

# **A SYSTEM UNACCOUNTABLE**

## **A SPECIAL REPORT ON IOWA'S PROFESSIONAL LICENSING BOARDS**

**Iowa Office of Ombudsman**

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**February 27, 2017**

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## Preface

The Office of Ombudsman (Ombudsman) is an independent and impartial agency in the legislative branch of Iowa state government which investigates complaints against most Iowa state and local government agencies. The governor, legislators, and judges and their staffs fall outside the Ombudsman's jurisdiction. The Ombudsman's powers and duties are defined in Iowa Code chapter 2C.

In any investigation, the Ombudsman aims to determine whether an agency's actions are unlawful, contrary to policy, unreasonable, unfair, oppressive, or otherwise objectionable. The Ombudsman may make recommendations to the agency and other appropriate officials to correct a problem or to improve government policies, practices, or procedures. If the Ombudsman determines that a public official has acted in a manner warranting criminal or disciplinary proceedings, the Ombudsman may refer the matter to the appropriate authorities.

If the Ombudsman decides to publish a report of the investigative findings, conclusions, and recommendations, and the report is critical of a specific agency, the agency is given an opportunity to reply to the report, and the unedited reply is attached to the report.

Separately from a critical report, the Ombudsman may also issue a special report under Iowa Administrative Code 141—2.13 if no specific agency is criticized and the issue is of significant public interest.

## Background on Professional Licensing Boards

The State of Iowa maintains 36 professional licensing boards that are responsible for regulating all manner of trained workers under Iowa Code chapters 147, 272C, and/or 546.<sup>1</sup> All but four of these boards are housed within the Iowa Department of Public Health or the Iowa Division of Banking. Among the more well-known professions licensed under these chapters are doctors, chiropractors, real-estate agents, and barbers. Other agencies that have responsibility for licensing and regulating occupations include the Department of Natural Resources, the Department of Agriculture, the Department of Public Safety, and the Iowa Judicial Branch. Several other licensing boards or agencies also exist under the direction of different chapters of the Code.<sup>2</sup>

The ostensible aim of these boards is to protect the public from incompetent or unscrupulous practitioners. Each board is tasked by law with creating minimum education requirements and continuing-education protocols for the professions they oversee. Administrative rules governing individual boards often speak of ethical responsibilities, such as treating clients with respect and sensitivity, and maintaining their confidences. State law directs most boards to police individual licensees and consider citizen complaints against them to “determine in any case whether an investigation ... or a disciplinary proceeding is warranted.”<sup>3</sup> If a licensee lacks the proper education or experience, or is proven to have committed carelessness, negligence, or intentional misdeeds or omissions, these oversight boards are empowered to take actions against them. Among the punitive measures contemplated by law are additional training, civil penalties, license suspensions, and license revocations.<sup>4</sup>

This disciplinary scheme is necessary “to assure the residents of this state a high standard of professional and occupational care,” according to the Code.<sup>5</sup>

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<sup>1</sup> These boards are: the Board of Engineering and Land Surveying Examiners; the Board of Examiners of Shorthand Reporters; the Iowa Accountancy Examining Board; the Real Estate Commission; the Board of Architectural Examiners; the Board of Landscape Architectural Examiners; the Board of Barbering; the Board of Chiropractic; the Board of Cosmetology Arts and Sciences; the Dental Board; the Board of Mortuary Science; the Board of Medicine; the Board of Physician Assistants; the Board of Nursing; the Board of Nursing Home Examiners; the Board of Optometry; the Board of Pharmacy; the Board of Physical and Occupational Therapy; the Board of Podiatry; the Board of Psychology; the Board of Speech Pathology and Audiology; the Board of Hearing Aid Dispensers; the Board of Veterinary Medicine; the Board of Water Treatment Operators; the Board of Respiratory Care; the Board of Athletic Training; the Board of Massage Therapy; the Board of Sign Language Interpreters and Translitterators; the Board of Emergency Medical Care Providers and Emergency Medical Care Services; the Plumbing and Mechanical Systems Board; the Fire Extinguishing and Alarm System Licensing Advisory Board; the Board of Behavioral Science; the Board of Dietetics; the Board of Social Work; the Real Estate Appraiser Examining Board; and the Interior Design Examining Board.

<sup>2</sup> Some of those boards include the Board of Educational Examiners; the Bureau of Radiological Health; the Bureau of Substance Abuse; the Electrical Examining Board; the Attorney Disciplinary Board; and the Racing and Gaming Commission.

<sup>3</sup> See Iowa Code § 272C.3(1)(d).

<sup>4</sup> See Iowa Code § 272C.3 (2).

<sup>5</sup> See Iowa Code § 272C.3 (2)(b).

