Further, the retirement boards do not gain any measure of investment control from 1965 PA 314; MCLA 38.1121 *et seq;* MSA 3.981(101) *et seq.* OAG, 1965-1966, No 4496, p 288 (May 23, 1966) concluded that 1965 PA 314, *supra,* merely granted supplementary investment authority to the governmental entity already expressly charged with the investment duties for the funds of a retirement system.

No fiduciary relationship and, hence, no liability, exists when there has been no reposing of confidence and trust, and no reliance is placed upon the judgment of another. *Potter* v *Chamberlin, supra.* As shown above, the legislature has not vested these retirement boards with any authority to invest the funds of their respective retirement systems. Nor do they have any power to review the investment of those funds.

It is noted that 1965 PA 380, § 91, *supra,* requires the state treasurer to report all investment transactions for each of these retirement systems to their respective boards at least every 3 months. Those informational reports, of course, do not impose any sort of derivative liability on these retirement boards.

It is, therefore, my opinion that the State Employees' Retirement Board, *supra,* the Public School Employees' Retirement Board, *supra,* the Judges' Retirement Board, *supra,* and the Probate Judges' Retirement Board, *supra,* have no fiduciary financial obligation or liability with regard to the investment of funds of their respective retirement systems.

FRANK J. KELLEY,
Attorney General.

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BOARD OF OSTEOPATHIC REGISTRATION AND EXAMINATION: Fingerprints.

Board of Osteopathic Registration and Examination has authority to adopt a rule requiring that applicants for licensure and applicants for annual renewal of licensure be fingerprinted.

Opinion No. 4848 January 20, 1975.

Roy G. Bubeck, Jr., D.O., Exec. Sec'y
Board of Osteopathic Registration and Examination
1116 South Washington Avenue
Lansing, Michigan 48926

This is in response to your request for my opinion on the legality of requiring fingerprints of all applicants for licensure and applicants for annual renewal of licensure under the osteopathic act, 1903 PA 162; MCLA 338.101 *et seq;* MSA 14.571 *et seq.*

A review of the osteopathic statute, *supra,* fails to reflect specific statutory authorization for the Board of Osteopathic Registration and Examination, hereinafter referred to as "Board," to require licensees and applicants to submit to fingerprinting. A determination must therefore

be made whether such authority may be implied and, if so, whether such a requirement would be an unconstitutional invasion of privacy violative of the First, Fourth and Fourteenth Amendments to the U. S. Constitution.

The legislature has delegated to the Osteopathic Board the authority to promulgate rules as follows:

> "Sec. 1c. (3) The board may promulgate rules to carry out this act pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws."

The osteopathic act, *supra*, further authorizes as follows:

> "Sec. 2. (1) A person, before engaging in the practice of osteopathic medicine and surgery, shall, upon the payment of a fee of $50.00, make application for a license to practice osteopathic medicine and surgery to the board on a form prescribed by the board, giving all of the following information:
>
> "* * *
>
> "(c) The date of his diploma, and evidence that the diploma was granted on personal attendance and completion of a course of study approved by the board, and such other information as the board may require.
>
> "* * *
>
> "(2) If the facts thus set forth, and to which the applicant shall be required to make affidavit, meet the requirement of the board, and demonstrate the applicant's fitness for licensure as promulgated in its rules, then the board shall require the applicant to submit to an examination as to his qualifications for the practice of osteopathic medicine and surgery, . . ."
>
> "Sec. 9. -(1) The board may revoke or suspend a license under this act for a limited period or place on probation or reprimand a licensee, or refuse to register or reinstate a licensee for any of the following causes:
>
> "(a) The conviction of any felony, or conviction of a misdemeanor involving conduct bearing upon his fitness to practice osteopathic medicine and surgery, . . .
>
> "* * *
>
> "(d) For unprofessional conduct . . ."

