



A REPORT
TO THE
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Performance Audit Division

Performance Audit and Sunset Review

Arizona Board of Fingerprinting

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Auditor General

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OFFICE OF THE
AUDITOR GENERAL

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March 21, 2007

Members of the Arizona Legislature

The Honorable Janet Napolitano, Governor

Michael LeHew, Chair
Arizona Board of Fingerprinting

Dennis Seavers, Executive Director
Arizona Board of Fingerprinting

Transmitted herewith is a report of the Auditor General, A Performance Audit and Sunset Review of the Arizona Board of Fingerprinting. This report is in response to a May 22, 2006, resolution of the Joint Legislative Audit Committee. The performance audit was conducted as part of the sunset review process prescribed in Arizona Revised Statutes §41-2951 et seq. I am also transmitting with this report a copy of the Report Highlights for this audit to provide a quick summary for your convenience.

As outlined in its response, the Arizona Board of Fingerprinting agrees with most of the findings and plans to implement most of the recommendations. We have attached a brief reply to the Board's response to address some statements in the response.

My staff and I will be pleased to discuss or clarify items in the report.

This report will be released to the public on March 22, 2007.

Sincerely,

Debbie Davenport
Auditor General

Enclosure

SUMMARY

The Office of the Auditor General has conducted a performance audit and sunset review of the Arizona Board of Fingerprinting (Board) pursuant to a May 22, 2006, resolution of the Joint Legislative Audit Committee. This audit was conducted as part of the sunset review process prescribed in Arizona Revised Statutes (A.R.S.) §41-2951 et seq.

Created by the Legislature in 1999, the Board considers applications for good cause exceptions from people who have been denied a fingerprint clearance card (card) by the Department of Public Safety (DPS). Arizona statutes require a fingerprint clearance card for several types of professional licensure, certification, and state jobs, mainly those that involve working with children or vulnerable adults. DPS must deny a card if an applicant is subject to registration as a sex offender, has been convicted of or is awaiting trial for certain crimes named in statute, or if it cannot determine the outcome of an arrest for these crimes within 30 business days of receiving the criminal records. The Board's ability to grant a good cause exception is designed to resolve those cases whose outcome could not be determined by DPS and to allow convicted people to demonstrate that they have been successfully rehabilitated.

The Board initially considers applications in a step called "expedited review" when it determines whether to grant a good cause exception immediately or to refer the case to a hearing. If more information is needed to make a decision, the application for a good cause exception proceeds to a hearing, which is generally conducted by the Board's Executive Director. The Board is to then receive the findings and recommendations from the hearing and make the final decision. According to the Board's database, the Board closed 1,769 appeals in fiscal year 2006, granting good cause exceptions in 1,148 instances.

Examples of precluding offenses whereby DPS must deny the fingerprint clearance card:

Appealable to the Board—Theft, forgery, manslaughter, shoplifting, fraud, possession of narcotics, domestic violence.

Not appealable to the Board—Murder, sexual assault, sexual abuse of a minor or vulnerable adult, child abuse.

Source: Auditor General staff summary of A.R.S. §41-1758.03.

Board should improve good cause exception decision timeliness (see pages 9 through 15)

While the Board has improved the timeliness of its decision-making process, as compared to the early 2000s, it has some delays at the end of the process and it took longer to decide cases in fiscal year 2006 than it did in 2005. For applications that cannot be decided on at the expedited review stage, the Board's goals are to (1) conduct a hearing within 60 days after the expedited review and (2) render a final decision no later than 90 days after the hearing. However, a delay is occurring in making final decisions. Based on a review of a sample of 31 cases that were still open more than 90 days after a hearing, auditors found that those 31 applicants had waited from 5 months to 1 year after the hearing and still did not have the Board's decision. Further, the time needed to complete the process appears to be lengthening. Auditors reviewed a random sample of 20 cases that went to a hearing in fiscal year 2005 and found that 19 were decided within 120 days—well within the combined 150-day goal for conducting the hearing and rendering the final decision. By comparison, a review of a sample of 20 cases closed in fiscal year 2006 showed that 5 took longer than 150 days to be decided and only 3 took fewer than 120 days. Completing the decision process as quickly as possible is important for people requesting a good cause exception because their ability to qualify for a job may depend upon it.

These timeliness problems have occurred mainly because the Executive Director has been unable to write up the hearing findings and submit them to the Board in a timely manner. The Executive Director has been conducting 40 to 60 hearings a month, but in June through August 2006 presented a 3-month total of only 66 cases to the Board for a final decision. To address this problem, the Board hired a full-time hearing officer in November 2006. However, several additional actions would augment this step:

- **Resolve concerns about using OAH**—To reduce the backlog that existed in previous years, the Board signed an interagency agreement with the State's Office of Administrative Hearings (OAH), which conducts hearings for state agencies that need this service. Under this agreement, the Board used OAH to handle about 100 hearings in fiscal year 2006. The agreement specifies that OAH's administrative law judges will make the final decision on these cases—a step taken to reduce the Board's workload. However, the Board has refrained from making greater use of this option because of concerns about ceding its decision-making authority to the administrative law judge. According to OAH's Director, most agencies that use OAH for hearings retain the right to accept, reject, or modify OAH's decisions. Although it would cost more, if timeliness continues to be a problem even with a full-time hearing officer added, the Board should consider revising the agreement with OAH so that the Board, and not the administrative law judge, makes the final decisions, and then the Board should make greater use of OAH.

- **Expand monitoring of case status**—Another step that could help in addressing delays is expanding the Board’s monitoring of how long it is taking to process cases. The Board’s existing case database lacks some fields needed to better track timeliness. In addition, although the Board receives aggregated, timeliness-related information such as the average number of days to close cases and the percentage of applications heard within 60 days of expedited review, these reports do not show how long cases were waiting beyond 60 days. The Board should obtain regular reports that provide such information.
- **Establish processing time frames in statute**—The Board’s 150-day case processing goal does not exist in statute or policy. Many Arizona boards have processing time frames for holding a hearing and making a decision that are established in statute—something the Legislature should consider in this instance as well. If the Legislature decides not to act in this regard, the Board should establish time frames in policy.

Board needs to improve management and oversight of decisions (see pages 17 through 20)

The Board needs to take several steps to improve its management and oversight of good cause exception decisions. Board members believe it is their responsibility to make the final decision on all applications for good cause exceptions brought before the Board. However, auditors identified a number of cases in which the case was closed without any record that the Board made a final decision. The Board needs to develop and implement better management control over these decisions. The Board is exempt from Arizona’s Open Meeting Laws, which require that other boards keep minutes of their actions. However, it should maintain records of its decisions. The Board had discontinued, but resumed in September 2006, keeping audio recordings of its meetings. The Board also recently began keeping detailed records of its meetings, which will help keep track of decisions.

Board needs to ensure decisions comply with statute (see pages 21 through 25)

The Board has inappropriately decided some cases and has also asked for inappropriate information from applicants. Auditors found two cases where the Board had denied a good cause exception to an applicant even though the case file documentation appeared to show that the applicant had neither been convicted of an offense nor was awaiting trial for it. Auditors discovered these cases in a review of 40 cases heard by the Executive Director in fiscal years 2005 and 2006. In these

cases, the Board went beyond the statutory criteria in denying the applications. The Board needs to ensure that it follows statute when granting or denying exceptions.

Further, the Board requires all applicants to report any contact with Child Protective Services (CPS) and suspension or revocation of a professional license or certification on its application. However, statutes do not authorize the Board to consider CPS contact or professional licensure/certification information in all cases when deciding whether to grant a good cause exception. The Board should modify its application form so it no longer requests this information from applicants who have not been convicted of a precluding offense since statutes do not authorize the Board to obtain this information in these cases. In addition, its application form should be modified to ask for information about a substantiated CPS report or professional license/certification suspension or revocation only when the information relates to the type of offense the applicant was convicted of. Otherwise, the Board would be treating applicants without convictions differently than they would be treated by DPS.

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concluded ♦

INTRODUCTION & BACKGROUND

The Office of the Auditor General has conducted a performance audit and sunset review of the Arizona Board of Fingerprinting (Board) pursuant to a May 22, 2006, resolution of the Joint Legislative Audit Committee. This audit was conducted as part of the sunset review process prescribed in Arizona Revised Statutes (A.R.S.) §41-2951 et seq.

