

OPINION NO. 80-008**Syllabus:**

1. Pursuant to R.C. 5119.801 the Ohio Joint Mental Health and Mental Retardation Advisory and Review Commission has the authority to conduct a study or series of studies evaluating the effectiveness of the Department of Mental Health and Mental Retardation's regulation of community mental health and retardation boards, county boards of mental retardation, and the contract agencies of such boards.
2. Pursuant to R.C. 5119.801 the Ohio Joint Mental Health and Mental Retardation Advisory and Review Commission has the authority to conduct a study or series of studies focusing on the administration of services by community mental health and retardation boards, county boards of mental retardation, and contract agencies, without specifically addressing the Department of Mental Health and Mental Retardation's role in such programs, so long as the studies are in furtherance of the Commission's primary duties of monitoring state mental health and mental retardation facilities and making appropriate recommendations.
3. R.C. 5119.801 grants the Ohio Joint Mental Health and Mental Retardation Advisory and Review Commission reasonable access to the records of the Department of Mental Health and Mental Retardation. R.C. 5119.801 does not, however, grant the Commission access to the records of community mental health and retardation boards, county boards of mental retardation, or contract agencies of such boards, which are not in the custody of the Department of Mental Health and Mental Retardation.

**To: Richard D. Thomas, Director, Ohio Joint Mental Health and Mental Retardation
Advisory and Review Commission, Columbus, Ohio**

By: William J. Brown, Attorney General, February 15, 1980

I have before me your request for my opinion regarding the investigatory powers of the Ohio Joint Mental Health and Mental Retardation Advisory and Review Commission (the Commission). The Commission, as you noted in your request, was established pursuant to R.C. 5119.80, and is responsible for fulfilling the duties prescribed in R.C. 5119.801. You wish to know the extent of the powers

of the Commission, and specifically inquire: (1) whether R.C. 5119.801 authorizes the Commission to conduct a study or series of studies evaluating the effectiveness of the Department of Mental Health and Mental Retardation in monitoring and regulating community mental health and retardation boards, county boards of mental retardation, and the contract agencies of such boards; (2) whether R.C. 5119.801 authorizes the Commission to conduct a study or series of studies focusing on the administration of services of community mental health and retardation boards, county boards of mental retardation, and the contract agencies of such boards, without specifically addressing the Department of Mental Health and Mental Retardation's role in such programs; and (3) whether R.C. 5119.801 grants to the Commission the express or implied authority to examine records in the possession of community mental health and retardation boards, county boards of mental retardation, and the contract agencies of such boards. You emphasized that the Commission does not seek to review client or patient records, or other records confidential in nature as declared by statutory or common law doctrine.

The Commission consists of uncompensated members. The governor, the president of the senate, the speaker of the house of representatives, and the chief justice of the Supreme Court of Ohio may each appoint a specified number of members. R.C. 5119.80. The duties of the Commission are set forth in R.C. 5119.801, which reads as follows:

The joint mental health and mental retardation advisory and review commission shall monitor the effectiveness of patient care and treatment and the availability of services for mentally ill and mentally retarded persons at state mental health and mental retardation facilities and make appropriate recommendations for administrative, executive, and legislative actions designed to improve such care, treatment, and services, and, in furtherance of these primary duties, the commission shall:

(A) Review and assess the administration of mental health and mental retardation services and programs and submit a report of its findings at least annually to the director of mental health and mental retardation;

(B) Participate in planning or developing mental health and mental retardation plans or programs for the department of mental health and mental retardation, which plans or programs shall include provisions for community-based alternatives to institutional care, for the availability of services in the least restrictive environment consistent with the individual's needs, and for comprehensive community services for the mentally ill, mentally retarded, and developmentally disabled;

(C) Establish task forces of its members, staff, and other knowledgeable persons to:

(1) Study federally funded programs that could benefit mentally ill and mentally retarded persons, and report to the department and the general assembly any executive or legislative actions necessary to obtain federal support of state or local programs relating to mental health and mental retardation;

(2) Review and assess the administration and availability of mental health and mental retardation and developmental disabilities programs and facilities in the state.