From these provisions it is my opinion that a rule requiring applicants and licensees to file their fingerprints with the Board may be justified on the basis that the requirement is for the purpose of carrying out the general provisions of the act, as cited above, as intended by the legislature. Filing of fingerprints will assist the Board in discovering those licensees and applicants who have been convicted of a felony or a misdemeanor involving conduct bearing upon their fitness to practice osteopathic medicine and surgery. The public interest, safety and welfare of the citizens of the State of Michigan must be considered in support of this regulation, for it is the legislature's and Board's proper concern that only those osteopathic

physicians of good character, competence and integrity should be permitted to practice osteopathy in the State of Michigan. The means of achieving this are provided for in the rule-making provisions of section 1c(3) of the osteopathic act, *supra.*

A case supporting this view is *Coffman* v *State Board of Examiners in Optometry*, 331 Mich 582; 50 NW2d 322 (1951). In this case the court recognized that an administrative agency may not, under the guise of its rule-making power, abridge or enlarge its authority or exceed the powers given to it by the statute conferring the power to make rules. However, the court recognized and held that the authority given a board or commission should be liberally construed in light of the legislative purposes for which it was created. The court, in determining whether a board has a particular power, stated that whatever is incidentally necessary to a full exposition of the legislative intent should be upheld as being germane to the law. In *Coffman* the court cited *Salowitz* v *State Board of Registration in Medicine,* 285 Mich 214; 280 NW 737 (1938), as follows:

> " 'In exercising supervision over the health of several millions broad discretionary powers must necessarily be granted, and it is only when that discretion is abused that the courts will interfere.' " (p 589)

Another Michigan case, *City Smoked Fish Co* v *Department of Agriculture,* 47 Mich App 125, 132; 209 NW2d 267, 271 (1973), held that if a rational basis exists for a public health regulation, it cannot be characterized as arbitrary.

A case directly in point is *Hamilton* v *New Jersey Real Estate Comm,* 117 NJ Super 345; 284 A2d 564 (1971). In this case a suit challenged the validity of the real estate commission's regulation requiring all applicants for salesman, broker-salesman or broker licenses, as well as present holders of licenses, to be fingerprinted. As in the situation at hand, there was no specific statute empowering the commission to take fingerprints. But it did have sections similar to the osteopathic act regarding the issuing and revocation of licenses as to convictions and fitness for licensure. The Superior Court, Appellate Division, upheld the fingerprint regulation, holding that the authority to require fingerprints was within the intent of the legislature in its delegation to the real estate commission of the authority to license proper applicants. The court stated that the delegated authority to the commission should be liberally construed so as to permit the fullest accomplishment of the legislative intent in protecting the public welfare.

It is readily apparent from these decisions that the requirement for fingerprinting is within the rule-making authority granted to the Board. The legislature intended, through sections 1c(3), 2(1)(c)(2) and 9 of the act, to protect the public welfare and the Board may carry out this intent by requiring by rule fingerprints of all initial applicants for licensure and applicants for annual renewal of licensure under the osteopathic act.

If the Board has the implied authority to promulgate a rule requiring fingerprints, the second question is whether such a requirement would be an unconstitutional invasion of privacy. The right to privacy is not to be found precisely enunciated in either the Michigan or United States constitutions. However, its existence and protection have been declared in

Griswold v *Connecticut*, 381 US 479, 483; 85 S Ct 1678; 14 L Ed 2d 510 (1965). In *People* v *McDonald*, 13 Mich App 226, 235; 163 NW2d 796, 801 (1968), and *People* v *Weaver*, 35 Mich App 504; 192 NW2d 572 (1971), the court also recognized that a citizen's privacy shall be respected by the state.

But a citizen's right to privacy is not absolute. Not every intrusion by government on the privacy of the individual is protected by the Fourth Amendment. *Hamilton* v *New Jersey Real Estate Comm*, *supra*, also ruled with respect to the argument that fingerprinting is an invasion of the right of privacy. The court stated that the individual's basic claim to be alone is not an absolute one and, in upholding the fingerprint regulation, recognized that certain intrusions on the privacy of the individual may be justified in the public interest. The court stated that the intrusion on the right of privacy, if such it be, promoted by the regulation in question, was in the public interest.

