

1983 WL 181995 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 8, 1983

\*1 The Honorable Joyce C. Hearn  
Member  
House of Representatives  
432A Blatt Building  
Columbia, South Carolina 29211

Dear Representative Hearn:

You have requested an opinion as to whether the South Carolina Freedom of Information Act would authorize disclosure or release of an applicant's complete file, including confidential letters of reference, to the applicant by the Board of Examiners for Nursing Home Administrators. In this instance, the applicant's application for examination was denied, and the applicant was given the opportunity to be heard as required by Regulation 93-7(c), Code of Laws of South Carolina (1982 Cum.Supp.). The applicant sought afterwards to have the entire file turned over to her or to see the entire file and has subsequently filed another application for examination.

The applicant's file contains not only the application submitted by her but also letters of reference submitted to the Board by character references and former employers with the understanding that the information contained therein would be kept confidential. These letters would not be subject to disclosure to the applicant under § 30-4-40(a)(2) of the South Carolina Freedom of Information Act, which exempts from disclosure 'information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy . . . .' The letter writer's expectation of privacy and confidentiality at the time of writing the letter possibly encouraged a more candid reference; to disclose or release the letter to the applicant would possibly violate the writer's privacy unreasonably. Though the South Carolina Supreme Court has not yet addressed what would constitute an unreasonable invasion of personal privacy, other jurisdictions have denied access to documents in the possession of public officials on the ground that such information was received in confidence. [MacEwan v. Holm](#), 226 Or. 27, 359 P.2d 413 (1961); 66 Am.Jur.2d, [Records and Recording Laws](#), § 29. It has been noted that 'the protection of confidential communications from enforced disclosure has been thought to represent rights of privacy and security too important to be relinquished. [McCormick on Evidence](#), § 77 (1972).

The applicant's file may be exempt from disclosure also under the theory that the file contains the investigative work product and conclusions of the Board, to be used in determining the applicant's qualifications to undergo examination. 'Reports based on an investigation are usually not subject to inspection, both because of their confidentiality and because they are based on hearsay and consist largely of the opinions and conclusions of the investigator [here, the Board].' 66 Am.Jur.2d [Records and Recording Laws](#), § 29, citing [Mathews v. Pyle](#), 75 Ariz. 76, 251 P.2d 893 (1952). Because the Board further investigates an application and makes reports for the applicant's file and then writes its conclusions, opinions and conclusions, possibly based on hearsay, of several persons would be reflected and should be withheld.

\*2 The entire file may not be turned over to the applicant for the purpose of allowing applicant to withdraw or destroy the file as if it had never existed, for the following reason:

Public records and documents are the property of the state . . . ; when they are deposited in the place designated for them by law, there they must remain and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot . . . give it up without authority from the same source which required it to be made.

66 Am.Jur.2d, Records and Recording Laws, § 10. Since the legislature requires the Board to receive applications for examination for licensure, then the legislature would also have to authorize the removal of the application (as a public record) from the Board. Furthermore, [Section 30-1-30 of the Code of Laws of South Carolina \(1976\)](#) provides criminal penalties for any person who unlawfully removes a public record from the place where it is usually kept, or alters, defaces, mutilates, secretes or destroys such record.<sup>1</sup>

Please do not hesitate to contact this office if you have further questions.

With kind regards,

Patricia D. Petway  
Staff Attorney

Footnotes

- 1 The only Question addressed herein is the one posed, i.e. the issue of the applicability of the Freedom of Information Act.  
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