## Complaints to the Ombudsman and Challenges to the Ombudsman's Authority

Over the past five years, citizens have filed 48 complaints with the Ombudsman against state licensing boards. Some of those complaints involved unreturned phone messages, the timely posting of meeting minutes, and concerns about the licensing process, to name a few. More substantive complaints involved close to a dozen different boards. In all but one of those cases, our complainants expressed the same frustration: Not only had the boards failed to take action against the professionals they complained about, but the boards also offered no meaningful explanations for their decisions.

We were surprised when we repeatedly ran into the same dead end in our review of these same complaints. Even though the Ombudsman has statutory authority to “examine any and all records and documents of any agency” (including confidential records), the boards shared few records with us that shed any light on how they arrived at their decisions. We presumed this meant that board members had judged the cases in closed-session meetings not open to the public. So we requested minutes and audio recordings of the closed-session meetings. The boards’ legal representatives—all from the Iowa Attorney General’s office—maintained that our office was barred from reviewing these records, despite our authority to review confidential records. Various assistant attorneys general began to argue in early 2012 that closed-session records could be released only at the order of a judge. We disagreed, noting that for years we had received such records from other state and local agencies with little or no resistance.<sup>6</sup>

Our attempts to learn details of closed-session discussions through interviews of board members also yielded little information. During one interview, an assistant attorney general advised a board member not to offer us specifics on why he and his colleagues had rejected a complaint filed against a licensee. This led us to ask who exactly the boards were accountable to:

**Ombudsman:** If we can’t view this, and the complainant can’t view this ... who has the ability to gauge the effectiveness of this board?

**Board member:** I don’t have an answer to that.

**Ombudsman:** If you don’t have an answer to that, I don’t either. And what that tells me is that the people who file complaints with the board are supposed to take on faith that their complaints are getting adequate consideration and are being closed appropriately. Would you agree?

**Board member:** Yes.

Because the boards’ closing communications to complainants say so little, and because Attorney General Tom Miller’s office believed the boards’ closed-session records were inaccessible without a court order, we were led to conclude that the only mechanism of oversight for the boards is the boards themselves.

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<sup>6</sup> We also believed our position was supported by a 2001 Attorney General opinion that stated closed-session records were accessible to investigative agencies with subpoena authority. The Attorney General’s office argued that the opinion should be given a more limited reading. The opinion focused on whether a member of a governmental agency that went into closed session could later access records from the meeting without a court order. See 2001 WL 1651411, (Iowa A.G. November 19, 2001).

Eventually, lawmakers who heard of our impasse with the Attorney General sponsored and passed legislation in 2015 giving us explicit access to all agencies' closed-session records. A day after the law went into effect, we renewed our requests for the closed-session records of four licensing boards. The records offered us significant insights into the boards' decision-making processes, but also raised new concerns. None of the records revealed the boards' rationale for closing the cases brought by the citizens who complained to our office. We found the boards spent little time and energy deliberating on each of the specific points raised by the complainants before dismissing them. In short, the boards' work product gave us little reason for confidence that the cases were given a careful and thorough look.

We decided to engage in a full investigation of four licensing boards that had closed five different cases filed by citizens who had complained to our office. Each of our five investigations was conducted independently. At the conclusion of each investigation, we issued our findings and recommendations to the four boards, and we received their replies. This report is a consolidated summary of those five investigations.

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## Disclaimer

Because we discovered significant deficiencies that were common to some or all of the licensing boards whose actions we reviewed, we felt it was vitally important to inform the state's policymakers and the public of our findings. We believe at least some of the weaknesses we identified here are likely to exist with other state licensing boards. However, Iowa law states that all licensing boards' complaint files, reports, and information are privileged and confidential.<sup>7</sup> Our statute empowers us to receive "information as necessary in the performance of the duties of the office," but with the caveat that "confidential documents ... shall continue to maintain their confidential status."<sup>8</sup> Even though the law was recently changed to give us explicit access to the detailed minutes and audio recordings of closed-session meetings, we still are required to keep "any portion of the minutes or recording" confidential.<sup>9</sup> For these reasons, presenting our full findings in a public report—even with redactions—posed a difficult challenge.

In an effort to share our findings and safeguard confidentiality, we decided to issue a "special report" allowed by our regulatory authority. The drawback of this special report is that we cannot identify the boards we investigated or the witnesses we interviewed. However, the special report does allow us to disclose the problems we identified through witness testimony and our extensive review of agency records. Our goal with this report is to raise awareness of procedural concerns and spur discussion on how licensing boards can be more accountable to the citizenry they are tasked to protect.

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<sup>7</sup> See Iowa Code § 272C.6(4).

<sup>8</sup> See Iowa Code § 2C.9(4).

<sup>9</sup> See Iowa Code § 21.5(b)(2).

## **Board Complaint-Handling Practices**

Each of the four boards whose work we examined follows a somewhat different process in how it receives and reviews complaints. How those complaints are investigated and decided can also vary.

In general, the boards we researched request that citizen complaints be in writing. In some cases, a board's executive director can reject a complaint without investigation and without any board involvement. Other boards review and act on every complaint they receive, even if the complaint obviously lacks merit or falls outside their jurisdiction.

