Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

March 10, 1997

The Honorable Hugo Berlanga
Chair, Committee on Public Health
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 97-017

Re: Whether the governing body of a county hospital district established under Health and Safety Code chapter 281 may lease a hospital facility without obtaining the approval of the county commissioners court and related questions (ID# 39349)

Dear Representative Berlanga:

You ask a series of questions about the authority of the governing body of a county hospital district established under chapter 281 of the Health and Safety Code. A county hospital district established under chapter 281 is governed by a board of hospital managers[1] ("board" or "board of managers"), but chapter 281 also grants the county commissioners court (the "commissioners court") some degree of control and oversight over the hospital district.[2]

I.

Your first two questions ask us to explore the extent to which a commissioners court may exert control over a hospital district's lease of a hospital facility to a private nonprofit corporation. First, you ask whether the board may lease a hospital facility without obtaining the approval of the commissioners court. In a second, related question you ask if the commissioners court has the authority to unilaterally amend a term of a contract or lease between the hospital district and a third party.

Chapter 281 provides that the board "shall manage, control, and administer the hospital or hospital system of the district,"[3] and authorizes the board to adopt rules governing the operation of

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[1]*See* Health & Safety Code §§ 281.001(1), .028, .047, .048.

[2]*See, e.g., id.* §§ 281.021, .029, .049, .050, .051, .052.

[3]*Id.* § 281.047.

the hospital or hospital system.[4] Sections 281.050 and 281.051 deal with the authority of the board to lease and contract. Section 281.050 provides in pertinent part: "[w]ith the approval of the commissioners court, the board may . . . lease . . . and convey any property [or] property right . . . to maintain a hospital, building, or other facility or to provide a service required by the district." Section 281.051 authorizes the board of managers to contract with various entities "[w]ith the approval of the commissioners court."

You ask about the relationship between these provisions and section 285.051 of the Health and Safety Code, which authorizes the "governing body of a hospital district" to order the sale, lease, or closure of all or part of a hospital upon a finding that the order is in the best interest of the residents of the hospital district. Section 285.052 sets forth procedures whereby an order to sell or close a hospital may be subject to voter approval. Whereas sections 281.050 and 281.051 appear to preclude the board of managers from leasing the hospital facility without the approval of the commissioners court, section 285.051 appears to leave the determination to the board of managers, as the governing body of the hospital district.

In Attorney General Opinion DM-37, this office concluded that sections 285.051 and 285.052 applied to the governing body of a chapter 281 hospital district and thus authorized the El Paso County Hospital District to close a dental clinic. *See* Attorney General Opinion DM-37 (1991) at 5. That opinion did not address whether the El Paso County Commissioners Court had any authority with regard to the closing. In 1988, however, this office addressed the relationship between the statutory predecessor to sections 285.051 and 285.052, former article 4437c-2, and provisions of the City of Amarillo Hospital District's 1957 enabling act, which gave the city's governing body certain authority with respect to hospital district sales and leases of land. *See* Attorney General Opinion JM-864 (1988). Apparently reasoning that former article 4437c-2, a later enacted provision[5] dealing more specifically with the sale, lease, or closure of a hospital district hospital, prevailed over the enabling act, the 1988 opinion concluded that the city's governing body had no authority with regard to the sale, lease, or closure of a hospital: "Article 4437c-2, V.T.C.S., does not give the city of Amarillo's governing body any authority to participate in a decision by the hospital district's board of managers to sell, lease, or close its hospital facility. If the proposed action is a sale or closure of the facility, the voters may petition for an election on the issue of approving or disapproving the proposed sale or closure." *Id.* at 5. *See also Jackson County Hosp. Dist. v. Jackson County Citizens for Continued Hosp. Care*, 669 S.W.2d 147 (Tex. App.--Corpus Christi 1984, no writ) (suggesting that former V.T.C.S. article 4437c-2 applied to hospital district created pursuant to 1979 enabling act).

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[4]*Id.* § 281.048.

[5]Former article 4437c-2 was enacted in 1981. *See* Act of June 1, 1981, 67th Leg., R.S., ch. 583, 1981 Tex. Gen. Laws 2361, 2361.

