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ARIZONA BOARD OF FINGERPRINTING

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March 9, 2007

Debbie Davenport
Auditor General
Office of the Auditor General
2910 North 44th Street, Suite 410
Phoenix, AZ 85018

Dear Ms. Davenport:

On behalf of the Arizona Board of Fingerprinting, I am enclosing our agency's response to the performance-audit report. As requested, the Board has responded to each of the report's recommendations.

The Board wishes to thank Mike Timmerman and the staff at the Arizona Department of Public Safety's Applicant Clearance Card Team ("ACCT"). Although ACCT was not itself being audited, it responded to inquiries and data requests from the audit team. Similarly, the Board thanks Cliff Vanell and the staff of the Office Administrative Hearings for their assistance with the audit.

Thank you for your recommendations and your office's professional courtesies.

Sincerely,

Dennis Seavers
Executive Director

Enclosure

c: Board members and alternates

ARIZONA BOARD OF FINGERPRINTING AGENCY RESPONSE TO AUDIT REPORT

FINDING 1. BOARD SHOULD IMPROVE GOOD-CAUSE-EXCEPTION TIMELINESS.

Recommendation 1. The Board should continue to monitor the timeliness of its decisions. If timeliness continues to be a problem, then the Board should consider:

- a. Amending the OAH agreement so OAH provides recommendations rather than decisions to the Board; and**
- b. Increasing the use of OAH to maintain timeliness throughout the decision process.**

The finding of the Auditor General is agreed to, and the audit recommendation will be implemented.

The Auditor General recommends that the Board amend its agreement with the Office of Administrative Hearings (“OAH”) and use OAH more frequently if timeliness remains an issue. If the full-time hearing officer cannot keep up with the Board’s caseload, then the Board will evaluate whether to (a) hire an additional hearing officer, perhaps on a part-time basis, or (b) make greater use of OAH. This evaluation will be based on factors such as cost, caseload projections, and business-process considerations.

Recommendation 2. The Board should ensure its database includes additional fields needed to monitor timeliness. For example, the Board plans to add a field or fields to capture the length of time between the hearing and the recommendation going to the Board.

The finding of the Auditor General is agreed to, and the recommendation will be implemented. As the report stated, the Board has authorized funding for database improvements.

Recommendation 3. The Board should expand its oversight of program operations by requiring that its staff provide it with regular reports that show how long beyond 60 days cases have been waiting for a decision.

The finding of the Auditor General is agreed to, and the recommendation will be implemented.

At its February 20, 2007, meeting, the Board adopted a new set of performance measures that would capture the sort of information the Auditor General's recommendation identified. Specifically, the Board will require reports from its staff on the number and percentage of cases that have been waiting for decisions longer than three-, four-, five-, and six-month periods. These reports will also show changes in values from previous reports and will show the frequency distributions for the number of days a case has been waiting for a decision.

Recommendation 4. The Legislature should consider amending A.R.S. § 41-619.55 to establish time frames for holding a hearing from the date of expedited review and the time to make a final decision after the hearing. If the Legislature decides not to do so, the Board should establish its own time frames in policy.

The finding of the Auditor General is agreed to, and the recommendation will be implemented. The Board will establish time frames in policy immediately, regardless of whether the Legislature establishes statutory time frames.

FINDING 2. BOARD NEEDS TO IMPROVE MANAGEMENT AND OVERSIGHT OF DECISIONS.

Recommendation 1. The Board should implement management controls to prevent fingerprint clearance cards from being issued without its final review. These could encompass procedures such as:

- a. Producing regular reports on case status and using the reports to review case status and providing direction to staff; and**
- b. Conducting regular reconciliations with DPS to verify that cases have been appropriately approved or denied a fingerprint clearance card.**

The Auditor General's finding is agreed to, and the recommendation will be implemented.

Recommendation 2. The Board should continue to keep records of the meetings in which it determines good cause exceptions.

The Auditor General's finding is agreed to, and the recommendation will be implemented. As the audit report indicates, the Board has implemented this recommendation.

FINDING 3. BOARD NEEDS TO ENSURE DECISIONS COMPLY WITH STATUTE.

Recommendation 1. The Board needs to ensure that it follows statute when granting or denying good cause exceptions.