Boards with sufficient resources often use their own investigators. These investigators are usually former practitioners in the profession with extensive knowledge of the board they work for, but without investigative skills or experience. Boards without their own investigators enlist the help of the Department of Inspections and Appeals, whose investigators have experience but may lack specialized knowledge of professions regulated by the boards.

Sometimes, these investigators take direction from board staff on what records to request, whom to interview, and which avenues to explore. In other cases, no specific directives are given. Some boards review their investigators' reports and order further questions to be asked; others allow the investigators to dictate the scope of their work.

Ultimately, the boards are responsible for deciding whether the information uncovered in an investigation is sufficient to proceed with formal charges against a licensee. When a board decides not to seek formal action against a licensee under investigation, no discernible record of the decision is made public. The complainant in such a case is usually told nothing substantive about the decision other than their complaint has been closed without further action.

## **Findings of Fact**

Our investigation of four boards' actions on five specific citizen complaints revealed some common problems in some or all of them.

### *Incomplete Investigations*

It was not unusual for us to see a board's investigator explore only a portion of the allegations submitted by a complainant. This occurred even when a complaint contained multiple allegations that were clearly delineated, well organized, and documented with dates and details.

When we asked one investigator how he chooses whom to interview, he said that he contacts the subject of the complaint and every party involved. However, we found that the investigator failed to interview a licensee in one case, which led the board to issue a public statement of charges against the licensee. The board later dismissed the charges when the licensee provided proof of her innocence. By that time, the licensee's name and the allegations against her were already made public, causing her humiliation and damaging her professional reputation. When

we asked the investigator why he had not interviewed the licensee, he responded, “She wasn’t there at the time.”

The investigator’s misstep was not merely careless—it was a violation of the board’s own regulations that require the board to give the subjects of a complaint an opportunity to explain or defend themselves before charges are publicly filed.

Neither the board’s director, nor the board itself, had noticed the investigator’s omissions. Instead, the board decided to file charges against both licensees. The board’s failure to demand a more thorough investigation before airing its accusations publicly left the licensee embittered.

“I have had a clean license for 22 years and was really scared and unsettled by this whole situation,” the licensee told us. “My family and I should not have been placed in this difficult and unjust situation.”

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Another board failed to address all seven allegations enumerated by a complainant who claimed, in part, that a licensee had performed a more invasive procedure than what they had agreed to.

Our investigation also found that the board and its executive director did not critically review the investigator’s report, even though the investigator failed to follow many of the board’s own directives.

In a third case we reviewed, a board had issued a fine against a licensee for failing to notify customers of a business transaction as required by board regulations. The investigator’s inadequate investigation in this case meant a second licensee involved in the transaction avoided any scrutiny or sanctions from the board.

That investigator also took no action to investigate the complainant’s allegations that the second licensee failed to maintain proper oversight of confidential records in its possession, in violation of state and possibly federal law. We asked the investigator what aspects of a complaint he chooses to pursue or decline. He replied that he would not decline an issue raised in a complaint, even if he thought it was trivial. “We have to investigate everything,” he said, “and trust me, there’s a lot of frivolity, but we’ve got to do it.” When we asked specifically about the alleged violation related to the confidential records, the investigator said he did not believe there was a chance the violation had occurred, so he chose not to investigate it.

Our investigation further found that there was no meaningful review of the investigator’s report by the executive director or the board. Board officials confirmed to our office that the allegation might have constituted a violation of the board’s rules, if an investigation had been done and confirmed it.

Conclusion: We found examples in three of the five cases we reviewed where an investigator failed to conduct a reasonably thorough investigation by addressing each of the allegations raised

in a complaint or following board directives. Compounding this problem, board staff and board members have lacked critical oversight of their investigators' work, and as a result, have overlooked important aspects of citizen complaints.

### *Delegating the Boards' Decision-Making Duties to Others*

Two of the boards we investigated rely heavily on committees comprised of a few board members to review citizen complaints and recommend whether they should be pursued further. The committees constitute less than a quorum of the full boards. No minutes of their meetings were taken, no synopses of their investigations were offered, and there were no written explanations for the committees' conclusions. We found that the full boards engaged in very little debate on the merits of complaints and did little more than rubber-stamp their committees' recommendations.

In one case, the committee simply recommended closure of the case to the full board; no written synopsis of the investigation was offered, nor were there any written explanations for the committee's conclusions. When it came time for the full board to discuss the committee's recommendations, there was no substantive discussion of the committee's findings.

We found a similar process at work with a second board that used an investigative committee to review the complaint. No board member raised any questions about the particulars of the investigation or made any comments before they voted to close the case. The complainant in the case received a generic form letter that simply stated the board had investigated the complaint and was unable to find any violations of Iowa law or administrative rules.

