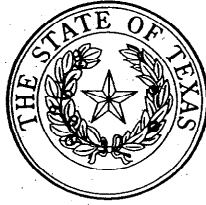


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OPINION COMMITTEE



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RQ-0529-JC

Texas Board of Architectural Examiners
Architecture / Interior Design / Landscape Architecture

April 3, 2002

The Honorable John Cornyn
Attorney General of Texas
Post Office Box 12548
Austin, Texas 78711-2548

FILE # ML-42552-02
I.D. # 42552

Re: Request for opinion regarding the confidentiality of medical information

Dear General Cornyn:

The Texas Board of Architectural Examiners ("the Board") has directed me to request from you an opinion regarding the Board's authority or duty to maintain the privacy of medical information that comes into the Board's possession under certain circumstances. Specifically, I am inquiring about the confidentiality of medical information the Board receives from a person who seeks accommodation for a licensing examination due to a disability.

Pursuant to its enabling legislation, the Board requires that an applicant for registration as an architect, landscape architect, or interior designer must pass a professional licensing examination. The Board administers the nationally standardized landscape architectural licensing examination in Austin, Texas. The Board contracts with the National Council of Architectural Registration Boards and the National Council for Interior Design Qualification (NCIDQ) to administer the architectural licensing examination and the interior design licensing examination, respectively. The architectural licensing examination is administered daily at facilities operated by the Chauncey Group and Sylvan Learning Centers throughout the United States, including a number of facilities in Texas. The interior design licensing examination is administered twice annually at Texas locations designated by NCIDQ.

In order to comply with the Americans with Disabilities Act (hereafter the "ADA"), the Board arranges for accommodations to be made at facilities where the professional licensing examinations are administered. As part of this process, the Board obtains information from each examinee who requests accommodation to determine whether the examinee has a disability and the nature of the accommodation(s) necessary as a result of the disability.

Accessibility Requirements under the Americans with Disabilities Act (ADA)

Title II of the ADA prohibits discrimination against the disabled by public entities. 42 U.S.C. § 12131 *et seq.* As a state agency, the Board is a “public entity” for purposes of Title II of the ADA. 42 U.S.C. § 12131(1). Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. In implementing this section, the Department of Justice adopted regulations that state, in part, “A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability. . . .” 28 C.F.R. § 35.130(b)(6)(2001)

Title III of the ADA prohibits discrimination against persons with disabilities in places of public accommodation. 42 U.S.C § 12181 *et seq.* The term “places of public accommodation” generally refers to private entities that provide services to the public, including educational facilities. 42 U.S.C § 12181(7)(J). Title III provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182. Title III includes the following specific prohibition on discrimination in administering licensing examinations: “any person that offers examinations . . . related to applications, licensing, certification or credentialing for . . . professional . . . purposes shall offer such examinations . . . in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.” 42 U.S.C. § 12189. The Department of Justice has construed this section to specifically apply to authorities which administer state mandated professional licensing programs and are not covered by title II of the ADA because they are not state or local agencies. Appendix B to Part 36 C.F.R. (1991) (Section-by-Section Analysis and Response to Comments).

The Office of the Attorney General, citing federal case law, has construed the provisions of title III of the ADA to apply to public entities that administer licensing examinations even though title III generally is restricted to private entities. *See* Tex. Att’y Gen. Op. No. JC-0050 at page 2 (May 17, 1999). Pursuant to this opinion, the Board is subject to the provisions of the ADA in administering its examinations pursuant to title II and also is subject to the specific accessibility requirements applicable to professional examinations included in title III. The contractors who administer the examinations for the Board clearly are subject to title III of the ADA.

The Department of Justice has determined that an examiner may require evidence that an examinee is entitled to accommodation under the ADA. The commentary to 28 C.F.R. § 36.309 states, “Examiners may require evidence that an applicant is entitled to modifications or aids as required by this section, but requests for documentation must be

reasonable and must be limited to the need for the modification or aid requested. Appropriate documentation might include a letter from a physician or other professional. . . .” App. B, construing § 36.309, *quoted in* Tex. Att’y Gen. Op. No. JC-0050 at 4.

The Board’s Disability Assessment Procedure

The Board has implemented a procedure through which a person may request accommodation, due to a disability, to sit for an examination. As part of this procedure, the Board requires each examinee who has requested accommodation to submit evidence of a disability as envisioned by the commentary to 28 C.F.R. § 36.309. The Board has created a disability assessment form for this purpose. The form is to be completed by the examinee’s physician and submitted to the Board’s staff. Copies of the form and a document explaining the Board’s procedure are enclosed for your reference.

