# MEMORANDUM

# State of Alaska

Department of Law

TO: Catherine A. Reardon, Director
Division of Occupational Licensing
Department of Commerce & Econ. Dev.

DATE: March 10, 1998

FILE NO: 663-97-0305

TEL. NO.: 465-2127 and 269-5200

SUBJECT: Questions re Open Meetings, Public Records, Etc.

FROM: John B. Gaguine
Assistant Attorney General
Governmental Affairs - Juneau

Teresa Williams
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You have asked for our assistance with 19 separate questions relating to the application to the Division of Occupational Licensing of state law regarding open meetings, public records, and confidentiality. We will address each of your questions in turn. In addition, following our analysis of your 19 questions, we will address a follow-up question that you posed after reviewing an earlier draft of this opinion.

1. Is any of the following information confidential: the fact that a complaint has been filed against a medical doctor; the identity of the complainant; the substance of the complaint; the final disposition of the complaint; or the reason for that disposition?

Response: The division may decline to disclose the existence of a complaint, its substance, and the identity of the complainant, at least while the investigation of the complaint is pending. We discuss the confidentiality of files of a pending investigation below, in response to your question #2. Because the complaint triggers the investigation, it is clearly part of the investigative file.

We cannot give you an unequivocal answer to your question regarding the final disposition of a complaint and the statements of reasons for the disposition. We refer you again to our response to your question #2, relating to disclosure of closed investigative files. This response is also pertinent to your question about the existence of a complaint, its substance, and the identity of the complainant after the investigation is complete.

Even if the complaint becomes a public record, the complainant may have a continuing privacy interest, under art. I, sec. 22 of the Alaska Constitution, that was not given up by making a complaint to the appropriate investigative agency. We believe that the identity of the complainant in a complaint that has become a public record should be withheld from the public when revealing it would be likely to cause significant embarrassment to the complainant, and that privacy interest is not outweighed by the public's need to know the identity. Each case must be determined on its specific facts.

You have expressed concerns that a standard such as "significant embarrassment" is difficult to apply. It is. However, difficult balancing decisions unfortunately cannot be avoided when a request for public records involves records containing personal information. Note, though, that the standard to be applied is an objective one, i.e., the question to be resolved is not whether the person named in the record subjectively would find the information embarrassing, but whether a reasonable person in those circumstances would find it to be so. *See Falcon v. Alaska Public Offices Com'n*, 570 P.2d 469, 479 (Alaska 1977).

When a complaint is dismissed without an accusation being filed, the reason given need not be detailed: a statement such as "insufficient evidence" would generally be adequate. Nothing in the public records laws requires the division to prepare detailed public explanations of its actions.

2. What information in the division's investigative files regarding a complaint made against a medical doctor is a public record while the investigation is active and what is confidential after the investigation has been closed based on the division's decision not to pursue the complaint? (Please include discussion of investigators' notes, tapes of interviews, records of the licensing agencies of other states, Department of Law advice, expert witnesses' opinions, medical and facility records in your response.)

Response: In 1987 we addressed the question of disclosure of an investigative file while the investigation was still pending. A member of the press had requested to see an active investigative file of the Alaska Public Offices Commission, and that agency asked us whether it was obligated to comply with that request. 1987 Inf. Op. Att'y Gen. 291 (April 30; 661-87-0468). In that opinion, a copy of which is attached as Appendix 1, we concluded that an active investigative file was not subject to disclosure because of AS 09.25.120(4), exempting from disclosure "records required to be confidential by . . . state law"; we concluded that state common law, which requires a balancing of the public's interest in disclosure and the state's interest in confidentiality, precluded disclosure.