The finding of the Auditor General is not agreed to, but the recommendation will be implemented. Although it disagrees with the finding, the Board understands that it must always act within the bounds of its statutes.

The Board always strives to follow statutory criteria when deciding whether to grant or deny a good cause exception. Whenever the Board becomes aware of a possible error, it reviews the case to determine whether it made an incorrect or improper decision. In addition, the Board has procedures in place to provide applicants an opportunity to identify possible errors.

The audit report describes two cases in which the Board supposedly made decisions that were contrary to law. However, good-cause-exception determinations are confidential by statute, so the Board cannot discuss the two cases that the audit report disclosed.

Recommendation 2. The Board should modify its application form about CPS contact and professional licensure suspension or revocation to:

- a. Ask for this information only from applicants who have been convicted of a precluding offense;**
- b. Ask for this information only when it relates to the type of offense the applicant was convicted of;**

The finding of the Auditor General is not agreed to, and the recommendation will not be implemented.

The Board agrees that individuals with no precluding offenses should be given a good cause exception, regardless of their contact with Child Protect Services (“CPS”) or the status of any professional licenses. However, the Board disagrees that it must first determine that an applicant was convicted before requesting information about CPS contact or licensure activity, or that the Board should rely on applicants to determine whether the information is related to an offense. The audit report is focusing particularly on individuals who (a) have their fingerprint-clearance-card application denied because the Department of Public Safety (“DPS”) could not determine the disposition within the

30-day time frame and (b) ultimately would demonstrate to the Board's satisfaction that they were not convicted of the precluding offense. The report argues that these individuals would be treated differently because other individuals who do not have convictions for precluding offenses and who received a fingerprint clearance card from DPS do not have to provide information on CPS contact or licensure activity. There are six reasons why the Board disagrees with the report.

1. *Applicants with no convictions would not be denied a good cause exception because they disclosed CPS information.*

If applicants demonstrate to the Board's satisfaction that they were not convicted of a precluding offense, the Board would issue a good cause exception, despite any contact with CPS or any negative licensure activity. Although these applicants would be treated differently than individuals who received their card directly from DPS, no harm would come from this different treatment.

2. *Applicants are treated differently in ways that the audit report does not characterize as inappropriate.*

There are other ways in which the applicants are treated differently but which the audit report does not characterize as inappropriate. For example, these applicants are required to provide court documents relating to non-precluding offenses; written statements about all arrests; police reports from any arrests that occurred within the past five years, even if the arrests were for non-precluding offenses; and reference letters. The audit report did not question the propriety of the Board asking for this information, even though applicants might ultimately demonstrate to the Board's satisfaction that they were not convicted of the precluding offense, and even though these applicants would be treated differently than individuals who received their cards from DPS. The Board derives authority to require this information from its statutes. Similarly, the Board derives its authority to require applicants to disclose certain CPS and licensure information from statute. Specifically, the Board uses the information to weigh the nature of the offense and to judge whether there is evidence of positive action to change criminal behavior. (See attached Auditor General Reply.)

3. *Implementing the recommendation would either place an unreasonable administrative burden on applicants or would strip the Board of its discretion.*

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The audit report argues that information that the Board considers must be relevant to a conviction for a precluding offense. However, the Legislature allows the Board to exercise discretion. Implementing the Auditor General's recommendation would strip the Board of this discretion.

The Board's statutes recognize that the Board or its hearing officer have and should exercise discretion in applying statutory criteria to the facts of a case. A.R.S. § 41-619.55(E) requires applicants to demonstrate rehabilitation "to the Board or its hearing officer's satisfaction." In addition, the statute identifies criteria, not specific types of information, for the Board to consider. For instance, the statute requires the Board to consider the extent of the applicant's criminal record or the length of time that has elapsed since an offense was committed. The statute does not specify what these terms mean by identifying a certain number of crimes that would qualify a criminal record as "extensive" or by listing the number of years that must pass before an applicant can be rehabilitated. One criterion in particular—"any applicable circumstances"—calls on the Board to exercise discretion in determining what circumstances are applicable to the case. The fact that the Legislature provided criteria rather than a list of specific items that the Board must consider shows that the Board was envisioned as an entity that has discretion to judge which facts are relevant to the statutory factors. The Legislature intended for the Board to exercise discretion in applying the criteria and to consider cases based on the totality of circumstances. In fact, the Legislature thought of the DPS process for denying or suspending fingerprint clearance cards as a "screening" process, after which the Board would closely scrutinize the applicants.¹ The authority to exercise discretion is also evident in the Board's rules. A.A.C. R13-11-110 requires the Board to grant an applicant's request for rehearing or review for various reasons, including instances where the applicant "was deprived of a fair hearing due to irregularity in the proceedings, *abuse of discretion*, or misconduct by the hearing officer" (emphasis added).

