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Texas Board of Nursing

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Katherine A. Thomas, MN, RN
Executive Director

June 4, 2008

Attorney General Greg Abbott
Office of the Attorney General
Opinion Committee
PO Box 12548
Austin, TX 78711-2548

Via CMRRR #7007 1490 0004 9913 1313

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OPINION COMMITTEE

RQ-0720-GA

FILE # ML-45729-08

I.D. # 45729

RE: Request for Attorney General Opinion

Dear Attorney General Abbott:

This letter amends and supercedes the request that was sent to your office on May 22, 2008 via certified mail number 7006 3450 0003 3864 7606. This letter is written pursuant to 402.042 of the Texas Government Code to request a legal opinion as to what information, if any, regarding an individual's mental health diagnosis or treatment may be kept confidential and not subject to disclosure under Chapter 552 of the Texas Government Code¹ or Chapter 301 of the Texas Occupations Code,² or when that information is collected pursuant to the duties of the Texas Board of Nursing. Similarly, does the Health Insurance Portability and Accountability Act (HIPAA) of 1996 limit the disclosure of these records. There has been no specific request from individuals for information on these matters. However, there has been general complaints received by candidates for licensure that the Board's inquiry into mental health disorders is an impermissible invasion of privacy, and if allowed because of public interest concerns, should remain confidential.

Issues:

1. Is the answer of an individual as to whether they have been diagnosed with mental health disorder that is provided on official documents of the Board confidential and exempt from disclosure?

¹ Texas Public Information Act. The Board believes the applicable exception to the issues presented is section 552.101, Texas Government Code, in that individuals have a constitutional right to privacy.

² Texas Nursing Practice Act (hereinafter referred to as "NPA"). The Board believes that the applicable exception to disclosure is section 301.466(a), Texas Occupations Code, which provides in part:

(a) A complaint and investigation concerning a nurse under this subchapter and all information and material compiled by the board in connection with the complaint and investigation are:

- (1) confidential and not subject to disclosure under Chapter 552, Government Code; and
- (2) not subject to disclosure, discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or a board employee or agent involved in license holder discipline.

2. Is the investigatory material collected during an investigation into a licensure candidate's mental health disorder confidential and exempt from disclosure even though it may form the basis of granting an unencumbered license or form the basis of a public order granting licensure?
3. Is a Board requested psychological or psychiatric evaluation of a candidate for licensure confidential and exempt from disclosure even though a public order is entered which summarizes the evaluation?
4. Is a final order of the Board which grants licensure subject to disclosure when the basis for Board action is a mental health disorder?

Background

In its effort to regulate the practice of nursing in Texas, the Board of Nursing will ask an applicant for nursing license or a licensee seeking to renew their license the following question:

in the last five (5) years, they have been diagnosed with, or treated, or hospitalized for schizophrenia, or other psychotic disorder, bipolar disorder, paranoid personality disorder, anti-social personality disorder, or borderline personality disorder?

See 22 TEX. ADMIN. CODE sec. 213.29 (Attachment 1). This self-disclosure question appears on several documents of the Board.³ (Attachment 2). Based on an affirmative answer to this question, the Board will conduct an investigation into the mental health history of the applicant or licensee to determine if the stated mental health diagnosis will impact their ability or competency to practice nursing safely.

The Board's self disclosure questionnaire has been challenged under the provision of the Federal Americans with Disabilities Act (ADA)⁴. In 1999, the Board was subject of a lawsuit⁵ and complaint⁶ filed with the Office of Civil Rights of the Department of Health and Human Services. The civil rights investigation was resolved favorably toward the Board in by letter

³ RN Application for Initial Licensure by Examination
LVN Application for Initial Licensure by Examination
Petition for Declaratory Order (regarding eligibility for licensure)
RN Temporary License/Endorsement Application
LVN Temporary License/Endorsement Application
RN License Renewal Form (filed bi-annually)
LVN License Renewal Form (filed bi-annually)
RN Reactivation Application
LVN Reactivation Application

⁴ See generally 42 U.S.C. §§ 12131-12180.

⁵ *Jane Doe v. Texas Board of Nurse Examiners*, Civil Action No. A 99 CA 711 JN, in the United States District Court, Western District of Texas, Austin Division.

