

Memorandum

TO: Maine Board of Licensure in Medicine

FROM: Dennis E. Smith, Assistant Attorney General

DATE: April 8, 2009

SUBJECT: Executive Sessions For Complaint Reviews

INTRODUCTION

The Board of Licensure in Medicine has requested a written opinion from the Office of the Attorney General addressing its ability to exclude licensees, complainants and/or their attorneys from the Board's executive session reviews of complaints. The Board's request for a written opinion was prompted by requests from attorneys representing licensees to be allowed to be present during the Board's executive session reviews of complaints against their clients.

ISSUES

- I. WHETHER THE BOARD MAY REVIEW A COMPLAINT AGAINST A LICENSEE IN EXECUTIVE SESSION?
- II. WHETHER THE BOARD MAY EXCLUDE THE LICENSEE AND/OR HIS ATTORNEY FROM AN EXECUTIVE SESSION DURING WHICH IT REVIEWS A COMPLAINT AGAINST THE LICENSEE?
- III. WHETHER THE BOARD MAY EXCLUDE THE COMPLAINANT AND/OR HIS ATTORNEY FROM AN EXECUTIVE SESSION DURING WHICH IT REVIEWS A COMPLAINT FILED BY THE COMPLAINANT?

BRIEF ANSWERS

1. Yes, the Board may generally review a complaint against a licensee in executive session because complaints and investigatory records are confidential while the investigation is pending pursuant to 10 M.R.S.A. § 8003-B(1), because many documents discussed by the Board are confidential pursuant to other laws, and 1 M.R.S.A. § 405 permits executive sessions to discuss records to which “access by the general public . . . is prohibited by statute.”
2. No, the Board generally may not exclude a licensee or his attorney from an executive session during which the Board reviews a complaint against the licensee because the licensee usually has access to the confidential records that provide the basis for an executive session to be held under 1 M.R.S.A. § 405 excluding the public. If the Board has obtained the Commissioner’s approval to withhold investigative information from the licensee pursuant to 10 M.R.S.A. § 8003-B(2)(G) on the grounds that it would prejudice the investigation, the licensee would not otherwise have access to information to be discussed in executive session and can be excluded from it.
3. No, the Board generally may not exclude a complainant and his attorney from an executive session during which the Board reviews a complaint filed by the complainant, unless, and to the extent that, the Board considers confidential information not otherwise known to the complainant.

LEGAL BACKGROUND

As part of its statutory duties, the Board must investigate and adjudicate complaints against its licensees. 32 M.R.S.A. §§ 3269(8) & 3282-A (Supp. 2008). The Board’s complaint process can generally be summarized as follows: Upon receipt or initiation of a complaint, the Board sends a copy of the complaint to the licensee. 32 M.R.S.A. § 3282-A(1). The licensee is required to respond to the complaint within thirty (30) days. *Id.* The Board provides the complainant with a copy of the licensee’s response, and gives her an opportunity to submit a reply. *Id.* Typically, the Board obtains a copy of the relevant medical records either by a medical release or subpoena. The Board then performs an initial review of the complaint, response, reply, and any investigative/medical records to determine if possible grounds exist for discipline. *Id.* The Board votes whether such grounds exist in public session.

The Board is a state agency created by statutes enacted by the Maine State Legislature.¹ As a state agency, the Board derives its lawful authority from the statutes enacted by the Legislature. All state agencies are subject to Title 1 M.R.S.A. Chapter 13 entitled "Public Records and Proceedings." Subchapter I of Chapter 13 is entitled "Freedom of Access." It is this particular statute, in conjunction with the Board's specific statutes, which forms the basis of this written opinion.

Title 1 M.R.S.A. §401, entitled "Declaration of public policy; rules of construction," provides as follows:

The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. It is further the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter.

This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.