In addition, AS 09.25.120 was amended in 1990, since the 1987 opinion, to add the exception for "records or information compiled for law enforcement purposes." This language was derived from the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552. 1994 Op. Att'y Gen. No. 1, at 5 n.4. Since the federal courts have interpreted this language broadly, to extend to documents produced in civil investigations as well as in criminal ones, the Alaska statute should be interpreted similarly. Thus materials produced during an investigation by the division are protected from disclosure by AS 09.25.120(a)(6), at least during the pendency of the investigation.

Once the division has decided not to pursue a complaint, the answer is not as clear. We addressed a somewhat similar question, with regard to criminal investigations not leading to charges, in 1994 Op. Att'y Gen. No. 1 (attached as Appendix 2), at pages 16-26. The balancing of interests discussed there is equally applicable here.[1]

"Medical and related public health records" that have come into the possession of the division during the investigation are specifically exempted from disclosure by AS 09.25.120(a)(3). Advice from the attorney general would likely be non-disclosable by virtue of the attorney-client privilege; the division should check with the assistant attorney general who rendered the advice. Information received from other states would be non-disclosable if it is not public under the laws of the other state, and if the information was provided to the division under a condition of confidentiality. Finally, disclosure may not be appropriate if the charge being investigated carries a strong social stigma and the investigation has determined that the allegations are probably not true. These determinations must be made on a case-by-case basis, preferably involving consultation with the division's attorney.[2]

3. May the division release descriptions of complaints with the names of the complainant and the medical doctor deleted, and is the division liable if that disclosure damages either of the parties?

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[1] As noted in that 1994 opinion, on page 26, before releasing potentially sensitive information contained in a closed file the division should notify the subject of the investigation and/or other persons with a legitimate privacy interest in the investigative materials, to give the opportunity to seek an order prohibiting the release of the records. *See Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 n. 13 (Alaska 1990).

[2] We believe that investigator's notes, tapes of interviews, and expert witness opinions would be subject to the general rules on disclosure of an investigative file enunciated in AS 09.25.120(a)(6), and the 1994 Op. Att'y Gen. No. 1, at 16-24.

Response: It is our understanding that this question deals with release of a summary of pending complaints. We believe that such a release is proper, especially if appropriate deletions are made. Such deletions may go beyond just the doctor's name: if town X has only one doctor, deleting the doctor's name but leaving his or her place of practice does not do much good in protecting the doctor's identity.

In our opinion such a disclosure would not expose the division to liability. Under AS 09.50.250 the state cannot be sued in tort based upon a state agency's or employee's exercise of a discretionary function. The decision to issue a synopsis of pending complaints would in our opinion be a discretionary function.[3]

4. Does the fact that the complainant or the medical doctor who is the subject of the complaint has revealed the existence or content of a complaint affect the division's duty to protect the confidentiality of information relating to the complaint and investigation?

Response: No. Even though it may seem pointless for the division to decline to disclose confidential information that has already been disclosed by a complainant or a subject of a complaint, the division should adhere to its usual disclosure rules.

5. May a complainant or witness provide information to the division under the condition that his or her identity remains confidential?

Response: We believe that the answer to this question is yes; however, there is no Alaska law on the question, and our research has disclosed little law from other jurisdictions. We did find a couple of federal cases implicitly supporting the proposition. *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 360 (3rd Cir. 1985), noted, without disapproval, that the Occupational Health and Safety Administration had expressly assured confidentiality to its witnesses. *Brant Constr. Co. v. United States Envtl. Protection Agency*, 778 F.2d 1258 (7th Cir. 1985), went further, and held that an agency did not have to reveal information given by a person when it could reasonably infer that the person would have expected confidentiality.[4] *See generally* 3 J. Stein et al., *Administrative Law* § 19.01 (1993)

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[3] A division employee could conceivably be sued over this sort of release of information. However, we believe that the employee would be immune from liability unless the employee acted in bad faith and that a release consistent with this opinion, or with advice from the Attorney General, would protect the employee. In addition, the Department of Law would defend the employee in such an action, unless the department determined that the employee had acted in bad faith.