In turning to your question, and in balancing the interests of the Board in protecting the public welfare and the privacy of the applicant/licensee, I find only a minimal intrusion caused on the applicant's or licensee's privacy. It cannot be said that the Board's action represents an unreasonable infringement upon one's right of privacy. Fingerprinting enables the Board to carry out the legislative intent in protecting the public's health, safety, morals and welfare. The recognition of the state's interest and needs in light of one's right to privacy were accepted in *Myricks* v *United States*, 370 F2d 901, 904 (1967).

Another case weighing the interests of the state over that of the individual is the case of *Mavity* v *Tyndall*, 224 Ind 364; 66 NE2d 755; 30 ALR3d 276 (1946). This case involved an action by one who had been arrested on and acquitted of a misdemeanor, who sought the surrender of his fingerprints. The court, balancing the private rights of the plaintiff against the public interests involved in the keeping of proper identification records, held that the police should not be compelled to surrender or destroy the fingerprints.

In *Norman* v *Las Vegas*, 64 Nev 38; 177 P2d 442; 30 ALR3d 278 (1947), a statute required all employees of retail establishments to submit to fingerprinting, with the further provision that the information so obtained should be submitted to other law enforcement agencies; that if, through the use of such information, it was determined that an employee had a previous criminal record, the information should be made available to various city officials and the employer of the person fingerprinted. The statute was upheld as a valid exercise of the police power, the court holding that the right of privacy, whether or not it originated in natural law, was not immutable and absolute but was subject to limitation in the valid exercise of the police power.

From these decisions, and in construing the purpose of the osteopathic act, it is my opinion that the Board has the authority to promulgate a rule requiring that applicants for licensure and applicants for annual renewal of licensure be fingerprinted. This opinion, of course, deals only with the

legality of imposing such a requirement and is not intended to suggest that applicants for licensure and for annual license renewal be fingerprinted.

FRANK J. KELLEY,
Attorney General.

COUNTY MEDICAL EXAMINERS: Only licensed allopathic or osteopathic physicians may serve as county medical examiners.

DEPUTY COUNTY MEDICAL EXAMINERS: In counties having a population of 50,000 or more, only licensed allopathic or osteopathic physicians may serve as deputy county medical examiners.

DEPUTY COUNTY MEDICAL EXAMINERS: In counties having a population of 50,000 or less, licensed allopathic or osteopathic physicians, dentists, registered nurses or morticians may serve as deputy county medical examiners.

DEPUTY COUNTY MEDICAL EXAMINERS: Licensed dentists, registered nurses or morticians serving as deputy county medical examiners may not certify death.

Opinion No. 4836 January 30, 1975.

Honorable Joseph S. Mack
State Senator
The Capitol
Lansing, Michigan

You have asked my opinion regarding the following issue:

"I would like to have your opinion as to who may serve as a Medical Examiner, and in particular, who may serve as a Deputy Medical Examiner."

The offices of county medical examiner and deputy county medical examiner were established by 1953 PA 181; MCLA 52.201 *et seq;* MSA 5.953(1) *et seq.* Section 1 of that act provides as follows:

"The board of supervisors of each county of this state shall by resolution abolish the office of coroner, and appoint a county medical examiner to hold office for a period of 4 years. Should the office of county medical examiner become vacant before the expiration of the term of office, the board of supervisors may appoint a successor to complete the term of office. In counties having a civil service system, the appointment and tenure of the medical examiner shall be made in accordance with the provisions thereof. *County medical examiners shall be physicians licensed to practice within the state* and shall be residents of the county for which they are appointed or of a neighboring county. Two or more adjoining counties, by resolution of the respective boards of supervisors thereof, may enter into common