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OPINION COMMITTEE

July 11, 2008

Attorney General Greg Abbott
Office of the Attorney General
Opinions Committee
P.O. Box 12548
Austin, TX 78711-2548

FILE # ML-45761-08
I.D. # 45761

Via Regular Mail and
CMRRR # 7008 0150 0003 0460 1847

Re: Request for Attorney General Opinion

RQ-0726-GA

Dear Attorney General Abbott:

This letter is written pursuant to 402.042 of the Texas Government Code to request a legal opinion as to what information, if any, may be disclosed to parties involved in filing a complaint with the Texas Board of Veterinary Medical Examiners (TBVME) or to the general public from information within the investigative record and collected pursuant to the duties of TBVME. There has been no specific request from individuals for information on these matters. However, there have been general complaints received from members of the general public that the Board's process is a violation of Chapter 55 of the Texas Government Code¹ and a violation of Chapter 801 of the Texas Occupations Code².

Issues

1. Is the complaint provided by the complainant confidential and exempt from disclosure to the licensee against whom the complaint is filed, as part of the investigative process conducted by the Board?
2. If the complaint is confidential, would a summary of the complaint also be confidential and exempt from disclosure to the licensee?

¹ Texas Public Information Act.

² Texas Veterinary Licensing Act (hereinafter referred to as "VLA." The Board believes the applicable exception to disclosure to the general public is §801.207, Texas Occupations Code, which provides:

- (a) Except as provided by Subsection (b), a board record is a public record and is available for public inspection during normal business hours.
- (b) An investigation record of the board, including a record relating to a complaint that is found to be groundless, is confidential.

3. Is the complaint and the licensee response confidential to the general public, but disclosable to the parties involved, i.e. complainant, the licensee, a reviewing veterinarian that is not a Board member to provide an expert opinion?
4. Is the investigative record disclosable at a non-confidential contested case hearing at the State Office of Administrative Hearings (SOAH) regarding the violations alleged against the licensee?

Background

When a standard of care complaint is filed with TBVME, the case is assigned to an investigator and the investigator requests medical records from the licensee regarding the matter in question. After medical records are provided, TBVME makes a copy of the complaint, not including any copies of pictures, radiographs, second opinions, or witness statements. TBVME supplies a copy of the complaint to the licensee in order for the licensee to be able to provide a response to the complaint to TBVME. With the response by the licensee, the investigator gathers any more information that may be necessary for the investigation and a report of investigation is completed. The contents of the investigative file: the complaint, the response by the licensee, medical records, and any other supporting evidence is sent to two reviewing veterinarians who sit on TBVME's Enforcement Committee. Those two veterinarians, after reviewing the information, make a determination of whether there was a possible violation of the standard of care or other violations of the Board's rules and/or the VLA.

Sometimes, the medical records, or radiographs, may be sent to a veterinarian with specialized knowledge, either another Board member or another veterinarian for a second opinion. If the medical records, or other portions of the investigative file are sent outside of TBVME, TBVME will ask the veterinarian to sign a confidentiality statement that they will keep the information they review confidential, will return the records promptly, and use it only to provide the requested second opinion.

If either of the TBVME reviewing veterinarians believes a possible violation of Board rules or the VLA has occurred, the licensee and the complainant will be asked to attend an informal settlement conference. At the conference, usually, both the licensee and the complainant are in the same room with the Enforcement Committee. The Enforcement Committee consists of the two reviewing veterinarians, one public Board member, the Executive Director, the General Counsel, the Director of Enforcement, and the investigator assigned to the complaint. On occasion, an additional veterinarian Board member will be asked to attend due to their specialized knowledge. Any other attendees are allowed at the discretion of the Executive Director. Radiographs and pictures are often shown during the conference with both the licensee and the complainant having access.

If a determination of a violation of the Board's rules or the VLA is found by the Board members in attendance, an Agreed Order is offered by the Board. If the licensee declines to sign the Agreed Order, a contested case hearing is scheduled at SOAH. The VLA does have a provision stating the hearings at SOAH are confidential. Once docketed at SOAH, the Board has taken the position that the entire investigative file is open. Upon a discovery request or an open records request, the only portion withheld would be any attorney work product or attorney-client

communications. In every contested case hearing, the Board offers the administrative record that includes the investigative file. And finally the Proposal for Decision is presented to TBVME at an open meeting. The Board may find a violation of the Board's rules and the VLA and vote for disciplinary action that is included in a public board order. The public board order often includes a summarization of information collected in the investigative file.