Board's role and purpose

The Arizona Legislature created the Board and the fingerprint clearance card in 1999. The Board was created to hear the appeals of people who were denied a fingerprint clearance card (card) or whose card was suspended by the Department of Public Safety (DPS). Arizona statutes require a fingerprint clearance card (card) for several types of professional licensure, certification, and state jobs, mainly those that involve working with children or vulnerable adults. Six state agencies require a card for licensure, certification, or employment (see textbox).¹ According to the Board, some other entities, such as nursing schools, also require or accept a fingerprint clearance card, although statute does not require it for these entities.

Prior to the creation of the fingerprint clearance card and the Board, five of these agencies were individually responsible for deciding how to treat the criminal records of people applying for licensure, certification, or employment to work with children and vulnerable adults.² Under this arrangement, a person would require

The Board hears appeals of people who have been denied a fingerprint clearance card or whose card was suspended by DPS.

Agencies Requiring a Fingerprint Clearance Card

Agency	Examples of purposes
Board for Charter Schools	Teachers and principals
Department of Economic Security	Child Protective Service jobs and those working with people who have developmental disabilities
Department of Education	Teacher certification
Department of Health Services	Nursing home employees, children's behavioral health program employees and volunteers, and child care providers
Department of Juvenile Corrections	Employees of a contractor who have direct contact with committed youth
Supreme Court	Juvenile probation contract providers

¹ Most state employees who require a background check for their jobs do not need to obtain a fingerprint clearance card. Instead, they submit their fingerprints and biographical information to DPS, which checks for a criminal record based on the biographical information and then, if necessary, confirms the record by using the fingerprints.

² The Board for Charter Schools did not require cards until 2002.

clearance from multiple agencies if his or her job required more than one type of licensure or certification, such as a direct care job with a company that provided adolescent behavioral health services and therefore might receive funding from as many as four of these agencies. Further, since there was no state-wide standard for granting clearance, agencies could apply different standards to determine whether or not to provide clearance to the same person or to people with similar backgrounds.

Approval or denial of a card depends on whether a person has been convicted of, or is awaiting trial on, certain criminal offenses. To obtain a card, a person must submit an application, fingerprints, and a fee to DPS.¹ DPS determines if a person has a criminal history by first comparing the applicant's prints to those on file in the Arizona Automated Fingerprint Identification System and then sending the prints to the Federal Bureau of Investigation, where the prints are run through its fingerprint database. Applicants are approved unless:

- The applicant is subject to registration as a sex offender, or has been convicted of or is awaiting trial for a "precluding" offense. A.R.S. §41-1758.03 lists a set of crimes, called precluding offenses, that should result in automatic denial of the card. Denial on the basis of certain of these offenses, such as sexual assault or child abuse, carries no possibility of appeal to the Board (see textbox). Denial on the basis of other offenses, such as manslaughter, forgery, or shoplifting, can be appealed to the Board.
- The applicant's record indicates an arrest for a precluding offense, and DPS cannot determine the disposition of the offense within 30 business days of receiving the applicant's state and federal criminal history records. Reasons DPS may be unable to determine the disposition include information about dropped charges not always being entered into the databases DPS checks and court records being destroyed after a certain number of years.

Examples of precluding offenses whereby DPS must deny the fingerprint clearance card:

Appealable to the Board—Theft, forgery, manslaughter, shoplifting, fraud, possession of narcotics, domestic violence.

Not appealable to the Board—Murder, sexual assault, sexual abuse of a minor or vulnerable adult, child abuse.

Source: Auditor General staff summary of A.R.S. §41-1758.03.

In fiscal year 2006, DPS records showed that it received 119,260 applications, and of these, it denied 5,469, or 4.6 percent. That year, the Board received 1,769 applications for a good cause exception, according to its database.

DPS can also suspend an issued card if its ongoing reviews find that a cardholder has been arrested for any precluding offense. According to a DPS official, on a daily basis the agency matches prints from newly reported arrests to the prints of people who hold fingerprint clearance cards. If any matches are found, DPS then determines

¹ The fee for unpaid volunteers is \$46 and for paid employees is \$52. Of this fee, \$25 is given to DPS, which, according to DPS, is used to cover its costs associated with fingerprint clearance cards; \$3 goes to the Board to fund its operations; and the remainder is sent to the Federal Bureau of Investigation to cover the cost of running fingerprints through its database.

whether a cardholder has been arrested for any precluding offenses and then suspends the card if needed and notifies both the cardholder and the state agency that licenses, certifies, or employs the cardholder.

Board's process for considering good cause exceptions

If DPS denies or suspends a card because of an appealable offense or denies a card because it could not determine the disposition of a charge within 30 business days, the applicant may request that the Board make what is called a "good cause" exception. The applicant must make this request within 30 days of DPS' denial or suspension. Applicants must submit to the Board a complete application that includes a personal explanation of all arrests—whether or not they were the basis for denial—and provide police records for all arrests in the last 5 years, along with other information.

Under A.R.S. §41-619.55(E), the Board considers requests for a good cause exception and determines whether an applicant has been convicted of, or is awaiting trial on, a precluding offense. The Board can grant an exception if it finds that the applicant is not awaiting trial on, or has not been convicted of, such an offense. The Board can also grant an exception if it finds that an applicant convicted of a precluding offense has been successfully rehabilitated and is not a recidivist.

The Board considers applications in two stages:

- **Expedited review**—Once the Board receives an application, its staff investigator reviews it for completeness, requests additional information from the applicant if necessary to complete the application, and makes a recommendation to the Board on whether to grant a good cause exception or to hold a hearing. At the first stage of the process, called "expedited review," the Board considers every application and decides whether to grant a good cause exception immediately or to refer the case to a hearing. Expedited review allows the Board to consider cases and approve good cause exceptions without having to hold a hearing with the applicant present. The Board does not deny any cases at expedited review. As shown in Table 1 (see page 4), the Board granted 844 good cause exceptions at expedited review in fiscal year 2006, or 48 percent of the cases closed that year, according to its database.
- **Hearing**—The Board refers cases to a hearing when it decides it needs more information from the applicant before reaching a decision. Cases referred to a hearing are handled in one of two ways. In most cases, the Board's Executive Director acts as a hearing officer and conducts the actual hearing. The Executive Director is then required to recommend that the Board either grant or deny a good cause exception. A.R.S. §41-619.53 requires that the Board's decision to

Table 1: Good Cause Exception Applications Closed
Fiscal Year 2006

Disposition	Number of Cases
Good cause exception granted at expedited review	844
Good cause exception granted after hearing	304
Denied after hearing	160
Withdrawn by applicant	395
Other ¹	<u>66</u>
Total cases closed	<u>1,769</u>

¹ Includes applications for which DPS was subsequently able to issue a card after the applicant had applied to the Board for a good cause exception.

Source: Auditor General staff analysis of the Board's good cause exception application database.

grant a good cause exception determination must be unanimous. In cases where the Executive Director has become personally involved or to occasionally help with its workload, the Board may refer cases to the Office of Administrative Hearings (OAH). The Board has an Interagency Service Agreement that allows OAH to conduct such hearings. Under the agreement, when a case is referred to OAH, the administrative law judge hearing the case—and not the Board—makes the final decision and issues the order granting or denying the good cause exception. Under either approach, the Executive Director writes a letter to the applicant informing him or her of the decision. If an exception is granted, the Executive Director also instructs DPS to issue

the card. As shown in Table 1, the Board's database shows that most of the cases decided at hearing in fiscal year 2006 resulted in granting a good cause exception (304 of 464 cases, or 66 percent). In the case of a denial, the applicant can request a rehearing or to have the Board review its decision. The Board's decision may also be appealed to Superior Court.

Staffing and budget

The Board comprises five members from five state agencies. Unlike boards that are appointed by the Governor or the Legislature, these board members are appointed by their respective agencies. The Chief Justice of the Supreme Court and the directors of the Departments of Economic Security, Education, Health Services, and Juvenile Corrections each appoint one board member and may appoint an alternate member, as well. Board members serve at the pleasure of the appointing authority and have no specified term.

The Board has five full-time staff: the Executive Director, a hearing officer, an investigator, and two administrative assistants. The hearing officer position was established in August 2006 and a hearing officer was hired in November 2006.

