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ATTORNEY GENERAL OF TEXAS

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Texas Board of Nursing
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Opinion No. KP-0260

Re: Applicability of nondisclosure orders on the licensing operations of the Texas Board of Nursing, and reconsideration of GA-0919 due to amendments to chapter 411 of the Government Code (RQ-0263-KP)

Dear Ms. Thomas:

Chapter 411 of the Government Code authorizes a court to issue an order regulating the use and disclosure of certain criminal history record information—a nondisclosure order. *See* TEX. GOV'T CODE §§ 411.071–.1410 (subchapters E-1 and F). You inform us that the Texas Board of Nursing (the “Board”) issues disciplinary orders that may cite to a licensee’s criminal history when relevant to Board action.¹ You ask generally about the duty of an entity maintaining criminal history record information to seal information subject to a nondisclosure order under subchapter E-1. Request Letter at 1. You ask more specifically whether the Board must seal or redact criminal history record information contained in a Board disciplinary order if the Board does not learn of the nondisclosure order until after issuing the disciplinary order. *Id.* at 1–2.

Courts “analyze statutes as a cohesive, contextual whole.” *In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018). They consider the context and statutory framework, and attempt to give each statute “a meaning that is in harmony with other related statutes.” *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018). Thus, we review in some detail the nondisclosure provisions of chapter 411, subchapters E-1 and F, and pertinent Board authority under chapter 301 of the Occupations Code before attempting to reconcile the Board’s statutory duties.⁰

Criminal history record information “consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *See* TEX. GOV'T CODE §§ 411.071, .082(2). Subchapter E-1 specifies a variety of circumstances that may be eligible for a nondisclosure order. *See id.* §§ 411.0715–.074. A nondisclosure order may be available for several types of misdemeanor and felony charges. *See, e.g., id.* §§ 411.072 (certain nonviolent misdemeanors), 411.0725 (certain felonies and

¹*See* Letter from Ms. Katherine A. Thomas, MN, RN, FAAN, Exec. Dir., Tex. Bd. of Nursing, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (Jan. 11, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

misdemeanors), 411.074 (required conditions). The types of dispositions of felony or misdemeanor charges that may qualify for a nondisclosure order include dismissal, deferred adjudication, probation, and conviction for certain misdemeanors. *See, e.g., id.* §§ 411.072 (concerning deferred adjudication community supervision), 411.0727 (concerning dismissal and other disposition following participation in a veterans' treatment court program), 411.0735 (concerning nondisclosure order following conviction of certain offenses). When a court issues a nondisclosure order, it must send a copy of the order or information in the order to the Department of Public Safety (the "Department"). *Id.* § 411.075(a). The Department, in turn, must provide the information or the order to law enforcement agencies, other specified entities, and "other officials or agencies or other entities of this state," which includes the Board. *Id.* §§ 411.075(b)(1), .125. An entity or individual who receives the information or order from the Department must, within 30 days, "seal any criminal history record information maintained by the individual or entity that is the subject of the order." *Id.* § 411.075(d).

Subchapter F governs the dissemination, use, and disclosure of criminal history record information. *See id.* §§ 411.081–.1410. The Department may not disseminate the criminal history record information it maintains except as provided by subchapter E-1 or subchapter F. *Id.* § 411.083(a). The Department must grant access to criminal history record information to noncriminal justice agencies authorized by statute to receive the information. *Id.* § 411.083(b)(2), (c) (authorizing dissemination "only for a purpose specified in the statute or order"). Subchapter F grants the Board and other specified entities access to the Department's criminal history record information.² Criminal history record information obtained from the Department "is for the exclusive use of the authorized recipient of the information [and] may be disclosed or used by the recipient only if, and only to the extent that, disclosure or use is authorized or directed by" a court order, subchapter F or another statute, or a rule adopted under a statute. *Id.* § 411.084(a)(1), (2). "An agency or individual may not confirm the existence or nonexistence of criminal history record information to any person that is not eligible to receive the information." *Id.* § 411.084(c). A person who knowingly or intentionally "obtains criminal history record information in an unauthorized manner, uses the information for an unauthorized purpose, or discloses the information to a person who is not entitled to the information" commits a criminal offense. *Id.* § 411.085(a)(1). Finally, subchapter F provides that it "does not apply to criminal history record information that is contained in" public administrative proceedings and published administrative opinions. *Id.* § 411.081(a)(3), (5).

²Section 411.125 provides:

The Texas Board of Nursing is entitled to obtain from the department criminal history record information maintained by the department that relates to a person who:

- (1) is an applicant for or the holder of a license issued by the board;
- (2) has requested a determination of eligibility for a license from the board; or
- (3) is subject to investigation by the board in connection with a complaint or formal charge against the person.