Taken together these two opinions suggest that sections 285.051 and 285.052 apply to a chapter 281 hospital district and that these later enacted provisions[6] prevail over sections 281.051 and 281.052,[7] precluding any role for the commissioners court in the lease of a hospital facility. We have reviewed the statutory predecessor to sections 285.051 and 285.052[8] and its legislative history and have found nothing that suggests that this conclusion is incorrect.

Former article 4437c-2 provided that "[t]he governing body of an incorporated city or town, or a hospital district by official action may order the sale, lease, or closure of all or any part" of a hospital. It defined the term "official action" to include "a resolution adopted by the governing body of a hospital district." There is nothing in the statutory language to suggest that the legislature did not intend former article 4437c-2 to apply to hospital districts generally.

When former article 4437c-2 was considered as Senate Bill 1067 in the Sixty-seventh Legislature, the author of the bill testified before the Senate Committee on Intergovernmental Relations that it would apply to "county hospitals, hospital district hospitals, city hospitals, city hospital authority hospitals, and county hospital authority hospitals -- all taxpayer hospitals." Hearings on S.B. 1067 Before Senate Comm. on Intergovernmental Relations, 67th Leg., R.S. (April 21, 1981) (statement of Senator Santiesteban) (tape available from Senate Staff Services Office). The comments of members of the House Committee on Intergovernmental Affairs also suggest that the bill was intended to apply to hospital districts generally. Hearings on S.B. 1067 Before House Comm. on Intergovernmental Affairs, 67th Leg., R.S. (May 18, 1981) ("Ordinarily we'll pass a similar bill of this nature for a local district, a designated district. This one here is broader in scope than that.") (statement of Representative Salinas) (tape available from House Video/Audio Services).

On the basis of our prior opinions and our additional research, we conclude that sections 285.051 and 285.052 apply to a chapter 281 hospital district and that the commissioners court has no authority with respect to an action taken by the board of managers under section 285.051.[9] Thus, in answer to your specific questions, we conclude that the board of managers need not seek the approval of the commissioners court before taking action under section 285.051. We also believe that section 285.051, by vesting in the board of managers the exclusive duty and authority to make

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[6]*See id.*

[7]The statutory predecessor to these provisions was enacted in 1963. *See* Act of May 8, 1963, 58th Leg., R.S., ch. 181, 1963 Tex. Gen. Laws 496, 496-97.

[8]Former V.T.C.S. art. 4437c-2 was repealed and codified in the Health and Safety Code in 1989. *See infra* notes 24-26.

[9]Attorney General Letter Opinion 96-092 (1996) considers the duty of a commissioners court to approve contracts under Health and Safety Code section 281.050 generally. That opinion did not address leases governed by section 285.051 and we do not believe our conclusion is inconsistent with that opinion.

a finding that the lease is "in the best interest of the residents of the hospital district," necessarily gives the board of managers complete authority over the terms of the lease. Therefore, we conclude that the commissioners court does not have the authority to unilaterally amend a contract or lease entered into by the board of managers under section 285.051.

With regard to the latter question, we also make this general comment about the commissioners court's authority to approve hospital district contracts under sections 281.050[10] and 281.051. These provisions do not authorize the commissioners court to enter into contracts on behalf of the hospital district or the board of managers. Under these provisions, in other words, it is the board of managers, rather than the commissioners court, that is party to hospital district contracts. Furthermore, these provisions merely authorize the commissioners court to approve or disapprove contracts presented to it by the board of managers. They do not authorize the commissioners court to negotiate hospital district contracts. Therefore, while the commissioners court clearly has the authority to reject a proposed hospital district contract, we do not believe that the court is authorized to bind the board of managers to a contract, or a contractual term, against the board's will. Nor do we believe that these provisions authorize a commissioners court to revisit the terms of a contract that the court approved and the board of managers thereafter executed relying on that approval.[11]

II.

