



Texas Board of Physical Therapy Examiners

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September 20, 2011

Greg Abbott, Attorney General of Texas
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OPINION COMMITTEE

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I.D. # 46824

Dear Attorney General Abbott:

As the Executive Director of the Executive Council of Physical and Occupational Therapy Examiners, I am requesting an Attorney General Opinion for the Texas Board of Physical Therapy Examiners (the Board) on the question of whether the Board may provide social security numbers (SSNs) of Texas licensees to the Federation of State Boards of Physical Therapy (the FSBPT), a non-profit, member-driven organization made up of physical therapy licensing authorities in the US and its territories. If providing the complete SSN is not possible, the Board asks, alternatively, whether it can provide the FSBPT with the last four digits of the SSN. The Board has unanimously agreed to request this opinion.

The Board understands that SSNs have certain confidentiality standards under federal and state law, but it believes that public protection will be better served if the Board and the FSBPT use SSNs to accurately identify licensees and applicants, as explained in the following paragraphs.

Use of the FSBPT database of disciplinary action and licensure information

The FSBPT owns and administers the only national database of disciplinary action and licensure information for physical therapists ("PTs") and physical therapist assistants ("PTAs"). Many, though not all, state licensing authorities report the disciplinary action they take to the FSBPT. (The Board currently reports disciplinary action to the FSBPT, and furnishes all licensee identification data except the SSN.) When it receives disciplinary action notification from another state, the FSBPT promptly notifies the Board if that individual is also licensed in Texas. This notification gives the Board the opportunity to contact the disciplining board to determine whether action to protect the public needs to be taken in Texas as well. To do this accurately and promptly, the FSBPT must be able to link score and disciplinary information to an individual and then link the individual to the jurisdictions which have issued a license to him or her. If matches are not exact in the database, the FSBPT must research the possible matches to determine which is accurate. Sometimes, due to name changes and other changing data, a match cannot be made with certainty without the SSN.

Additionally, the FSBPT monitors the National Examinations for activity which indicates an attempt to cheat, or to harvest questions to sell to applicants who might not otherwise pass the exam. The goal, for the FSBPT and its members, is to avoid licensing individuals who would

have failed the exam without pre-knowledge of the exam questions, and to maintain the validity and reliability of the national exam so that it is a true measure of a person's knowledge. The SSN is critical in this effort as well, as the FSBPT verifies data provided by the applicant to the Board with data it receives as part of the individual's exam registration.

Both of these services provided by the FSBPT are of vital importance to the Board in carrying out its mission of public protection, and require accurate identification of the individuals in question. SSNs are the only unique identifier for individuals licensed as PTs and PTAs in Texas, and for National Examination candidates. The Board believes the FSBPT needs SSNs to accurately identify each unique individual in its database, and to make sure that people licensed in more than one state are identified correctly so that the Board and the FSBPT exchange accurate information with no uncertainty to preclude or delay the exchange.

Because of the nature of the relationship between the Board and the FSBPT, and the role the FSBPT plays in physical therapy licensure nationally, the Board believes the FSBPT is in a unique position to assist the Board in protecting the public. Indeed, the Board is aware that the Texas Board of Nursing has a similar relationship with the National Council of State Boards of Nursing. The National Council administers the Nurse Licensure Compact and its "coordinated licensure information system," which is defined as "an integrated process for collecting, storing, and sharing information on nurse licensing and enforcement activities related to nurse licensing laws, which is administered by a nonprofit organization composed of and controlled by state nurse licensing boards." (304.001 Article 2). Title 3, Subtitle E, Chapter 304 of the Occupations Code, 304.008, Disclosure of Personal Information, states "In reporting information to the coordinated licensure information system under Article 7 of the Nurse Licensure Compact, the Texas Board of Nursing may disclose personally identifiable information about the nurse, including social security number."

Background information about the FSBPT

The FSBPT, a Not-For-Profit corporation under IRC 501c(6), was formed in 1986 to provide an organization through which physical therapy licensing agencies could work together to promote and protect the health, welfare and safety of the American public who seek and receive legally qualified physical therapy services. The FSBPT is a membership organization made up of the 50 state physical therapy licensing agencies, as well as the District of Columbia, Puerto Rico, and the US Virgin Islands. The FSBPT is also the owner of the National Physical Therapy and Physical Therapist Assistants Examinations (the National Examinations).

