

August 26, 20004

Employers Protective Insurance Company, Inc.  
c/o Hugh G. Baker, Jr.  
333 E. Ohio Street, #200  
Indianapolis, IN 46204

*Re: Formal Complaint 04-FC-126; Alleged Violation of the Access to Public Records Act by the Indiana Department of Insurance and the Indiana Compensation Rating Bureau*

Dear Mr. Baker:

This is in response to your formal complaint alleging that the Indiana Department of Insurance (“IDOI”) and the Indiana Compensation Rating Bureau (“ICRB”) violated the Access to Public Records Act (“APRA”) by denying to Employers Protective Insurance Company, Inc. (“EPIC”) access to certain worker’s compensation filing information. I find that the Indiana Department of Insurance denied you a record that it is required by statute to disclose, and in so doing, violated the Access to Public Records Act. Ind. Code 5-14-3. I also find that the IDOI did not meet the requirements for written denial of a request for records under the APRA. Finally, I find that the Indiana Compensation Rating Bureau is not a public agency as that term is defined in the Access to Public Records Act, and is therefore not subject to the requirements of the Access to Public Records Act.

#### BACKGROUND

You represent for purposes of this complaint the Employers Protective Insurance Company, Inc. (“EPIC”). On July 13, 2004, you wrote to Acting Commissioner Amy Strati of the Indiana Department of Insurance on behalf of EPIC. In that letter, you requested under the Access to Public Records Act all documents filed by the ICRB or NCCI (National Council on Compensation Insurance, a contractor of ICRB) regarding the proposed Indiana Reinsurance Pool (also known as the assigned risk pool). Your request concerned filings made by the ICRB under the Worker’s Compensation assigned risk pool, under IC 27-7-2-28.1. In a separate request, you asked for the rule revision filing of FCCI Insurance Company effective 10/1/04,

although the record does not contain a copy of this July 13 request. However, you supplied me with a July 13 letter sent by FCCI to “interested persons” giving notice of the rule revision filing and citing to IC 27-7-2-20.2. These requests prompted a two-fold response from the IDOI. A July 15, 2004 letter from Commissioner Strati informed you that:

“The Department has received a filing from the ICRB regarding the assigned risk plan. The filing is currently under review. It is the practice of the Department not to allow public access to a filing that is under review. Once the review is completed the file will be available for public inspection. You may want to request the information from the ICRB for this interim time period or follow up with the Department in approximately thirty (30) days.”

You also received a letter in response to your July 13 request for documents regarding FCCI from Dan Tollefson, Financial Services Counsel for the IDOI. He states that the Department had received a rule revision filing of FCCI Insurance Group Companies to be effective 10/1/104. He further states:

“The filing is currently under review. It is the practice of the Department not to allow public access to a filing that is under review. Once the review is completed the file will be available for public inspection.”

The letter further invites you to request the information from the filer, FCCI Insurance Group Companies during the 30-day interim period. Prior to the July 13 letter, you had verbally requested documents from ICRB regarding filings under IC 27-7-2, and were told that the request for filing information should be made to the IDOI, since ICRB is not a public agency.

After receiving the denial letters of July 15 from the IDOI, you filed this complaint, which we received on July 28. In your complaint, you raised IC 27-7-2-20.2(d), which states:

All information filed under this chapter shall, as soon as filed, be open to the public for inspection and copying under IC 5-14-3.

We forwarded a copy of the complaint to Commissioner Strati for response from the IDOI, and to Ronald Cooper of the Indiana Compensation Rating Bureau for that entity’s response. You have requested and received a copy of those responses, so we have not enclosed them with this formal advisory opinion.

In the IDOI response, Mr. Tollefson told us that IDOI did not deny disclosure, because it had offered to make those filings available once they had been fully reviewed. He further argues that because the IDOI must have a reasonable review period before deeming the filing compliant with insurance laws and regulations, it is not disclosable until the thirty-day review period has expired. Throughout the thirty-day review period, IDOI works with filers to bring each submission into compliance. Once compliant, the submission is stamped as “FILED.” In fact, a filer may withdraw a filing if it cannot or is unwilling to make the appropriate changes to the filing. The IDOI complaint response does not cite any insurance statute or any provision of the exceptions to disclosure under the APRA.

The response of ICRB sets out two bases for its denial of the record. One is that ICRB is not a public agency as defined by the APRA. The second basis for denial of the record is that the filings are excepted from disclosure under IC 5-14-3-4(b)(6), the “deliberative materials” exception.

You sent me a reply letter to these responses in which you offer rebuttal of the deliberative materials exception for the documents, and again reiterate your belief that ICRB is a public agency subject to APRA.