⁶ OCR Docket Number 06993177.

decision of the Office of Civil Rights on October 19, 1999. (Attachment 3). The lawsuit was settled without a finding of liability. The legal analysis that supports the Board's inquiry into mental health is based in part on the 1994 decision of Judge Sam Sparks, United States District Court Judge, in *Applicants v. Texas State Board of Law Examiners, et al.*, No. A 93 CA 740 SS. (Attachment 4). Board was able to settle its lawsuit and investigation by agreeing to modify its eligibility question concerning mental illness by dropping the mental health diagnosis of "depression" or "major depression" from the question. Since 1998, the Board's eligibility question regarding an applicant's mental health history has remained unaltered and unchallenged.

Additionally, objection has been made that the Board may be able to request medical history information, but that redisclosure is forebidden pursuant to the Health Insurance Portability and Accountability Act (HIPAA) of 1996.

Public Policy Supports Mental Illness Inquiry:

In order to protect the public from any risk of incompetent nursing practice, the Board makes inquiry into those areas that clearly relate to the present fitness and good professional character necessary to practice nursing. By rule, the Board's fitness inquiry "is relevant only so far as it may indicate current . . . lack of fitness." See 22 Tex. Admin. Code §213.29(e).

As stated earlier, an applicant or licensee seeking renewal will be asked, "in the past five (5) years, have you been diagnosed with, or treated, or hospitalized for schizophrenia or other psychotic disorder, bipolar disorder, paranoid personality disorder, antisocial personality disorder, or borderline personality disorder?" As a result of any affirmative answer to the eligibility question, the Board will conduct an investigation to ensure that should the individual be granted a license or license renewal, they possess the minimum character and competency to practice nursing safely. The investigation may take on several forms.

Board's Investigation Concerning Mental Disorders

Although the individual may have a reviewable mental health diagnosis, the applicant or licensee may provide reliable and verifiable evidence of having functioned in a manner consistent with safe practice. Normally, this evidence is a letter from a treating physician that states the individual is, and has, functioned very well. An investigation with this type of evidence may be closed with no action or licensure restriction. However, the information provided by the individual will contain mental health treatment records and remains in the nurses permanent file. Attached hereto is an example of a letter from a treating physician showing that the individual in question has a reviewable diagnosis, but is functioning very well. (Attachment 5).

Occasionally, the mental health issues may appear more serious after initial review and demonstrate a risk of behavior inconsistent with nursing. During the investigation; a request is made to the individual to provide additional information. For example, the individual may be requested to submit to a psychological or neurological evaluation to be performed by an independent mental health expert. A mental health professional is specifically asked to evaluate

the individual in terms of their mental health disorder and whether they have the ability to meet the standards associated with nursing practice. The evaluator will conduct an interview, review extensive medical records, medical history and any material received by the Board through its investigation. The resulting report is provided to the Board for further evaluation. (Attachment 6). Attachment 6 summarizes the material reviewed by the evaluator.

At the conclusion of an eligibility investigation, the Board may determine that it is prudent to enter into a probationary order with the candidate based on recommendations contained in the evaluation. (Attachment 7). Alternatively, the Board may find it prudent to deny licensure based on an unfavorable evaluation or other evidence that may justify denial of licensure. The Board's orders, as they relate to licensure eligibility when there is mental health concerns, will contain findings of fact and conclusions of law as required by Chapter 2001 of the Texas Government Code.

The findings in the Board's orders outline the mental health concern or diagnosis and a summary of the evidence which the Board accumulated in an effort to support the decision to grant licensure. These orders are generally consent or agreed orders, unless a contested case or formal proceeding has been conducted at the State Office of Administrative Hearings. These orders, as well as the underlying findings are considered public records under Chapter 552 of the Texas Government Code. Nevertheless, it is the investigatory material and records that the Board has accumulated in support of its action, or decision not to act, which is of serious concern to the Board.

Confidentiality of the Personal Mental Health Records and Material.

