Office of the Attorney General
State of Texas

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August 25, 1993

Homer R. Goehrs, M.D.
Executive Director
Texas State Board of Medical Examiners
P.O. Box 149134
Austin, Texas 78714-9134

Letter Opinion No. 93-69

Re: Access of members of the Texas State Board of Medical Examiners to the agency's personnel and investigative files (ID# 20337)

Dear Dr. Goehrs:

On behalf of the Texas State Board of Medical Examiners (the "board"), you ask several questions concerning access of board members to personnel and investigative files in the board's possession. You first ask whether members of the board may examine the personnel files of its employees. You explain that

> [t]he personnel files of this agency can be further broken down into three categories. These categories are public information files, time records, and confidential personnel files. . . . The third category of personnel files which contain confidential information such as deferred compensation data, allegations of misconduct, and medical histories, raises concerns about whether or not this information should be made available to Board members . . . .

You also explain that section 2.09 of the Medical Practices Act (the "act"), V.T.C.S., article 4495b, requires the board's executive director to administer, enforce, and carry out the provisions of the act. *See* V.T.C.S. art. 4495b, § 2.09(b) (executive director has primary responsibility for administering act under board's direction).[1] You state that the act "is silent on the issue of Board member access to personnel files."[2]

In Attorney General Opinion JM-119 (1983), this office stated that a member of the board of trustees of a community college district has an inherent right of access to district records when the trustee requests access to the records in his official capacity.

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[1]The board appoints the executive director who holds that position "at the pleasure of the board and may be discharged at any time." V.T.C.S. art. 4495b, § 2.09(b).

[2]Various sections of the act were recodified or amended by Senate Bill 1062, adopted by the 73d Legislature during its regular session. Acts 1993, 73d Leg., ch. 862. The act is generally effective September 1, 1993. *Id.* § 40. This opinion references the amended act which, like its predecessor, does not address the issue of a board member's access to personnel files.

Attorney General Opinion JM-119 at 3. This office noted therein that under state law the board was "responsible for the governance and control of the district. . . . [and that without] complete access to district records, such trustee could not effectively perform his duties." *Id.* (referring to Educ. Code § 130.082). Accordingly, the opinion concluded that when a trustee exercises his inherent right to district records and requests records in his official capacity and not as a member of the general public, the custodian of the district's records cannot deny the trustee access to the requested records on the basis of exceptions to public disclosure set forth in the Open Records Act, V.T.C.S. article 6252-17a. *Id.* at 1.

Section 2.09(a) authorizes the board to adopt rules and bylaws as needed to govern its proceedings, perform its statutory duties, regulate the practice of medicine and enforce the act, while section 2.09(e) provides that the board shall employ and compensate "administrators, clerks, employees, consultants, professionals, and other persons" as needed to enforce the act. While the executive director may be charged with the primary responsibility to administer and enforce the act, he does so "under the control and supervision and at the direction of the board." V.T.C.S. art. 4495b, § 2.09(b); *see also id.* § 2.09(v) (board shall develop system of annual performance evaluations). Board members may reasonably require access to the personnel files of the board to oversee the executive director's administration of the act or to employ and compensate other employees of the board. Thus, we conclude here that members of the board have an inherent right of access to all information in the personnel files of the board, including confidential information, when they request access to the files in their official capacity.[3]

You also ask whether it is advisable for certain board members to examine the board's investigative files concerning licensed physicians alleged to have violated the act. You explain that board members do not generally "review investigative files except as part of an informal settlement process or the oversight functions of the Disciplinary Process Review Committee." *See id.* §§ 2.09(i) (authorizing board to establish advisory committees pertaining to the enforcement of the act), 4.02(h) (authorizing board to resolve complaints or contested cases by agreed settlement). You also explain that board members who serve on the disciplinary review committee for a particular case or who

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[3]In information submitted to us, you indicate you are concerned that access of board members to confidential personnel records will jeopardize the privacy of board employees. We do not believe this is a problem. First, we doubt that board employees have a right to keep "private" information in their personnel files from the board members who are their ultimate employers. Second, release of personnel information to board members to the extent it is confidential under the Open Records Act will not lead to its general release to the public. This office has previously stated that information made confidential by law and not required to be disclosed to the public under section 3(a)(1) of the Open Records Act may be transferred for official purposes within an agency without losing its confidential status. *See* Attorney General Opinion JM-1235 (1990) at 2; Open Records Decision No. 468 (1987) at 3. Thus, board members may examine confidential information in personnel files which is exempt from public disclosure under section 3(a)(1) of the Open Records Act without waiving its confidentiality or affecting the agency's authority to withhold it from public disclosure.

consider the case at an informal settlement conference routinely recuse themselves if the case is not settled and is then considered by the board as a whole. *Id.* § 4.01(a) (authorizing board to revoke or suspend a physician's license, place on probation a person whose license has been suspended, or reprimand a licensee). Specifically, you ask whether the board members who will make the final decision to discipline a particular licensed physician, that is, those members who neither serve on the disciplinary review committee for that physician's case nor consider that case at informal settlement conference and have therefore not recused themselves, should be provided access to the investigative files concerning that physician.