In 1995, the FSBPT initiated its national licensure and disciplinary action database to support physical therapy state licensing authorities in their mission of public protection. The FSBPT already has the SSNs of all applicants for physical therapy licensure who have applied for licensure in any state (including Texas) since 2000; in that year the FSBPT began requiring the SSN to register for the national examination. The FSBPT warrants that any information, including the SSN, that is provided by any of its member boards will not be used for any type of marketing purposes, nor will it be considered or used as public information. The Board is aware of no breaches in confidentiality in the 16 years that the FSBPT has maintained its database.

Based on the membership nature of the organization, any such breach would have come to the attention of the Board as a member.

As a member of the FSBPT, the Board is aware of the great effort the organization has invested in developing and implementing policies and procedures and electronic systems with an emphasis on security. Its online system is housed on a secure website and can only be accessed by authorized states that have been given a user name and password by the FSBPT. Licensing boards only have access to data on their licensees; other boards can only view that data if they too have licensed that individual or if a score transfer has been requested by an applicant for licensure in that state. Currently, information required on applications to take the National Examinations includes the applicant's SSN as noted above.

Legal background information about the use of SSNs

SSNs originated as nine-digit account numbers assigned by the Commissioner of Social Security to assist in carrying out the Social Security Act of 1935. They were originally intended for the federal government's exclusive use as a method of tracking earnings to determine the amount of Social Security taxes to credit to each worker's account. *Greidinger v. Davis*, 988 F.2d 1344, 1352 (4th Cir. 1993).

Despite their initial intended use, over the years SSNs have been widely used as universal identifiers in both the public and private sectors. Since it began issuing licenses to PTs and PTAs in 1972, the Board has required applicants for licensure to provide the Board with their SSNs on their application forms. Authorization for the Board to require the information it finds necessary was included in the original 1971 enactment of the law requiring the licensure of PTs and PTAs:

An applicant for a license as a physical therapist shall file a written application on forms provided by the board together with an examination fee of \$5.

Section 8 of Acts 1971, 62nd Leg., p. 2542, ch. 836, eff. Sept. 1, 1971. Section 9 of the same Act makes the same requirement of PTAs. Attached is a copy of the Board's Application for Licensure from 1971 marked as "Exhibit 1" where the SSNs must be provided. (The SSNs on this application have been redacted.) Also, Texas law states that a licensing agency may request an SSN in its application form where the relevant licensing statute provides that "a person shall apply for an original or renewal . . . license on forms prescribed by [the licensing agency]." *Op. Tex. Att'y Gen. No. GA-0289, 2005 Tex. AG LEXIS 441, *4 (Jan. 3, 2005).*

Although the legislation dealing with the licensing of PTs and PTAs has been amended over the years, it has retained its requirement that an applicant for a license file a written application on a form provided by the Board. *See Tex. Occ. Code, § 453.202 (1999) ("An applicant for a physical therapist license or a physical therapist assistant license must submit to the board a written application on a form provided by the board").* The forms have always required provision of the applicant's SSN. Thus, from 1972 to the present, the Board has properly

obtained, through its authorized application forms, the SSNs of all applicants for a license to practice physical therapy in Texas.¹

The Police Power of the State

The State of Texas has long recognized that the public need for safety, health, security and protection of the general welfare allows for the regulation of occupations and professions as part of its police power. *See Satterfield v. Crown Cork & Seal Co., Inc.*, 268 S.W.3d 190, 217 (Tex. App.-Austin 2008) (citing cases). *See also Garcia v. State Bd. Of Medical Examiners*, 384 F.Supp. 434 at p. 437 (W.D. Tex. 1974, *aff'd*, 421 U.S. 995 (1975) (reciting that police power of state includes power to enact regulations for practice of medicine..., and there is no right to practice medicine which is not subordinate to the police power.) The Board's proposed provision of SSNs to the FSBPT for the purpose of obtaining accurate information from, and providing accurate information to, the FSBPT licensure and disciplinary database regarding disciplinary action and licensure status for PTs and PTAs licensed in Texas is consistent with the exercise of the State's police power to protect its citizens' health, safety and welfare. Texas residents have the right to trust that the PT or PTA treating them obtained his or her license pursuant to law. They have the right to trust that, when another state reports disciplinary action to the FSBPT for a person who holds a license in Texas as well as in the reporting state, that Texas licensee is properly identified in the licensure and disciplinary action database so that the FSBPT can report that information accurately and quickly to Texas.

Another example that demonstrates why Texas should exercise its police powers by including SSNs to accurately identify individuals involves fraudulent activity by licensure applicants. The FSBPT has been confronted numerous times in the last ten years with cheating scandals involving licensees and licensure applicants who obtained illegally received material about the National Examinations which enabled them to pass the exam. SSNs provided by member licensing agencies for the FSBPT's national licensure and disciplinary database have proven to be a powerful tool for identifying and prosecuting the violators. The repeating nature of this problem emphasizes the need for the exercise of the state's police power to ensure the fitness of each of licensee to practice physical therapy in Texas. The only question is whether the sharing of SSNs for this purpose is absolutely prohibited by law.