As background to your third question, you explain that three of the seven members of the board of managers also serve as trustees of a private nonprofit corporation that is a tenant of the hospital district. The board of trustees of the private nonprofit corporation has fourteen members. You ask if meetings of the private nonprofit corporation's board of trustees are subject to the Open Meetings Act, Gov't Code ch. 551, and whether documents related to the meetings are subject to the Open Records Act, Gov't Code ch. 552.

The Open Meetings Act applies to the meeting of a "governmental body." Clearly, the board of managers of a hospital district created under the authority of Health and Safety Code chapter 281 is a governmental body under the act. *See* Gov't Code § 551.001(3) (defining "governmental body" to include "the governing board of a special district created by law"); Attorney General Opinion H-238 (1974) (concluding that governing body of Harris County Hospital District, a special district created under former V.T.C.S. 4494n, now Health & Safety Code ch. 281, is subject to Open Meetings Act). You have not provided us with any facts, however, that would suggest that the

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[10]*See generally* Attorney General Letter Opinion 96-092 (1996) (discussing types of contracts requiring commissioners court approval under Health and Safety Code section 281.050 and authority of commissioners court to preapprove certain contracts); *see also supra* note 9.

[11]Of course, the commissioners court's authority to approve or disapprove a contract under sections 281.050 and 281.051 applies whenever the board of managers contemplates entering into a binding agreement under these provisions and therefore extends to contract renewals and renegotiations.

private nonprofit corporation is a governmental body under the act, *see* Gov't Code § 551.001(3), and we assume that it is not.[12]

Your letter implies that you are concerned that the presence of the three board of managers members at the meetings of the private nonprofit corporation's board of trustees meetings transforms those meetings into meetings of the board of managers, or a subcommittee of that body, governed by the act. Whether there is any basis for your concern turns on whether the group of three board managers members who serve on the other board has been delegated any authority by the board of managers.

The act defines a "meeting" as "a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed." *Id.* § 551.001(4). Generally, meetings of less than a quorum of a governmental body are not subject to the act. While three members do not constitute a quorum of the seven member board of managers,[13] the act may apply to meetings of less than a quorum of a governmental body in certain circumstances. A subcommittee of a governmental body itself may be covered by the act if, for example, the subcommittee supervises or controls business of the governmental body or makes recommendations that are merely rubber-stamped by the governmental body.[14] Thus, the group of three board members may constitute a governmental body in and of itself if the board of managers has delegated the group any authority over hospital district business or rubber-stamps the group's recommendations regarding hospital district business. In that case, meetings of the board of trustees of the private nonprofit corporation at which the three board of managers members deliberate regarding the business of the hospital district would be subject to the act.[15]

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[12]A board of trustees of a private nonprofit corporation that is not subject to the act must nevertheless conduct meetings in accordance with requirements set forth in its articles of incorporation and by-laws, which may mandate that the board comply with the act or otherwise admit the public to its meetings.

[13]*See* Gov't Code § 551.001(6) (defining "quorum" as majority of governmental body unless defined differently by law, rule or charter).

[14]*See, e.g.*, Attorney General Opinions JM-1072 (1989), H-772 (1976), H-238 (1974), H-3 (1973).

[15]You have not asked us to address whether the board of managers members' service on the board of trustees of the private nonprofit corporation that has a contractual relationship with the hospital district presents a conflict of interest, and we do not do so. This is a question that the three board of managers members and the two boards may wish to consider if they have not done so already. *See* Local Gov't Code § 171.009 ("It shall be lawful for a local public official to serve as a member of the board of directors of private nonprofit corporations when such officials receive no compensation or other renumeration from the nonprofit corporation or other nonprofit entity."); Attorney General Opinion DM-256 (1993) (addressing Local Gov't Code § 171.009 and noting that this provision does not insulate trustee from some possible legal consequences of conflict between interests of public entity and private corporation).