As discussed above, members of the governing body of a state or local governmental entity have an inherent right to examine the records of the governmental entity if they request access to the records in their official capacity. The determination whether a member makes a request in his official capacity rather than as a member of the public would involve the resolution of factual issues and is therefore outside the scope of the opinion process. We note, however, that section 4.02(f) of the act permits the board (or persons authorized by the board) to conduct investigations of alleged violations of the act, while section 4.05(c) recognizes a board member's right as part of his official duties to examine investigative information in the board's possession.[4] In particular, section 4.05(c) provides in part:

> [a]ll complaints, adverse reports, investigation files, other investigation reports, and other investigative information in the possession of, received or gathered by the board or its employees or agents relating to a licensee, . . . are privileged and confidential and are not subject to . . . release to anyone other than the board or its employees or agents involved in licensee discipline.[5]

Although a board member who will make a final determination with regard to the discipline of a particular licensee may have a right to examine the licensee's investigative file in his official capacity, it may be problematic if the board member examines records in

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[4]The combination of investigative, prosecutorial, and adjudicative functions within one administrative agency does not of itself constitute a denial of due process. *See* Hill & Kent, *Administrative Law*, 36 Sw. L.J. 527, 529 (1982) (and authorities cited therein). *But see Rogers v. Texas Optometry Board*, 609 S.W.2d 248, 250 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.) (reversal of agency decision on due process grounds; decision based solely on testimony of two board members who investigated matter posed "unreasonable risk of bias" even though those two members did not vote at hearing).

[5]Section 26 of Senate Bill 1062 amends this section to provide a licensee who is the subject of a formal complaint access to all information in the board's possession that the board intends to offer into evidence at the contested hearing on the complaint except "board investigative reports or investigative memoranda, the identity of nontestifying complainants, attorney-client communications, attorney-work product, or other materials covered by a privilege as recognized by the Texas Rules of Civil Procedure or the Texas Rules of Civil Evidence." Acts 1993, 73d Leg., ch. 862, § 26.

the file that are not offered into evidence. First, to do so may subject the final determination to attack on procedural due process grounds. *See Richardson v. City of Pasadena*, 513 S.W.2d 1 (Tex. 1974) (reversing city civil service commission decision on due process grounds because decision influenced by the *ex parte* receipt of three affidavits after completion of civil service hearing). A fair and just decision requires an agency to consider only the evidence presented at the hearing since to hold otherwise would deny an individual his right to cross-examine adverse witnesses and offer rebuttal testimony. *Id.* at 4.[6] Furthermore, a violation of an individual's procedural due process rights will result in reversal of an administrative decision "notwithstanding that under the [administrative] record as made, the order may be said to have reasonably factual support under the precepts of the substantial evidence rule." *Rector v. Texas Alcoholic Beverage Comm'n*, 599 S.W.2d 800 (Tex. 1980) (quoting *Lewis v. Metropolitan Sav. & Loan Ass'n*, 550 S.W.2d 11, 12 (Tex. 1977)); *see* V.T.C.S. art. 4495b, § 4.09(b) (appeals from the board's orders are under the substantial evidence rule).

In addition, a board member's consideration of extra-record evidence may in certain instances result in reversal of the board's final determination on appeal on the ground that the board's determination was in violation of section 19(e) of the Administrative Procedure and Texas Register Act, V.T.C.S. article 6252-13a ("APTRA").[7] The Texas courts have reversed on appeal under section 19(e) of APTRA board decisions based not on substantial evidence as evidenced by the record on appeal, but on extra-record evidence such as the medical expertise of the agency's board. *Compare Dotson v. Texas State Bd. of Medical Examiners*, 612 S.W.2d 921 (Tex. 1981); *Wood v. Texas State Bd. of Medical Examiners*, 615 S.W.2d 942 (Tex. Civ. App.--Fort Worth 1981, no writ) (both stating board's expert medical knowledge outside the record and beyond scope of court's review) *with Conley v. Texas State Bd. of Medical*

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[6]If the decision is not based in whole or part on the extra-record evidence, it will not be reversed on procedural due process grounds. *Compare Alberty v. Federal Trade Comm'n*, 118 F.2d 669 (9th Cir. 1941), *cert. denied*, 314 U.S. 630 (confidential record used only to refresh witness' memory) *with Chew Hoy Quong v. White*, 249 F. 869 (9th Cir. 1918) (denial of due process to base decision on individual's admission to country on confidential communications); Annotation, *Administrative Decision or Finding Based on Evidence Secured Outside of Hearing, and Without Presence of Interested Party or Counsel*, 18 A.L.R.2d 552, 571 (1951).