[4] *Brant* specifically held that unsolicited letters received by EPA containing allegations of

(administrative agencies may, as part of investigation, hold private conferences and consultations; agencies are empowered to use a wide range of information-gathering techniques).

Law enforcement agencies can promise confidentiality; in fact there is a provision of the public records law, AS 09.25.120(a)(6)(D), that exempts from disclosure law enforcement records that "could reasonably be expected to disclose the identity of a confidential source." Since, as noted, "law enforcement" is not limited to the enforcement of the criminal law, it follows that agencies enforcing the civil law can also promise confidentiality.

6. Can a person who files a complaint against a medical doctor be sued for defamation and is that person's potential liability increased if that complaint is made public?

Response: A person cannot be successfully sued for filing a complaint, or participating in an investigation or proceeding based on the complaint, in good faith against a medical doctor. AS 08.64.362. Additionally, what is contained in such a complaint is absolutely privileged in a case alleging defamation. Restatement (Second) of Torts § 587 (1977); W. Page Keeton et al., *Prosser and Keaton on Torts,* § 114 at 818-19 (5th ed. 1984).[5] This privilege does not depend on whether the complaint is released to the public.[6] We must note, though, that a person who knowingly files a false complaint against a doctor could be liable to the doctor under a different tort theory, such as wrongful use of civil proceedings. *See* Comment a to Restatement (Second) of Torts § 587.

7. May the division initiate an investigation of a medical doctor in the absence of an identified injured party or evidence of a violation of the law, and is that investigation confidential?

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illegal and improper activities in connection with an EPA-funded construction project were exempt from disclosure under the Freedom of Information Act.

[5] While there is no dispositive decision on this question from the Alaska Supreme Court, that court's decisions in the area of defamation have been consistent with the general rules of law as set out in the restatement and the hornbooks. Thus, we find no reason to suspect that the court would not choose to follow the general rule on this question.

[6] If the complainant himself or herself releases the complaint to the public, the answer to the liability question might be different. Because this scenario does not involve a state agency, we do not feel it is appropriate to address it.

Response: The division may initiate an investigation on its own. An administrative agency may make preliminary factual inquiry on its own in order to determine if charges should be filed. *In re Cornelius*, 520 P.2d 76, 84 (Alaska 1974). The general rule is that an agency does not have to have probable cause that a law has been violated before it can investigate: "[t]he agency may investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." 73 C.J.S. *Public Administrative Law and Procedure*, § 78 at 558-59 (1983) (footnotes omitted).[7] However, the agency must be reasonable: it cannot, for example, select a target for investigation based on political reasons. *Id.* at 559.[8]

As to confidentiality, we can see no reason why the records of that investigation would not be confidential to the same extent as the records of an investigation arising from a complaint.

8. Are disciplinary hearings regarding medical doctors open to the public?

Response: Yes, except as noted in response to (9), below. Common law requires that adjudicative hearings be generally open to the public; only the deliberations are closed. The common law is reflected in the rules governing court procedures: "So far as practicable, all judicial business involving the trial of causes and conferences with members of the Bar or litigants shall be on the record and transacted in open court." Alaska Admin. R. 21.

9. May a hearing be closed to the public if information revealed in the hearing would be detrimental to the complainant (for example the fact that the complainant has a physical or mental illness)?

Response: Yes. Depending on the nature of the matter, closing a portion of the proceeding to take testimony from that person may be appropriate. The protection would

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[7] Again, there is no Alaska case law on this question, but we have no reason to suspect that the Alaska courts would take a different view.

[8] It is likely that the Alaska courts would take a hard line on the reasonableness requirement, in light of the last sentence of the due process clause of the Alaska Constitution, art. I, sec. 7: "The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed."

also extend to other persons who are called as witnesses but were not complainants. This subject is discussed in the Department of Law *Hearing Officer Manual* at 67-68 (1994).[9]

10. Is it possible under the Constitution to allow videotaped or teleconferenced testimony in situations when the complaining witness does not wish to be in the same room as the accused medical doctor or may be mentally harmed by that experience, and would statutory changes be required?