The audit report recommends that the Board ask applicants for information about CPS contacts or licensure activity only if the applicants determine that the information is relevant to a precluding offense. However, this recommendation assumes that the Board should not be allowed to exercise discretion. To implement this recommendation effectively, the Board would have to rely on applicants to understand and properly judge what it means for a particular contact to "relate" to a precluding offense. For example,

¹ House Bill 2585, chaptered at Arizona Session Laws 1998, Chapter 270 (Second Regular Session), created the Board. The final revised Senate fact sheet for House Bill 2585 described the Board as an agency that would "conduct 'good cause' exception hearings for employees who are denied fingerprint clearance during the screening process, but who may be eligible for showing successful rehabilitation."

suppose an applicant had a charge for child neglect, in which the applicant neglected his children while high on drugs. Also suppose that the applicant had a substantiated allegation of neglect several years later that was unrelated to the criminal charge. In this later CPS-related event, the applicant might have taken drugs and then left his children unattended. Even if the incident did not lead to criminal charges, clearly the applicant is engaged in a pattern of behavior that places his children at great risk. This information might show that there is insufficient evidence that the applicant has taken positive action to change criminal behavior—a factor that the Board’s statutes require it to consider. Is it reasonable to expect the applicant to understand that this later CPS contact “relates” to the original offense, and thus the applicant must disclose it? Would an applicant be wrong to conclude that a CPS contact “relates” to an offense only if the CPS contact led directly to criminal charges? The Board’s statute is crafted to allow the Board to exercise discretion in answering these types of questions.

If the Board retained its discretion but only requested information about CPS contact or licensure activity after determining that applicants were convicted of precluding offenses, then the applicants would be subject to an unreasonable administrative burden. In cases where the disposition of an arrest is unavailable, the question of whether the applicant was convicted may need to be resolved at an administrative hearing, and the following steps would have to occur.

1. At the hearing, which would take place after giving the applicant at least 20 days notice, the Board’s hearing officer would determine whether the applicant offered credible testimony that he or she was not convicted. If the hearing officer finds that the applicant was convicted—either because the applicant testified that he or she was convicted, or because the applicant testified that he or she was not convicted, but that testimony was not credible—then the hearing officer would recommend that the Board adopt a finding that the applicant was convicted.
2. The hearing officer’s recommendation would be transmitted to both the Board and the applicant, and the applicant would be given at least 20 days notice that the Board would be considering the recommendation.
3. The Board would consider the recommendation. If it adopted the recommended finding—that is, if the Board determined that the applicant was convicted of the precluding offense—then the Board would need to ask the applicant whether he or she had any CPS contact or licensure suspension or revocation related to the precluding offense. If the applicant disclosed any relevant CPS contact or

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licensure activity, the Board would need to remand the case back to the hearing officer and require the applicant to provide the information on CPS contact or licensure activity.

4. The hearing officer would hold another administrative hearing after the applicant received at least 20 days notice. The hearing officer would consider the new information on CPS contact or licensure activity and then provide a recommendation to the Board that incorporated this new information.
5. The hearing officer's new recommendation would be transmitted to the Board and the applicant, and the applicant would be given at least 20 days notice that the Board would be considering the recommendation.
6. The Board would decide whether to adopt, reject, or modify the hearing officer's recommended findings of fact, conclusions of law, and decision, and the Board would issue an order either granting or denying the good cause exception.

The Board believes that it is unreasonable to place such a heavy administrative burden on applicants. (See attached Auditor General Reply.)