1 M.R.S.A. § 401(1989)(emphasis added).

The Maine Law Court has stated that the "basic purpose of the Freedom of Access Act, as expressed in its introductory section, is to protect the public's right to obtain information about their government and governmental policies, to know what their government is doing, and to prevent the mischief of arbitrary and self-serving government action." *Cook v. Lisbon School Committee*, 682 A.2d 672, 677 (Me. 1996). In addition, the Law Court has repeatedly noted the Legislature's explicit declaration that the Freedom of Access law be liberally construed, and "that as a corollary to this liberal construction, statutory exceptions to the [Freedom of Access Law] must be strictly construed." *Paul A. Cyr v. Madawaska School Dep't*, 207 ME 28 ¶8, 916 A.2d 967, 970 (citing *Doe v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.*, 1997 ME 195, ¶8, 699 A.2d 422, 424)(emphasis added). See also *Citizens Communications Co. v. Attorney General*; *Societe Coillas, S.A. v. Dep't of Attorney General & Dep't of Envntl. Protection*, 207 ME 114, ¶9, 931 A.2d 503, 505; *Bangor Publ'g Co. v. City of Bangor*, 544 A.2d 733, 736 (Me. 1988)

¹ Title 5 M.R.S.A. § 12004-A includes the Maine Board of Licensure in Medicine within the category of "Occupational and professional licensing boards." Title 5 M.R.S.A. § 12002(1) defines "Board" as "any authority, board, commission, committee, council and similar organization, including independent organizations, established or authorized by the Legislature to fulfill specific functions the members of which do not serve full time." Title 32 M.R.S.A. § 3263 establishes the composition of the Maine Board of Licensure in Medicine. Title 10 M.R.S.A. § 8001-A includes the Board of Licensure in Medicine as one of the boards "affiliated with the Department of Professional and Financial Regulation." Title 10 M.R.S.A. § 8003 (5) provides the Board with supplemental disciplinary authority. Title 5 M.R.S.A. Chapter 375 (Maine Administrative Procedure Act) delineates the process by which state agencies, such as the Board, may make rules, deny licenses, and conduct adjudicatory (disciplinary/licensure) hearings.

1 M.R.S.A. § 402(2)(B) defines “public proceedings” to include “the transactions of any functions affecting any or all citizens of the State by... [any board or commission of any state agency or authority.” 1 M.R.S.A. § 402(2)(B)(Pamph. 2008)(emphasis added). In keeping with the Legislature’s directive that the Freedom of Access Act be “liberally construed,” the Maine Law Court has interpreted broadly this provision to include the meetings of a committee of a board, commission, agency or authority. *Lewiston Daily Sun, Inc. v. City of Auburn et al.*, 544 A.2d 335, 337-38 (Me. 1988)(“[I]n view of the extensive links between the committee and Auburn’s city council and mayor, we conclude that the Civil Service Study Committee is a ‘board, commission, agency or authority of... [the] municipality’ and hence covered by the Act’s open meeting requirement.”).

1 M.R.S.A. § 403, entitled “Meetings open to the public,” requires that all public proceedings “be open to the public, any person shall be permitted to attend any public proceeding and any record or minutes of such proceedings that is required by law shall be made promptly and shall be open to public inspection.” 1 M.R.S.A. § 403 (1989)(emphasis added). The Maine Law Court has issued multiple decisions echoing the clear purpose of section 403, indicating that “all public proceedings must be open to the public, except as provided by statute or by section 405.” *John Underwood, et al. v. City of Presque Isle, et al.*, 1998 ME 166, ¶12, 715 A.2d 148, 152 (emphasis added). *See also Robert Chase, et al. v. Town of Machiasport, et al.*, 1998 ME 260, ¶8, 721 A.2d 636, 639 (“Deliberations outside of the public proceeding, except where explicitly allowed by law, are directly contrary to the language and intent of the Act.”).

1 M.R.S.A. § 405, entitled “Executive sessions,” permits the Board to hold an executive session to discuss “information contained in records made, maintained or received by [it]... when access by the general public to those records is prohibited by statute.” 1 M.R.S. § 405(6)(F)(Pamph. 2008). However, the Maine Law Court has declared that “any statutory exceptions to the requirement of public deliberations must be narrowly construed.” *John Underwood, et al. v. City of Presque Isle, et al.*, 1998 ME 166, ¶16, 715 A.2d 148, 153 (emphasis added). *See also Robert Chase et al. v. Town of Machiasport*, 1998 ME 260, ¶ 8, 721 A.2d 636, 639 (“Deliberations outside of the public proceeding, except where explicitly allowed by law, are directly contrary to the language and intent of the Act.”).