Other Agency Statutes

It should be noted that other professional regulatory agencies have or had similar statutory confidentiality language to protect the investigative file or record. While the agency believes its current practice does not violate the PIA or the VLA as discussed hereafter as a selected disclosure, it recognizes that a statutory amendment such as found in Chapter 351 of the Texas Occupations Code §2045 resolves any ambiguity or uncertainty.³ See also §254.006 of the Occupations Code (Dental Practice Act); §160.006 of the Occupations Code (Medical Practice Act); §301.466 (Nursing Practice Act).

TBVME's Current Position

TBVME believes that the statutory language must create an exception from the cloak of confidentiality to the general public for the parties involved in the complaint process in order for the Board's regulatory functions to even exist. Without some kind of exception interpreted into the Board's statutory language, the results would be absurd (and the Texas Legislature is presumed not to intend an absurd result.) The license holder would be asked to respond to the treatment of a particular animal, for example, but would not know what particular incident was in question over the possible course of many treatments. The informal settlement conference process would be stifled by the inability of the Board to point to visual evidence and ask for a response from either the license holder or the complainant. And, the agency would have no evidence to present at a contested case hearing as all evidence collected during an investigation is collected in the investigative file. This interpretation would grind the Board's regulatory function to a halt.

³ As an example, the Texas Optometry Act specifically states in Section 351.2045 of Chapter 351 of the Occupations Code:

- (c) On the completion of the investigation and before a hearing under Section 351.503, the board shall provide to the license holder, subject to any other privilege or restriction set forth by rule, statute, or legal precedent, access to all information in the board's possession that the board intends to offer into evidence in presenting its case in chief at the contested case hearing on the complaint. The board is not required to provide: (1) a board investigative report or memorandum; (2) the identity of a nontestifying complainant; or (3) attorney-client communications, attorney work product, or other materials covered by a privilege recognized by the Texas Rules of Civil Procedure or the Texas Rules of Evidence.
- (d) Notwithstanding subsection (a), the board may: (1) disclose a complaint to the affected license holder; and (2) provide to a complainant the license holder's response to the complaint, if providing the response is considered by the board to be necessary to investigate the complaint.

(Note: The Chiropractic Practice Act and the Podiatric Practice Act contain almost identical statutory language regarding this matter. §201.206 and §202.509, TEX. OCC. Code, respectively)

This interpretation would not serve the intent of the Texas Legislature when it created the Board and set forth the purpose that the Board establish and maintain a high standard of integrity, skills, and practice in the veterinary medicine profession and protect the public.⁴ Instead, the Board has chosen an interpretation of the VLA that is premised upon the concept that selected disclosure of confidential information is not a waiver of confidentiality in regards to the general public and in essence creates an exception for the parties involved, in order for the Board's regulatory function to proceed, yet still allow the investigative process to exist with a level of confidentiality to ensure as accurate and complete of evidence is gathered as possible.⁵

In summary, the Board would request an opinion as to whether under Chapter 552 of the Government Code or Chapter 801 of the Texas Occupations Code:

1. the complaint provided by the complainant is confidential and exempt from disclosure to the licensee against whom the complaint is filed, as part of the investigative process conducted by the Board;
2. the complaint and the licensee response is confidential to the general public, but disclosable to the parties involved, i.e. complainant, the licensee, a reviewing veterinarian that is not a Board member to provide an expert opinion;
3. the investigative record is disclosable at a non-confidential contested case hearing at the State Office of Administrative Hearings (SOAH) regarding the violations alleged against the licensee;
4. and finally if a summarization of information included in the investigative file, either provided to a license holder in order for them to respond or in a Board order finding of fact, would also be confidential under the VLA.

If you have any questions, please contact me at (512) 305-7562, or Nicole Oria, General Counsel, at (512) 305-7561.

Sincerely,



Dewey E. Helmcamp, III, J.D.
Executive Director

cc: Nancy Fuller, Chair
Opinions Committee
Office of the Attorney General

⁴ §801.151, TEX. OCC. CODE.

⁵ See Ord No. 579 (1990); Attorney General Opinion JM-119 at 2 (1983); See also, ORD Nos. 678 at 4 (2003), 674 at 4 (2001), 666 at 4 (2000), and 464 at 5, overruled on other grounds by ORD No. 615 (1993).