The Board views the information relating to a person's mental health to be highly personal in nature and often very embarrassing. The Board believes very strongly in its right to inquire regarding a person's mental health to the extent that it is relevant to the person's ability to practice nursing safely. *See Applicants v. Texas State Bd. of Law Examiners, supra.* The issues posed by this request for opinion is subsequent to the Board's lawful inquiry, investigation and determination. What information contained in the Board's files regarding an applicant or licensee is subject to disclosure pursuant to Chapter 552 of the Texas Government Code? The Board seeks the answer to this basic question, *supra*, regarding several types of documents and information. The stigma associated with a mental health disorder is often voiced by those under review by the board and is one of the reasons applicants seek protection under the ADA. The Federal Freedom of Information Act has specific statutory reference that protect personal medical records.⁷

⁷ See 5 U.S.C §552(b)(6) (FOIA does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy")

Confidentiality of Answer to the Mental Health Self Disclosure Question

First, the eligibility question itself. It is not uncommon for an applicant for licensure or licensee seeking to renew their license to answer affirmatively, provide clear and convincing evidence of successful intervention, treatment, and consistently safe practice. There may be no action considered necessary or warranted. However, a public inquiry of the Board's records would reveal that the individual answered "yes" to the mental health question and identified the concern. The answer itself would be considered highly personal, embarrassing and an invasion of personal privacy.

The Board believes it has the right to keep its investigations confidential under Texas Occupations Code, Section 301.466, but what about the disclosure made on the official forms of the Board? Can the Board maintain the confidentiality of the answers to its mental health question?

Confidentiality of the Material Collected During Investigation

Second, the information gathered in the investigation is inevitably an accumulation of medical evidence regarding an individual's history, diagnosis and treatment. The medical records which led to mental illness often includes highly embarrassing and personal information. Similarly, an individual will provide documents from personal references and family members designed to attest to the individual's competency or treatment success. Although these records are not medical in nature, they too contain the highly personal and embarrassing information.

Staff believes that the medical records and background information may be confidential because of the fact that the Board must engage in an investigation and that investigations are considered confidential pursuant to Section 301.466, Texas Occupations Code. However, full investigations often lead to public eligibility orders that merely summarize the evidence in support of eligibility. Can the Board maintain the confidentiality of the investigatory material collected even though a public order is entered that summarizes that information?

Confidentiality of Board Requested Psychological Evaluation

Third, the psychological or psychiatric evaluation that is provided to the Board will reveal extensive testing and interviews of an individual with a mental health specialist. These reports are furnished directly to the Board and contain highly personal and embarrassing information. These reports often form a basis for approval of licensure and may contain recommendations that support stipulations which are summarized in a public board order.

The Board feels that these reports may also be investigation information protected from disclosure under Section 301.466, Texas Occupations Code. These reports are frequently referenced in Board eligibility orders, but never outlined in their entirety. Can the Board maintain the confidentiality of Board requested psychological or psychiatric evaluations even though a public order is entered which summarizes the evaluation?

Final Orders Based on Mental Health Investigations

Lastly, the Board orders that grant licensure to candidates and nurses with a mental health history may require a monitoring period. These orders contain findings regarding the mental health diagnosis and the rationale for the stipulated licensing order. Staff views these orders as public,⁸ but the material referenced within the findings and conclusions are often highly personal and embarrassing. Many licensure candidates believe these orders should be made confidential. Can the final orders or findings be kept confidential and exempt from disclosure?

In summary, the Board would request an opinion as to whether all or any of the following may be considered confidential and not subject to disclosure under Chapter 552, Texas Government Code, Health Insurance Portability and Accountability Act (HIPAA) of 1996, or Section 301.466 of Texas Occupations Code:

1. Answer to the mental health fitness question.
2. Investigatory material supplied to or gathered by the Board concerning mental health diagnosis and treatment (including a Board requested psychological evaluation) when the Board chooses to close the investigation without action.
3. Investigatory material supplied to or gathered by the Board concerning mental health diagnosis and treatment (including a Board requested psychological evaluation) when the Board chooses to license an applicant with Board action that summarizes the material or deny licensure.
4. Board orders or more particularly the findings of fact regarding mental health diagnosis.

If you have any questions, please contact me at (512) 305-6888, or Dusty Johnston, General Counsel, at (512) 305-6821.

Sincerely,


Katherine A. Thomas, MN, RN
Executive Director

Enclosures

cc: Nancy Fuller, Chair
Opinion Committee
Office of the Attorney General

⁸ TEX. OCC. CODE ANN §§301.463(c) and 301.466(c).