Next, we review the Board's authority under the Nursing Practice Act, chapter 301 of the Occupations Code. Chapter 301 generally governs licensure and discipline of the practice of nursing by the Board. *See generally* TEX. OCC. CODE §§ 301.001–.657. A person's criminal history may provide the grounds for disciplinary action. Specifically, the Board may revoke, suspend, or deny a license as appropriate for a conviction, deferred adjudication, and deferred disposition for a felony or a misdemeanor involving moral turpitude, among other misconduct. *Id.* §§ 301.452(b)(3), (4), .453, .4535; *see also id.* § 53.021 (applicable to licensing authorities generally); 22 TEX. ADMIN. CODE § 213.28 (Tex. Bd. of Nursing, Licensure of Individuals with Criminal History).

The Board or any person may initiate a disciplinary proceeding by filing a complaint. TEX. OCC. CODE § 301.457(a). The Board may investigate the complaint and, if probable cause exists, attempt an informal disposition or file formal charges. *Id.* § 301.457(d). A formal charge must “be specific enough to enable a person of common understanding to know what is meant by the formal charge,” and “contain a degree of certainty that gives the person who is the subject of the formal charge notice of each particular act alleged to violate a specific statute, board rule, or board order.” *Id.* § 301.458(b)(2), (3).

Under section 301.466, the complaint and investigatory stages of disciplinary proceedings are generally confidential:

(a) A complaint and investigation concerning a nurse under this subchapter, 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.

Id. § 301.466(a); *but see id.* § 301.466(b) (authorizing limited disclosure). Beginning with the filing of formal charges, however, specified disciplinary actions and information are generally *not* confidential:

(c) The filing of formal charges against a nurse by the board, the nature of those charges, disciplinary proceedings of the board, and final disciplinary actions, including warnings and reprimands, by the board are not confidential and are subject to disclosure in accordance with [the Public Information Act].

Id. § 301.466(c); *but see id.* § 301.466(a), (d) (excepting Board-ordered peer assistance program). Thus, final disciplinary orders, whether they follow formal or informal disciplinary proceedings, are not confidential and are subject to public disclosure. *Id.* § 301.463(c) (“An agreed order is a

public record.”), 301.466(c) (final disciplinary actions are not confidential and are subject to disclosure).³

Several sections in chapter 301 specifically address criminal history and criminal history record information. The Board may require license applicants and holders seeking renewal to provide fingerprints “for the purpose of obtaining criminal history record information.” *Id.* §§ 301.2511, .3011. The Board may utilize criminal history record information to determine a petition for a declaratory order of eligibility for licensing. *Id.* § 301.257(a), (j), (m). Finally, section 301.1615 provides:

(a) . . . the board may request and receive criminal history record information from the Federal Bureau of Investigation [and from the Department];

(b) Criminal history record information received by the board may be used only by the board and is privileged. The information may not be disclosed to any person other than:

(1) as required under a court order; or

(2) to a nursing board that is a member of the nurse licensure compact under Chapter 304.

(c) If, on the basis of criminal history record information obtained by the board, the board proposes to deny an application for a license, refuse to renew a license, or suspend or revoke a license or temporary permit, the applicant or license holder is entitled to a hearing under Section 301.454.

Id. § 301.1615 (emphasis added). Thus, subsection 301.1615(c) reinforces the Board’s authority to utilize criminal history record information to deny a license or discipline a license holder. *See id.* § 301.1615(c). But subsection 301.1615(b) expressly prohibits the board’s disclosure of criminal history record information to “any person” except pursuant to a court order or to another nursing board. *Id.* § 301.1615(b).

Previously, this office determined that the Board’s final disciplinary orders were not subject to the duty to seal pursuant to a nondisclosure order. Tex. Att’y Gen. Op. No. GA-0919 (2012) at 3. Government Code subsection 411.081(a) states that “[t]his subchapter [i.e., subchapter F] does not apply to criminal history record information that is contained in” public administrative proceedings and published administrative opinions. TEX. GOV’T CODE

³The Board must send a copy of its final order to the nurse and the nurse’s last known employer. TEX. OCC. CODE § 301.469. Also, the Board must periodically disseminate summaries of disciplinary action taken to nurses and employers of nurses. *Id.* § 301.158. The Board must maintain records of its meetings and a registry of nurses available as public information. *Id.* § 301.103. In certain circumstances, the Board may remove specified disciplinary action from the nurse licensure verification page of its website and from the coordinated licensure system under the Nurse Licensure Compact of licensing authorities. *Id.* § 301.1583.