In our review of a third board, we discovered late in our investigation that relevant records covered by our subpoena had not been provided to our office. After identifying the missing records, the Attorney General's office explained that its assistant assigned to the board had subpoenaed the records and never provided them to the board. Only after we inquired about the records did the Attorney General's office provide a copy of them to the board for its file, more than three years after the board had closed the case. Clearly, the board could not have made an informed decision on the merits of the complaint without having access to relevant information.

Conclusion: Three of the five licensing boards we investigated were willing to blindly cede their decision-making authority to others, without demanding synopses of staff investigations or exchanging viewpoints. The lack of any interactive discussion by board members displays an apathetic approach to vetting complaints.

### *Poor Documentation of Board and Staff Deliberations*

It would have been impossible for us to understand the basis of these four boards' decisions without reviewing their closed-session recordings and minutes. That is because the boards keep few, if any, records that memorialize their discussions or explain the rationale for their decisions. Even after we received the boards' closed-session records, they sometimes shed little light on the members' decision-making. For example:

- One board's closed-session recording had somehow become damaged and was indiscernible.
- One board destroyed a recording of one of its closed-session meetings, even though the case was still open and under consideration by the board. Officials cited a one-year records-retention policy as the reason.
- Another board informed us that its closed-session minutes were destroyed before its case was closed. We later learned that the minutes were never created.
- Two of the boards used investigative committees to evaluate citizen complaints. These committees met separately from the full board and did not record their meetings or commit their discussions to a written record for the benefit of members or others.

In several cases, we interviewed board members in an attempt to tap their recollections. Some board members could not remember specifics on why they voted to close the cases, while others followed the assistant attorney general's advice and refused to answer questions on what occurred in closed session.

One board member with professional expertise gave some well-reasoned justifications for her feelings about a complaint, but admitted that she did not voice her reasoning during closed-session meetings and did not know what other members of the board had based their decisions on. No record of any board members' rationale existed in closed-session minutes or in their explanation to the complainant.

One board's attorney who had participated in an investigative committee meeting told us that a court decision on a similar matter answered a pertinent legal question and justified closure of the complaint. Although we understood the applicability of the legal precedent to the facts in the complaint, we learned that the case was not shared with the committee nor made part of the written record. The attorney told us he did not believe the case was discussed among committee members. If the committee and the board had not relied on the court case when it dismissed the complaint, it was unclear what basis the board had for its decision.

Conclusion: The four boards we investigated created no written record that explained the basis of their decisions; nor did their closed-session minutes or the recordings of their discussions offer any clarity. The absence of documented proof that the complaints were properly considered raises questions about the integrity of their work.

### *Conflicts of Interest*

Licensing boards in Iowa and across the country have come under fire in recent years from some analysts who believe such boards are more interested in safeguarding their livelihoods from outside competition than in regulating bad practitioners. Some argue that the licensing and training requirements imposed by boards are unnecessarily daunting and dissuade new workers from entering their professions.<sup>10</sup> One way to perpetuate these barriers, they say, is to load licensing boards with like-minded business partners and colleagues. Said one legislative analyst:

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<sup>10</sup> See Editorial, *Iowa needs comprehensive job licensing review*, D.M. Register, Jan. 24, 2017, available at <http://www.desmoinesregister.com/story/opinion/editorials/2017/01/24/editorial-iowa-needs-comprehensive-job-licensing-review/96975210/>.

The dirty little secret about state licensure is that the people who lobby for it are usually the stronger competitors of those who would be licensed. Their goal is not to protect the public, but instead to raise barriers to new competitors who might cut prices and lower profits.<sup>11</sup>

Nationally, it is common for licensing boards to consist primarily of professionals who are licensed by these same boards. The stated reason for this model is to bring expertise to the table when complaints are brought; it is difficult for laypersons to know, for example, whether certain medications might cause dangerous side effects to patients with specific conditions.<sup>12</sup>

While we believe this expertise is necessary for licensing boards to be effective, it also exposes boards to public accusations of self-dealing or protectionism when the target of a complaint is not disciplined. This is especially the case when a board member is known to associate or work with a licensee under investigation.

The Iowa Attorney General's office has authored and distributed orientation materials to board members that address conflicts of interest and bias. That material includes the *Legal Overview for New Board and Commission Members*, which states that board members are required to provide "unbiased, fair treatment—free from improper influences of family, social, political, and other relationships, or prejudgment of the facts." Cases where obvious conflicts would arise include spouses, siblings, close friends, or work colleagues.

The *Governor's New Board and Commission Members' Orientation* also provides guidance on how members should approach conflicts of interest:

Although not required by statute, you should refrain from taking any official action or performing any official duty in any matter where your objectivity or impartiality could reasonably be questioned.

When a board member has an obvious conflict of interest—or where there is even a perception of a conflict of interest—he or she is typically advised to remove him or herself not only from voting, but also discussion on the matter, so as not to influence other board members either directly or indirectly. The conflict should also be stated for the record so that no one can accuse the board of hiding the fact.