In addition, section 405 imposes specific conditions on executive sessions, including:

- (1) The executive session is not used to defeat the purpose of the open meeting policy;
- (2) No final official action is taken in executive session;
- (3) The Board holds a public and recorded vote by 3/5 of the members present to go into executive session;
- (4) The motion to go into executive session indicates “the precise nature of the business of the executive session” and includes “a citation of one or more sources of statutory or other authority that permits an executive session for that business;” and
- (5) No matters other than those referred to in the motion are discussed in executive session.

1 M.R.S.A. § 405(1)-(5) (Pamph. 2008)(emphasis added).

Thus, the Board has the authority to enter into executive session to discuss information that is confidential from the “general public.” Examples of this type of information include:

1. Reports made to the Board pursuant to Title 24, Chapter 21 (The Maine Health Security Act) – i.e. Reports from “healthcare entities” and “professional review committees.” See 32 M.R.S.A. § 2510.
2. Consumer complaints under investigation and filed with the Board pursuant to Title 10 M.R.S.A. § 8003-B.
3. Patient medical records pursuant to Title 22 M.R.S.A. § 1711-C.
4. Alcohol and Drug Counseling Records pursuant to 5 M.R.S.A. § 20047 and 42 U.S.C. § 290dd-2.
5. Investigative records of the Attorney General’s Office pursuant to 10 M.R.S.A. § 8003-B(3).

In addition, the Law Court has ruled that “a public body charged with violating the terms of the FAA [Freedom of Access Act] has the burden of proving that its actions during the executive session complied with an exception to the FAA’s open meeting requirement.” *John Underwood, et al. v. City of Presque Isle, et al.*, 1998 ME 166, ¶19, 715 A.2d 148, 154 (emphasis added). In other words, if challenged, the Board has the burden of justifying that its decision to review, discuss, and deliberate regarding a particular issue in executive session was predicated upon one of the narrowly construed statutory bases.

Title 1 M.R.S.A. § 409(2) “empowers the Superior Court after a trial de novo² to enter an order declaring an improper administrative action [taken in executive session] to be null and void.” *John Underwood, et al. v. City of Presque Isle, et al.*, 1998 ME 166, ¶12, 715 A.2d 148, 152 (emphasis added). Section 409(2) provides in relevant part:

Actions. If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action shall be illegal and the officials responsible shall be subject to the penalties hereinafter provided. Upon learning of any such action, any person may appeal to any Superior Court in the State. If a court, after a trial de novo, determines this action was taken illegally in an executive session, it shall enter an order providing for the action to be null and void...

1 M.R.S. § 409(2) (Pamph. 2008)(emphasis added).

² *John Underwood, et al. v. City of Presque Isle, et al.*, 1998 ME 166, ¶ 22, 715 A.2d 148, 155 (“[S]ection 409(2) expressly provides for a ‘trial de novo’ of the alleged FAA violation. Thus, in its review of the actions of a governmental board or agency pursuant to the FAA, the Superior Court is the forum of origin for a determination of both facts and law to the alleged violation and does not function in an appellate capacity.”)

DISCUSSION

I. WHETHER THE BOARD MAY REVIEW A COMPLAINT AGAINST A LICENSEE IN EXECUTIVE SESSION.

Pursuant to 10 M.R.S.A. § 8003-B all complaints and investigative records of the Board are confidential during the pendency of an investigation. Thus the documents reviewed by the Board during a complaint review are indeed "confidential." As a result, these documents are not "public records" under 1 M.R.S.A. § 402(3)(A) and are not subject to public inspection pursuant to 1 M.R.S.A. § 408(1). Furthermore, it appears that pursuant to 1 M.R.S.A. § 405(6)(F), the confidential nature of these documents makes discussion of information contained in them to be a basis for the Board to go into executive session—that is, to exclude the general public from the Board's discussion of this information.