As shown in Table 2, page 5, in fiscal year 2006 the Board's revenues of \$370,998 exceeded its expenditures of \$252,313. The Board's funding is continuously appropriated, which means the Board receives its revenues independent of any appropriation from the Legislature. The excess of revenues over expenditures has led

to a fund balance of \$561,647 at the end of fiscal year 2006. The Board's revenues come from a \$3 fee, established in fiscal year 2004, charged to all fingerprint clearance card applicants. Until fiscal year 2005, the Legislature also funded the Board's activities through General Fund and Fingerprint Clearance Card Fund appropriations.

A \$3 fee charged to all fingerprint clearance card applicants funds the Board.

Most of the Board's expenses are employee related, with the next largest category being other operating costs, such as rent, postage, and information technology services. The Board also pays the Department of Administration for accounting services, which is reflected in expenditures for professional and outside services. The Board's payments to OAH for the hearings it conducts are included in fund transfers.

Table 2: Schedule of Revenues, Expenditures, and Changes in Fund Balance
Fiscal Years 2004 through 2006
(Unaudited)

	2004	2005	2006
Revenues:			
License and permit fees ¹	\$495,230	\$296,994	\$370,998
State General Fund appropriations	<u>72,600</u>		
Total revenues	<u>567,830</u>	<u>296,994</u>	<u>70,998</u>
Expenditures and net operating transfers out: ²			
Personal services and employee related	170,795	177,790	192,015
Professional and outside services	20,328	18,151	2,362
Other operating	41,061	44,478	45,592
Equipment	<u>4,256</u>	<u>11,671</u>	<u>2,688</u>
Total expenditures	236,440	252,090	242,657
Net operating transfers out	<u>29,086</u>	<u>13,291</u>	<u>9,656</u>
Total expenditures and net operating transfers out	<u>265,526</u>	<u>265,381</u>	<u>252,313</u>
Excess of revenues over expenditures and net operating transfers out	302,304	31,613	118,685
Fund balance, beginning of year	<u>109,045</u>	<u>411,349</u>	<u>442,962</u>
Fund balance, end of year	<u>\$411,349</u>	<u>\$442,962</u>	<u>\$561,647</u>

¹ Composed of a \$3 fee charged to all applicants who apply for a Fingerprint Clearance Card, in accordance with A.R.S. §41-619.53. However, the 2004 amount includes \$268,700 of additional fees from the Fingerprint Clearance Card Fund that was appropriated to the Board.

² Administrative adjustments are included in the fiscal year paid.

Source: Auditor General staff analysis of the Arizona Financial Information System (AFIS) *Accounting Event Transaction File*; and *Revenue and Expenditures by Fund, Program, Organization, and Object and Trial Balance by Fund* reports for the Board of Fingerprinting Fund for fiscal years 2004 through 2006.

Scope and methodology

This audit focused on the timeliness of board decision making on good cause exceptions, the Board's management practices in overseeing decisions, and whether the Board is appropriately deciding cases where an applicant has not been convicted or is awaiting trial for a precluding offense and is asking for appropriate information from applicants. The report presents findings and recommendations in the following areas:

- The Board should improve the timeliness of its good cause exception decisions. The Board has hired a hearing officer to help improve its timeliness, but additional actions would augment this step. It should consider changes to improve its ability to use OAH as a back-up alternative for hearing cases, modify its database to include more information, and expand its monitoring of the timeliness of the decision process. In addition, specifying processing time frames, either in statute or in board policy, might help improve timeliness.
- Some cases have been closed and cards issued without any record of the Board having made a decision. The Board needs to improve oversight to ensure it makes the final decision on all applications brought before it.
- The Board has denied good cause exceptions to two applicants who were not convicted or awaiting trial for a precluding offense. Auditors identified these cases during a review of 40 cases heard by the Executive Director in fiscal years 2005 and 2006. In addition, the Board inappropriately requires all applicants to provide CPS contact information and information about revocation or suspension of professional licenses/certifications. The Board should follow statute in making its decisions, and modify its application to require information about substantiated CPS complaints and professional license/certification suspensions or revocations only when the information relates to the type of offense an applicant was convicted of.

Auditors used various methods to study the issues addressed in this report, including interviewing board members, attending board meetings and good cause exception determinations, observing hearings, interviewing DPS staff, and reviewing case files. Auditors also used the following specific methods:

- To evaluate the timeliness of the Board's good cause exception determination process, auditors reviewed two groups of cases. First, auditors reviewed a random sample of 20 closed cases heard by the Executive Director from each of fiscal years 2005 and 2006, to determine the length of time to complete the process. Second, auditors reviewed a sample of 50 cases randomly selected from a group of 186 cases identified as having had a hearing at least 3 months

earlier but having no board decision, to determine how long open cases had waited before receiving a decision. Because in 19 of these 50 cases auditors found the cases had been misfiled, and were actually closed, or the case files lacked enough documentation to determine the case status, auditors used only the remaining 31 cases to determine how long cases had been waiting for a decision. For each case in both groups, auditors determined the dates of each step in the process by reviewing documentation contained within case files, listening to the audio recordings of hearings, and reviewing electronic files. In addition, auditors contacted DPS to verify the dates cards were issued when the ultimate disposition of a case was to grant a good cause exception. Auditors also contacted the Arizona Department of Education to determine whether applicants who needed a card as part of the teacher certification process and who were awaiting board decisions had active teacher certifications and whether department records showed they were working as teachers. Finally, auditors reviewed statutes and administrative rules to identify time frame requirements for hearings or appeals at other Arizona agencies, boards, and commissions. Auditors' conclusions on timeliness are based on an examination of samples of cases, and the results should not be generalized.

To determine whether the Board could use OAH to help meet its timeliness goals, auditors reviewed a random sample of 10 closed hearing cases conducted by OAH in each of fiscal years 2005 and 2006 to determine how long these cases took to complete the process. In addition, auditors interviewed the Director of OAH, who provided information regarding OAH's agreements with other agencies, including statutory time frames for hearings and the differences in costs and time frames depending on whether OAH provides recommendations or decisions to the agencies.

- To evaluate the Board's oversight of decisions, auditors reviewed 33 cases where the Board's database showed the case was closed but case files lacked documentation of the decision. Thirteen of these cases were discovered in the sample of open cases auditors had drawn to assess the Board's timeliness, and the other 20 were discovered through other audit work. To determine whether the Board had made decisions in these cases, auditors reviewed case files, electronic files including audio recordings of hearings, and audio recordings of board decisions on the dates shown in the database for each case's decision and for surrounding dates. To determine whether DPS had issued a card in the 28 cases where the database indicated the case disposition was to grant a good cause exception, auditors obtained information from the DPS official responsible for managing the fingerprint clearance card program. To confirm that DPS had received a letter from the Executive Director requesting card issuance, auditors also reviewed DPS archived case files for the 22 of those 28 cases for which the files were available. To identify ways to help ensure decisions would not be issued without board review, auditors compared the Board's

management practices for how it tracks cases to best practices from the United States Government Accountability Office's *Standards for Internal Control in the Federal Government*.¹ Finally, auditors contacted seven other state boards to determine their practices for monitoring and tracking applications.²

- To assess the appropriateness of the criteria used by the Board in deciding good cause exceptions, auditors reviewed a random sample of 20 cases heard by the Executive Director in each of fiscal years 2005 and 2006. These were the same cases used to assess board timeliness. Auditors and the Office of the Auditor General's legal counsel then compared the facts of these cases to statute and rules to determine whether board actions in these cases were appropriate or not.
- To gather information for the Introduction and Background, auditors reviewed Arizona statutes, session laws, rules, legislative committee hearings, information from the Board on the number of full-time equivalent positions, and the Arizona Financial Information System (AFIS) *Accounting Event Transaction File* and *Revenue and Expenditures by Fund, Program, Organization, and Object* and *Trial Balance by Fund* reports for fiscal years 2004 through 2006. Auditors also interviewed DPS staff in order to obtain information about how DPS handles applications for fingerprint clearance cards and their process for determining whether or not to issue a card. Auditors also used the Board's good cause exception database to report on the number of good cause exception applications received and closed by the Board in fiscal year 2006. Auditors sampled cases from fiscal years 2005 and 2006 to compare the hard file documentation against the database information. However, for some of the cases either some of the documentation was missing from the files or the files could not be located.

The audit was conducted in accordance with government auditing standards.