(D) Appoint and fix the compensation of a director to serve as secretary and chief administrative officer of the commission, and a staff of professional and clerical employees, all of whom shall serve at the pleasure of the commission. The staff shall conduct in-depth inspections of all institutions under the jurisdiction of the department, examine the administration of and delivery of services at state-supported mental health and mental retardation facilities, and provide the commission with such other information and policy analysis as is necessary for the commission to carry out its duties.

(E) Appoint knowledgeable consultants, upon approval by the

controlling board, to further assist it in carrying out its duties;

(F) Receive reports and other information from the citizen's advisory boards established under section 5119.81 of the Revised Code, and receive and act upon any reports or information from other organizations that relate to mental health and mental retardation;

(G) Receive and evaluate reports of alleged dehumanizing practices and violations of individual or other legal rights by the department or by or at any institution under the control of the department. The commission shall forward those allegations that involve possible criminal activity to the state highway patrol and shall forward those allegations that involve possible violations of other legal rights to the director of mental health and mental retardation and to the legal rights service. A copy of any allegations forwarded by the commission to the state highway patrol shall be supplied to the director.

(H) Coordinate its activities with those of citizen's advisory boards, the department of mental health and mental retardation, county boards of mental retardation, and community mental health and mental retardation boards;

(I) Complete a plan for submission to the general assembly and the director of mental health and mental retardation by January 1, 1979, for phasing out as many long-term residential institutions and facilities as is possible. The plan shall list the executive, administrative, and legislative actions that must be initiated in order to implement the plan and, thereby, to transfer to community-based programs all care and treatment burdens of the department that can reasonably be transferred;

(J) Adopt rules or procedures necessary to carry out its duties.

The commission and its staff shall have reasonable access to all patient treatment and living areas and records of the department of mental health and mental retardation and the institutions under its control, except those records of a strictly personal or confidential nature. The commission shall have access to a patient's personal records with the consent of the patient or his legal guardian or if the patient is a minor, with the consent of the parent or legal guardian of the patient.

Turning to your first question, whether the Commission may do a study evaluating the efforts of the Department of Mental Health and Mental Retardation (the Department), it appears that the Commission has been given such power. The first paragraph of R.C. 5119.801 sets forth the primary duties of the Commission. Those duties are to "monitor the effectiveness of patient care and treatment and the availability of services for mentally ill and mentally retarded persons at state mental health and mental retardation facilities and make appropriate recommendations for administrative, executive, and legislative actions designed to improve such care, treatment, and services." (Emphasis added.) "Facility" is not defined for purposes of R.C. 5119.801. However, the common meaning of "facility" includes anything "that permits the easier performance of an action, course of conduct, etc." Random House Dictionary of the English Language 509 (unabridged ed. 1973). Hence, "facility" can include any program or institution of the state. In furtherance of these primary duties division (A) of R.C. 5119.801 goes on to require the Commission to "[r]eview and assess the administration of mental health and mental retardation services and programs and submit a report of its findings at least annually to the director of mental health and mental retardation." Division (B) of R.C. 5119.801 provides that the Commission shall "[p]articipate in planning or developing mental health and mental retardation plans or programs for the department of mental health and mental retardation, which plans or programs shall include. . .comprehensive community services for the mentally ill." Finally, the last paragraph permits the Commission to have access to nonconfidential records of the Department.

Thus, R.C. 5119.801 clearly permits the Commission to conduct a study or series of studies evaluating the efforts of the Department in monitoring and regulating community mental health and retardation boards established by R.C. Chapter 340 (hereinafter "community boards"), county boards of mental retardation established by R.C. Chapter 5126 (hereinafter "county boards"), and the contract agencies of such boards. In conducting such studies, the Commission may review any Department records of a nonconfidential nature.

In connection with your first question, you asked whether the Commission's studies could focus specifically on the efforts of the Department to regulate the various boards and agencies pursuant to R.C. 340.03 and 5126.03. These sections require the Department or divisions of the Department to promulgate rules which govern the community boards and the county boards. These rules, found in 7 Ohio Admin. Code Chapters 5119:1 and 5119:3, concern, among other topics, the administrative procedures to be followed by these boards. The Commission could, pursuant to R.C. 5119.801, recommend new rules which would require the boards to receive certain data from their contract agencies. In addition, the Commission could recommend that the appropriate divisions of the Department prospectively review all contracts which community boards wish to enter, as the Division of Mental Retardation and Developmental Disabilities currently requires in the case of county boards. See rule 5119:3-1-03(H)(5).