4. *Applicants who believe the Board has abused discretion have administrative remedies.*

If the Board determines that information about CPS contact or licensure activity is relevant to a case, and the applicant believes that the Board abused its discretion, the applicant has remedies. The applicant is entitled to request a rehearing or review. If the applicant demonstrates that the Board abused its discretion, the Board must hold a new hearing or review its decision. Additionally, applicants may request judicial review by filing a complaint in superior court. These remedies are a check on abuse of discretion or inappropriate use of information.

5. *The information may be appropriate to help the Board determine whether applicants were convicted of precluding offenses.*

Information about CPS contact may be relevant to help the Board determine whether the applicant was convicted of the precluding offense. For instance, if a person is charged with child neglect and that charge stemmed from a CPS investigation, examining the CPS information will help the Board determine whether the applicant was convicted of child

neglect. Using this information is similar to how the Board may rely on police reports to help decide whether an applicant has been convicted of a precluding offense. (See attached Auditor General Reply.)

6. *No laws prohibit the Board from requesting this information.*

The Board derives its authority to request information about CPS contact and licensure activity from the Board's statutes. In addition, the Board is not aware of any law prohibiting it from asking for information about CPS contacts. As the audit report correctly stated, the Board's statute does not exclude other factors that the Board might consider, and there is no regulation that prevents the Board from considering information about CPS contacts or licensure activity.

Finally, the Board wishes to note that information about CPS contact or licensure activity does not need to be related only to a precluding offense. If an applicant was convicted of a precluding offense and had also committed non-precluding offenses, the Board would be authorized to consider information related to the non-precluding offenses. The Board's statutes require it to consider whether an applicant is a recidivist. Also, in order to determine whether an applicant is rehabilitated, the Board must consider the extent of the criminal record and whether the applicant has engaged in positive action to change criminal behavior. These factors allow the Board to consider information about arrests and convictions for non-precluding offenses. For the same reasons that it is appropriate for the Board to consider information about CPS contact or licensure activity for precluding offenses, it is similarly appropriate for the Board to consider this information for arrests and convictions for non-precluding offenses. (See attached Auditor General Reply.)

c. Ask about substantiated CPS complaints, not all CPS contact.

The finding of the Auditor General is agreed to, and the recommendation will be implemented.

AUDITOR GENERAL REPLY TO AGENCY RESPONSE

The following auditor comments are provided to address certain statements the Board of Fingerprinting made related to Finding 3, Recommendation 2:¹

- The Auditor General recognizes that the Board treats applicants for good cause exceptions differently than they are treated by the Department of Public Safety in obtaining additional information related to their criminal records (see page 5 of the response). As noted on page 23 of the report, statute authorizes the Board to consider the extent of the applicant's criminal record. It does not authorize use of CPS and professional licensure/certification information, which are not criminal records.
- The Auditor General disagrees that implementing this recommendation would either place an undue administrative burden on applicants or strip the Board of its discretion (see pages 5 through 8 of the response). The Board can modify its application form as described on page 24 of the report to provide guidance to applicants in determining whether they need to answer the question by providing some examples of offenses where substantiated CPS reports or professional licensure/certification information would be relevant, and asking only applicants who had been convicted of those types of crimes to respond to the question.
- The Auditor General disagrees that information about CPS contact may be relevant in determining whether an applicant was convicted of a precluding offense (see page 8 of the response). CPS reports are limited in scope to the facts surrounding incidents involving children. These reports do not include information about criminal proceedings either prior to or subsequent to the incident and would be of little use in determining whether an applicant was convicted of a precluding offense.
- The Auditor General disagrees that, as stated on page 9 of the Board's response, because no laws specifically prohibit the Board from requesting this information, the Board has authority to request it. In contrast, as discussed on page 23 of the report, a government agency such as the Board can only do what statutes authorize it to do. The Supreme Court of Arizona has ruled that "Because agencies are creatures of statute, the degree to which they can exercise any power depends upon the legislature's grant of authority to the agency. 'An agency ... has no powers other than those the legislature has delegated to it...'"²

¹ In its response, the Board provided some new reasons why it disagrees with Finding 3, Recommendation 2, that had not been previously shared with auditors. Therefore, auditors further clarified the text on pages 23 and 24 of the report after receiving the Board's response.

² *Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488, 80 P3d 765, 767 (Ariz. 2003).