

TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

EXECUTIVE DIRECTOR
Darrel D. Spinks



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OPINION COMMITTEE

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May 20, 2014

Via Email to Opinion_committee@texasattorneygeneral.gov

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-1201-6A

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Dear Mr. Abbott:

The Texas State Board of Examiners of Psychologists (the Board) seeks an Attorney General opinion regarding the following issue(s):

1. Whether mental health records placed in the custody of the Board by a District Court, following a civil action brought by the Attorney General-Consumer Protection Division against a licensed psychologist, constitute *state records*, as that term applies to the Board under Ch. 441 of the Texas Gov't Code.
2. If the mental health records placed in the Board's custody do not constitute state records, can the Board legally destroy those records?

On March 11, 2014, the 430th District Court of Hidalgo County, Texas entered an *Agreed Final Judgment and Permanent Injunction* (hereinafter referred to as the "Agreed Judgment") against a licensee of this Board. A true and correct copy of the Agreed Judgment is attached hereto for reference. According to the Agreed Judgment, the business records belonging to the licensee, which were in the temporary custody of the Office of the Attorney General-Consumer Protection Division (OAG-CPD), were to be transferred to the Board. Since the entry of the Agreed Judgment, some twenty-three boxes of mental health records have been received by the Board from the OAG-CPD and are currently being stored in the Board's office. These records consist of personal identifying information, notes from therapy sessions, psychological testing records, etc. and are comingled with one another in a state of disarray. Furthermore, some of the comingled records contain no information that would allow a reviewer to identify the patient to whom they belong, and many of the records contain illegible handwriting. Additionally, even assuming the records are capable of being sorted and organized for return to the patient, the Board does not have the staff or resources to identify and locate each patient for whom records exist. Moreover, given the disorganized nature of the records, the Board is concerned that any attempt to return the records to patients without having sorted and organized same, will lead to a breach of confidentiality, the very problem the underlying civil action sought to redress.

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The Texas State Board of Examiners of Psychologists is an equal opportunity employer and does not discriminate on the basis of race, color, religion, national origin, age, sex, disability, or sexual orientation.

The mission of the Board is to protect the public by ensuring that psychological services are provided to the people of Texas by qualified and competent practitioners who adhere to established professional standards. The Board typically fulfills its mission by promulgating rules regarding licensure and practice, but now finds itself in the unsolicited position of serving as custodian over thousands of pages of patient records. While Tex. Occ. Code Ann. §159.0061 grants the Texas Medical Board the authority to appoint a custodian of records in situations similar to this involving physicians, the Board has no such similar statutory authority, and must now undertake a function it was never designed to perform. Not having been a party to the underlying lawsuit, the Board is now in need of guidance regarding the lawful disposition of the records in question.

After careful consideration of the volume, nature, and condition of the records in its custody, the Board does not believe that it can provide reasonable assurances that were the records to be released, they would be released to appropriate parties only. From a practical standpoint, because of their disarray, the records are no longer accessible and as such, have no utility. Therefore, the Board believes the safest course of action would be to destroy the records, and remove all possibility of a breach of confidentiality. The Board recognizes however, the unusual nature of this situation and felt it prudent to seek an Attorney General opinion regarding the legality of destroying the records, before actually doing so.

With regard to the Board's first question, the Board does not believe the records placed in its custody constitute *state records*, as that term is defined in Ch. 441, Subchapter L of the Texas Gov't Code. According to Tex. Gov't Code Ann. §441.180(11), the term "state record" means any written, photographic, machine-readable, or other recorded information created or received by or on behalf of a state agency or an elected state official *that documents activities in the conduct of state business or use of public resources*. The term includes any recorded information created or received by a Texas government official *in the conduct of official business*, including officials from periods in which Texas was a province, colony, republic, or state. The term does not include: library or museum material made or acquired and maintained solely for reference or exhibition purposes; an extra copy of recorded information maintained only for reference; or a stock of publications or blank forms.

The records in question do not document any activities in the conduct of state business or use of public resources, nor were they received by a governmental official in the conduct of official business. Rather, a District Court ordered that the records be turned over to the Board in a final judgment entered in a lawsuit brought by the OAG-CPD. Thus, the Board believes these records fall outside the definition of a state record.

If the mental health records currently in the custody of the Board are not state records, the Board requests an opinion on whether it is legally permissible to destroy those records. A review of the following laws did not reveal any requirement that the Board retain or maintain the records under this unique set of circumstances. However, the Board seeks the Attorney General's advice on any such law that may impose such a requirement.

- Ch. 501, Tex. Occ. Code
- Ch. 181, Tex. Health & Safety Code
- Ch. 611, Tex. Health & Safety Code
- Ch. 72, Tex. Bus. & Com. Code
- Ch. 521, Tex. Bus. & Com. Code

- HIPAA

In the event that no legal barriers to destroying the records can be found, the Board would ask that the Attorney General include in his opinion any steps required by law before the records may be destroyed.

The Board appreciates your review of this matter and looks forward to your opinion. If additional information is required, please contact Darrel D. Spinks, the Board's Executive Director, at (512) 305-7700.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim F. Branaman" followed by a stylized flourish.

Tim F. Branaman, Ph.D.

Chair, Texas State Board of Examiners of Psychologists