In sum, the Commission may evaluate the efforts of the Department to monitor and regulate community boards, county boards, and their contract agencies. Furthermore, the Commission may recommend to the Department any rule changes the Commission feels are necessary. The Commission may, in addition, make similar recommendations to the executive and legislative branches.

Your second question asks whether R.C. 5119.801 permits the Commission to conduct a study or series of studies, focusing on the administration of services provided by community boards, county boards, and their contract agencies, but which studies would not address the Department's role in such programs.

In ascertaining the extent of the powers granted to the Commission in R.C. 5119.801, it is imperative that the entire section be read as a whole. Humphrys v. Winous Co., 165 Ohio St. 45, 133 N.E. 2d 780 (1956). Reading R.C. 5119.801 as a whole, it is clear that although the Commission was primarily established in order to provide a public agency which monitors the effectiveness of the state mental health and retardation services, it was also established to review the entire state system of mental health and mental retardation services. See R.C. 5119.801(A)-(B) (discussed above); R.C. 5119.801(C)(2) (the Commission shall "[r]eview and assess the administration and availability of mental health and mental retardation and developmental disabilities programs and facilities in the state") (emphasis added); R.C. 5119.801(D) (the Commission staff shall "examine the administration of and delivery of services at state-supported mental health and mental retardation facilities") (emphasis added). However, all of these activities of the Commission must be done in furtherance of the Commission's primary duties which are to monitor state mental health and mental retardation facilities and make appropriate recommendations. Hence, it is clear that the Commission has the authority to review local programs to the extent that the Commission can establish that such review relates to its primary duties, but such review need not be limited to the Department's role in such programs.

The extent of the authority to review and assess the services provided by boards and contract agencies is limited only by the requirement that the study be in furtherance of the Commission's primary duties. Since the programs of contract agencies are as critical to the delivery of services to the mentally ill, mentally retarded and developmentally disabled as the programs of local government boards, R.C. 5119.801 should be read to authorize studies reaching all types of bodies which administer programs and facilities, including contract agencies.

It should be kept in mind that my answers to your first two questions were limited to the power to conduct studies and not the extent of the studies. The issue

of which investigative powers the Commission has is partially raised by your third question, i.e., the ability of the Commission to review the records of the Department, the community boards, the county boards, and the contract agencies of these boards. I will now turn to that issue.

As noted above, the Commission is authorized access to records of the Department, except confidential records, by the last paragraph of R.C. 5119.801. Such records would include any documents of any board or agency which are in the custody of the Department. The Department should have many such records as there is a broad range of documents which community and county boards are required by rule to supply to the appropriate divisions of the Department. An illustration is rule 5119:1-1-09, which requires community boards to prepare a community plan to be submitted to the Chief of the Division of Mental Health annually. Many different kinds of information are required to be included in the community plan. For example, one of the parts of the community plan is the application for reimbursement for programs. Rule 5119:1-1-10 requires the following documents to accompany the application: budgets, fee schedules, copies of contracts with service agencies, and an organizational chart.

County boards also have extensive reporting requirements. The rules of the Division of Mental Retardation and Developmental Disabilities govern county boards. One rule of the Division, rule 5119:3-1-03, requires many of the boards' records to be open for public inspection. In addition, rule 5119:3-1-03(H)(5) requires the county boards to submit any proposed contracts between the county board and a service agency to the Division for approval. In sum, it is readily apparent that the Commission will be able to examine many of the documents pertinent to the administration of services by community boards, county boards, and contract agencies pursuant to the express authorization of access to Department records in R.C. 5119.801.

On the other hand, however, R.C. 5119.801 gives the Commission no authority, express or implied, to require community boards, county boards, or their contract agencies to open their records to the Commission. While the staff of the Commission is authorized by R.C. 5119.801(D) to "examine the administration of and delivery of services at state-supported mental health and mental retardation facilities," this function does not perforce require the inspection of documents in custody of the facilities. It is possible for the Commission to perform this task without having direct access to the records of community boards, county boards, and contract agencies of such boards, especially in light of the fact that the Commission will have access to certain records of the boards and contract agencies by virtue of these records being in the custody of the Department.

