

Fund Manager Opinion 1998-2

Obligation Of The Fund Manager And Local Boards To Review And Discuss Member Medical Records Only In Executive Session

In Fund Manager Opinion 1998-1, the Fund Manager opined that the medical records of members of the Arizona Public Safety Personnel Retirement System, Elected Officials' Retirement Plan and Corrections Officer Retirement Plan (collectively and in the singular, the "Plan") are confidential records which, except in unusual circumstances, are not to be disclosed by the Fund Manager or local boards to the press or third parties, absent court order. In this opinion, we explain that **to further preserve the confidentiality of member medical records, the Fund Manager and local boards should review and discuss those records in executive session only, although any final decision on a member's entitlement to Plan benefits must be made in an open public meeting.** Specifically, the Fund Manager and local boards should not discuss information contained in a member's confidential medical file in open public meeting without the member's consent. Instead, the Fund Manager and local boards should only examine such records in executive session. After discussing with their attorney the member's medical records in executive session, the Fund Manager or local boards must then reconvene in open public session to deliberate and render a final decision on the member's application for Plan benefits, but in doing so, the Fund Manager and local boards should refrain from discussing specific medical data contained in the member's medical records, unless the member consents otherwise. The Fund Manager and local boards should also refrain from divulging any confidential medical information relating to the member in any meeting notices or published meeting agenda or minutes.

I. The Open Meeting Law

Section 38-431.01(A) of Title 38, Chapter 3, Article 3.1 of the Arizona Revised Statutes ("A.R.S."), colloquially referred to as Arizona's "Open Meeting Law," provides that "All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." Section 38-431.09 further declares:

"It is the public policy of this state, reflected in this article, that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretations of this article shall take into account the policy of this article and shall construe any provision of this article in favor of open and public meetings."

As state agencies and/or boards of the state or its political subdivisions, the Fund Manager and local boards are "public bodies" as that term is referenced in the Open Meeting Law, for among other things, § 38-431(5) defines "public body" as:

"all boards and commissions of the state or political subdivisions, all multi-member governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivisions."

Thus, the Fund Manager and local boards are subject to the requirements of the Open Meeting Law, absent any exceptions to the Law's application.

II. The Exempt Records Exception.

One of the exceptions to the public meeting requirements of the Open Meeting Law is that conference call meetings of the Fund Manager held for investment purposes only do not need to be public. *See* A.R.S. § 38-848(F). The Open Meeting Law also permits public bodies to meet for seven (7) narrowly defined purposes in "executive sessions" that exclude the public. *See* A.R.S. §§ 38-431.03(A)(1)-(7); Ariz. Att'y Gen. Op. I96-012. One of the purposes for which executive sessions are allowed is to facilitate the "Discussion or consideration of records exempt by law from public disclosure." *See* A.R.S. § 38-431.03(2). For purposes of this opinion, we will refer to this as the "Exempt Records Exception."

In Fund Manager Opinion 1998-1, we opined that medical records of Plan members are confidential and privileged from disclosure pursuant to both state and federal law. Since member medical records are confidential and privileged from disclosure, the Exempt Records Exception permits the Fund Manager and local boards to discuss and consider such records in executive session. While there exists no case law supporting such a thesis, the Arizona Attorney General has concluded that the Exempt Records Exception permits public bodies to meet in executive session to discuss and consider confidential medical records relating to an employee's right to benefits.

In Op. Att'y Gen. No. I87-038, the Mesa Public Schools Employee Benefit Trust asked the Attorney General whether the Trust's board of trustees could meet in executive session to discuss and consider confidential medical records relating to a school district employee's claim for benefits from the Trust. The Attorney General concluded that the Exempt Records Exception permitted the Trust's board to discuss and consider the employee's confidential medical records in executive session. *Id.* However, the Attorney General cautioned that while the board could discuss and consider the employee's medical records during executive session, it could not deliberate upon or decide the employee's claim for benefits in executive session since A.R.S. § 38-431.03(D) provides that "No executive session may be held for the purpose of taking any legal action involving a final vote or decision." *Id.* Thus, the board was required to "meet and hear, deliberate and decide" the employee's claim for benefits during an open meeting. *Id.* The Attorney General further advised that to protect the confidentiality of the employee's medical

records, the contents of those records "should not be divulged in the notice of, agenda for, or during an open meeting unless the employee consents thereto." *Id.*

In other opinions, the Arizona Attorney General has endorsed the use of executive sessions for examination and discussion of confidential financial records (Op. Att'y Gen. I90-058), confidential criminal history records (Op. Att'y Gen. I87-131), and confidential complaints to regulatory authorities (Op. Att'y Gen. I83-006). We think these opinions are well reasoned and supported by the controlling law, and coupled with the Attorney General's formal opinion (No. I87-038) endorsing the convening of executive sessions for purposes of discussing and considering confidential medical records, provide adequate authority for the proposition that the Open Meeting Law authorizes the use of executive sessions for the purpose of discussing and considering confidential medical records.

III. The Legal Advice Exception.

A second pertinent exception to the general requirement for open public meetings is set forth in subsection 2 of § 38-431.03(A), which provides that an executive session may be convened for "Discussion or consultation for legal advice with the attorneys of the public body in order to consider its position and instruct its attorneys regarding the public body's position in pending or contemplated litigation." When coupled with the Exempt Records Exception, this legal advice exception permits counsel for the Fund Manager and local boards to review member medical records for the purpose of advising the Fund Manager and local boards in executive session about the ramifications of such records. *See generally* Op. Att'y Gen. I87-038. *See also City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 485, 803 P.2d 891, 896 (1990) (public body may provide its attorney with all information necessary for the attorney to advise public body during executive session about the legal ramifications of such information).

IV. Procedure For Examining Medical Records In Executive Session.

In view of the above, the Fund Manager, local boards and their counsel should not discuss information contained in a member's confidential medical file in open public meeting without the member's consent. Instead, the Fund Manager and local boards should only examine such records in executive session. After discussing and considering with their attorney the member's medical records in executive session, the Fund Manager or local boards must then reconvene in open public session to deliberate and render a final decision on the member's application for Plan benefits, but in doing so, the Fund Manager and local boards should refrain from discussing specific medical data contained in the member's medical records, unless the member consents otherwise. The Fund Manager and local boards should also refrain from divulging any confidential medical information relating to the member in any meeting notices or published meeting agenda or minutes. On the other hand, nothing requires the Fund Manager or local boards to keep confidential the name of the member, the fact that he or she has applied for a particular kind of benefit, or has appealed a decision denying the member benefits. *See* Op. Att'y Gen. I87-038.