Two of the boards whose decisions we reviewed faced accusations of conflicts of interest. In both cases, we believe the complainants' concerns were valid and were inadequately addressed by the boards.

In the first case, we were informed that a board member was working for the licensee that was the subject of a complaint. When we interviewed that board member under oath and asked her

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<sup>11</sup> Jack P. McHugh, "We're All Licensees Now," Mackinac Center for Public Policy, July 24, 2003, <http://www.mackinac.org/article.aspx?ID=5570>.

<sup>12</sup> Many of Iowa's licensing boards are required to have a number of public members in addition to licensed members, although the public members make up a minority of the full board.

whether she had participated in any closed-door discussions about the licensee under investigation, she assured us that she had removed herself from those discussions.

“[I]n this particular case,” the board member told us, “because I felt like my presence might be construed as a bias and there might be a suspicion of impropriety, I recused myself.” Closed-session records revealed otherwise.

In addition, we found a second member of the same board who had recently worked for the licensee under investigation. This board member took part in all of the meetings on the subject during his time on the board. Based on the information he provided, the board member was employed by the licensee for many years and may have still been working there when the complaint was filed. We asked him about the negative perception this might have for the complainant:

**Ombudsman:** Can you understand why that would bother them?

**Board Member:** I can understand why it would bother some people.

**Ombudsman:** Okay. But that’s not enough for you to change your action?

**Board Member:** I did not take myself out of the voting. No, that would not be enough to change my opinion.

In another case we investigated, the chairman of the board was the person accused of wrongdoing. Although the chairman stepped out of all the meetings relating to the complaint against him, we questioned whether other members of the board could consider the complaint fairly since they had worked side-by-side with him. One board member we interviewed who served alongside the chairman and was a practitioner in the profession acknowledged that the chairman was “a colleague” and “a peer” with whom the board member consorted at professional events. Regardless, the board member did not believe a conflict of interest existed. The board member said the board was conscious of the potential perception of a conflict when they deliberated and called for an outside investigator to mitigate the perception. However, we could find no evidence in the record indicating that the board raised the subject of the conflict, or that it had such a concern in mind then they brought in the investigator.

Conclusion: The three board members who had professional relationships with the licensees under their boards’ investigation should have recused themselves from all discussions on the cases since their participation created, at a minimum, an appearance of a conflict of interest. When it is known that a board member has had a relationship with a licensee under investigation, participating in that investigation understandably erodes the public’s trust and faith in the system. It is plausible that these board members’ participation in the meetings could have influenced other board members to vote with them. Additionally, in the second case, we believe that the entire board should have recognized the perception created by their oversight of a fellow board member and taken steps to address the conflict.

### *Unprofessional Behavior*

It is unfortunate that we cannot share statements made in closed session by the members of one board. A variety of remarks made in a pair of meetings were derogatory, inappropriate, and quite frankly, appalling. While the statements were made in the privacy of closed-session meetings, they were not harmless. The remarks suggest that at least some of the board members may have been biased against the complainants and certain licensees. That bias may have had an effect on the board members' ultimate decisions.

A variety of remarks made in a pair of meetings were derogatory, inappropriate, and quite frankly, appalling.

Conclusion: One of Iowa's licensing boards made gratuitous and unwarranted statements about complainants whose cases they should have evaluated solely on their merits. The remarks signal a potential bias on the part of some board members, and do damage to their credibility as impartial and serious arbiters of legitimate public complaints.

### *Uninformative Closing Letters*

This was the full explanation one of our complainants received from a board's executive director, by email, on the board's decision to close her complaint:

The Board has ended its investigation and closed the matter, with no further action to be taken. This was done in consultation with the Iowa Attorney General's office, during this week's board meeting.

Our complainant was apoplectic. "No further action like hell," she replied. "... You haven't done anything."

We found that short and simple responses to complainants are the norm for the boards we investigated—if a response is offered at all.

We found that short and simple responses to complainants are the norm for the boards we investigated—if a response is offered at all.

A complainant to a different board told us he was "amazed" and "baffled" when he learned that his allegations against a licensed professional were closed without further action. He believed the facts he provided to the board were clear-cut evidence of a violation. Nevertheless, the board left him with no explanation on how they had

reached their conclusion. "I'm beyond disappointed in an agency that I once felt upheld the integrity of this profession," the complainant told us.

Another board's uninformative, four-sentence closing letter invited a complainant to contact the board's executive officer if he had any questions. The executive officer later admitted to us that he would not have been able to provide additional information on the case if the complainant had called. "I only answer general questions about the board's disciplinary process," he told us.

When we questioned the need for such secrecy, officials claimed that any public acknowledgement of an unfounded complaint could do damage to the licensee's reputation. Indeed, state law considers many of the records the boards review and produce confidential. The particulars of board discussions on investigations also are protected from disclosure, since they happen almost exclusively in closed-session meetings.