Most importantly, the legislative grant of access to records was specifically limited to the records of the Department of Mental Health and Mental Retardation. Pursuant to the maxim of statutory construction that expressio unius est exclusio alterius (the expression of one power implies the exclusion of others), the Commission would not have access to other records not mentioned in R.C. 5119.801. Having granted the Commission access to the Department's records and having remained silent on access to the records of community boards, county boards, and contract agencies, it is my opinion that the General Assembly did not intend for the Commission to have a statutory right of access to documents in the custody of the community boards, county boards, and contract agencies.

¹ Although not expressly controlling here, "record" is defined in R.C. 149.40 to include "[a]ny document. . . received by or coming under the jurisdiction of any public office of the state. . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. . . ."

Although I have concluded that R.C. 5119.801 does not grant the Commission access to records of community boards, county boards, and contract agencies, the Commission would have the same access to certain records of the community boards and county boards as any other person. R.C. 149.43 makes certain records² of these boards available to the public.

In addition to the powers of access discussed above, rule 5119:1-1-19 of the Division of Mental Health, which governs community boards, states:

The [Chief] or his authorized representatives may visit, examine, inspect, and investigate any service or facility for which state reimbursement is made under provisions of the Act, to determine whether the services and facilities are being conducted in compliance with the Act, the Rules and Regulations relating thereto, and to the approved community plan; and make recommendations thereon to the board. Likewise, the [Chief] or his authorized representatives shall have the right to examine the financial accounts and related records of any board. The [Chief] shall also require from the board or from any agency receiving funds under the Act statistical or other types of reports. These reports shall be submitted in a manner prescribed by the [Chief].

Thus, if the Commission were designated to be an authorized agent of the Chief of the Division of Mental Health, the Commission would have access to the records and documents listed in the rule.

One final point must be made. Even absent any express statutory provision so providing, it is incumbent upon the Department, community boards, or county boards to ensure that public funds are spent only in furtherance of the purpose for which the funds were appropriated. Article XV, §3 of the Ohio Constitution reads:

An accurate and detailed statement of the receipts and expenditures of the public money, the several amounts paid, to whom, and on what account, shall, from time to time, be published, as shall be prescribed by law.

The Ohio Constitution is clear in its requirement that those who spend public money must be able to account for it. Since the community and county boards are responsible for the provision of services to the public, they must account for the expenditure of funds provided to them. Therefore, where contracting agencies seek to provide certain services for the mentally handicapped, community and county boards are obligated to include provisions in the contract that will enable the boards and the Department to ensure that the public funds are in fact spent to provide services for the mentally handicapped. Such provisions would logically include reporting requirements and authorization to examine certain records of the contracting agency. If such provisions were included in the contract, those provisions may enable the Commission to secure the records it wishes to review.

In conclusion, it is my opinion, and you are advised, that:

1. Pursuant to R.C. 5119.801 the Ohio Joint Mental Health and Mental Retardation Advisory and Review Commission has the authority to conduct a study or series of studies evaluating the effectiveness of the Department of Mental Health and Mental Retardation's regulation of community mental health and retardation boards, county boards of mental retardation, and the contract agencies of such boards.

²There is currently pending before the Franklin County Common Pleas Court North Central Community Mental Health Services, Inc. v. Franklin County Mental Health and Retardation Board (Case No. 80 CV-02-630) that will decide whether contract agencies' records are public records.

2. Pursuant to R.C. 5119.801 the Ohio Joint Mental Health and Mental Retardation Advisory and Review Commission has the authority to conduct a study or series of studies focusing on the administration of services by community mental health and retardation boards, county boards of mental retardation, and contract agencies, without specifically addressing the Department of Mental Health and Mental Retardation's role in such programs, so long as the studies are in furtherance of the Commission's primary duties of monitoring state mental health and mental retardation facilities and making appropriate recommendations.
3. R.C. 5119.801 grants the Ohio Joint Mental Health and Mental Retardation Advisory and Review Commission reasonable access to the records of the Department of Mental Health and Mental Retardation. R.C. 5119.801 does not, however, grant the Commission access to the records of community mental health and retardation boards, county boards of mental retardation, or contract agencies of such boards, which are not in the custody of the Department of Mental Health and Mental Retardation.