March 7, 1996

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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Draft Minutes of State Regulatory Board Meetings

Dear Ms. Westberg:

QUESTIONS PRESENTED

1. Are draft minutes of state regulatory board meetings "public records" and are they available for public inspection and copying under the provisions of the Idaho Public Records Law, Idaho Code §§ 9-337 through 9-348?

2. If so, how soon after a board meeting must draft minutes be made available to the public?

3. Are tape recordings of board meetings "public records" and are they available for inspection and copying under the provisions of the Idaho Public Records Law?

4. May a state regulatory board adopt a protocol whereby draft minutes are withheld until after the draft is circulated to the board members for their approval by mail?

CONCLUSION

State agencies may not deny otherwise appropriate public requests for access to draft minutes and tape recordings of the meetings of public agencies. Draft minutes of meetings of state regulatory boards are "public records" as defined by the Idaho Public Records Law. Tape recordings of the meetings of regulatory boards are also "public records."

Draft minutes must be made available for public inspection within a reasonable time after the board meeting. A reasonable time would be that time reasonably necessary to fulfill the clerical function of preparing the draft. Board approval of the draft minutes is not a prerequisite to public availability.

A state agency may not adopt a protocol whereby otherwise available draft minutes are withheld from public inspection until such time as the board completes an informal review and ballot approving the draft minutes.

DISCUSSION

The Public Records Law clarifies the obligations of state agencies with respect to any information the agency produces, holds, uses or maintains as a part of the agencies' conduct of the public's business. This law is founded on the premise that "every person has a right to examine and take a copy of any public record of this state." Idaho Code § 9-338(1). It includes the presumption that "all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute." *Id.* State regulatory boards are "state" agencies for purposes of the Public Records Law. Idaho Code §§ 9-337(11) and 67-2341(4)(a). As such, boards are required by law to make available for inspection, public records. Idaho Code §§ 9-338 and 9-339.

State regulatory agencies are also obliged by law to "provide for the taking of written minutes of all of [their] meetings." Idaho Code § 67-2344(1). While a complete transcript of the proceedings is not required, the law is clear that minutes "shall be made available to the public within a reasonable time after the meeting." *Id.*

Board minutes are public documents which are intended to be available to the public under the Public Records Law. The issue here, however, concerns "draft" minutes which have not become a part of a board's permanent record.

In Fox v. Estep, 118 Idaho 454, 797 P.2d 854 (1990), the Idaho Supreme Court held that the handwritten notes taken by the Clerk of the Boundary County Commissioners could constitute public writings, available for purposes of public inspection and copying. A private citizen sought access to the handwritten notes of the Boundary County Clerk and Clerk of the Commissioners. These notes were taken during the meetings of the Board. The clerk refused, arguing that the handwritten notes or "raw minutes" were "transitional" or "working papers" which were not included within the then existing "public writing" provisions of the public records law. *Id.*

The court rejected the clerk's contention that only final or "approved" minutes adopted by the commissioners and signed by the chairman of the Board of County Commissioners were subject to public inspection. This decision was premised on the court's rationale that if the "raw" notes were "an act undertaken pursuant to a statutory directive in fulfilling the function of the Clerk of Boundary County," they would be potentially within the disclosure provision which existed at the time of the initial request. 118 Idaho at 455, 797 P.2d at 855.

The Estep decision was entered on August 29, 1990, and involved a public writings provision which has been subsequently amended by the Idaho Legislature. The same conclusion is dictated by the Public Records Law as it now exists.

Minutes of public meetings fall clearly within the definition of "public records." They are writings "containing information relating to the conduct or administration of the public's business" prepared by any state agency "regardless of physical form or characteristics." Idaho Code § 9-337(10). The term "public record" is also defined to include handwriting, printing, typewriting, and "every means of recording . . . sounds," Idaho Code § 9-337(12). Thus, the definition extends to tape recordings of the meetings as well.[1]

There are specific exemptions from the disclosure requirement, codified at Idaho Code § 9-340. These exemptions, unlike the public records laws in some other states, do not include any reference to "draft" minutes or other similar "transitional" or "working" papers. When combined with the rationale of the Estep court, this rationale provides clear direction.

Boards are required by law to meet in public, to reach decisions in public, and to memorialize both meetings and decisions in minutes. Draft minutes are prepared pursuant to the statutory directive to provide for contemporaneous minutes. Draft minutes are not exempted from the provisions of the Public Records Law and must, therefore, be made available for inspection, within a reasonable time.

In this context, "reasonable" means as soon as possible after the meeting. This definition of the term specifically requires that the time spent in preparing the draft not exceed the amount of time reasonably necessary to fulfill the clerical function.

Audio tapes of the proceedings constitute "public records." Such tapes are available immediately after a meeting; thus, there can be no justification for a different substantive result when a writing is involved.

A protocol that would delay release of prepared draft minutes until such time as the draft has been circulated and approved by the members of the board would violate the Public Records Law. The law does not include any requirement of board approval of minutes as a prerequisite to public access. The concern that the public not be confused can be met by placing a disclaimer or other warning on the draft indicating it does not contain final or approved board minutes.

Very truly yours,

JOHN J. MCMAHON

Division Chief
Contracts & Administrative Law Division

[1] The question whether tape recordings must be made available to the public is distinct from the question of how long such tape recordings must be retained. The former is a Public Records Law question; the latter is a records retention question. It is commonplace for governmental entities in Idaho to reuse tapes. Nothing in the Public Records Law prohibits them from doing so or requires them to purchase new tapes for every recording. On the other hand, it would be censurable conduct if the governmental entity were to erase or reuse tapes knowing that the decision is likely to be appealed, or if it is likely that the public will request access to the tapes. Such conduct would be equivalent to shredding important documents. A public entity should establish a formal policy regarding record retention to avoid inadvertent loss of records. In addition, the governmental entity may take whatever precautions are reasonably necessary to safeguard the integrity of the tape while assuring public access to it.