This means that people who file complaints in the genuine belief that they were wronged never learn the basis of a board's dismissal. They also receive no assurance that each of their allegations was considered, or how thoroughly.

It is understandable, then, why complainants have appealed to our office for answers. Interestingly, licensing boards have not always been so restrictive in their closing communications with complainants.

In 2001, the Iowa Supreme Court ordered a licensing board, the Iowa Board of Educational Examiners (BOEE), to provide a better explanation on one of its decisions.<sup>13</sup> The BOEE had issued what amounted to a two-paragraph form letter that merely told the complainant there was "insufficient evidence" to support a hearing into the allegations.

The Court, citing the BOEE's own administrative rules and federal court precedent, found that the board "should have furnished a statement of reasons for its refusal to act that was more specific than its mere declaration that no probable cause was established." The Court reasoned that it would be difficult for any court to review the correctness of the BOEE's decision without a fuller explanation:

[T]he board should be free to exercise its discretion and expertise without interference from the courts. These powers must, however, be exercised in a manner that is not arbitrary or capricious, and a court must be satisfied that is the case. The court can only make that determination if the board's statement of reasons provides the necessary information as to how the agency power was exercised.<sup>14</sup>

In the ensuing two years, the BOEE offered the complainant expanded explanations that were twice rejected by a district court as insufficient. The fourth version of the decision, which totaled 15 pages, finally passed court muster in 2003.

Ironically, the long-term result of that Iowa Supreme Court decision was less accountability, not more. Immediately after the Court's decision, the Legislature amended Iowa law to prohibit the courts from reviewing licensing board decisions when the boards dismiss a case.<sup>15</sup>

That leaves citizens with no options for appeal when they want to know why their complaint to a state licensing board led nowhere.

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<sup>13</sup> *Lewis Central Educ. Ass'n v. Iowa Bd. Of Educational Examiners*, 625 N.W.2d 687 (2001).

<sup>14</sup> *Lewis Central*, 625 N.W.2d at 693.

<sup>15</sup> See Iowa Code § 272C.3(1)(d).

One licensing board that has committed to providing detailed explanations of its work is the Iowa Attorney Disciplinary Board (ADB). The ADB, which is governed by court rules established by the Judicial Branch, has a grievance process generally similar to that of other licensing boards. Unlike licensing boards governed by Iowa Code chapter 272C, the ADB is obligated under court rules to inform the complainant in writing if a complaint is dismissed.<sup>16</sup> Sample ADB dismissal letters we reviewed included details specific to the complaints and the facts of the cases. These explanations are given despite ADB rules that deem its files confidential.<sup>17</sup>

Licensing boards are authorized to sanction licensees with a letter of education or a written administrative warning, both of which are considered private actions. Informing complainants of such private actions, one assistant attorney general told us, would violate the licensees' due-process rights because licensees are not afforded a hearing. It is noteworthy that the ADB also is empowered to issue private admonitions without a hearing, but still "must notify the complainant of the board's opinion concerning the matter and its communication with the attorney involved."<sup>18</sup>

Conclusion: The four licensing boards we investigated are overly strict in their judgment that secrecy in their decisions must prevail. Without some transparency, complainants cannot understand the basis for the boards' decision to dismiss a complaint. This culture of secrecy breeds public distrust, resentment, and a lack of confidence in a system intended to assure the public that professionals are being held to a high standard. While it is certainly important to preserve the reputations of professionals who have not committed rule violations, it is equally important for the public to have confidence that their complaints were earnestly and thoroughly investigated. We believe that licensing boards can and should provide more substantive explanations in their closing communications with complainants to ensure public confidence in the process, and to validate licensees who conduct themselves properly.

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<sup>16</sup> See Iowa Rules of Court:

Rule 35.5 "Upon receipt of any complaint, the disciplinary board must notify the complainant in writing that the board has received the complaint and will act upon it or that pursuant to rule 35.4(1) the board will take no action on the complaint.";

Rule 35.8(1) "Upon receipt of a response, the disciplinary board must do one of the following: (a) Dismiss the complaint and notify the complainant and the respondent of the dismissal in writing";

Rule 35.9(1) "When the report and recommendation of the investigator is returned to the disciplinary board, the board must do one of the following: Dismiss the complaint and notify the complainant and the respondent of the dismissal."

<sup>17</sup> See Iowa Rules of Court, Rule 35.4(3).

<sup>18</sup> See Iowa Rules of Court, Rule 35.11(3).

## **Summary and Conclusions**

When we began to receive the complaints profiled in this report, we had no reason to believe that the licensing boards' decisions would not be reasonable and well-founded. But when we asked to see the boards' work, we were met with a wall of secrecy that took more than three years to penetrate.