II. WHETHER THE BOARD MAY EXCLUDE THE LICENSEE AND/OR HIS ATTORNEY FROM AN EXECUTIVE SESSION DURING WHICH IT REVIEWS A COMPLAINT AGAINST THE LICENSEE.

Although the Board may review a complaint in an executive session excluding the public, its ability to exclude the licensee and his attorney from such an executive session requires a different analysis. Under most circumstances, the material that the board will be reviewing is either provided to the licensee pursuant to 32 M.R.S.A. § 3282-A(1) or required by statute to be made available to the licensee under 10 M.R.S. A. § 8003-B(2)(G) and therefore is not confidential as to him. Interpreting the executive session provision in a manner consistent with the clear dictate that the exceptions to the public proceedings mandate shall be "narrowly construed," there is no statutory basis for excluding the licensee from a discussion of documents that are not confidential as to him.

A licensee and/or her attorney should not be "narrowly construed" as the "general public" for the purpose of 1 M.R.S.A. § 405. Pursuant to Title 24, Chapter 21 (The Maine Health Security Act)³ and 10 M.R.S.A. § 8003-B⁴, the Legislature provided licensees with the right to receive copies of the Board's investigative materials. In fact, the Board customarily provides these materials to licensees in order for them to respond to complaints. See 32 M.R.S. § 3282-A(1) ("The board shall notify the licensee of the content of a complaint filed against the licensee as soon as possible, but no later than 60 days after receipt of the information."). Similarly, patient medical and substance abuse treatment records are either in the possession of the licensee or are provided to the licensee. Since the Board typically provides this information to the licensee, who is entitled to it by law, the Board cannot invoke executive session to exclude the

³ 24 M.R.S.A. § 2509(4) provides in relevant part: "Disclosure to physician. A physician shall be provided with a written notice of the substance of any information received [by the Board] pursuant to this chapter." In addition, 24 M.R.S.A. § 2509(5) provides in relevant part that a "physician or his authorized representative shall have the right, upon request, to examine the physician's individual historic record which the board maintains pursuant to this chapter."

⁴ 10 M.R.S.A. § 8003-B(2)G provides in relevant part: "during the pendency of an investigation, a complaint or investigative record may be disclosed to the person investigated upon request."

licensee from its discussion of this information on the basis that it is confidential from the licensee.

One exception to a licensee's access to complaint and investigative information can be found at 10 M.R.S.A. § 8003-B(2)G, which provides in relevant part:

The commissioner [of the Department of Professional and Financial Regulation] may refuse to disclose part or all of any investigative information [to the person investigated upon request], including the fact of an investigation, when the commissioner determines that disclosure would prejudice the investigation. The authority of the commissioner to make such a determination shall not be delegated.

10 M.R.S.A. § 8003-B(2)(G) (Pamph. 2008)(emphasis added).

The Department of Professional and Financial Regulation has created a rule [Chapter 2, "Disclosure of Investigative Records of Licensing Board During Pending Investigation When Public Knowledge Exists"] regarding the process by which the commissioner may refuse to disclose complaint and investigative information to a licensee. A copy of the rule is attached to this memorandum. In sum, the commissioner makes such a determination on a case-by-case basis. In the event that the commissioner decides to withhold part or all of any investigative information to a licensee, then the licensee will not be entitled access to that information and can be excluded from an executive session discussion of that information. Absent such a determination by the commissioner, the Board cannot exclude a licensee from the executive session based upon its own determination that allowing such access could compromise the investigation of the case or complaint. The Maine Legislature gave the sole authority to make such a determination to the commissioner, effectively eliminating the ability of the Board to unilaterally invoke the protection of the public (due to the potential compromise of the investigation) as a basis for excluding a licensee from an executive session discussion of the complaint/investigation.

III. WHETHER THE BOARD MAY EXCLUDE THE COMPLAINANT AND/OR HIS ATTORNEY FROM AN EXECUTIVE SESSION DURING WHICH IT REVIEWS A COMPLAINT FILED BY THE COMPLAINANT.