The Auditor General and staff express appreciation to the board members, Executive Director, and staff of the Board of Fingerprinting as well as the staff of the Department of Public Safety's Applicant Processing Group for their cooperation and assistance throughout the audit.

¹ United States Government Accountability Office. *Standards for Internal Control in the Federal Government*. Washington, D.C.: USGAO, 1999.

² These seven boards were the Arizona Board of Appraisal, the Arizona Board of Chiropractic Examiners, the Arizona Board of Funeral Directors and Embalmers, the Arizona Board of Osteopathic Examiners in Medicine and Surgery, the Arizona Board of Psychologist Examiners, the State of Arizona Naturopathic Physicians Board of Medical Examiners, and the Arizona State Board of Massage Therapy. These boards were contacted because they had a similar staff size as the Board of Fingerprinting.

FINDING 1

Board should improve good cause exception decision timeliness

Although the Board is taking steps to help manage its hearings workload, further action is needed to ensure timely decisions on applications for fingerprint clearance card good cause exceptions. While the Board has improved the timeliness of its decision-making process as compared to the early 2000s, auditors found it still had some cases that were waiting over 3 months for a decision and it took longer to decide cases in fiscal year 2006 than in 2005. Lack of timely decisions to grant an exception that would allow a person to obtain a fingerprint clearance card can affect the person's employment. In November 2006, the Board hired a hearing officer to help with the workload, but it also needs to (1) consider changes to improve its ability to use the Office of Administrative Hearings (OAH) as a back-up alternative for hearing cases, (2) modify its database to include more information, and (3) expand its monitoring of the timeliness of the decision process. Timeliness might also be helped by specifying processing time frames, either in statute or in board policy.

Decision process has improved but remains lengthy

The Board does not take as long to hear cases as it did several years ago, but it still has cases that wait over 3 months for a decision, and its timeliness appears to have worsened from fiscal year 2005 to 2006. Without a Board decision, applicants who require a fingerprint clearance card to retain or acquire employment may not work.

Timeliness has improved as compared to prior years—Although the current process for deciding good cause exception applications is lengthy, it is an improvement from prior years. By 2002, the Board had accumulated a backlog of cases awaiting a hearing, according to a review by the Governor's Office for Excellence in Government (OEG). The OEG estimated that the backlog totaled 462 cases. The Executive Director stated that in 2003, the year he began working at the Board, hearings were being scheduled as much as 2 years after the application was received.

In 2002, the Board had an estimated backlog of 462 cases awaiting hearing.

Two main changes helped improve board timeliness:

Expedited Review—Board review to determine whether to immediately grant the applicant a good cause exception, thereby allowing him or her to obtain a fingerprint clearance card, or to refer the case to a hearing.

- First, the Board now decides most cases at expedited review instead of through a hearing. It established an investigator position whose responsibility is preparing case summaries for the Board to consider at expedited review. The Board uses these summaries to determine whether to grant a good cause exception or to send a case to a hearing. According to board data, in fiscal year 2006 the Board granted 844 good cause exceptions at expedited review, which represented about two-thirds of the cases it decided.
- Second, the Board received statutory authority to devolve hearing responsibility. Until 2003, the Board itself had to conduct the hearing. Legislation passed in 2003 allowed the Board to use hearing officers to conduct hearings. The Board now uses its Executive Director—or alternatively, OAH—to conduct hearings. A review of 40 cases heard by the Executive Director and 20 heard by OAH in fiscal years 2005 and 2006 found that all but one of these cases were heard within 120 days, compared to the 2-year wait for a hearing in 2003.

The Board has also decreased the amount of time it takes to get cases to expedited review. The Executive Director reports that the Board's goal is to review cases at expedited review within 14 days of receiving a complete application. Based on a review of a sample of 40 closed cases, auditors determined that in fiscal year 2005 the Board narrowly missed this goal for expedited review—it took an average of just less than 16 days for a case to move through this process—but in fiscal year 2006, it achieved the goal with an average of only 13½ days for a case to have an expedited review.

Board still does not meet all timeliness goals—While the Board is moving cases quickly into the process, it is continuing to experience delays at the end of the process—specifically, between the time a hearing is conducted and a final decision is rendered. Although the Board has no formal time frames for completing the decision process, the Executive Director stated that the Board's goals are to hold a hearing within 60 days from expedited review and render a final decision within 90 days from the hearing. Auditors reviewed a sample of 31 cases where the hearing had been held at least 3 months earlier but no decision had been rendered. In these 31 cases, as of August 14, 2006, applicants had waited from 146 to 376 days after the hearing and still did not have the Board's decision.

Further, cases that went through a hearing appeared to be taking longer to receive a final decision in 2006 than in 2005. Auditors reviewed a sample of 20 closed cases for each of fiscal years 2005 and 2006. In fiscal year 2005, 19 of 20 cases auditors reviewed went through hearing and final decision within 120 days, well

within the 150-day goal, and only 1 of the 20 took more than 150 days. However, in fiscal year 2006, 5 of the 20 cases auditors reviewed took longer than 150 days. The other 15 cases met the 150-day goal. Even though these 15 cases met the goal, they waited longer for a final decision than cases decided in fiscal year 2005. Specifically, only 3 of the 20 fiscal year 2006 cases auditors reviewed were decided within 120 days, compared to 19 of 20 in fiscal year 2005.

Lack of timely decisions may affect employment opportunities—The lack of a fingerprint clearance card can impact a person’s employment. People already employed in positions that require a card and whose card is suspended may be terminated or moved to a position without direct contact with juveniles or vulnerable adults until they have a good cause exception. Similarly, people applying for a position that requires a card cannot start working in that position until they either receive a card or—for some positions—at least apply for a card within a certain time frame. One position that requires a card is that of public or charter school teacher. Teaching positions are usually filled before the start of the school year, and people without the proper certification may not be eligible for a position for that school year, even if the Board’s decision is ultimately to grant a good cause exception. For example:

- An applicant lost his teacher certification when DPS suspended his card following an arrest for a precluding offense. He submitted to the Board a completed good cause exception application in July 2005. The Board referred the case for a hearing, which was conducted in September 2005. However, as of September 2006, a recommendation from the Executive Director had not been provided for board review and a final decision had not been issued. The applicant still lacks a card and a teaching certificate, according to the Arizona Department of Education, and therefore he cannot legally work as a teacher in Arizona.

Steps to improve timeliness can be augmented

The Board is attempting to address timeliness issues by hiring a dedicated hearing officer to conduct hearings and bring the hearing results more quickly to the Board for consideration. Other steps, however, would also help address delays in the decision process. One is to revisit the interagency agreement with OAH to resolve issues that have kept the Board from making greater use of this alternative, and then use OAH as needed to address timeliness. Another is to enhance its database and expand monitoring of cases throughout the process.

Board has hired hearing officer—The Board has increasingly relied on the Executive Director to conduct hearings in the past year, and while he appears to be conducting an adequate number of hearings, he has not been able to keep up

The Board's new hearing officer will perform most hearing duties once he is trained.

with the workload of completing the hearing write-ups, preparing recommendations, and providing them to the Board on a timely basis in addition to his other duties. The Executive Director has been conducting approximately 40 to 60 hearings a month. However, he presented a total of only 66 cases to the Board for final decision in June through August 2006. According to the Executive Director, the Board's newly hired hearing officer began employment on November 6, 2006, and he will perform most of the hearing duties once he is trained.

Back-up approach exists, but changes could make it more effective—In addition to having a new hearing officer, the Board has an interagency service agreement with OAH that allows the Board to use administrative law judges to hear cases and render decisions. However, the Board uses OAH far less than the agreement allows. Before it hired the new hearing officer, the Board had decided not to refer cases to OAH unless the Executive Director had become personally involved in the case, especially when contact with the applicant was negative, or if he was concerned with falling too far behind. OAH conducted about 100 hearings for the Board in fiscal year 2006, compared to over 650 hearings it conducted in fiscal year 2004.

The Board has made limited use of OAH due to concerns about ceding its own decision-making authority

The Board's limited use of OAH has stemmed from concerns about ceding its own decision-making authority. The agreement with OAH specifies that OAH's administrative law judges will provide a final decision and a brief summary order regarding the decision. Statute was revised in 2003 to state "the Board or its hearing officer may grant a good cause exception." According to the Board's Chair, the statute was written in this manner to eliminate the backlog. However, according to the Chair and the Executive Director, the Board has not always agreed with decisions made by OAH personnel, and therefore has not used OAH to the extent the agreement allows. In contrast to the Board, most agencies that use OAH for hearings retain the right to accept, reject, or modify OAH's decisions, according to OAH's Director.