[7]If an agency's decision is subject to judicial review under the substantial evidence rule, section 19(e) requires the court to reverse or remand the agency's decision if the appellant's substantial rights have been prejudiced because the agency's findings and conclusions, *inter alia*, violate constitutional or statutory provisions, are made upon unlawful procedure, are not reasonably supported by substantial evidence in view of the evidence in the record as a whole, or are arbitrary or capricious or characterized by abuse of discretion. A determination that an appellant's substantial rights have been prejudiced because of one or more of the factors enumerated in section 19(e) would generally require the resolution of factual issues, and thus, is outside the scope of the opinion process. *See* Shannon & Ewbank, *The Texas Administrative Procedure and Texas Register Act: Selected Problems*, 33 BAYLOR L. REV. 395, 396-97 (1981) (describing primarily factual five-part test for reversal of agency decision on appeal on basis of extra-record evidence).

Examiners, 605 S.W.2d 699 (Tex. Civ. App.--Corpus Christi 1980, writ ref'd n.r.e.) (affirming board decision because the record contained expert testimony supporting decision).[8]

We understand you also to ask whether the board may promulgate "rules to alleviate potential concerns in regard to" personnel and investigative files. No provision of the act expressly authorizes the board as a whole to adopt rules that restrict an individual board member's access to any records in the custody of the board. Nor are we aware of any case authorizing a board of a governmental entity by majority vote to adopt rules restricting either an individual board member's access to the entity's records or the access of a minority of the board to the entity's records.

As noted above, this office in Attorney General Opinion JM-119 concluded that a member of the board of a governmental entity had an inherent right of access to the records of the entity requested in the member's official capacity. Given the importance of such access to all members of a governmental board, we believe the legislature would have expressly authorized the board to adopt rules limiting the board members' access to the board's personnel or investigative records if it had intended the board by majority vote to limit an individual member's access to those records. Furthermore, section 4.05(c) of the act expressly recognizes the inherent right of board members to the board's confidential investigative files. *See generally* 2 TEX. JUR. 3d *Administrative Law* §§ 16 - 17 (1979) (agency may not adopt rules inconsistent with statutes).[9] Thus, we decline to construe the board's general rule-making authority in section 2.09(a) of the act to encompass the authority to adopt rules by majority vote that would restrict the access of any member of

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[8]For similar decisions involving other agencies *see, e.g., Flores v. Texas Dep't of Health*, 835 S.W.2d 807 (Tex. App.--Austin 1992, writ denied) (stating decision must be based on the record and not on extra-record evidence); *Railroad Comm'n of Texas v. Lone Star Gas Co.*, 611 S.W.2d 908 (Tex. Civ. App.--Austin 1981, writ ref'd n.r.e.) (stating decision based on methodology not supported by record violated company's constitutional right to a fair hearing). The courts in these two decisions expressly cited the provisions of APTRA requiring all parties be given notice of matters to be officially recognized and recognizing the right of a party to cross-examine witnesses and to respond by presenting evidence and argument on all issues in the case. *Flores*, 835 S.W.2d at 811 (referring to section 14(q) of APTRA on official notice); *Lone Star Gas Co.*, 611 S.W.2d at 910 (citing sections 13(d) and 14(p) of APTRA concerning right to cross-examine witnesses and rebut testimony); *see also* V.T.C.S. art. 6252-13a, § 13(f) (record in contested case must include "evidence received or *considered*") (emphasis added).

[9]As stated in *County of Galveston v. Texas Dep't of Health*, 724 S.W.2d 115 (Tex. App.--Austin 1987, writ ref'd n.r.e.), the chief protection against the use of *ex parte* information in agency proceedings is "the morality and good judgment of responsible administrators." 724 S.W.2d at 123 n.5 (discussing *ex parte* communications, a subset of the various types of *ex parte* extra-record evidence that can contaminate decisions); *see generally* Shannon & Ewbank, 33 BAYLOR L. REV. at 399 (listing broad categories of extra-record evidence including *ex parte* communications and investigative reports).

the board to the records at issue here. The board is certainly not precluded, however, from providing board members with a legal opinion that explains the risks inherent in their examination of investigative records.

SUMMARY

A member of the Texas Board of Medical Examiners (the "board") has an inherent right of access to agency personnel and investigative files. A majority of the board by rule may not restrict a member's right of access to these records absent express statutory authority to do so. The board is not precluded, however, from providing board members with a legal opinion that explains the risks inherent in their examination of investigative records.

Yours very truly,

Celeste A. Baker

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Opinion Committee