The disability assessment form used by the Board requests a diagnosis of the examinee’s disability, a description of the limitations caused by the disability, and a description of the necessary accommodation(s). The staff of the Board reviews each request for accommodation. If the staff determines that the examinee is disabled in a manner which denies the examinee an equal opportunity to successfully complete the examination, appropriate accommodations are made for the examinations administered at the Board’s offices. For the examinations which are not administered by the Board, a request for accommodation is forwarded to the appropriate contractor so that necessary accommodation(s) may be made.

Confidentiality of Medical Information

The Board is requesting an opinion regarding its authority or obligation to maintain the privacy of the data it obtains through a disability assessment form pursuant to the ADA. Title I of the ADA relating to employment discrimination requires that information about the medical conditions or medical histories of employees and applicants be collected and maintained on separate forms, kept in separate medical files, and treated as confidential medical records. 42 U.S.C. §§ 12112(d)(3)(B) and 12112(d)(3)(C). *See* Open Records Decision No. 641 (April 18, 1996) (holding that medical records which are confidential under title I of the ADA are exempt from disclosure under the Texas Open Records Act). There are no comparable confidentiality requirements regarding the medical conditions or histories of examinees under title II and title III of the ADA.

Although there is no federal provision that directly addresses the confidentiality of physicians’ statements regarding an examinee’s disability, the Board respectfully submits that such information is confidential under Texas law pursuant to Chapter 159 of the Texas Occupations Code. Chapter 159 of the Texas Occupations Code provides for the confidentiality of communications between physicians and patients. Texas Occupations Code § 159.02 reads, in part, as follows:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Nearly all of the information recorded on the disability assessment form consists of a physician's record of the identity, diagnosis, evaluation, or treatment of a patient. An examinee may include additional information regarding the disability or the accommodation(s) the examinee is requesting. This information is disclosed to the Board solely for the purpose of determining whether accommodation(s) should be made at an examination and the nature of such accommodation(s). It would appear that the information recorded on the disability assessment form would be subject to the provisions of Texas Occupations Code § 159.02(b). If so, pursuant to §159.02(c), this information may not be disclosed except for the purpose of ensuring that the Board's licensing examinations are administered in a nondiscriminatory manner.

The Office of the Attorney General has ruled that in governing access to a specific subset of information, the confidentiality provisions described above prevail over the more general provisions of the Public Information Act. *See* Open Records Decision No. 598 (1991); Open Records Letter Ruling 2001-0472 at page 3 (February 6, 2001); and Open Records Letter Ruling 2001-1005 at pages 1-2 (March 14, 2001). The Board submits that the information it obtains through its disability assessment form is confidential under Texas Occupations Code § 159.001 *et seq.* and may be disclosed only pursuant to the provisions of that Act.

Request for Opinion

The Board would appreciate your providing answers to the following questions:

1. Whether the information that the Board receives on its disability assessment form pursuant to the ADA is confidential under Texas Occupations Code §§ 159.001 *et seq.* and subject to disclosure only pursuant to the provisions of that Act?
2. Whether the privacy provisions in title I of the ADA apply by analogy to information regarding examinees' medical histories and medical conditions obtained by the Board under title II and title III of the ADA, thus requiring the Board to maintain this information in separate files and treat such information as confidential medical records?

Honorable John Cornyn, Texas Attorney General

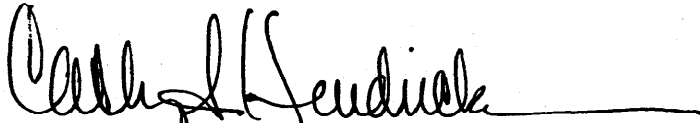
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The Board recognizes that the requirements of the Texas Public Information Act will continue to apply to all requests for information provided through the disability assessment form even if the requested opinion holds that this information is confidential. If the Board receives a request for this information, the Board will seek a ruling from the Office of the Attorney General pursuant to the Texas Public Information Act and will not withhold the information without such a ruling. The Board is seeking this opinion to determine whether the Board should reconsider the information it solicits through the disability assessment form if it is determined that the information is not confidential and may be available to the public. The Board also would like to know whether the ADA requires this information to be maintained in separate files.

Thank you for your consideration of this request for a formal opinion. I look forward to receiving your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Cathy L. Hendricks", with a long horizontal line extending to the right.

Cathy L. Hendricks, ASID/IIDA
Executive Director

Enclosures

cc Chairman Steve Ellinger and Members, Texas Board of Architectural Examiners