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Office of the Attorney General

State of South Carolina
Opinion No. 84-61
May 25, 1984

***1 SUBJECT: Public Information**

Under South Carolina's Freedom of Information Act, a final order or opinion issued in a disciplinary proceeding by a State licensing board or agency would be public information.

TO: F. Douglas McDonald, Ph.D.
Chairman
South Carolina State Board of Examiners in Speech Pathology and Audiology

QUESTION:

You have requested the opinion of this Office as to whether 'final disciplinary actions taken by the state's licensing boards (or agencies) against licensed professionals is public information.' By 'final disciplinary actions,' it is assumed that you are referring to the final order or report, in whatever written form, issued at the conclusion of a disciplinary matter heard by a licensing board, agency, or commission of this State.

DISCUSSION:

The South Carolina State Board of Examiners in Speech Pathology and Audiology (Board) has received a request from the National Clearinghouse on Licensure, Enforcement and Regulation, Inc., to have this Office determine whether final disciplinary actions taken by the state's licensing boards against licensed professionals would be public information. The Clearinghouse is establishing a National Disciplinary Information System which, by subscription, will provide timely written reports on disciplinary actions taken by state authorities against licensees; its use would be to determine if any disciplined licensees from other states are licensed or applying for a license in another state. Each report would list, by profession, full names of disciplined licensees and the following facts for each licensee: date of birth, date and type of disciplinary action taken, other professions of the licensee (if possible), length of action, and name of the state authority taking action. While the request for this opinion originated with your Board, this opinion would apply equally to reports or results of disciplinary actions taken by any licensing board, agency, or commission in the State, except as specifically noted. [1]

South Carolina's Freedom of Information Act (the Act or FOIA) is presently codified as Section 30–4–10 et seq., Code of Laws of South Carolina (1983 Cum. Supp.). In enacting the FOIA in its present form by Act No. 593, 1978 Acts and Joint Resolutions, the General Assembly found

that it is vital in a democratic society that public business be performed in an open and public manner as it conducts its business so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, this act is adopted, making it possible for citizens, or their representatives, to learn and report fully the activities of their public officials.

Act No. 593 of 1978, Section 2. Clearly, one goal of the Act is the protection of the public. Similarly, the General Assembly has sought to protect the public through the licensure of persons practicing a learned profession and through the regulation (i.e.,

discipline by suspension or revocation of license) of the members of the profession. See, State ex rel. McLeod v. Holcomb, 245 S.C. 63, 138 S.E.2d 707 (1964). The South Carolina State Board of Examiners in Speech Pathology and Audiology is one such licensing board. See Section 40–67–10 et seq. of the Code, entitled 'Licensure Act for Speech Pathologists and Audiologists.'

***2** As with any statute, the primary guideline to be used in construing the FOIA or any provision thereof, is the intention of the legislature. Adams v. Clarendon County School District No. 2, 270 S.C. 266, 241 S.E.2d 897 (1978). As mentioned earlier, one obvious purpose of the FOIA is to protect the public. Toward that end, the Act is remedial in nature and must be construed liberally to carry out the purpose mandated by the General Assembly. See, South Carolina Department of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Exemptions from or exceptions to the Act's applicability are to be narrowly construed. News and Observer Publishing Company v. Interim Board of Education for Wake County, 29 N.C.App. 37, 223 S.E.2d 580 (1976).

The requirements of the Freedom of Information Act apply to public bodies of this State as that term is defined by Section 30–4–20(a); a portion of the definition would include as a public body '. . . any state board . . . supported in whole or in part by public funds or expending public funds . . ..' Section 40–67–30 of the Code states that '[t]here is hereby created a State Board of Examiners in Speech Pathology and Audiology . . ..' By Section 112 of Act No. 151, 1983 Acts and Joint Resolutions, it may be seen that the Board is supported by public funds. Hence, the Act is applicable to the Board. [2]

The scope of applicability of the Act to records of the Board is established by the definition of 'public record' contained in Section 30–4–20(c):
'Public record' includes all books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of or retained by a public body. Records such as income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records and other records which by law are required to be closed to the public shall not be deemed to be made open to the public under the provisions of this chapter . . ..

An examination of the Licensing Act reveals that no provision is made for the confidentiality of the records of the Board; hence, it must be assumed that the records of the Board, including records of disciplinary proceedings, would be public information unless an exemption to disclosure under Section 30–4–40 would be applicable to a particular record or portion thereof. [3] Specifically, final orders or opinions rendered in the adjudication of cases are declared to be public information by Section 30–4–50(3); as discussed below, this provision is applicable to final decisions of the Board in disciplining procedures.