We next address your question regarding whether documents that relate to meetings of the board of trustees of the private nonprofit corporation are subject to the Open Records Act, Gov't Code ch. 552. The definition of the term "governmental body" under this statute includes all public entities in the executive and legislative branches of government, as well as counties, municipalities, political subdivisions, and special districts. *Id.* § 552.003(1)(A). In addition, a private entity that is supported in whole or in part by public funds or that spends public funds is a governmental body under section 552.003(1)(A)(x) of the Government Code. If a governmental body makes an unrestricted grant of funds to a private entity to use for the private entity's general support, the private entity is a governmental body subject to the act.[16] If, however, a distinct part of an entity is supported by public funds within section 552.003(1)(A)(x), only the records relating to that part of the entity are subject to act.[17] Furthermore, while the Open Records Act does not apply to private persons or businesses merely because they provide goods or services under a contract with a governmental body,[18] if a private person or business holds records "for a governmental body and the governmental body owns the information or has a right of access to it," then those records will be subject to the act pursuant to section 552.002(a)(2) of the Government Code.

As you have not provided us with any information that would suggest that the private nonprofit corporation is a public entity or is supported in whole or in part by public funds, we assume that it is not a "governmental body" under the Open Records Act. In addition, we have no basis on which to conclude that records held by the corporation are held on behalf of the hospital district or that the hospital district has a right of access to any such records. Lastly, we do not believe that merely because the private nonprofit corporation's board of trustees includes three members of the hospital district board of managers, the corporation is a "governmental body" subject to the Open Records Act. *But see* discussion *supra* p. 5. Regardless of whether the private nonprofit corporation is subject to the Open Records Act, however, the hospital district is clearly a governmental body under the act[19] and any information relating to the corporation that is in the possession of the hospital district, including information in the possession of board of managers members in their capacity as members of the hospital district's governing body,[20] is subject to the act. Finally, we note that records

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[16]Open Records Decision No. 228 (1979) at 2.

[17]Open Records Decision No. 602 (1992).

[18]Open Records Decision No. 1 (1973) (concluding that bank that holds funds of governmental body is not subject to act). Thus, an entity that receives public funds is not a governmental body if its agreement with the government imposes "a specific and definite obligation . . . to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser." Open Records Decision No. 228 at 2; *see also Kneeland v. National Collegiate Athletic Ass'n*, 850 F.2d 224 (5th Cir. 1988), *rev'g* 650 F. Supp. 1047 (W.D. Tex. 1986), *cert. denied*, 488 U.S. 1042 (1989); Attorney General Opinion JM-821 (1987).

[19]*See* Gov't Code § 552.003(1)(A)(viii), (x).

[20]*See, e.g.*, Open Records Decision Nos. 626 (1994), 450 (1986).

of some nonprofit corporations may be available for public inspection and copying under other law. *See, e.g.*, V.T.C.S. art. 1396-2.23A, C ("All records, books and annual reports of the financial activity of [a nonprofit corporation organized under art. 1396-2.23A] . . . shall be available to the public for inspection and copying there during normal business hours.").

III.

Finally, you ask about a hospital district's relationship with the county attorney and the board of managers' authority to seek legal advice from outside counsel. Your question suggests that the board believes that the county attorney has a conflict of interest regarding a certain matter involving the hospital district[21] and that the board would like to consult with outside counsel regarding the matter in the closed session of a meeting of the board from which the county attorney would be excluded. We gather that the county attorney objects to this course of action.

Section 281.056 of the Health and Safety Code, subsection (b) provides that the county attorney "*shall* represent the district in *all* legal matters,"[22] while subsection (c) provides that "[t]he board *may* employ *additional* legal counsel when the board determines that additional counsel is advisable."[23] The relationship between these two subsections is not readily apparent. They were enacted in 1955 as part of section 12 of now-repealed article 4494n, V.T.C.S., which provided as follows:

> It shall be the duty of the County Attorney, District Attorney or Criminal District Attorney, as the case may be, charged with the duty of representing the county in civil matters, to represent the Hospital District in all legal matters; *provided, however*, that the Board of Hospital Managers shall be authorized *at its discretion* to employ additional legal counsel when the Board deems advisable.