The Board could amend the agreement to have OAH provide more detailed recommendations for the Board to decide upon, although this would likely increase the cost of using OAH, according to the directors of both agencies. The Board should monitor the timeliness of its decisions, and if the addition of its new hearing officer does not resolve these problems, the Board should consider revising the agreement with OAH so that the Board, and not the administrative law judges, makes the final decision. The Board could then use OAH as necessary to help ensure timely decisions.

Expanded monitoring of case status could help timeliness—Another step that could help in addressing delays is expanded monitoring of how long it is taking to process cases. The Board has a database for recording the information gathered for an applicant's request for a good cause exception. However, the

Board should take two steps to make this database more effective to help monitor cases:

- **Database should be enhanced**—Although the database includes numerous fields to capture information about the case, it does not have fields to identify all dates in the decision process. For example, the database shows when a hearing is scheduled, but it does not show the relevant dates if the hearing was rescheduled or was not conducted, nor does it show whether the case was heard by OAH or by the Executive Director, or relevant dates to track cases sent to OAH. The database should be modified to include such fields in order to provide the Board with better information about the status of individual cases. The Board has discussed the need for enhancing the database and authorized monies for this purpose in August 2006. 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.
- **Board should expand monitoring**—Even though the database does not contain all timeliness information, expanded monitoring of a case’s progress through the good cause exception process could have shown that some cases had not been decided several months after the scheduled hearing date. While the Board receives aggregated information related to timeliness, such as the average number of days to dispose cases and the percentage of applications heard within 60 days of expedited review, these reports do not provide information on how long cases were waiting beyond 60 days. The Board should improve its oversight of program operations by requiring that its staff provide it with regular reports on how long beyond the 60 days cases have been waiting. For example, such reports could show the number of cases beyond 90 days, 180 days, and so on.

Examples of dates in Board’s database:

- DPS denial or suspension,
- Request for a good cause exception,
- Application sent and received,
- Investigator review,
- Expedited review,
- Hearing, and
- Board decision.

Board should have time frames for its processing steps

A final step that would help place emphasis on timeliness is to establish formal processing time frames for good cause exceptions. The Board’s 150-day goal does not exist in statute or policy. Many Arizona agencies, boards, and commissions have processing time frames that are established in statute—something the Legislature should consider in this instance as well. If the Legislature decides not to act in this regard, the Board should establish time frames in policy.

Auditors' review of other agencies, boards, and commissions in the State showed that many had processing time frames specified in statute. Specifically:

- A review of statutes and rules found several Arizona state agencies, boards, or commissions that either conduct their own hearings or use OAH and have timeliness standards prescribed in statute. These timeliness standards apply to disciplinary hearings held by these agencies, boards, or commissions, or by OAH on their behalf. Fourteen of these entities, including OAH, had time frames in statute for holding a disciplinary hearing. The time frame for holding such a hearing ranged from 10 to 180 days from the initiation of the hearing process, with the majority of entities having a deadline of 60 days to hold a disciplinary hearing. Auditors also identified 12 Arizona state entities that had time frames in statute for making a decision after the disciplinary hearing date, including some of the same entities that have time frames for holding a hearing. The time range for making a decision was from 5 days to 120 days from the hearing date with a median time frame of 45 days. (See Appendix A, pages a-iii through a-v for the entities and time frames.)
- OAH has statutory requirements that set strict criteria for timeliness. OAH is the Arizona state agency whose purpose is to conduct hearings for state agencies that are supported by the General Fund or who do not have an internal hearing process and have an agreement with OAH. By statute, OAH has 60 days in which to hold a hearing and 20 days after the hearing to render a decision or recommendation and send it to the appropriate agency.

The Legislature should consider amending A.R.S. §41-619.55 to establish time frames for the good cause exception decision process. Although these other entities' specific time frames apply to different processes than those of the Board and therefore these specific time frames may not be appropriate for the Board, establishing statutory time frames would bring requirements for the Board into a framework similar to what exists for many other state agencies, boards, or commissions. If the Legislature decides not to do so, however, the Board should establish its own time frames in policy. These time frames should include the time to hold a hearing from expedited review and for issuing a final decision from the date of a hearing.

Recommendations:

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.
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.
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.
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.

FINDING 2

Board needs to improve management and oversight of decisions

The Board needs to take several steps to improve its management and oversight of good cause exception decisions. The board members believe it is their responsibility to make the final decision on all applications brought before them. However, auditors identified a number of cases in which the case was closed without any record that the Board made a final decision about it. The Board needs to establish better management control over these decisions. Keeping minutes of its meetings, which the Board started to do in January 2007, should also help keep track of decisions.

Board believes it is responsible for final decisions

Board members believe it is their responsibility to make final decisions on cases that come to the Board, except for those cases that are referred to OAH. For those cases, the interagency agreement between the Board and OAH requires OAH's administrative law judge (ALJ) to render the final decision. The Board closes the case without reviewing the facts, findings, and conclusions reached by the ALJ. However, the Board uses its Executive Director as its hearing officer in most cases. When the Executive Director conducts the hearings, he offers recommendations for the Board to consider and then render the final decision. The Board's chair and the Executive Director report that the Board's Attorney General representative advised them that the Board should make the final decisions.

Some decisions issued without final board review

Because the Board lacks adequate mechanisms to track its decisions, some cases heard by the Executive Director have had decisions issued without the Board's review. Auditors discovered several cases where a fingerprint clearance card had

Auditors found 22 cases where the Executive Director requested that DPS issue a card, but there are no records of a board decision.

been issued or denied but there was no documentation that the Board had made decisions on whether to grant or deny the good cause exceptions. Specifically, auditors found 22 cases where DPS archives contained a letter signed by the Executive Director requesting that DPS issue a card but the Board's files did not include any record of a decision by the Board.¹ To verify that these cases were decided without the Board's review, auditors checked DPS' records, audio tapes of board decisions, and hard copy and electronic files. All of these efforts confirmed that the decisions to grant or deny good cause exceptions had been made without the Board's review. Although the Board generally agrees with the recommendations provided by the Executive Director, these cases show that the Board is not always making the decisions as it intends to do.

For example, fingerprint clearance cards were issued without the Board's final review in the following cases heard by the Executive Director:

- In March 2005, DPS denied an applicant a card needed to obtain a teaching certificate. He applied for a good cause exception, and the Executive Director conducted a hearing on September 20, 2005. Although the Board's database indicates a card was approved for this applicant on December 16, 2005, the case file does not show any record of a recommendation from the Executive Director or a final decision by the Board. However, the case file contains a phone message from the applicant dated March 3, 2006, stating that he would like either a letter regarding the Board's decision or a card. DPS verified that it issued the applicant a card on March 10, 2006.
- In February 2005, DPS denied a fingerprint clearance card to another applicant who needed a card to work in the field of Marriage and Family Therapy as required by statute for people who work in programs that provide children's behavioral health services that are licensed by the Department of Health Services. He applied for a good cause exception, a hearing was scheduled for July 12, 2005, and the Executive Director heard his case. According to the Board's database, a card was approved for him on August 12, 2005. DPS verified that it issued a card to the applicant on September 19, 2005. However, the audio recording of the Board's meeting on August 12 does not mention this applicant, and the appeal was not included with others e-mailed to the Board's Chair for review for that date.

¹ Auditors found 33 cases—30 approvals and 3 denials—where the Board's database showed the cases were decided, but the Board's files did not include any record of a decision. Thirteen cases were obtained from the original sample of 50 cases pulled from a total of 186 cases identified as having had a hearing but no final decision. The additional 20 cases were found during other audit work. DPS reported it had issued cards in 28 of the 30 cases where the database indicated approval, and provided access to its archive files for 22 of the cases, all of which contained a letter signed by the Board's Executive Director requesting that DPS issue a fingerprint clearance card.

The Executive Director stated that he did not remember specific cases and could not explain why fingerprint cards were issued to applicants when there was no documentation of board review. However, he said he would most likely have relied on the database and sent a letter requesting card issuance to DPS without verifying whether the Board had actually made the decision to grant a good cause exception.