The Board recognizes that growing concerns over privacy rights and identity theft have given rise to increasing restrictions on how SSNs are used. Texas, however, does not appear to have enacted an absolute prohibition against a state agency's disclosure of SSNs in all circumstances. Rather, the Legislature has focused on limiting public disclosures of SSNs under Texas' Public Information Act, Tex. Gov't Code, §§552.001 et seq. In some circumstances, SSNs may be disclosed to the public. *See Tex. Gov't Code, §552.147(c) and (d)* (allowing county or district clerks to disclose, in the ordinary course of business, an SSN that is contained in information

¹ Federal law now mandates that state professional licensing agencies require applicants for professional licenses to provide their SSNs to increase the effectiveness of child support enforcement. 42 U.S.C. § 666(a)(13) (requiring states to adopt laws providing that the SSN of any applicant for a professional license be recorded on the application). *See* Tex. Fam. Code, § 231.302(c)(1) (requiring applicants for a license to provide their SSNs).

held by the clerk's office unless an individual has submitted a written request for the clerk to redact all but the last four digits of the individual's SSN). However, with respect to the SSNs gathered by the Board, the Texas Legislature has declared that the SSNs provided by applicants for licensure are protected from public disclosure.

The social security number of an applicant for or a holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

*Tex. Occ. Code, § 59.001. See also Op. Tex. Atty Gen. No. GA-0519, 2007 Tex. AG LEXIS 21, *10 (Feb. 21, 2007) (listing laws outside the Public Information Act as well as provisions of the Public Information Act that protect SSNs from public disclosure).*

The Board believes that the sharing of SSNs with the FSBPT is not a disclosure under Chapter 552. The Public Information Act is an act that makes information in the hands of government bodies available to the public. *See Tex. Gov't Code, § 552.021.* In the present case, the Board is not proposing to make the SSNs of its licensees or applicants available to the public. On the contrary, the Board, as a member of the FSBPT, is only seeking to provide SSNs to the FSBPT under circumstances where the continued confidentiality of the SSN will be warranted and maintained by the FSBPT and not shared with the public. As discussed above, the FSBPT has developed and implemented strict policies and procedures to prevent access to its database information by unauthorized individuals or entities. Accordingly, the provisions of the Public Information Act are not applicable because there is no proposal or request to make a public disclosure of SSNs.

Nor, in the Board's opinion, is the proposed sharing of SSNs with the FSBPT a violation of the licensees' privacy rights. A relatively low risk of identity theft may sufficiently diminish the privacy interest in SSNs to warrant their disclosure in a situation where a strong public interest in disclosure exists. *O'Connor v. Frost National Bank, 2009 Tex. App. LEXIS 7924, *24 (Tex. App. - Houston [1st Dist.] 2009), review denied, 2010 Tex. LEXIS 192 (Tex. 2010), cert. denied, ___ U.S. ___, 131 S.Ct. 155 (2010) (quoting from *Sherman v. United States Dept. of Army, 244 F.3d 357, 366 (5th Cir. 2001)*). See also *Industrial Foundation of the South v. Texas Industrial Accident Bd., 540 S.W. 2d 668, 686 (Tex. 1976) (providing names and social security numbers of claimants for workmen's compensation is not an invasion of privacy even if information about the nature of their injuries is protected by the claimant's privacy rights). Cf. Texas Comptroller of Public Accounts v. Attorney General of Texas, ___ S.W.3d ___, 2010 Tex. LEXIS 890, *17 (Tex. 2010) (applying a balancing test to determine that state employees' privacy interests in their birthdates outweigh public interest in disclosing birthdates in response to a request for payroll database information about state employees).**

In the present case, the public interest is best served by obtaining and providing accurate information about the disciplinary and licensure status of the PTs and PTAs practicing in Texas,

as well as those applying to practice. Providing the SSNs of Texas licensees to the FSBPT enables the Board to provide and receive this vital information. On the other hand, there appears to be little risk to the Texas licensees that any identity theft of their SSNs will result from the Board's providing the SSNs to the FSBPT. As described previously, the FSBPT houses its online system on a secure website that can only be accessed by authorized states that have been given a user name and password. The FSBPT's policies, procedures and electronic systems have been developed and implemented with an emphasis on security. Given the low risk of identity theft, the Texas licensees' privacy interests in their SSNs should not outweigh the strong public protection interest in providing those SSNs to the FSBPT.