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[21]You have not described the nature of the alleged conflict, but we infer that it may have to do with the board's dispute with the commissioners court regarding the lease. While the Texas Disciplinary Rules of Professional Conduct limit attorneys in private practice from representing clients with conflicting interests, government attorneys are not subject to these restrictions. As the preamble to the rules points out, government lawyers "may be authorized to represent several governmental agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. . . . These rules do not abrogate any such authority." Tex. Disciplinary R. Prof. Conduct preamble para. 13 (1996). *Cf.* Attorney General Opinions JM-633 (1987) (Harris County Attorney authorized to represent both sheriff's department civil service commission and sheriff despite conflicts of interest), JM-28 (1983) (attorney general may represent parties with conflicting interests in same litigation). Thus, the alleged conflict may not preclude the county attorney, or an assistant county attorney, from advising the hospital district.

[22]Health & Safety Code § 281.056(b) (emphasis added).

[23]*Id.* § 281.056(c) (emphasis added).

> The Hospital District shall contribute sufficient funds to the general fund of the county for the account of the budget of the County Attorney, District Attorney or Criminal District Attorney, as the case may be, to pay all additional salaries and expenses incurred by such officer *in performing the duties required of him* by such District.

Act of May 5, 1955, 54th Leg., R.S., ch. 257, 1955 Tex. Gen. Laws 715, 721 (emphasis added). The legislature did not amend section 12 at any time after 1955. In 1989, article 4494n was repealed[24] and incorporated into the Health and Safety Code[25] as part of a nonsubstantive statutory revision.[26]

Because section 12 of former article 4494n was codified as part of a nonsubstantive statutory revision, any construction of section 281.056(b) and (c) must be consistent with the former statute. *See Johnson v. City of Fort Worth*, 774 S.W.2d 653, 654-55 (Tex. 1989) (stating that when conflict exists between former statute and nonsubstantive revision, former statute controls); Attorney General Opinion JM-1230 (1960) at 8 (quoting *Johnson*, 774 S.W.2d at 654-55). We believe it is apparent from former section 12 that the legislature intended to provide that the county attorney is required to represent the hospital district in all legal matters, but that the hospital district is not required to use the services of the county attorney and that the county attorney cannot veto or control the hospital district's employment of outside counsel, for a number of reasons.

First, the use of the words "provided, however" immediately following the phrase describing the authority and duty of the county attorney with respect to the hospital district suggests that the authority of the hospital district to employ additional legal counsel limits the authority and duty of the county attorney. In addition, the last sentence of section 12, which requires the hospital district to pay the county attorney for his or her services, limits that obligation to "the duties required of him by such District." This language further suggests that the hospital district has a choice regarding whether to obtain legal services from the county attorney. Furthermore, the fact that section 12 requires the hospital district to pay the county attorney for his or her services indicates that representation of the hospital district is not an official duty of the county attorney. *See* Attorney General Opinion WW-886 (1960) at 4 (construing statutory predecessor to Health & Safety Code § 281.049, former V.T.C.S. art. 4494n, § 6, requiring hospital district to pay salaries and expenses incurred by county, its officers and agents in performing certain services for district, and concluding that these were not official county duties because county and officers would not receive extra compensation for performing official county duties). Finally, we believe the use of the words "at its discretion" to describe the circumstances in which the board of managers may employ additional

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[24]*See* Act of May 18, 1989, 71st Leg., R.S., ch. 678, § 13, 1989 Tex. Gen. Laws 2230, 3165.

[25]*See id.* § 1, at 2230, 2545.

[26]*See id.* § 14, at 3165 ("This Act is enacted under Article III, Section 43, of the Texas Constitution. This is intended as a recodification only, and no substantive change in the law is intended by this Act.")

counsel indicates that the board may employ such counsel at any time and need not obtain the approval of the county attorney in order to do so. In sum, we believe that the language of the statutory predecessor to section 281.056(b) and (c) compels us to conclude that the county attorney is required to represent the hospital district in all legal matters, but that the hospital district is not required to use the services of the county attorney and that the county attorney cannot veto or control the hospital district's employment of outside counsel.[27]

With this background, we turn to your question. The Open Meetings Act authorizes a governmental body subject to the act to meet in closed session only pursuant to certain exceptions. Government Code section 551.071 authorizes a governmental body to meet in closed session with its attorney regarding litigation and settlement offers or to seek or receive the attorney's advice with regard to legal matters. Attorney General Opinion JM-100 (1983). The purpose of this exception is to "enable[] governmental bodies and their attorneys to secure the protection of the attorney-client privilege . . . . The purpose of the privilege is to promote the unrestrained communication between attorney and client, without fear that the attorney will disclose confidential communications." Attorney General Opinion JM-238 (1984) at 4. Section 551.071 does not permit a governmental body to admit to a closed session a person whose presence would prevent a privileged communication from taking place. *Id.* at 5.

