

December 10, 2003

Mr. Joseph Zrnchik
9306 Saric Drive
Highland, Indiana 46322

*Re: Advisory Opinion 03-FC-118:
Alleged Violation of the Access to Public Records Act by Indiana State Board of Accounts*

Dear Mr. Zrnchik,

This is in response to your formal complaint wherein you allege that the Indiana State Board of Accounts (Board) violated the Access to Public Records Act (APRA) when it failed to produce documents in response to your public records request. The Board has responded to the complaint alleging that any omission in the production was inadvertent, and providing a copy of the document at issue. For the reasons set forth below, I find that the Board did not violate the APRA.

BACKGROUND

On September 30, 2003, you submitted an email request to the Board seeking copies of all correspondence between the Board and counsel for Drs. Dennis Shawver and Judith DeMuth related to an audit by the Board. When you did not receive a response to that request within seven days of making the request you filed a formal complaint with this office challenging the Board's failure to respond in a timely manner.¹ In reviewing that complaint, filed on October 10, 2003, and designated 03-FC-100, this office determined that the Board did not receive the request until October, 2, 2003, and that upon receipt the State Examiner telephoned you the following day to discuss the request. At that time, the Board acknowledged the request and indicated that the request was being reviewed to determine whether and what documents could be produced in response to the request.

According to other papers you and the Board have submitted to this office, you apparently renewed your records request by email to the Board on October 13, 2003. It appears from the allegations of your complaint and from the Board's responses that this was not a request for different records, but rather a verbatim repeat of the records request submitted on September 30, 2003. The Board thereafter, on October 15, 2003, sent you a letter denying your request for public records. In that letter, the Board supported its nondisclosure of records by citing to the attorney-client privilege, and to state statutes prohibiting the disclosure of audit results before the audit is filed by the State Examiner and made part of the public record. The Board also relied on

¹ Pursuant to Indiana Code 5-14-3-9(b), the Board's response was due seven days *after receipt of the request*.

the deliberative materials exemption codified at Indiana Code 5-14-3-4(b)(6). On November 7, 2003, you withdrew your complaint challenging the timeliness of the Board's initial response to your records request and indicated your intent to submit a new complaint challenging the October 15, 2003, denial of access.

You filed your second complaint on November 13, 2003. That complaint, designated 03-FC-118, challenged the Board's October 15, 2003, denial of access to the records responsive to your request. This office requested that the Board respond to the complaint. The Board responded on November 17, 2003, and indicated that it had reconsidered the request given the status of the audit and Indiana law governing the confidentiality of audit information prior to the examination report being made public.² The Board concluded that it could produce the correspondence you sought without running afoul of Indiana Code 5-11-5-1(c). The Board's response to your second complaint further indicated the Board's intention to produce records in full compliance with your records request. A copy of the Board's response to your second complaint is attached for your convenience. Thereafter, on November 20, 2003, the Board sent you a cover letter listing six documents that it characterized as being responsive to your request, and enclosing those records. The Board's letter did not suggest that it was withholding any responsive document pursuant to any exemption to disclosure, and further indicated its understanding and belief that the enclosures satisfied your request for documents. That letter further invited you to contact the Board if the Board could be of any further assistance to you. A copy of the Board's letter and document production is attached for your convenience.

On November 26, 2003, after you received the documents produced by the Board in response to your records request, this office received your third complaint regarding the Board's action on that request. In the latest complaint you acknowledge production by the Board but challenge the Board's failure to include a September 10, 2003, letter. In response to your current complaint, the Board responded that it produced what it thought were all of the records responsive to your request, and that the September 10, 2003, letter, was inadvertently omitted from the production. The Board produced that letter to this office on December 9, 2003, and a copy is attached for your convenience. The Board further indicated its intent to send you the September 10, 2003, letter under separate cover.

ANALYSIS

I find that the Board did not violate the APRA when it inadvertently omitted a copy of a responsive document from the production in response to your records request.³

² It appears from the record before me that after the Board initially denied access on October 15, 2003, and prior to the time you filed your second complaint, the parties being audited filed their response to the audit. *See* IC 5-11-5-1(b).

³ In light of the production on November 20, 2003, and the allegations set forth in your most recent complaint, I interpret your active complaint to be limited to the allegation that the September 10, 2003, letter, was omitted from the production in violation of the APRA. I do not reach the issue of whether the state statute governing the confidentiality of the results of an audit may be invoked by the Board to support nondisclosure of correspondence between the Board and the persons or entities being audited if that correspondence would reasonably lead to disclosure of the audit results before the audit is final and filed by the State Examiner. *See* IC 5-11-5-1(c). Neither do I write on whether correspondence setting forth the arguments and negotiations of counsel and the Board may be characterized as deliberative and subject only to limited disclosure. *See* IC 5-14-3-4(b)(6).

Indiana Code 5-14-3-3 and 5-14-3-9 govern a public agency's obligations to respond upon the receipt of a request for public records. A public agency must respond to a request for records in a timely manner, and its failure to do so will be construed a denial. IC 5-14-3-9(b). A timely response to a public records request does not mean that the public agency must produce or expressly decline to produce the documents or other material that are responsive to the request within the statutorily prescribed time period. Of course, a public agency is free to take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production. Once a public agency indicates that there are responsive documents that will be produced in response to your request, it need only produce those documents within a reasonable time. *Cf.* IC 5-14-3-3(a) (limiting inspection and copying to the regular business hours of an agency). Certainly, there is nothing in the APRA that would suggest that production must occur within a specific time, in one piece, or in a manner that unreasonably interferes with the regular business of the public agency.

Here, upon receipt of the September 30, 2003, request the Board immediately acknowledged the request and stated its intent to review and determine what and whether records could be produced in response to the request. Within fifteen (15) days of that request, and within two (2) days of your renewed request, the Board contacted you again and notified you in writing that it considered the records to be confidential and nondisclosable. The Board revisited the confidentiality issue on November 17, 2003, and at that time notified you that it would comply fully with your request. The Board's subsequent November 20, 2003, letter and production characterized itself as being responsive to your request. The Board's letter did not suggest that it was withholding any responsive document pursuant to any exemption to disclosure, and further indicated its understanding and belief that the enclosures satisfied your request for documents. That letter further invited you to contact the Board if the Board could be of any further assistance to you. There is no indication before me that you contacted the Board to address the omission after you discovered the reference to the September 10, 2003, letter, and upon my inquiry with the Board it immediately reviewed its files and located and produced the letter at issue. Moreover, because the omitted letter was prominently featured in another document you received, the Board cannot reasonably be characterized as seeking to hide its nondisclosure of a responsive document. Based on these facts, I cannot find that the Board withheld this document in violation of the APRA.

CONCLUSION

For the reasons set forth above, I find that the Board did not violate the APRA in responding to and producing responsive documents in response to your request for public records.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Charles Johnson, III, State Examiner, Indiana State Board of Accounts