The Board is authorized not only to license speech pathologists and audiologists but also, by provisions in Sections 40–67–160 and 40–67–170, to suspend or revoke the license of a speech pathologist or audiologist. [4] Section 40–67–160 specifies the grounds for suspension or revocation of licenses of speech pathologists or audiologists. Section 40–67–170 provides the due process procedures to be followed, including notice and a hearing; that section specifically provides that ' t he licensee shall be notified in writing of the Board's decision.' [5] The statute does not, however, specify what information is to be contained in the notification of the Board's decision.

***3** To determine the information which should be contained in the decision or order of the Board to suspend or revoke a license of one of its licensees, the Freedom of Information Act may be read together and harmonized with South Carolina's Administrative Procedures Act, Section 1–23–310 et seq. of the Code. [6] See, Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970). Section 1–23–350 provides the guidelines for final decisions or orders in contested cases; that statute reads in pertinent part:
A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in

accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding . . ..

Thus, to comply with statutory requirements, the Board's decision concerning suspension or revocation of a licensee's license should set forth (1) a statement of the underlying facts which support (2) the stated findings of facts, and finally (3) the conclusions of law, stated separately from the findings of fact.

Once the Board has rendered such a decision in the form specified by Section 1–23–350, that final decision or order would become public information subject to disclosure under Section 30–4–50(3), which provides in part:
Without limiting the meaning of other sections of this [Act], the following categories of information are specifically made public information subject to [specified] restrictions and limitations . . . of this [Act]:

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(3) Final opinions, including concurring and dissenting opinions, as well orders, made in the adjudication of cases;

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As public information, the Board's final order or decision in cases of license revocation or suspension could then be released to the National Clearinghouse for use in its National Disciplinary Information System. As a practical matter, the order or decision would probably contain most, if not all, of the information sought by the clearinghouse; full name of the disciplined licensee, date and type of disciplinary action taken, length of action, and name of the state authority taking action would most certainly be included.

One additional factor to be considered is whether the order or decision may contain information of such a nature that disclosure thereof would constitute an unreasonable invasion of personal privacy. In such instances, according to Section 30–4–40(a)(2), such matters may be exempt from disclosure. As noted above, such exemptions are to be construed narrowly, to effectuate the purpose of the Act. News and Observer Publishing Company v. Interim Board of Education, supra. While our Supreme Court has not yet interpreted this exemption, the Fourth Circuit, in construing a similar provision in the Federal Freedom of Information Act,[7] 5 U.S.C. § 552 et seq., stated that 'in determining the issue whether a disclosure would constitute a 'clearly unwarranted invasion of personal privacy', they should 'tilt the balance in favor of disclosure.'' Robles v. Environmental Protection Agency, 484 F.2d 843, 846 (4th Cir. 1973). The Robles court looked for 'intimate details' of a 'highly personal nature' to determine whether a clearly unwarranted invasion of personal privacy had occurred. 484 F.2d at 845. Because the South Carolina and federal statutes are similar, the reasoning of the Robles court could probably be followed in this instance to conclude that public disclosure in doubtful cases is favored. Such a determination must, of course, be made on a case-by-case basis.

***4** Also requested by the National Clearinghouse were the date of birth of the licensee and, if possible, a listing of other professions in which the licensee may be licensed. This information may or may not be contained in a final order or decision of the Board. If such information is contained in the order or decision, it should probably be released. The date of birth in particular would serve as an additional piece of identifying information and may serve to protect another licensee who coincidentally has the same name as the disciplined licensee. If such information is not contained in a final order or decision but is contained in another record (i.e., application for licensure) maintained by the Board and subject to public disclosure, the information may be released.[8] See, Simpson v. Vance, 648 F.2d 10 (D.C. Dir. 1980) (date of birth is matter of public record); State v. Mayo, 4 Conn. Cir. 511, 236 A.2d 342 (1967) (application is public record).

By analogy, other professions have taken into account the purpose of protecting the public interest by disciplinary actions against licensees as well as the privacy rights of licensees, and have balanced the interests in favor of the public interest. See, for example, Gross v. Colorado State Board of Dental Examiners, 37 Colo. App. 504, 552 P.2d 38 (1976); Kansas State Board of Healing Arts v. Seasholtz, 210 Kan. 694, 504 P.2d 576 (1972). Furthermore, at least one court has stated that the 'right to privacy does not extend to affairs with which the public has a legitimate concern.' Courier-Journal v. McDonald, 524 S.W.2d 633, 635 (Ky. 1974). The South Carolina Supreme Court Rules on Disciplinary Procedure indicate that records of the Supreme Court are confidential prior to its taking disciplinary action against an attorney, by Rule 20, yet the final order is public unless the sanction is a private reprimand. See Rules 31, 27C, and others. Furthermore, Supreme Court Rule 20G provides that [t]he Board [of Commissioners on Grievances and Discipline] through the Chairman or his designee shall transmit notice of all public discipline imposed on an attorney or the transfer to inactive status due to disability of an attorney to the National Discipline Data Bank maintained by the American Bar Association.