## ANALYSIS

Your complaint raises two issues, which I restate as the following:

1. May the Department of Insurance deny access to records it maintains of filings made by ICRB or any insurance company under IC 27-7-2 during the 30-day review period?
2. Is the ICRB a “public agency” subject to the Access to Public Records Act?

### *Disclosure of IC 27-7-2 Filings Maintained by the Indiana Department of Insurance*

As a state administrative agency, the Indiana Department of Insurance is a public agency under IC 5-14-3-2. IC 5-14-3-3 states that “any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of this chapter.” Although the IDOI response does not cite to any exception under APRA, ICRB has offered IC 5-14-3-4(b)(6) as a likely means for ICRB (if a public agency) to resist disclosure of the record. That exception allows a public agency in its discretion to not disclose:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

However, I find that this general exception cannot overcome the clear legislative mandate to disclose all filings made under IC 27-7-2. That mandate comes in the form of IC 27-7-2-20.2:

(d) All information filed under this chapter shall, as soon as filed, be open to the public for inspection and copying under IC 5-14-3.

By its terms, this mandated disclosure statute applies to all filings under the Worker’s Compensation chapter at IC 27-7-2, which would include section 28.1 applying to the request for the assigned risk pool filing, as well as the filing by FCCI under section 20.2. Again, IDOI does not cite or refer to this provision in its response, but appears to argue that a submission is not “filed” until it has undergone the review period set out in the same provision of the statute.

Undertaking an analysis of caselaw authorities interpreting the meaning of the word “filed” is unnecessary here, where IC 27-7-2-20.2 supplies the precise context for construing that term. IC 27-7-2-20.2(a) provides that the insurance commissioner shall disapprove a filing that does not meet the requirements of section 20.1; further, the filing shall be deemed approved unless disapproved by the commissioner within thirty (30) days after the filing is made. Conversations with Mr. Tollefson of IDOI confirmed that this statutory thirty-day approval period is the thirty days referred to in his response to EPIC’s record request. Yet under the IDOI’s construction, the submission doesn’t become a filing for thirty days after it is submitted to IDOI. IC 27-7-2-20.2(c) requires that each filing be accompanied by adequate proof that notice of the filing has been mailed to interested persons who are listed with the IDOI. In the case of the FCCI filing, that company sent an “interested persons” notification on July 13. This notification coincides with the Tollefson letter of July 15 referring to that company’s filing and stating that the review period would expire in approximately 30 days.

These and other references to “filing” or “filed” in IC 27-7-2-20.2 leads to the inescapable conclusion that the legislature considered a submission to the IDOI “filed” when it is submitted to the IDOI and would undergo review for the thirty days following the filing. The plain meaning of IC 27-7-2-20.2(d) is that IDOI must make worker’s compensation rate filings available for inspection and copying as soon as they are submitted to the IDOI, not after they are reviewed.

An issue raised by ICRB is whether the deliberative materials exception trumps the disclosure requirement contained in IC 27-7-2-20.2(d). The deliberative materials exception applies to all public agencies, for a general category of records. In contrast, IC 27-7-2-20.2(d) applies to specific records maintained by the IDOI. These provisions can be harmonized, but even when they cannot, the more specific provision will prevail. *Berry v. Peoples Broadcasting Corp.*, 547 N.E.2d 231 (Ind. 1989).

Although not raised by the complaint, I also note that the written denials of the records, although timely sent, were not sufficient under the APRA. IC 5-14-3-9(c) requires that an agency specify the basis for denial of a record by including a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record. By not specifying the statutory basis for denial of the filing information, and by not following the plain mandate of IC 27-7-2-20.2(d) to make all information filed under IC 27-7-2 available for inspection and copying as soon as filed, the IDOI violated the Access to Public Records Act.

#### *Whether ICRB is a “public agency” under the APRA*

The second issue raised by EPIC’s complaint concerns the ICRB’s status as a public agency subject to the Access to Public Records Act. EPIC as the party seeking to avail itself of the APRA bears the burden of establishing that ICRB is a public agency under the APRA. *Indianapolis Convention and Visitors Association, Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991). I have been favored with several authorities on the question of whether an entity is a public agency under APRA.