Response: Yes, it is possible, and no, statutory changes would not be required. The confrontation clauses of the state and federal constitutions both specifically apply only to criminal prosecutions, and hence are not applicable to administrative licensing proceedings. The evidence rules for the adjudicative hearings of the occupational licensing boards are found in AS 44.62.460. While that statute grants parties the right to cross-examine opposing witnesses, it does not include a right of confrontation.[10]

There may be some due process considerations involved with such testimony, as allowing it may arguably affect an accused's right to a fair hearing. This, however, is a matter for the hearing officer to determine.

11. If the Medical Board reviews a complaint or investigative information before a hearing, is the Board disqualified from acting on that complaint?

Response: No. The Alaska Supreme Court has explicitly upheld the general rule that an agency as a whole may conduct a preliminary investigation of a complaint and then adjudicate the complaint. *In re Hanson*, 532 P.2d 303, 305-06 (Alaska 1975). On a cautionary note, however, a problem arises if the participation of an individual board member

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[9] Even in criminal cases, where the accused has a constitutional right to a public trial (Alaska Const., art. I, sec. 11), closure is permitted in certain instances. *See Renkel v. State*, 807 P.2d 1087, 1091 (Alaska App. 1991) (citations omitted): "[I]t is well accepted that the right [to a public trial] is not absolute. It may be limited by some other overriding interest." Because there is no constitutional right to a public hearing in licensing matters, we believe that closure would be appropriate in instances where closure of a criminal trial might not be.

[10] AS 44.62.410(b), part of the Administrative Procedure Act, specifically provides that a party or witness may participate in a hearing by telephone if no party objects, the witness or party lives far from the hearing site, or other good cause is shown for the request. However, telephonic participation may not be allowed if it would "substantially prejudice" the opposing party. This determination will be made by the hearing officer.

in an investigation or review of a complaint prevents that individual from being fair or impartial. AS 44.62.450(c).[11]

> The availability of an impartial tribunal is "a basic ingredient of a fair and adequate hearing in accordance with due process." *Eidelson v. Archer*, 645 P.2d 171, 181 (Alaska 1982) (citations omitted). We have stated that when one person performs the functions of investigating, prosecuting and judging a case, this requirement of an impartial tribunal may not be satisfied. *Id.* at 182; *Storrs v. Lutheran Hosp. & Homes Soc'y of Am., Inc.*, 609 P.2d 24, 28 n. 12 (Alaska 1980).

*Voigt v. Snowden*, 923 P.2d 778, 781 (Alaska 1996). Commentators have suggested that an agency should maintain an internal separation of adjudicative functions from investigative and prosecutorial functions, so that individuals do not perform dual roles. *See* 2 K. Davis and R. Pierce, Jr., *Administrative Law Treatise*, § 9.8 and 9.9 (3rd Ed. 1994).

In short, we continue to adhere to our advice that, to the greatest extent possible, a board not be exposed to information outside of the hearing process. *See* 1977 Inf. Op. Att'y Gen. (Nov. 2; J66-239-78); 1994 Inf. Op. Att'y Gen. (July 29; 663-94-0602). If a board or commission is given information about a case prior to adjudicating the matter, a record should be kept of the information provided so that the respondent may have an opportunity to counter the information.

12. What changes in statute and hearing procedures would be necessary to permit the Medical Board to review complaints at the time they are filed and to review investigative information before it is presented in a hearing?

Response: As noted above, the medical board in our opinion already has this authority, as limited by the state or federal constitutions. Hence no statutory changes would be necessary. However, if the board wishes to participate more fully in the investigative function than its general oversight role, the board may need to break into separate investigative and adjudicative panels. This division may necessitate legislative changes.