The Board is aware that the Social Security Act has been amended to impose disclosure limitations on federal and state employees. In particular 42 U.S.C. § 405(c)(2)(C)(viii)(I) provides:

Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security number or related record.² Emphasis added.

This provision, however, only applies to SSNs obtained or maintained pursuant to a provision of law enacted on or after October 1, 1990. *See Op. Tex. Att'y Gen. No. GA-0519, 2007 Tex. AG LEXIS 21, *7-8 n.2 (Feb. 21, 2007)(listing examples of Texas laws enacted after October 1, 1990, that authorize Texas governmental bodies to obtain or maintain SSNs).*

The Texas law requiring the licensure of PTs and PTAs was enacted in 1971, as stated previously, and the application form provided by the Board has required applicants to list their SSN since the first application was printed in the same year. *See Sections 8 and 9 of Acts 1971, 62nd Leg., P. 2542, Ch. 836, eff. Sept. 2, 1971.* A licensing board is authorized to request a SSN in its application form where relevant licensing statute provides that "a person shall apply for an original or renewal...license prescribed by [the licensing agency]". *Op. Tex. Atty Gen. No. GA-0289 2005 Tex. AG LEXIS 441 *4 (Jan. 3, 2005).* Although the law dealing with the licensing of PTs and PTAs in Texas has been amended in part over the years, it has retained through all amendments its requirement that an applicant for licensure file a written application on a form provided by the Board. And the form provided by the Board has retained to the present the requirement that the applicant list his or her SSN. Thus, from 1971 until the present the Board has properly obtained and maintained the SSNs of all applicants for licensure pursuant to a law enacted long before October 1, 1990. Accordingly, the Board believes that 42 U.S.C. §405(c)(2)(C)(viii)(I) should not apply to the SSNs in the possession of the Board and should not prohibit the Board from providing those SSNs to the FSBPT in the interest of public protection.

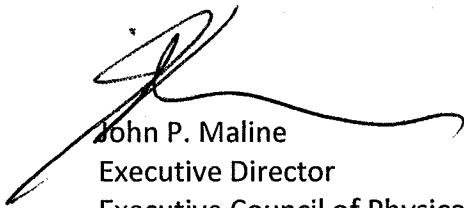
² "Authorized person" is defined to include "an officer or employee of any State... or agency of a State... who has or had access to social security account numbers or related records pursuant to any provision of law enacted on or after October 1, 1990..." 42 U.S. § 405(c)(2)(C)(viii)(III). Disclosure in violation of the statute is a felony. 42 U.S.C. § 408(a)(8).

Congress also imposed limitations on the disclosure of an individual's identifying information in the 1974 Privacy Act, 5 U.S.C. §552a. However, it appears these limitations are only applicable to federal agencies and do not apply to state agencies or bodies. *See St. Michael's Convalescent Hospital v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981); *Ingerman v. Delaware River Port Auth.*, 630 F. Supp. 2d 426, 434 (D.N.J. 2009)(distinguishing between the definition of "agency" as a federal agency throughout the codified Privacy Act and the specific language of the uncodified Section 7 of the Privacy Act barring any "Federal, State or local government agency" from requiring individuals to provide their SSNs in order to obtain any right, benefit or privilege).³

Based on the status and application of Texas and federal law as stated above, the Board asks for consideration of the question posed in the first paragraph: In the interest of public protection, can the Board legally provide SSNs to the FSBPT along with the other data it provides on all individuals licensed, or seeking to be licensed, by the Board. Alternatively, if the Atty General finds that the Board may not share SSNs with the FSBPT, can the Board legally provide the last four digits of its licensees' SSNs. Although a truncated SSN is not in itself a unique identifier, it does provide an additional element that can be paired with other information, such as date of birth, to increase the accuracy of the identification.

Thank you for your consideration of this issue.

Sincerely yours,



John P. Maline
Executive Director
Executive Council of Physical Therapy & Occupational Therapy Examiners

³ The Board believes uncodified Section 7 of the Privacy Act of 1974 (recited in the note to 5 U.S.C. § 552a) is not applicable to the present request for an Attorney General Opinion because the issue here is whether the Board can provide licensees' SSNs it already has to the FSBPT, not whether the Board can require applicants for licensure to divulge their SSNs. In any event, exemptions in Section 7 allowing for compulsory disclosure by applicants where such disclosure is required by federal law or where the state agency required such disclosure prior to January 1, 1975, permit the Board to continue to require applicants to provide their SSNs.