ICRB is a nonprofit, unincorporated association of insurance companies authorized to write worker's compensation insurance in Indiana. It was created by statute establishing a worker's compensation rating bureau. *See* IC 27-7-2-3. The ICRB is governed by bylaws filed and approved by the insurance commissioner. IC 27-7-2-6. Management of the bureau is handled by duly elected officers or committees provided in the bylaws. IC 27-7-2-5. ICRB draws no revenue from tax monies. The Bureau's two main responsibilities are: 1) to recommend rates to be charged by carriers to employers for worker's compensation insurance in the voluntary market and in the assigned risk pool; and 2) administer the assigned risk plan, which provides for apportionment among bureau members of insurance for applicants who are unable to secure worker's compensation insurance through ordinary means. ICRB is licensed by the IDOI under IC 27-7-2-25.

EPIC maintains that ICRB is a public agency under APRA because the court of appeals referred to it as a "governmental agency" in a case in which no issue was raised or decided regarding applicability of either the Open Door Law or Access to Public Records Act to ICRB. *See D.A.X., Inc. v. Employers Ins Of Wausau*, 659 N.E.2d 1150, 1152 (Ind.App. 1996). Also, EPIC argues that because ICRB conducts activities that are "official business" as that term is used in the Open Door Law, IC 5-14-1.5-2(d), such as receiving information and deliberating, it is a public agency. EPIC has not cited to or argued a specific element of the 10-part definition of public agency contained in APRA, but one surmises that EPIC believes that ICRB is exercising a part of the executive, administrative, judicial or legislative power of the state, under definition (1) of "public agency." IC 5-14-3-2.

EPIC concedes that a 1998 Attorney General Opinion found that the Worker's Compensation Rating Bureau was not subject to the Open Door Law because it was not a public agency under three of ten provisions defining "public agency" that are common to APRA. *See 1998 Op.AttyGen. No.54*. That opinion considered and rejected that the bureau was exercising a portion of the executive, administrative, or legislative power of the state.<sup>1</sup>

The ICRB files with IDOI information regarding recommended minimum premiums and rates and also administers the assigned risk pool. Insurance companies are not required to charge only the rates that are filed by the ICRB. Nothing in the statute setting out the powers of the worker's compensation rating bureau suggests any legislative, executive, or administrative power of the state. IC 27-7-2-3.1. Also, cases analyzing entities that are controlled by local governmental agencies<sup>2</sup> are arguably inapposite here, because APRA defines "public agency" with respect to entities exercising statewide powers differently from those exercising powers in a limited geographical area. In the latter case, an entity may be a public agency if it exercises "delegated local government power." With respect to an entity that exercises statewide power, the issues of control and delegation do not appear to be relevant. *Cf.* IC 5-14-3-2, "Public agency" (1) with (2)(C).

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<sup>1</sup> Attorney General Modisett also considered whether the bureau was subject to budget review and audit, and whether the bureau was an advisory commission. He found that the bureau was not subject to audit because it did not receive or handle public funds, and it did not advise a "governing body" made up of two or more persons, since the bureau advised only one person, the insurance commissioner.

<sup>2</sup> *See Perry County Development Corp. v. Kempf et al.*, 712 N.E.2d 1020 (Ind.App. 1999).

I am mindful of the many cogent policy arguments offered by EPIC as well as State Representative Ron Herrell for deeming ICRB a public agency. In no sense is this advisory opinion disapproving of those arguments, just as it does not endorse them. However, my duty is to interpret the public access laws without regard to whether a provision reflects the best public policy.

There is another worker's compensation insurance provision that is significant to the question of whether the ICRB was required to disclose the information to EPIC. IC 27-7-2-3.1(5) states:

The bureau, in addition to other activities not prohibited, is authorized to do the following: ... (5) Distribute information that is filed with the commissioner and open to public inspection.

This provision appears to permit or allow ICRB to make available the filings that EPIC requests. It falls short of mandating disclosure, given the plain meaning of "authorized" to mean "empowering, sanctioning, or formally endowing another to act."<sup>3</sup> A court may determine that by authorizing certain action, the legislature meant to make the bureau's powers mandatory, but I cannot make that interpretation. In any case, while the statute may not have mandated that ICRB give EPIC information regarding the filings, it was surely empowered to do so, since the information EPIC requested had been filed with the commissioner and was open to public inspection under IC 27-7-2-20.2(d).

#### CONCLUSION

For the foregoing reasons, I find that by withholding worker's compensation filing information from EPIC until after its review, the Indiana Department of Insurance violated the Access to Public Records Act and the insurance law that mandates disclosure. I also find that EPIC has not sustained its burden of showing that the Indiana Compensation Rating Bureau is a public agency.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Dan Tollefson, IDOI  
Commissioner Strati, IDOI  
E. Scott Treadway, ICRB  
Rep. Ron Herrell

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<sup>3</sup> See *Bollinger v. Board of Parole and Post-Prison Supervision*, 992 P.2d 445, 448 (Ore. 1999).