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[11] Note that the Administrative Procedure Act places a value on maintaining a quorum of a board or commission to act in a case. A member of a board or commission may not be disqualified from hearing a matter if removal would prevent the existence of a quorum. AS 44.62.450(c).

13. Are the division's medical license files public records, including letters of recommendation, evaluations by health care professionals, and applicants' descriptions of disabilities and prior disciplinary actions?

Response: In general, yes. The public has a strong interest in assuring that the division is not licensing incompetent doctors; that interest cannot be effectuated if relevant materials that are part of the application process are withheld from the public.

Medical and other public health-related records, however, are specifically confidential under the public records law. AS 09.25.120(a)(3). In addition, as discussed above, the applicant's right to privacy must also be weighed against the public need to know. The division will need to make determinations in such cases on an individual basis, preferably in consultation with this office. Moreover, as discussed below, the weight given to the public interest in disclosure would be less for information regarding persons whose applications are denied.

You have specifically asked whether an application filled out by an applicant that contains questions about the applicant's fitness to practice constitutes a confidential "medical record." We believe that the answer is no. The application itself is meant to be a public document and cannot be "exempted" because it contains medical information. However, records that are attached to an application might be medical records that are confidential.

Overall, in determining whether to release contents of a licensing file, the public interest in disclosure should not be minimized. One of the chief purposes of the public records laws is to allow the public to make sure that the government is doing its job. The public should be able to review a board's decisions relating to the fitness of applicants. We also note that AS 08.64.130(a) and (b) require the Medical Board to maintain certain records, and that subsection (c) of that statute requires the board to make those records available to the public the records maintained "for each person licensed [by the board]."

14. Is the investigation of an applicant for a medical license public, and may the Medical Board's review and discussion of the investigative information be conducted in executive session?

Response: We first address what we assume will be the usual situation, where a public records request is made after the licensing investigation is complete and the board has acted on the application. In this situation decisions must be determined on a case-by-case

basis, and will depend in part on whether the applicant is issued a license. In general, see our response to question #2, above.

If the applicant is denied a license, there is a strong argument that information embarrassing to the applicant need not be disclosed. In such a case the public's need to know is significantly less than in cases where a license has been issued, and the courts might well find that the applicant's privacy interests outweigh that need to know. Note, though, that even when the license is denied, non-sensitive parts of the investigative files would still be subject to disclosure.

If the public records request is made before the board has acted on the application, and if the division believes that disclosing the records sought may compromise the investigation or compromise the privacy interests of a person who figures in the investigation, the division may decline to disclose the records. We have two reasons for this response. If license investigation files are considered to be "law enforcement records" under AS 09.25.120(a)(6), they would be protected from disclosure by the subparagraphs to this law. If these files are not considered to be law enforcement records, we believe that they would be protected to the same extent by the individual's privacy rights and the public interest in not disclosing a file from an ongoing investigation.[12]

As to the second question, the medical board in our opinion may meet in executive session to review and discuss the information obtained in an investigation of an applicant only if that information might "tend to prejudice the reputation and character" of the applicant or might constitute an unwarranted invasion of the person's privacy. AS 44.62.310(c)(2) and (3); Alaska Const., art. I, sec. 22. We would assume that this is the current practice of the board, i.e., that the board does not go into executive session to review every application.

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[12] Because paragraph (a)(6) is derived from the federal FOIA, we have looked at the federal law for guidance. We have not found any cases relating to license applications. We did find one case in which the federal courts took a narrow view of "law enforcement purposes," finding that correspondence and related documents generated in a routine audit of a government contractor by a federal agency are not covered by the exemption. *John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 108-09 (2nd Cir. 1988), *rev'd on other grounds*, 493 U.S. 146 (1989). However, we cannot conclude, based on this one case, that the Alaska courts would find that license investigations are not made for "law enforcement purposes" within the meaning of the public records acts.

