that conclusion is dispositive of whether those investigators are, for purposes of R.C. 3719.13, "state officers" whose duty it is to enforce state or federal laws relating to controlled substances. R.C. 3719.13 contains references to distinct categories of government personnel authorized to inspect prescriptions for controlled substances retained on file by pharmacies or pharmacists. R.C. 3719.13 provides that prescriptions shall be open for inspection only to (1) federal, state, county, and municipal officers; (2) employees of the State Board of Pharmacy; and (3) employees of the State Medical Board. By making separate and explicit reference to federal, state, county, and municipal officers on the one hand, and employees of both the State Board of Pharmacy and the State Medical Board on the other, one may reasonably presume an intention on the part of the General Assembly to distinguish employees of those Boards from the former category of "state officers." To presume the opposite would render needlessly redundant and superfluous R.C. 3719.13's separate references to "employees of the state board of pharmacy" and "employees of the state medical board." R.C. 3719.13 thus discloses the General Assembly's understanding that employees of the State Board of Pharmacy and the State Medical Board are not included within the category of "state officers," as used therein.

By analogy, therefore, it follows that employees of the State Dental Board are not included within the category of "state officers" referenced in R.C. 3719.13. The activities and responsibilities undertaken by employees of the State Dental Board pursuant to the various authorizations set forth in R.C. Chapter 4715 correspond closely, in their general character and scope, to the activities and responsibilities carried out by employees of the State Board of Pharmacy and employees of the State Medical Board pursuant to R.C. Chapters 4729 and 4731, respectively. Thus, to the extent one concludes, as I do, that employees of the State Board of Pharmacy and the State Medical Board are not "state officers" for purposes of R.C. 3719.13, one must adopt the same conclusion regarding employees of the State Dental Board, including those employees hired by the Board to work as investigators therefor.

Accordingly, employees of the State Dental Board are not "state officers" for purposes of R.C. 3719.13. Thus, R.C. 3719.13 does not require that prescriptions for controlled substances be open for inspection to employees of the Board who serve as its investigators.

**The State Dental Board Has No  
Authority To Inspect Prescriptions  
Absent A Valid Warrant**

In your second question you have asked whether the State Dental Board may inspect and collect prescriptions for controlled substances absent a valid warrant therefor. I presume that this inquiry, as in the case of your first question, is addressed to such inspection authority as may be conferred by R.C. 3719.13, but as may be exercised, however, by the individual members of the State Dental Board. If, as noted, R.C. 3719.13 does not empower investigators employed by the State Dental Board to inspect prescriptions for controlled substances, the same is necessarily true with respect to the individual Board members. Again, the structure of R.C. 3719.13 indicates that where the General Assembly has intended to confer specific inspection authority upon a regulatory board of its own creation, it has communicated that intent in express language that is clear and unequivocal, as in the case of both the State Board of Pharmacy and the State Medical Board. R.C. 3719.13 makes no mention of the State Dental Board, however, and from that I conclude that the General Assembly does not intend the State Dental Board to have such authority.

**The State Dental Board Has No Authority Under  
Administrative Rule 4729-5-17(H)  
To Collect Prescriptions From Pharmacies**

Finally, you have asked whether the State Dental Board may collect

prescriptions for controlled substances from pharmacies. You suggest that 7 Ohio Admin. Code 4729-5-17(H)<sup>3</sup> may confer such authority upon the Board. The State Board of Pharmacy has promulgated rule 4729-5-17 pursuant to authorizations in R.C. Chapter 4729, which regulates the practice of pharmacy in Ohio. Rule 4729-5-17 enumerates, *inter alia*, recordkeeping requirements that pharmacists and pharmacies must follow with respect to the dispensing of drugs. See 7 Ohio Admin. Code 4729-5-17(A)-(E). Rule 4729-5-17 also describes the circumstances in which drug dispensing or administering records shall be released in connection with specific investigations of designated persons or drugs. See 7 Ohio Admin. Code 4729-5-17(F)-(H). Rule 4729-5-17(H) 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.)

The language of rule 4729-5-17(H) thus provides that, upon request, drug dispensing or administering records shall be released to (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. Rule 4729-5-17(H) does not provide that drug dispensing or administering records shall be released to a "member," "inspector," "agent," "investigator," or "employee" of the State Dental Board. Accordingly, whether rule 4729-5-17(H) requires the custodian of such records to release them to a member, investigator, or other employee of the State Dental Board will depend upon the extent to which the individual Board member, investigator, or employee qualifies as a "state officer" under that regulation.

In your letter you have noted the similarity apparent in the language of R.C. 3719.13 and rule 4729-5-17(H). I concur in your observation, and for that reason believe it appropriate that an analysis corresponding to that which I have already used in the case of R.C. 3719.13 should be used in resolving this final question. In that regard, rule 4729-5-17(H) refers separately to a "member, inspector, agent, or investigator" of the State Board of Pharmacy, and any "state, county, or municipal officer," thus disclosing an understanding on the part of the State Board of Pharmacy that a member, inspector, agent, or investigator of the Board is not a "state officer" as therein described. For the reasons discussed previously, it also follows that a member, investigator, or other employee of the State Dental Board is not included within the category of "state officer" described in rule 4729-5-17(H). Cf. 1991 Op. Att'y Gen. No. 91-038 (similarly concluding that neither a member nor an employee of the State Medical Board is a "state officer" under rule 4729-5-17(H)). That rule does not, therefore, require a pharmacy or pharmacist that is responsible for maintaining drug dispensing or administering records to release those records to the State Dental Board or its investigators or other employees.

It is, therefore, my opinion, and you are advised that:

1. Employees of the State Dental Board who serve as investigators therefor are not "state officers" for purposes of R.C. 3719.13.
2. Absent a valid warrant or subpoena therefor, 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 prescriptions for controlled substances to the State Dental Board or its investigators or other employees.

<sup>3</sup> In your letter you have referred to rule 4729-5-17(F). The State Board of Pharmacy has reorganized the provisions of 7 Ohio Admin. Code 4729-5-17, however, and the matters addressed in former paragraph (F) of rule 4729-5-17 now appear in paragraph (H) thereof.