Board should implement management controls

The Board should develop and implement management controls to prevent fingerprint clearance cards from being issued without its final review. Effective controls over program operations include policies and procedures to provide reasonable assurance that program goals and objectives are met, and to provide accountability for an agency's actions.¹ For example, the Board could require staff to develop and submit reports on good cause exception cases sent to hearing, and the Board could use the reports to monitor case progress and disposition and to provide direction to staff. Other Arizona boards, such as the Arizona Board of Osteopathic Examiners in Medicine and Surgery and the Arizona Board of Chiropractic Examiners, use such reports to track their actions.² The Board could also require staff to reconcile closed cases with DPS to verify that cards were issued or not issued in accordance with the Board's decisions.

Further, better recordkeeping in the form of meeting minutes, which the Board has initiated as of January 2007, will help the Board ensure that it can track its decisions. Although the Board is exempt from Arizona's Open Meeting Laws, which require that other boards keep minutes of their actions, better records of the Board's decisions would improve management and oversight of operations. Although the Board previously maintained audio recordings of its hearing decisions, it stopped this practice for about 1 year. However, according to the Executive Director, it restarted this practice in September 2006. In addition, the Board has begun keeping detailed records of its decisions on whether to send applicants to a hearing and whether to grant good cause exceptions. The Board should continue to maintain records of all meetings, whether audio recordings or written minutes, to accurately reflect its decisions and actions.

¹ United States Government Accountability Office. *Standards for Internal Control in the Federal Government*. Washington, D.C.: USGAO, 1999.

² Auditors contacted the Arizona Board of Appraisal, the Arizona Board of Chiropractic Examiners, the Arizona Board of Funeral Directors and Embalmers, the Arizona Board of Osteopathic Examiners in Medicine and Surgery, the Arizona Board of Psychologist Examiners, the State of Arizona Naturopathic Physicians Board of Medical Examiners, and the Arizona State Board of Massage Therapy to determine their practices for monitoring and tracking applications. These boards were selected because they have a similar staff size as the Board of Fingerprinting.

Recommendations:

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 provide direction to staff; and
 - b. Conducting regular reconciliations with DPS to verify that applicants have been appropriately approved or denied a fingerprint clearance card.
2. The Board should continue to keep records of the meetings in which it determines good cause exceptions.

FINDING 3

Board needs to ensure decisions comply with statute

The Board has inappropriately decided some cases and has also inappropriately requested certain information for possible consideration in reaching its decisions. Auditors identified two cases in which the Board did not apply statutory criteria correctly when the applicant had no convictions and was not awaiting trial for a precluding offense. Further, the Board requires all applicants to report any contact with Child Protective Services (CPS), as well as information about revocation or suspension of a professional license/certification, on its application although statute does not authorize it to use this information in all cases. The Board should modify its application to require this information only when the applicant has been convicted of a precluding offense and the information relates to the type of offense the applicant was convicted of.

Board inappropriately denied good cause exceptions to two applicants with no precluding offenses

The Board has inappropriately handled at least two applications for good cause exceptions where the applicant appears to have had no conviction of a precluding offense and was not awaiting trial. This type of case comes to the Board when DPS cannot determine the disposition of a charge for a precluding offense in an applicant's criminal history within 30 business days of receiving the applicant's criminal history information. In such cases, DPS must deny the card. The applicant can apply to the Board for a good cause exception, which the Board may grant if the applicant submits evidence regarding the charge's disposition.

Statute specifies how the Board should handle applications and identifies two different situations where the Board can grant a good cause exception. A.R.S. §41-619.55(E) says the Board may grant a good cause exception if (1) the applicant shows to the Board's satisfaction that the applicant is not awaiting trial on, or has not

DPS must deny a card if it cannot determine the disposition of a charge within 30 business days.

been convicted of, any precluding offenses or (2) if the applicant is successfully rehabilitated and not a recidivist. A person without a conviction has no need of rehabilitation, and only a convicted person has the potential of being a recidivist. Therefore, the Board should grant a good cause exception when an applicant shows he/she has no conviction of and is not awaiting trial for a precluding offense.

Auditors identified two cases out of 40 reviewed where applicants appeared to have had no convictions for a precluding offense and were not awaiting trial, but the Board denied a good cause exception.¹ In both cases, the Executive Director, acting as the Board's hearing officer, found there was credible evidence that the applicant had not been convicted and was not awaiting trial for any precluding offenses and recommended that a good cause exception be granted. However, the Board rejected these recommendations. Specifically:

- One applicant was denied a card in May 2004 because DPS could not determine the disposition of a January 2002 arrest for possession, use, or sale of marijuana or narcotic drugs. The Executive Director recommended granting a good cause exception because the police report indicated that the prosecutor was not going to seek charges. However, the Board decided that it had valid grounds for denying the good cause exception because the arrest was only 2 years old and because the Board believed the applicant was guilty of a crime based on the arrest report and the applicant's testimony.
- Another applicant was denied a card in February 2005 because DPS could not determine the disposition of a May 1995 arrest for criminal trespass. The Executive Director found that the applicant credibly testified that the 1995 charges were dropped. In addition, DPS had determined that other charges from 2003 were dismissed. The Executive Director recommended granting this applicant a good cause exception because she was not convicted of a precluding offense and was not awaiting trial. However, the Board decided that it had valid grounds for denying the good cause exception because the most recent arrest was only 2 years old and the charges were of a serious nature.

The Board did not follow the statute in denying good cause exceptions in these two cases. In the first case, the Board based its decision on evidence in the criminal record even though the prosecutor had chosen not to pursue charges. In the second case, the Board's decision was based on an arrest where DPS had already determined that the charges had been dropped. In each case, the Board concluded that according to "A.R.S. §41-619.55(E) and A.A.C. R13-11-108, the appellant is responsible for showing successful rehabilitation and that he (she) is not a recidivist." However, there is no such requirement in the law. Because both applicants had not been convicted of a precluding offense and were not awaiting trial, they did not have to show successful rehabilitation or that they were not recidivists. The Board should follow statute in approving or denying good cause exceptions.

The Board's Executive Director recommended good cause exceptions in two cases, but the Board inappropriately denied the exceptions.

The Board based two denials on applicants' need to show rehabilitation although they had not been convicted and were not awaiting trial.

• 1 These cases were identified from a random sample of 40 closed cases heard by the Executive Director in fiscal years 2005 and 2006.

Board inappropriately asks for some information

The Board inappropriately collects information from good cause exception applicants about their contact with CPS and revocation or suspension of a professional license or certification. In its application form, the Board asks all applicants to report and explain any type of contact they have had with CPS or a similar agency in another state. The application also asks whether a professional license or certification has ever been suspended or revoked. In several cases auditors reviewed, applicants responded to the broadly worded application question about CPS by submitting information about their contact with CPS.

However, statutes do not authorize the Board to consider CPS contact information or professional licensure/certification information in all cases, or to obtain information from CPS about good cause exception applicants. 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. . . .'"¹ Consequently, the Board should not require, through its application process, that all applicants provide information that the Board, by statute, has no right to obtain from all applicants. Further, the Legislature, in the statutes related to CPS, restricts access to CPS records, and has not granted the Board authority to obtain them. If the Legislature wished to grant the Board direct access to CPS' records, it could have done so.

For applicants whose records do not show whether they were convicted of a precluding offense, the Board should use only the information necessary to determine whether the applicant has met the burden of showing that the applicant is not awaiting trial or has not been convicted. If DPS determines a person has not been convicted of a precluding offense, it is required to issue a fingerprint clearance card without obtaining information about CPS contact or professional licensure/certification revocation or suspension. Therefore, if the Board obtains this information from applicants who were denied a card because DPS could not determine the disposition of an offense, it is treating applicants without convictions differently than they would be treated by DPS. Auditors acknowledge that the Board also obtains other information not available to DPS in making its decisions, including court documents relating to nonprecluding offenses and written statements about all arrests. However, unlike CPS records and professional licensure/certification information, this other information pertains to applicants' criminal records, which statute authorizes the Board to consider.

Statutes do not authorize the Board to obtain or consider CPS contact or professional licensure/certification information in all cases.

¹ *Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488, 80 P.3d 765, 767 (Ariz. 2003).