As with a licensee, the Board's ability to exclude a complainant from a complaint review is likely something less than its ability to exclude the general public. The complainant and/or her attorney may or may not be "construed narrowly" as the "general public" for the purpose of 1 M.R.S.A. § 405. In general, complainants who are patients, or who are the legal guardian of patients (i.e. possess the requisite legal relationship to the patient) and who file complaints pursuant to 10 M.R.S.A. § 8003-B should not be considered the "general public" and excluded from an executive session discussion of their complaint. In most circumstances, the Board is required to provide a complainant with a copy of the physician's response. In addition, complainants have access to their medical records or can request a copy from the Board. In those circumstances, the Board cannot invoke executive session to exclude the complainant from its discussion of information that is not confidential from the complainant.

There may, however, be circumstances in which a complainant may be excluded from an executive session. Such circumstances may include: (1) Board-generated complaints following receipt of a report pursuant to Title 24, Chapter 21 (The Maine Health Security Act); (2) complaints where the Board does not provide a copy of the physician's response to the complainant⁵; and (3) complaints where the complainant does not have legal access⁶ to the patient's confidential medical information. Under these limited circumstances, the Board has the statutory authority to exclude the complainant from the executive session because it would be discussing information that is confidential from the complainant.

CONCLUSION

As indicated in the above discussion, it is the opinion of this Office that although the Board may generally go into executive session to discuss complaint reviews, it does not have the authority to exclude a licensee or his attorney from that session without first obtaining the commissioner's approval pursuant to the standards and procedures of 10 M.R.S.A. § 8003-B(2)(G) and Department of Professional and Financial Regulation Rule, Chapter 2. Similarly, the Board may have limited ability to exclude a complainant from such a review and should undertake a determination of that ability on a case-by-case basis.

⁵E. g., the Board has withheld the response pursuant to 32 M.R.S. § 3282-A(1) because of the potential harm to the patient ("The board shall share the licensee's response with the complainant, unless the board determines that it would be detrimental to the health of the complainant to obtain the response.").

⁶E.g., the complainant is not the legal guardian, executrix, or does not possess a medical power of attorney.

02 DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION

027 OFFICE OF THE COMMISSIONER

CHAPTER 2 Disclosure of Investigative Records of Licensing Boards During Pending Investigation When Public Knowledge Exists

1. DEFINITIONS

As used in this rule, unless the context otherwise indicates, the following terms have the following meanings:

- A. "Commissioner" means the commissioner of Professional and Financial Regulation.
- B. "Division Director" means the Director of Licensing and Enforcement.
- C. "Commission Director" means the Director of the Real Estate Commission.

2. CRITERIA FOR DISCLOSURE DURING PENDING INVESTIGATION

Except for investigative records subject to 10 M.R.S.A. Section 8003-B (3), the Commissioner, Division Director, Commission Director or departmental employee designated by the commissioner, may disclose a complaint or investigative records, upon request, during the pendency of an investigation provided that the criteria set forth in A and B below are satisfied.

- A. Confidentiality is no longer warranted due to general public knowledge of the circumstances surrounding the complaint or investigation. Factors relevant to such a determination may include, but are not limited to, the following:
 - 1. broadcast or printing of media news stories available to the general population;
 - 2. publication of the circumstances in public court documents; and
 - 3. availability of the information in some other accessible public source or record.
- B. The investigation would not be prejudiced by the disclosure. Factors relevant to such a determination may include, but are not limited to, the following:

1. the background and history of the case as reflected in the existing record of such complaint or investigation;
2. whether disclosure would jeopardize potential sources of information or in any way inhibit the successful completion of an investigation; and
3. whether the rights and interests of the complainant and the subject of the investigation would be affected in any way so as to make either party less likely or able to raise issues relevant to the investigation.

3. REQUIREMENTS FOR EVIDENCE

The Commissioner, Division Director, commission Director, or departmental employee designated by the Commissioner may require the individual requesting disclosure to submit written or other evidence that the circumstances of the case are within the scope of general public knowledge.

AUTHORITY: 10 M.R.S.A., Section 8003-B(2)(F)

EFFECTIVE DATE: May 29, 1990

EFFECTIVE DATE (ELECTRONIC CONVERSION): November 13, 1996