§ 411.081(a)(3), (5) (emphasis added). Before amendment in 2015, the duty to seal was also located in section 411.081.⁴ Because all of the nondisclosure provisions were then contained in subchapter F, and subchapter F does not apply to public administrative proceedings and published administrative opinions, this office determined that section 411.081 did not require the Board to “adjust its disciplinary orders to avoid disclosure of criminal history record information.” Tex. Att’y Gen. Op. No. GA-0919 (2012) at 3.⁵

But by moving the duty to seal from section 411.081 in subchapter F to section 411.075 in subchapter E-1, the 2015 amendments disconnected the link between the duty to seal and the exception for public administrative proceedings and published opinions. The exception in subsection 411.081(a) still limits application of “this subchapter,” *i.e.* subchapter F, and does not include the duties now located in subchapter E-1. Subchapter E-1 does not contain a similar exception for public administrative proceedings and published administrative opinions. *See* TEX. GOV’T CODE §§ 411.071–.0775.

Thus, the Board’s duties to seal and keep criminal history record information confidential potentially conflict with its duties to discipline or deny licensing using nonconfidential procedures and orders. *Compare id.* §§ 411.075(d) (requiring the Board to seal the information), 411.085(a)(1) (making unauthorized use or disclosure an offense), 552.142(a) (excepting criminal history record information from the duty of disclosure under the Public Information Act), *and* TEX. OCC. CODE § 301.1615(b) (prohibiting the Board from disclosing criminal history record information to “any person”), *with* TEX. GOV’T CODE § 411.081(a)(3), (5) (excepting administrative proceedings and final opinions from application of subchapter F), *and* TEX. OCC. CODE §§ 301.463(c) (providing that agreed orders are public records), 301.466(c) (providing that the filing of formal charges, the nature of the charges, disciplinary proceedings, and final disciplinary actions are not confidential and are subject to disclosure). However, courts attempt to harmonize potentially conflicting statutes, giving full effect to both, if possible. *Rodriguez*, 547 S.W.3d at 838–39. A court may apply rules for resolving conflict to determine that one statute prevails over another, but only if the conflict is irreconcilable.⁶ *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 86 & n.19 (Tex. 2006).

A court would likely conclude that the Board’s duty to keep criminal history record information confidential can be reconciled with its duty to keep specified disciplinary proceedings and final actions nonconfidential. No statute specifically requires the Board to disclose criminal history record information in its proceedings and orders. While formal charges must “be specific” and sufficiently certain to provide the nurse charged with “notice of each particular act alleged to violate a specific statute, board rule, or board order,” only the *filing* of formal charges, not the charges themselves, must be nonconfidential. TEX. OCC. CODE § 301.458(b)(2), (3), .466(c). Moreover, the Board may impose disciplinary action in nonconfidential proceedings and orders for underlying criminal conduct without disclosing criminal history record information that results

⁴*See* Act of May 26, 2015, 84th Leg., R.S., ch. 1279, § 8, 2015 Tex. Gen. Laws 4328, 4332 (transferring subsection 411.081(g-1b) to section 411.075).

⁵Because it construed subchapter F prior to the 2015 amendments, Texas Attorney General Opinion GA-0919 (2012) is superseded by statute.

⁶*See* TEX. GOV’T CODE §§ 311.025 (latest date of enactment rule), 311.026 (general versus specific rule).

from that conduct.⁷ While the duty to protect criminal history record information may require the Board to alter its nonconfidential disciplinary procedures and actions, the Legislature has called on the Board to strike that balance and comply with both mandates. *See id.* § 301.151 (authorizing the board to adopt rules “necessary to . . . perform its duties and conduct proceedings”).⁸

⁷*See id.* §§ 411.071, .082(2) (defining criminal history record information as “identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions”).

⁸You also ask whether the Board must seal or redact criminal history record information contained in a Board disciplinary order, if the Board does not learn of the nondisclosure until after issuing the disciplinary order or learns of the order from some source other than the Department. Request Letter at 1–2. The statutes requiring the Board to keep criminal history record information confidential do not include an exception applicable to the Board’s final orders. *See* TEX. OCC. CODE § 301.1615. Courts will not “write special exceptions into a statute so as to make it inapplicable under certain circumstances not mentioned in the statute.” *Pub. Util. Comm’n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988). While it may seem unusual to require the Board to treat information that previously was available to the public as confidential, we note that another statute requires that result in another context. TEX. OCC. CODE § 301.6555(b) (authorizing Board to issue a nonconfidential deferred disciplinary action, but requiring the Board to make that information confidential if the person successfully meets the conditions imposed by the Board).

S U M M A R Y

Under subsection 301.1615(b) of the Occupations Code, the Texas Board of Nursing may not disclose the criminal history record information of its license applicants or holders to any person except to another nursing board or by court order.

When the Department of Public Safety provides the Board with a nondisclosure order or the order's contents, subsection 411.075(d) of the Government Code requires the Board to seal criminal history record information it maintains that is subject to the nondisclosure order. The Board has a duty to seal and maintain such information as confidential even when the Board learns of a nondisclosure order after issuing a final disciplinary action.

Very truly yours,



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