One of the reasons stated in A.R.S. §41-619.55(E) for when the Board may grant a good cause exception is when it decides a person is successfully rehabilitated, and the statute lists several factors the Board should include in its considerations when deciding whether an applicant is rehabilitated:

- Completion of probation, parole, or community supervision;
- Whether the person paid restitution or other compensation for the offense;
- Evidence of positive action to change criminal behavior, such as completion of a drug treatment program or counseling; and
- Personal references attesting to the person's rehabilitation.

The statute does not exclude other factors, and the Board can consider any information relevant to an applicant's rehabilitation. However, the information needs to be relevant to a conviction for a precluding offense. CPS information is only relevant to whether an applicant is rehabilitated after being convicted of certain offenses. For example, if an applicant has been convicted of child neglect or felony offenses involving contributing to the delinquency of a minor, information about subsequent CPS contact, if any, would be relevant to determining whether the applicant had been rehabilitated from those crimes. In contrast, if the applicant had been convicted of non-child-related crimes such as shoplifting, theft, arson, or drug possession, information about subsequent CPS contact would be just as irrelevant to determining if the applicant had been rehabilitated from those crimes as asking for an applicant's credit record, which the Board does not do. People convicted of most child-related offenses, such as child abuse, sexual abuse of a minor, sexual exploitation of a minor, and dangerous crimes against children, cannot apply to the Board for a good cause exception.

The Board should modify its application form. First, it should only ask about CPS contact or professional license/certification suspension or revocation if the applicant was convicted of a precluding offense. Second, it should only ask for information about CPS contact or professional license/certification suspension or revocation from an applicant when the CPS contact or professional license/certification suspension or revocation relates to the type of offense the applicant was convicted of. In doing so, the Board could help guide the applicants in determining whether they need to respond to the question by providing some examples of offenses where CPS information would be relevant, and asking only those applicants who have been convicted of those types of crimes to provide information on any substantiated CPS reports against them. Finally, it should only ask about substantiated CPS reports, not all CPS contacts.

Recommendations:

1. The Board needs to ensure that it follows statute when granting or denying good cause exceptions.
2. The Board should modify its application form regarding 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; and
 - c. Ask about substantiated CPS reports, not all CPS contact.

SUNSET FACTORS

In accordance with A.R.S. §41-2954, the Arizona Legislature should consider the following 12 factors in determining whether the Board of Fingerprinting (Board) should be continued or terminated.

1. The objective and purpose in establishing the Board.

The Board was established in 1999 under A.R.S. §41-619.52 to conduct good cause exception hearings for people who require a fingerprint clearance card. The Board was created as part of an effort to consolidate the fingerprint clearance function that had previously been conducted by five separate state agencies. Unlike boards that are appointed by the Governor or the Legislature, the board members are appointed by their respective agencies. The Chief Justice of the Supreme Court and the directors of the Departments of Economic Security, Education, Health Services, and Juvenile Corrections each appoint one board member and may appoint an alternate member. Board members serve at the pleasure of the appointing authority and have no specified term.

The Board is responsible for hearing appeals by applicants who were denied a card or whose card was suspended by the Department of Public Safety (DPS). DPS is supposed to deny applications for fingerprint clearance cards when an applicant is subject to registration as a sex offender, has a conviction for or is awaiting trial for a precluding offense, or when DPS cannot determine the disposition of an arrest for a precluding offense within 30 business days after receiving the applicant's criminal records. Precluding offenses are specified in statute, and denials based on conviction of some offenses, such as murder, sexual assault, and child abuse, are final. However, applicants can apply to the Board for a good cause exception for denials that are based on some other offenses, including assault, theft, shoplifting, fraud, possession of narcotics, child neglect, and domestic violence, or when DPS was unable to determine the disposition of an arrest. Once the Board receives a good cause exception application, it must determine whether the applicant is awaiting trial or has been convicted of the offenses listed in statute, or if the applicant is successfully rehabilitated and not a recidivist, and then deny or grant a good cause exception.¹

¹ In addition to board decisions to deny or grant a good cause exception, some cases are withdrawn by the applicant or are administratively closed because the applicant did not respond to requests for further information or because DPS was able to issue a card.

2. The effectiveness with which the Board has met its objectives and purpose and the efficiency with which it has operated.

The Board has generally been effective and met its purpose of determining good cause exceptions for people denied a fingerprint clearance card by DPS, but should improve timeliness and ensure decisions are not made without the Board's final review. The Board reviews applications for good cause exception through an expedited review process and either approves the application or refers the application to a hearing, after which the Board will approve or deny the application. According to the Board's data, in fiscal year 2006, the Board closed 1,769 cases, granting 1,148 good cause exceptions through either hearings or an expedited review process and denying 160.

In addition, the Board has been timely in making many of its decisions. Specifically, in its expedited review process, the Board made decisions in an average of only 13½ days from receiving a complete application, based on a random sample of 20 closed cases from fiscal year 2006. According to the Board's data, the Board granted 844 good cause exceptions through expedited review in fiscal year 2006.

However, this audit found that the Board can improve timeliness of deciding cases that require a hearing. Auditors' review found a delay is occurring in getting hearing recommendations to the Board for a final decision. In a review of a sample of 31 cases that had a hearing at least 3 months earlier but had no decision, auditors found that in these 31 cases, applicants had waited from 146 to 376 days after the hearing as of August 14, 2006, and still did not have the Board's decision. Further, those applications that had received final decisions appeared to be taking longer in 2006 than in 2005. Auditors reviewed a sample of 20 closed cases per year from fiscal years 2005 and 2006. In fiscal year 2005, only 1 application was decided in over 150 days—the other 19 were all decided within 120 days, well within the Board's 150-day goal for issuing a final decision. However, in fiscal year 2006, there were 5 applications decided outside the 150-day goal, and even the cases that met the goal took longer to decide than the cases auditors reviewed from fiscal year 2005 (see Finding 1, pages 9 through 15).

In addition, the Board needs to take several steps to improve its management and oversight of appeal decisions. Because the Board lacked adequate mechanisms to track its decisions, some cases heard by the Executive Director have had decisions issued without board review. Auditors discovered several cases where a card had been issued or denied but the Board had never made a final decision to grant or deny the good cause exception. Specifically, auditors found 22 cases where DPS' archives contained a letter signed by the Executive Director requesting that DPS issue a card, but the Board's files did not include any record of a decision by the Board (see Finding 2, pages 17 through 20).

3. The extent to which the Board has operated within the public interest.

The Board has generally operated in the public interest in providing an appeals process for people who have been denied a fingerprint clearance card required for employment, but should take additional steps in this regard. The Board has developed a Web site to provide information on how to apply for a good cause exception. This Web site contains information about the application process, copies of some forms that applicants may use, and frequently asked questions to help answer some of the more common issues that arise when appealing a case to the Board.

However, this audit found that the Board inappropriately denied good cause exceptions to two people who had no precluding offense and were not awaiting trial. This means that at least two people who should otherwise be granted clearance to work in specific jobs requiring a fingerprint clearance card were not allowed to hold such positions. The Board has also collected information not authorized by statute—specifically, information regarding all applicants' contact with CPS and information about revocation or suspension of a professional license/certification. The Board should only ask for information regarding substantiated CPS reports and license/certification suspension or revocation from applicants who were convicted of a precluding offense and when it relates to the type of offense an applicant was convicted of (see Finding 3, pages 21 through 25).

4. The extent to which the rules adopted by the Board are consistent with the legislative mandate.

The Board has taken steps to align its rules with its statutes, but according to the staff of the Governor's Regulatory Review Council (GRRRC), the Board has not promulgated all rules required by statute. Specifically, the Board has not promulgated rules regarding issuing interim work approval under A.R.S. §41-619.55(l). Interim work approval allows the Board to give a person permission to keep working in his or her position that requires a fingerprint clearance card until the Board makes a decision on whether or not to grant a good cause exception. According to board members, the Board has not used interim work approval very much because it can quickly grant good cause exceptions through the expedited review process. However, auditors found timeliness problems for some cases that go to a hearing.

5. The extent to which the Board has encouraged input from the public before adopting its rules and the extent to which it has informed the public as to its actions and their expected impact on the public.

The Board is exempt from the rule-making requirements of Arizona Revised Statutes Title 41, Chapter 6. However, the Board has filed notices with the Secretary of State and allowed public comment on its proposed rules.

6. The extent to which the Board has been able to investigate and resolve complaints that are within its jurisdiction.

This factor does not apply because the Board has no statutory authority to investigate and resolve complaints.