Once the Legislature gave us the explicit authority to review records of the boards' closed-session meetings that are so integral to their work, we were surprised by what we saw: lackadaisical investigations, apathetic board members, poor documentation of deliberations, and questionable outcomes. Even though we exhausted our ability to investigate these cases, it is still inexplicable why some of them were dismissed with no action.

We believe that the citizens who filed the complaints referenced in this report deserved better: more complete investigations, more engaged discussions by the boards, and more detailed explanations for how their cases were handled. We wanted our complainants to have comfort that their allegations were taken seriously and the decisions made in their cases were justified. In truth, our complainants had none of that. They still don't.

This causes us to ponder whether the shortcomings in this small handful of cases might be symptomatic of broader problems. Is it possible that Iowa's licensing boards, through their less-than-vigorous work, might be failing to protect the public at large from troublesome practitioners?

We strongly believe that the environment in which these boards have been allowed to exist—behind closed doors—has fostered uninspired work and unprofessional conduct. It has been easy for these boards to do less than their best because, for years, no one has been in a position to evaluate their work. In short, it has been a system unaccountable.

It is our opinion that all of Iowa's licensing boards, perhaps with guidance from the Legislature, must find a way to be transparent, in the interest of maintaining a system that patients, clients, and professionals can have confidence in. We encourage board administrators to begin speaking with their boards and with lawmakers about how to accomplish that.

## **Recommendations and Responses**

The findings in our investigations led us to make 20 recommendations among the four licensing boards. Almost all of our recommendations called for systemic improvements to the boards' practices or policies. Because we identified some common problems among the boards, several of our recommendations were made to more than one board.

We recommended in three of our reports that the boards commit to more critical reviews of their staffs' investigations, to ensure that complaints are thoroughly examined and all aspects of a complaint are considered.

One of the responding boards—the one which had failed to investigate five of the seven allegations raised by a complainant—promised to “take a more active and comprehensive role in directing and overseeing [its] investigations.” A single member of that board, responding separately to our office, acknowledged that the investigation in the case we scrutinized was less than ideal. “A quick look at the barely legible notes of the investigation reveals no organized approach to the interviews,” he said. “A Board cannot expect a complete, accurate, and useable report if we do not first request one.”

“A Board cannot expect a complete, accurate, and useable report if we do not first request one.” – member of a licensing board

Another board, which had conducted no review of a significant aspect of a complaint, was more tepid in its response: “The Board understands that it has the authority and discretion to request further investigation. The Board has and will continue to exercise this authority where it believes appropriate.” We also recommended to this board that it interview all people who might have relevant information about a complaint. We found that this board had publicly filed charges against a licensee without ever speaking with her, despite a board rule that required outreach to the licensee before charges were filed. The board admitted fault and promised to follow the rule and adopt a policy to ensure the error would not be repeated.

That board declined, however, to review documents that its attorney had subpoenaed and examined but had withheld from the board. The board acknowledged that there may have been some procedural irregularities in the investigation, but based on the amount of time that had passed, did “not feel that devoting additional time and resources is a good use of our already limited time and resources.”

### *Recording Investigative Committee Meetings*

Two boards balked at our recommendations that they begin recording investigative committee discussions so the basis of the committees’ decisions could be better understood.

One of the boards suggested that taking minutes of its committee’s discussions for others’ benefit “would have a chilling effect on necessary free, thorough, and frank participation.” That board also maintained that its committee discussions were adequately summarized for other board members, when it was clear from our investigation that they were not. The second board said it would “endeavor to keep more detailed notes” of its committee discussions “in case questions should arise from its work.”

In the case of these two boards, we also recommended that all of their members take a more active role in evaluating their committees’ findings to ensure that a variety of perspectives would lead to the best decisions. The first board suggested that its members could decide for themselves whether to take an active interest in the purported misbehavior of licensees. The board’s executive officer said that “each board member would be reminded to thoroughly review each complaint ... and participate” in discussions. The second board assured us that its board members know it is their job—not the committee’s—to decide disciplinary cases.

### *Conflicts of Interest*

Two boards agreed with our recommendation to be more sensitive in situations where their members may have personal or professional relationships with licensees under investigation. Training materials from the Attorney General's and Governor's offices suggest that board members remove themselves from discussions and abstain from voting when their independence could reasonably be questioned.

One board, although it disputed our report's finding that two of its members had improperly participated in board discussions, still pledged to add a conflicts-of-interest section to its annual training session.

The second board claimed it already met the goals spelled out in the training materials, but would "try to be more transparent when potential conflicts of interest are involved." The board, which had decided a complaint against its chairman in his favor, declined our recommendation to consider outsourcing such decisions in the future, to avoid any hint that the board might be apt to protect one of its own. The board argued that the current law does not allow complaints to be handled by others. It also placed importance on its specialized expertise and consistency in decision-making. "We do not feel that allowing another board to decide complaints against a licensee is wise," the board said. It did, however, say it would consider asking peer reviewers to offer input in future such cases.

