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OFFICE OF THE ATTORNEY GENERAL

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ROBERT T. STEPHAN
ATTORNEY GENERAL

December 1, 1980

ATTORNEY GENERAL OPINION NO. 80-254

Dr. Lois Rich Scibetta, R.N.
Executive Administrator
Kansas State Board of Nursing
503 Kansas Avenue, Suite 330
Topeka, Kansas 66608

Re: State Boards, Commissions and Authorities--Board
of Nursing--Register of Licensees Open to Public
Inspection

Synopsis: The limitation imposed under subsection (b) of section 1,
L. 1980, ch. 255, relating to the collection of health
manpower information, only restricts the health and
environment secretary's use and distribution of such
information, and does not affect or restrict the
dissemination of information by the board of nursing
or the other regulatory boards listed in that section.

Questions pertaining to an applicant's sex, race, age
and marital status should be excluded from the board's
application and renewal application forms or, alternatively,
may be submitted on a separate form whereby desired
statistical information could be returned anonymously.
Cited herein: K.S.A. 1979 Supp. 47-819, as amended by
L. 1980, ch. 155, §5, 65-2808, 74-1106(c)(5), as amended
by L. 1980, ch. 235, §1, 74-1407(c), K.S.A. 74-1502,
74-1504(d), L. 1980, ch. 255.

* * *

Dear Dr. Scibetta:

On behalf of the Kansas State Board of Nursing, you have asked
for the opinion of this office whether 1980 Senate Bill No. 544
(L. 1980, ch. 255) prohibits the Board from supplying the Board's

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list of names and addresses of licensees to interested persons and associations, including continuing education providers and the state nurses' association. You also inquire whether the Board's renewal application, which contains questions relating to the applicant's race, sex, age and marital status, invades the privacy of the applicants, since the answers to those questions have the applicants' names attached to them. You advise that the above-listed questions have no relevance to the renewal process, but are included in the renewal application to facilitate a survey conducted by the American Nurses' Association.

In response to your first question, it is our opinion that 1980 Senate Bill No. 544 (hereinafter, "SB 544") published in the 1980 Session Laws at Chapter 255, does not prohibit the Board from supplying a list of the names and addresses of persons licensed by the Board to interested persons or associations. The act in question provides as follows:

"Section 1. (a) The secretary of health and environment shall collect such information as is necessary to define the effective distribution of health manpower in the state and to project future health manpower needs in the state. The board of nursing, the Kansas dental board, the board of examiners in optometry, the state board of pharmacy, the state board of healing arts and the state board of veterinary medical examiners shall cooperate with the secretary of health and environment in the collection of health manpower information and shall furnish to the secretary of health and environment all such health manpower information.

"(b) Information collected pursuant to the provisions of subsection (a) of this section shall be confidential and shall not be disclosed or made public upon subpoena or otherwise, except such information shall be disclosed if no person can be identified in the information to be disclosed and the disclosure is for statistical purposes only." (Emphasis added.)

We are informed that SB 544 was introduced by the Special Committee on Public Health and Welfare "to promote cooperation in the collection of health manpower data" because of "the need to formalize the

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existing system in which various health care provider licensing boards supply manpower data to the Department of Health and Environment for use in health planning" "Proposal No. 34--Credentialing of Health Care Providers," Report on Kansas Legislative Interim Studies to the 1980 Legislature (Special Committees, December 1979), p. 654. We find nothing in the Committee's report or in the act in question which restricts public access to information about persons licensed by the respective boards listed in SB 544. The limitation imposed under subsection (b) of SB 544 only restricts the health and environment secretary's use and distribution of the information collected, and does not affect or restrict the dissemination of information by the various boards listed.

Indeed, K.S.A. 1979 Supp. 74-1106(c)(5), as amended by L. 1980, ch. 235, §1, imposes an affirmative duty on the nursing board's secretary-treasurer to "keep a record of all proceedings of the board and a register of professional and practical nurses and mental health technicians licensed and showing the certificates of registration or license granted or revoked, which such register shall be open at all times to public inspection." (Emphasis added.) A similar duty is imposed on officers of the other boards listed in SB 544. See K.S.A. 1979 Supp. 74-1407(c) (duty of secretary-treasurer of dental board to keep and maintain board records and to "furnish to any person making application therefor a copy of any part thereof"); K.S.A. 74-1502, 74-1504(d) (duty of board of examiners in optometry to keep a record of all registrants and to make such record "accessible to the public"); K.S.A. 1979 Supp. 65-2808 (licensee records of the state board of healing arts "shall be open to public inspection under proper regulations adopted by the board"); K.S.A. 1979 Supp. 47-819, as amended by L. 1980, ch. 155, §5 (duty of secretary-treasurer of state board of veterinary medical examiners to keep and maintain a register of all persons licensed by the board, which record "shall be open to the public during regular office hours").

Whether the disclosure of information including the applicant's or licensee's name, address, sex, race, age and marital status violates a right of privacy presents two questions. First, does such disclosure constitute a tortious invasion of privacy? In Froelich v. Adair, 213 Kan. 357 (1973), the Kansas Supreme Court ruled that "[o]ne who intentionally intrudes . . . upon the solitude or seclusion of another, or his private affairs or concerns, is

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subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable man." 213 Kan. at 358. (Emphasis added.)

Secondly, does the disclosure infringe upon a constitutionally protected right of privacy, grounded in the United States Constitution? In Atchison, Topeka and Santa Fe Ry. Co. v. Lopez, 216 Kan. 111 (1975), the Kansas Supreme Court cited the tests elucidated by the United States Supreme Court in several cases. The court noted that "[t]he protection of a person's general right to privacy--his right to be let alone by other people--is . . . left largely to the law of the individual States." 216 Kan. at 120 (citing Griswold v. Connecticut, 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678). (Emphasis in original.) But, "'where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.'" 216 Kan. at 121.

We doubt that disclosure of the information in question would constitute a "highly offensive" or unreasonable intrusion upon the private affairs of individual applicants or licensees so as to justify a tort claim for damages, under the above-cited test. Further, we recognize that a licensing agency may have need of the information in question from its applicants and licensees for identification or other purposes reasonably related to the agency's licensing function. But, if the Board's only use of the questions concerning sex, race, age and marital status is to provide statistical data for a survey conducted by the American Nurses' Association, we have serious doubts that the Board's application and renewal policy would pass constitutional muster, inasmuch as the questions appear to bear no "rational relationship" to the Board's licensing function, let alone any consideration whether the questions serve any "compelling state interest," under the above-cited constitutional tests.

Thus, to avoid any invasion of privacy problems, we recommend that the license application and renewal application be changed. Neither Kansas statutes nor the board's administrative rules and regulations require the current format. Questions pertaining to the applicant's

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sex, race, age and marital status should be excluded or, alternatively, may be submitted on a separate form whereby the statistical information desired by the American Nurses' Association could be returned anonymously.

Very truly yours,

ROBERT T. STEPHAN
Attorney General of Kansas

Steven Carr
Assistant Attorney General

RTS:BOS:SC:pf