15. May the division decide that a medical licensee's address, phone number, social security number, or other identifying information will be kept confidential if the licensee asserts that he or she is, or may be, stalked?

Response: We believe that the division should not disclose social security numbers in any case. An individual clearly has a privacy interest in his or her social security number, and we cannot see any countervailing public interest in giving out that number.[13]

The division should also keep addresses, phone numbers, and other identifying information confidential in the circumstances described. We have expressed the opinion that the addresses of permanent fund dividend recipients are public records. 1992 Inf. Op. Att'y Gen. (April 1; 663-92-0163). Based on this opinion's reliance on AS 44.99.350(2), we would conclude that in normal circumstances a person's telephone number (assuming that it is not an unlisted number) would also be subject to disclosure. However, neither this opinion nor our other opinions on public records have indicated that the right of inspection is absolute. And a recent Alaska Supreme Court opinion held that when there are credible threats to a person's safety, that person's constitutional privacy rights override the public records laws with regard to information that would endanger him or her. *Alaska Wildlife Alliance v. Rue*, ___ P.2d ___, Op. No. 4910 (Alaska, Nov. 28, 1997).

16. Must disciplinary hearings conducted by hearing officers and State Medical Board meetings to consider proposed decisions, memoranda of agreement, stipulated agreements, summary suspensions, license surrenders, or subpoenas be publicly-noticed?

Response: The open meetings law exempts from the operation of the law "a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding." AS 44.62.310(d)(1). This office has consistently advised boards and commissions that the Open Meetings Act does not apply when the sole purpose of the meeting is adjudication. If the meeting agenda contains non-adjudicative matters, then the usual rules of the Open Meetings Act apply. Hearings conducted by hearing officers, as well, are not covered under the open meetings law.

Proceedings for cease and desist orders or to obtain subpoenas are conducted ex parte under AS 08.01.087(b) and AS 08.01.090. Otherwise, adjudicative proceedings are

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[13] Congress has recognized an individual's privacy interest in his or her social security number by enacting § 7 of P.L. 93-579, the Privacy Act of 1974. Section 7 provides that in general a governmental agency may not deny a right, benefit or privilege to a person because of the person's refusal to disclose that number.

open to the public. Notice of the time and place of the adjudicative proceeding should be posted in your offices, unless the only matter to be taken up is off-record deliberations or closed testimony.

17. Is information regarding a medical doctor's compliance with the terms of probation, including the evaluation of the doctor made by a health care professional, a public record?

Response: The information is public unless it is a medical record under AS 09.25.120(a)(3) or the constitutional privacy interests of the respondent outweigh the public need to know the content of the information. The division would again need to make this determination on an individual basis, preferably in consultation with this office.

18. What statutory changes would need to be made within the confines of the Constitution in order to make all investigative and license information a public record and to protect the division from liability based on such disclosure?

Response: It is not entirely clear that all investigative and license information could be made public records by legislation. Obviously legislation is not valid if it conflicts with provisions of the Alaska Constitution, and if a court were to determine that the release of certain information found in medical board records would violate someone's right of privacy under art. I, sec. 22 of the Alaska Constitution, the information could not be released regardless of what the statutes provided. However, because the parameters of the right to privacy are not clearly defined, there is a significant likelihood that a court would defer to a legislative determination that the public's need to know about medical board matters outweighs the individual's right not to have information in medical board files disclosed.

Probably the most logical statutory change, if one were to be made, would be to add a new subsection to AS 09.25.120 specifically making public whatever information you wish to make a public record.

As to liability, we reiterate our opinion, expressed above, that AS 09.50.250 does not allow an action against the division for disclosing a record, even if the division errs in good faith in concluding that the record is disclosable.

19. How is information relating to complaints and investigations against medical doctors different in regards to confidentiality from information relating to complaints and investigations against other types of occupational licensees?

Response: The same general principles apply to all occupational licensees. As discussed, however, there are privacy considerations involved in medical, and other health care, board matters that one would not expect to find with most other boards.

