



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

November 30, 1990

Marjorie A. Bronk, R.N.
Executive Director
Board of Vocational Nurse
Examiners
9101 Burnet Road, Suite 105
Austin, Texas 78758

LO-90-102

Dear Ms. Bronk:

You have informed us that one of your licensees seeks the expunction of the records of a written complaint against her filed with the Board of Vocational Nurse Examiners (hereinafter the board) and an ensuing investigation of the matter. Although the investigation did not reveal any evidence against the licensee and no action was taken against her, she asserts that prospective employers have denied her employment because of these records. Furthermore, you state that the licensee was not notified of the complaint nor the investigation, contrary to board procedures. You ask our opinion as to whether you may expunge the matter of her investigation from her records.

Included with your request is an opinion letter from an assistant attorney general in our litigation division, advising that a previous attorney general opinion, Attorney General Opinion MW-327 (1981), decided that Texas law forbids the expunction or alteration of information in state records. We agree that the material in question is a public record, and does come under the holding of Attorney General Opinion MW-327. Section 12 of the Open Records Act provides that

Any person who wilfully destroys, mutilates, removes without permission as provided herein, or alters public records shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$25 nor more than \$4000, or confined in the county jail not less than three days nor more than three months, or both such fine and confinement.

However, this prohibition against the destruction of public records applies only when the destruction is unauthorized by statute. In other words, a public record may be destroyed if the destruction is carried out in accordance with law, unless the record at issue is the subject of a pending open records request. See Attorney General Opinion H-808 (1976); Open Records Decision No. 505 (1988).

There is no provision under the enabling statute of the board, V.T.C.S. art. 4528c, empowering you to destroy records of investigations.¹ V.T.C.S. art. 4528c. However, Government Code § 441.035(e) provides for the destruction of certain state records after approval by the director and librarian of the Texas State Library and Archives:

With the approval of the director and librarian, in accordance with this section, the head of any department or institution may destroy any state record in the custody of the head of the department or institution that, in the opinion of the head of the department or institution, does not have any further legal, administrative, or historical value. Before destroying the record, the head of the department or institution must file an application to do so with the director and librarian that describes the original purpose and the contents of the state record.

We advise you to apply to the director and librarian of the Texas State Library and Archives to determine whether you may expunge the information at issue. Without such permission, you must retain the information. However, MW-327 also states that an agency may insert into its files an explanation that allegations against an individual were

1. We note, however, that the statutes governing the Board of Nurse Examiners do contain such a provision. Article 4525a, V.T.C.S., relating to professional nurse reporting, provides in section 13, that "if at any time the board determines that a report submitted under this article is without merit, the report shall be expunged from the registered nurse's file." V.T.C.S. art. 4525a, § 13. V.T.C.S. article 4528 excepts licensed vocational nurses from the provisions regarding the Board of Nurse Examiners.

found to be unjustified. You may wish to take advantage of this option as well.

Because prior attorney general opinions resolve your question, we are answering you with this letter opinion rather than a published attorney general opinion. If you have further questions about this matter, please refer to LO-90-102.

Yours very truly,



Faith S. Steinberg
Assistant Attorney General
Opinion Committee

APPROVED: Sarah Woelk, Chief
Letter Opinion Section

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