### *Professional Decorum*

We recommended that one board maintain professionalism during its closed-session meetings after we found two separate instances where board members and staff made disparaging remarks about complainants and licensees. The board agreed to this recommendation, stating that it strives to treat all Iowans "with respect and civility."

### *Closing Communications to Complainants*

Our most commonly issued recommendation—that the boards provide more substantive explanations of their decisions to complainants—received only minimal commitments from most of the boards. Each board argued in its own way that state law strictly limits its ability to justify its decisions with details.

"[T]he Board is statutorily constrained and cannot give 'investigative information' relating to licensee discipline to a complainant, in a letter closing the investigation, or otherwise," one board said. "... [T]he Board has a duty to protect the [reputation of the licensee] as well as the complainant."

One board said it would consider creating a pamphlet for the public to better understand its complaint-taking processes. But it gave no ground on its past practice of issuing what essentially are form letters.

A different board took the curious position that it “neither accepts nor rejects” our recommendation. “The Board agrees that it should provide an explanation to complainants to the extent permitted by law.” But it added, “The Board does not believe that the amount of information contemplated by your recommendation is consistent with Iowa law.”

One board implied that it had no responsibility to explain its actions to complainants: “Our mission as a public health board is to protect the public from incompetent or unethical licensees,” the board said, “... not to provide individualized resolution to a complaint.”

Only one board acknowledged complainants’ frustration with uninformative letters, and the effect that secrecy has on the public’s confidence:

The [board] recognizes that this statutory limitation on its ability to share investigative findings can lead to frustration among some complainants. You correctly note that a lack of transparency can undermine confidence in a licensing board’s disciplinary decisions.

The board informed us that it would explore ways to update and expand its closing letters to provide more information to complainants on the scope of its disciplinary authority and its decision-making processes while maintaining the confidentiality of its investigative files.

#### *Some Improvements Underway*

Since issuing the reports to the four boards, at least one of them is taking our concerns to heart. A member of that board reported that he and his colleagues are already requesting more investigative information on complaints. They also are discussing specific reasons for closing cases that may be shared with complainants. He added that the Attorney General has promised a presentation on conflicts of interest. In an email to our office, the board member wrote: “This was THE best meeting I attended in three years. Thank you for your efforts.”

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#### **A Final Note**

A government agency that purports to exist for the benefit of the public but refuses to explain its work invites deep suspicion and distrust. Such is the case with Iowa’s licensing boards, which have displayed an obvious preference for secrecy over transparency. The boards we investigated have argued that state law ties their hands and requires them to safeguard all the findings of their inquiries and deliberations, regardless of any sympathies they may have for complainants.

For some boards, we are not convinced that is their main motivation. Two different board officials told us they stopped sending automatic closing letters to complainants because it was inconvenient. “The letters took time to write,” one director told us, “and it would almost be counterproductive because the complainant then would be unhappy. It would be unsettling for them to know that the board had reviewed it and not taken any action.”

Some of the boards have a history of hiding their deliberations from outside eyes. In a litigation action spanning from 1998 to 2003, one board had to be instructed three times to comply with a court order to explain to a complainant why it dismissed a case. In the midst of litigation, the board amended its statute to shield investigative records that were previously accessible to the public. Also during this time, the Legislature was persuaded to pass a law to preclude judges from reviewing decisions of other licensing boards whenever a case is dismissed.

We acknowledge that providing closing explanations to complainants can be burdensome. We can attest that providing explanations to our 4,000 complainants each year takes time and resources. This is especially true in the handful of cases when complainants do not readily accept our decisions. It also can be difficult for us to balance responsiveness with our obligation to maintain the confidentiality of sensitive information. However, we consider this responsiveness not only our legal obligation, but a moral one. Citizens must have faith in the government that affects their lives, and this accountability is a small price to pay. Otherwise, “a body of men holding themselves accountable to nobody ought not to be trusted by anybody.”<sup>19</sup>

Through the Legislature’s actions in 2015, lawmakers recognized the need for licensing boards to be more accountable. Our office now has access to closed-session records, which should help provide much-needed oversight of the licensing boards’ work. But we still are unable to share particulars from the boards’ investigations, leaving the public with little choice but to blindly trust our judgments.

In light of the culture of secrecy long employed by the licensing boards, we believe that policymakers and agency officials should consider whether a change in their processes is warranted. We are not making a specific legislative recommendation at this time, as we recognize there may be valid policy arguments for and against opening licensing board records. There may be no easy consensus on balancing licensees’ desire for privacy with the public’s right to know.

Regardless of how it is done, we believe it is imperative that the state’s licensing boards be more accountable to the public they serve. More transparency is the only way to instill confidence in the important decisions these boards make.

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<sup>19</sup> Thomas Paine, “The Rights of Man: Being an Answer to Mr. Burke’s Attack on the French Revolution,” 1791. <http://www.ushistory.org/paine/rights/index.htm> (last visited February 1, 2017.)