Thus, it is evident that the Supreme Court has considered the privacy interests of disciplined attorneys and has tipped the balance in favor of protecting the public. We find no reason to distinguish final disciplinary orders or decisions by other professional licensing boards from those issued by the Supreme Court disciplining attorneys. Otherwise, such disciplinary action would lose much of its meaning and public purpose.

CONCLUSION:

Under South Carolina's Freedom of Information Act, the final order or decision of a professional licensing board or agency to suspend or revoke the license of one of its licensees, written to meet the specifications of Section 1–23–350, would be public information which could be released to the National Clearinghouse on Licensure, Enforcement and Regulation, Inc. Such disclosure would further the goals of both the Freedom of Information Act and the licensing boards to protect the public.

***5** T. Travis Medlock
Attorney General

Footnotes

1 This opinion is limited to consideration of the disclosure of the final order or decision rendered in a disciplinary proceeding against a licensee and does not address the disclosure of investigative materials or the records of a sanction other than a public one.

2 Applicability of the Act to other such licensing boards would be similarly established by reference to a particular board's enabling legislation and other related legislative acts, including but not limited to annual appropriations acts.

3 By contract, see, for example, Section 40–15–180(3) of the Code (Board of Dentistry) and Section 40–55–130 of the Code (1983 Cum. Supp.) (Psychology Examiners Board). Because the General Assembly has chosen to specify by statute the state boards whose proceedings and investigations or communications are to remain confidential, it must be presumed that the legislature intended that such proceedings, investigations, or communications of other state boards unaddressed by statute not be confidential. 2A Sutherland Statutory Construction § 47.23; Home Building & Loan Association v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1938). But see John P. v. Whalen, 75 A.D.2d 1021, 429 N.Y.S.2d 335, aff'd 54 N.Y.2d 89, 429 N.E.2d 117, 444 N.Y.S.2d 598 (1980) (investigative materials used in disciplinary proceeding of licensee not discoverable); Nichols v. Gamos, 35 N.Y.2d 35, 358 N.Y.S.2d 712 (1974); Atchison, T. & S.F. Ry. Co. v. Kansas Comm. on Civil Rights, 215 Kan. 911, 529 P.2d 666 (1974). These statutes or cases would not apply to the final order or decision of a licensing board, however.

4 See licensing statutes for other licensing boards' authority to suspend or revoke a professional license; examples are Sections 40–47–200 (Medical Board), 40–37–280 (Optometry Board), and 40–69–140 (Veterinary Board).

5 See also Regulation 115–10, part F: 'The individual charged will be notified of any Board decision(s) by certified or registered mail immediately following the conclusion of the proceedings.'

6 To determine applicability of the Administrative Procedures Act to this Board or any other board, see Section 1–23–310(1) of the Code, pertaining to the definition of 'agency' as including state boards authorized by statute to make rules or determine contested cases, as well as the enabling legislation of the board to determine its authorization to promulgate rules or determine contested cases.

Section 40–67–90 authorizes the Board in question to promulgate regulations, and Section 40–67–170, to determine contested cases. Therefore, the provisions of the Administrative Procedures Act would be applicable to the Board.

7 See 5 U.S.C. § 552(b)(6) which states that the section of the Act pertaining to availability of public information does not apply to 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' (Emphasis added.)

8 No statute pertaining to this Board appears to make confidential the application for licensure; thus, it would be considered a public record generally subject to disclosure. See Op. Atty. Gen. dated September 8, 1983. Of course, some information in the file may be determined to be of such a nature that the disclosure thereof would constitute an unreasonable invasion of personal privacy, warranting non-disclosure under Section 30–4–40(a)(2).

It should be noted further that this Office has twice advised that age or date of birth not be disclosed in Ops. Atty. Gen. dated March 25, 1975, and August 21, 1980. These opinions were written in the context of what information may be released from an employee's personnel file. Here, a licensee and not an employee is under consideration; therefore, the two prior opinions are readily distinguishable and would not be applicable in this instance.

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