In addition, there is one specific State Medical Board statute that governs confidentiality of one specific type of investigation. AS 08.64.336 requires the board to investigate a report made by a physician who treats any other physician for alcoholism, drug addiction, mental, emotional, or personality disorder if there is probable cause to believe that the person constitutes a danger to patients or the public. The medical board must also investigate reports by a hospital whenever a physician's practice privileges are restricted, revoked, conditioned or refused. Neither a hospital nor a treating physician may withhold a report or evidence during an investigation based upon a physician-patient or psychotherapist-patient privilege or upon a claim of confidentiality under AS 18.23.030, which governs activities of an entity defined as a peer review organization.

However, subsection (d) of AS 18.23.030 provides that any report received or information gathered by the medical board during an investigation under AS 08.64.336 is to be held confidential by the medical board until such time as a formal disciplinary action is filed. We interpret this to mean that if no formal action is taken by the medical board as the result of an investigation under AS 08.64.336, the closed investigative file is not a public record. We also interpret this statute as applying to the division when it is acting on behalf of the State Medical Board.

We also need to address another aspect of AS 18.23.030. This section can be read in the abstract to establish strict confidentiality rules for the State Medical Board, since AS 18.23.070 defines "review organization" (the term used in AS 18.23.030) to include the medical board, and does not limit the definition to when the medical board is acting as a review organization. However, because AS 18.23.010 - 18.23.070 deal with review organizations, this broad reading may not be warranted. We are attempting to ascertain the intent of the legislature when, in 1978, it amended the definition of review organization to include the State Medical Board. To do this we must review tapes of the House Commerce Committee and of a House floor session. Because these tapes have been archived, we expect that this review will take a while. Therefore, in order not to delay this opinion further, we will postpone our analysis of AS 18.23.030 until we have completed this review.

**Follow-up question:** You have noted that the division has a practice of sending confidential letters to the subject of a complaint, when either the investigation has failed to produce conclusive evidence of a violation or the potential violation is too minor to warrant the investigative or legal resources that would be necessary to pursue the complaint. These

letters essentially inform the accused of the complaint and instruct the accused that if he or she has been engaging in the misconduct charged, he or she should desist. Your question, as we read it, is whether these letters can be confidential.

We cannot give you a definitive answer to this question. We believe, however, that there are sound arguments in support of keeping such letters confidential. If the division wishes to continue the practice and is challenged in court, we are prepared to defend the division's position.

The first argument will not be applicable to all situations, but may apply in some. If the division is not closing a complaint file, but is leaving it open in case further evidence comes to light, the letter would be confidential as part of an ongoing investigation. We stress, however, that if the division has decided not to pursue a complaint - if, for instance, the division decides that the complaint does not warrant the devotion of limited resources - it cannot invoke the ongoing investigation exception to the public records law.

The second argument will apply to all letters. You note that the use of these letters "has been an effective tool for correcting professionals and increasing public safety." Obviously the use of such letters requires that they be confidential; otherwise the accused would be able to demand a hearing before the letters could be sent out. Under the balancing test discussed throughout this opinion, a sound argument can be made that the public interest in this sort of informal counseling outweighs the public interest in disclosure of the letters.[14] We acknowledge that the courts will be the final balancers, and that they may not agree with this weighing. However, the weighing is certainly not clearly incorrect.

Note that if an "instructional" letter is sent out as the result of a Medical Board investigation conducted pursuant to AS 08.64.336, it clearly <u>is</u> confidential, because of the express language of AS 18.23.030(d). See the discussion in response to your question #19, above.

We hope that this memorandum has been helpful. Please feel free to contact us if we can be of further assistance.

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[14] The levels of the individual's privacy interest and of the public interest in disclosure will generally vary for each document in a file. A licensee's privacy interest will usually be higher with respect to a document that contains a caution when there has been no finding of wrongdoing.