7. The extent to which the Attorney General or any other applicable agency of state government has the authority to prosecute actions under enabling legislation.

This factor does not apply because the Board's enabling legislation does not establish any authority that would require prosecuting actions.

8. The extent to which the Board has addressed deficiencies in the enabling statutes, which prevent it from fulfilling its statutory mandate.

The Board successfully sought legislative changes in 2003 to address some of the root causes of a backlog of unheard good cause exception applications. The Legislature enacted Laws 2003, Chapter 214, which authorized the use of hearing officers, required the Board to establish fees, and authorized the Board to employ personnel subject to fee monies instead of appropriated monies, among numerous other changes related to fingerprint clearance requirements for several agencies.

In the 2007 legislative session, the Legislature is considering Senate Bill 1045, which would make changes to the lists of precluding offenses in A.R.S. §41-1758.03. These changes would:

- Add seven crimes to those listed in A.R.S. §41-1758.03(B) as not appealable. These crimes include sex trafficking, luring a minor for sexual purposes, and sexual abuse.
- Add 12 crimes to the appealable offenses in A.R.S. §41-1758.03(C). These crimes include negligent homicide, identity theft, prostitution, and welfare fraud.

The Legislature is also considering an amendment to the bill that would move some crimes from the list of appealable offenses to the list of nonappealable offenses.

Senate Bill 1045 would also make a change to A.R.S. §41-619.53(A)(1) that would make appointing a hearing officer to determine good cause exceptions optional rather than requiring it to appoint a hearing officer.

9. The extent to which changes are necessary in the laws of the Board to adequately comply with the factors in the sunset laws.

The audit found that the Legislature should consider revising A.R.S. §41-619.55 to establish time frames in which the Board should hold hearings and render decisions, similar to statutory time frames established for other state agencies, boards, and commissions (see Finding 1, pages 9 through 15).

The Board's specific responsibility with regard to making final decisions may need clarification. A.R.S. §41-619.53 states that the Board shall appoint a hearing officer to determine good cause exceptions. However, the Board's Chair and the Executive Director report that the Board's Attorney General representative advised them that the Board should make the final decisions. The Legislature may wish to consider revising A.R.S. §41-619.53 to clarify who has the authority to render final decisions.

10. The extent to which the termination of the Board would significantly harm the public health, safety, or welfare.

Terminating the Board would not significantly harm the public health, safety, or welfare, although it might result in fewer people getting fingerprint clearance cards. Without the Board, the process would end with DPS' denial of an application. Unless the Legislature took action, there would then be no process for applying for a good cause exception.

11. The extent to which the level of regulation exercised by the Board is appropriate and whether less or more stringent levels of regulation would be appropriate.

This factor does not apply because the Board has no regulatory authority.

12. The extent to which the Board has used private contractors in the performance of its duties and how effective use of private contractors could be accomplished.

The Board uses private contractors to provide information technology-related services and some interpreting services. In addition, the Board has an interagency service agreement with the Office of Administrative Hearings (OAH) to conduct hearings. This audit did not identify any ways in which private contractors could be used more effectively, but it did find that if the Board continues to have timeliness problems in making good cause exception decisions, it should consider modifying its agreement with OAH so that the Board and not the administrative law judge makes the final decisions, and then the Board should make greater use of OAH.

APPENDIX

Table 3: Examples of Time Frames for Holding Hearings
Established in Statutes or Rules for Arizona Entities¹
As of August 2006

Arizona State Agency, Board, or Commission	Type of Hearing	Days to Hearing	A.R.S. or AAC Reference
Board of Behavioral Health Examiners	Summary suspension of license	60	32-3281
Board of Chiropractic Examiners	Summary suspension of license	60	32-924
	Suspension or revocation of license	180	32-924
Board of Funeral Directors and Embalmers	Cease and desist order for conducting funeral or embalming services	30	32-1369
Board of Homeopathic Medical Examiners	Summary suspension of license	60	32-2934
Board of Massage Therapy	Summary suspension of license	60	32-4254
Board of Pharmacy	Summary suspension of license	10	32-1927.02
Board of Podiatry Examiners	Summary suspension of license	60	32-852.01
Board of Psychologist Examiners	Summary suspension of license	60	32-2081
Board of Respiratory Care Examiners	Summary suspension of license	60	32-3553
Medical Board	Summary suspension of license	60	32-1451
Office of Administrative Hearings	Appealable agency action	60	41-1092.05
State Personnel Board	Disciplinary action appeal	30	R2-5.1-103
Regulatory Board of Physician Assistants	Summary suspension of license	60	32-2551
Veterinary Medical Examining Board	Summary suspension of license	60	32-2234

¹ The specific time frames that apply to these entities apply to different processes than those of the Board, and therefore these specific time frames may not be appropriate for the Board.

Source: Auditor General staff analysis of Arizona Revised Statutes and Arizona Administrative Code for agencies, boards, and commissions whose role is related to licensure or certification.

Table 4: Examples of Time Frames for Issuing Decisions
Established in Statutes or Rules for Arizona Entities¹
As of August 2006

Arizona State Agency, Board, or Commission	Type of Decision	Days to Decision	A.R.S. or AAC Reference
Board of Funeral Directors and Embalmers	Complaint	60	R4-12-125
State Board of Optometry	Licensee violation	20	32-1744
Board of Regents	Complaint regarding competition with private enterprises	30	41-2753
Cotton Research and Protection Council	Proposed districts	30	48-1305
	Assessments and fees liability	5	48-1309
Department of Racing and Racing Commission	Appeal of stewards' rulings and appeal of director's ruling	45	R19-2-123 and R19-2-124
Department of Revenue	Taxpayer liability	90	42-2063
Department of Water Resources	Water permits and certificates	60	45-114
Industrial Commission	Employer violation	30	23-421
Office of Administrative Hearings	Final administration decisions	20	41-1092.08
Psychiatric Security Review Board	Determine if secure state mental health facility patient is eligible for release or conditional release	15	31-502
State Land Department Board of Appeals	Investigation, classification, and appraisal of state land	60	37-215
Veterinary Medical Examining Board	Summary suspension of license	60	R3-11-903

¹ The specific time frames that apply to these entities apply to different processes than those of the Board, and therefore these specific time frames may not be appropriate for the Board.

Source: Auditor General staff analysis of Arizona Revised Statutes and Arizona Administrative Code for agencies, boards, and commissions whose role is related to licensure or certification.

AGENCY RESPONSE

Mike LeHew
Chair
Kim Pipersburgh
Vice Chair



Janet Napolitano
Governor
Dennis Seavers
Executive Director

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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.*

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

ARIZONA BOARD OF FINGERPRINTING

Agency Response to Audit Report

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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).

Performance Audit Division reports issued within the last 24 months

05-02	Department of Administration— Financial Services Division	05-15	Department of Revenue— Business Reengineering/ Integrated Tax System
05-03	Government Information Technology Agency (GITA) & Information Technology Authorization Committee (ITAC)	05-16	Department of Revenue Sunset Factors
05-04	Department of Economic Security—Information Security	06-01	Governor’s Regulatory Review Council
05-05	Department of Economic Security—Service Integration Initiative	06-02	Arizona Health Care Cost Containment System— Healthcare Group Program
05-06	Department of Revenue—Audit Division	06-03	Pinal County Transportation Excise Tax
05-07	Department of Economic Security—Division of Developmental Disabilities	06-04	Arizona Department of Education—Accountability Programs
05-08	Department of Economic Security—Sunset Factors	06-05	Arizona Department of Transportation—Aspects of Construction Management
05-09	Arizona State Retirement System	06-06	Arizona Department of Education—Administration and Allocation of Funds
05-10	Foster Care Review Board	06-07	Arizona Department of Education—Information Management
05-11	Department of Administration— Information Services Division and Telecommunications Program Office	06-08	Arizona Supreme Court, Administrative Office of the Courts—Information Technology and FARE Program
05-12	Department of Administration— Human Resources Division	06-09	Department of Health Services—Behavioral Health Services for Adults with Serious Mental Illness in Maricopa County
05-13	Department of Administration— Sunset Factors		
05-14	Department of Revenue— Collections Division		

Future Performance Audit Division reports

Department of Racing and Racing Commission

Arizona Department of Transportation—Highway Maintenance