Section 551.071 presupposes an attorney-client relationship between the attorney giving the advice and the governmental body. For the reasons stated above, we believe that Health and Safety Code section 281.056 authorizes the board to enter into an attorney-client relationship with outside counsel without the county attorney's approval. Because the board can form an attorney-client relationship with outside counsel even if the county attorney objects, the board is authorized to hold a closed session to seek and receive advice from outside counsel even if the county attorney has not approved of the representation and is not included in the closed session. The board has the authority to exclude the county attorney from a closed session of a board meeting, just as it has the authority to exclude any other non-board member. *See* Attorney General Opinion JM-6 (1983) (only members of governmental body have right to attend executive session and commissioners court may exclude county clerk from its executive sessions). Of course, the board will have no basis to conduct a closed session under Government Code section 551.071 unless it meets with either the county attorney or with other counsel with whom the board has established an attorney-client relationship.[28]

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[27]This office has issued several opinions addressing the authority of a commissioners court to employ counsel other than the county attorney. These opinions generally conclude that a commissioners court is not authorized to employ other counsel without the approval of the county attorney unless expressly authorized to do so by statute. Attorney General Opinions JM-1281 (1990), JM-633 (1987) (county attorney of Harris County must name and control terms of employment of special counsel). Our conclusion here is peculiar to this particular statutory scheme, which we believe expressly authorizes the board of managers to hire outside counsel. We do not believe it conflicts with our prior opinions.

[28]Whether the presence of the county attorney would prevent privileged communications between the board and its outside attorney from taking place would depend upon the nature of the alleged conflict, *see supra* note 21, and other relevant facts, *see* Attorney General Opinion JM-238 at 6 (whether particular person may be admitted to closed session of governmental body held pursuant to statutory predecessor of Gov't Code § 551.071 depends upon case-by-case analysis of

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SUMMARY

Health and Safety Code sections 285.051 and 285.052 apply to a county hospital district established under Health and Safety Code chapter 281 and prevail over sections 281.050 and 281.051. As a result, a commissioners court has no authority with respect to an action to lease a hospital facility taken by a hospital district board of managers under section 285.051.

We have no basis to conclude that the board of trustees of a private nonprofit corporation, which includes three members of a hospital district board of managers, is itself a governmental body subject to the Open Meetings Act, Gov't Code ch. 551, or the Open Records Act, Gov't Code ch. 552. The three members of the board of managers may constitute a governmental body as a group and be subject to the Open Meetings Act, if the board of managers has delegated the group any authority over hospital district business or rubber-stamps the group's recommendations regarding hospital district business. Regardless of whether the private nonprofit corporation is subject to the Open Records Act, the hospital district is a governmental body under the act and any information relating to the corporation that is in the possession of the hospital district, including information in the possession of board of managers members in their capacity as members of the hospital district's governing body, is subject to the act.

Because Health and Safety Code section 281.056 authorizes a hospital district board of managers to form an attorney-client relationship with outside counsel even if the county attorney objects, the board is authorized under the Open Meetings Act to hold a closed session to seek and receive advice from outside counsel even if the county attorney has not approved of the representation and is not included in the closed session. The board has the authority to exclude the county attorney from a closed session of a board meeting, just as it has the authority to exclude any other non-board member.

Yours very truly,

Mary R. Crouter
Assistant Attorney General
Opinion Committee

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[28](...continued)
all relevant facts). Therefore, we express no opinion regarding whether the board *must* exclude the county attorney to consult with its outside attorney with regard to a particular matter. Of course, if the county attorney and outside counsel jointly represent the hospital district on a matter, the board may invite both attorneys to attend a closed meeting to advise the board on the matter.