

March 8, 2004

Ms. Judith A. Demuth
Mr. Dennis K. Shawver
3903 Tamarron Drive
Bloomington, Indiana 47408

*Re: Formal Complaint 04-FC-21; Alleged Violation of Access to Public Records Act
by the Indiana State Board of Accounts*

Dear Ms. DeMuth and Mr. Shawver:

This is in response to your complaint dated February 8, 2004, alleging that the Indiana State Board of Accounts (SBOA) violated the Access to Public Records Act (APRA) (Ind. Code §5-14-3) when it produced records in response to a public records request that were required to be kept confidential. The SBOA responded to your complaint, and a copy of that response is attached for your review. For the reasons set forth below, I find the complaint without merit.

BACKGROUND

On or about November 17, 2003, the SBOA produced records in response to a records request prepared and submitted by Joseph Zrnchik. Specifically, Mr. Zrnchik requested copies of all correspondence between the SBOA and your counsel regarding an audit being conducted by the SBOA. The SBOA produced documents responsive to that request, but inadvertently omitted one responsive record, thus generating a complaint with this office. The SBOA thereafter produced the missing record, and this office issued an opinion on the complaint finding that the SBOA's inadvertent failure to produce the record at issue did not violate the APRA. *See Advisory Opinion 03-FC-118: Alleged Violation of the Access to Public Records Act by Indiana State Board of Accounts*, issued December 10, 2003.

On February 8, 2004, you prepared and signed the complaint in this matter alleging that the SBOA's production of records to Mr. Zrnchik violated the APRA. Your complaint, which sought expedited review and priority status pursuant to 62 IAC 1-1-3, asserts that the SBOA produced the responsive records because it was required to do so on the authority of the above-referenced opinion from this office, which opinion you assert is flawed. As I further understand

your complaint, you allege that the responsive records were private correspondence that was confidential and should not have been disclosed.¹

ANALYSIS

As a threshold matter, your complaint seeks expedited consideration pursuant to Indiana Administrative Code 62 IAC 1-1-3. Your request for expedited review and citation to Indiana Administrative Code 62 IAC 1-1-3 is inapplicable to the claim you raise. You fail to cite to the specific criteria upon which you base your request for expedited status, and it is not otherwise apparent from reviewing the factors how any of them can be asserted to be applicable to your claim. Your claim does not challenge a denial of records by this office, let alone a denial of records that you intend to present in a proceeding to be conducted by another public agency. *See* 62 IAC 1-1-3. Your request and citation to the administrative code is without merit.

Your complaint also mischaracterizes or, at least, misapprehends the formal opinion about which you complain. In *Advisory Opinion 03-FC-118: Alleged Violation of the Access to Public Records Act by Indiana State Board of Accounts*, a constituent filed a formal complaint with this office against the SBOA and alleged that the SBOA withheld a public record when it produced documents in response to a public records request. The documents sought were public records of that agency, and included the correspondence between that agency and your counsel regarding the special audit that also underlies a records request you made to the same public agency. The SBOA tendered responsive public records in response to that request, but inadvertently omitted one of the records requested. In reviewing the complaint with the SBOA, that public agency characterized the omission as inadvertent, and produced the omitted record. This office did not issue an opinion requiring the SBOA to produce any records. Indeed, the opinion at issue does not opine that the SBOA was required to produce any records. Rather, the opinion is limited to opining that, by inadvertently omitting a record from a voluntary production, the SBOA did not violate the Access to Public Records Act.

On the merits, your complaint does not support a violation of the APRA. Typically, violations of the APRA are alleged when a public agency fails to produce a record. That said, the APRA does provide for sanctions against an employee or official of a public agency when that agency discloses a record that is required by law to be kept confidential. IC 5-14-3-10. In my opinion you have not established that the records at issue were required by law to be kept confidential, and I decline to find a violation of the APRA on that basis.

Indiana Code 5-11-5-1(c) governs the confidentiality of audit records and comes perhaps the closest of any law in support of your claim. That statute makes it unlawful for any deputy examiner, field examiner, or private examiner, before an examination report is made public, to

¹ Although you do not cite to the specific provision of the APRA you allege was violated, I note that Indiana Code 5-14-3-10 precludes the disclosure of records required to be kept confidential. You made these identical claims in separate complaints filed with *and against* this office requesting that this office withdraw its prior opinion. On February 9, 2004, and again on February 11, 2004, this office issued informal opinions rejecting those claims inasmuch as this office did not tender or release the records at issue and no claim under the APRA could lie against this office on allegations directed at another agency's conduct.

make any disclosure of the result of any examination of any public account, except to the state examiner or on the order of the state examiner or a court. IC 5-11-5-1(c). There is no suggestion that the correspondence at issue reveals the result of any examination of a public account, or even that the correspondence was reasonably likely to do so. Moreover, your characterization of the documents at issue as “private” is not otherwise supported. Certainly, that you consider or even declare a record confidential does not make it so. Your attorney’s correspondence to the SBOA, and the SBOA’s correspondence to your attorney, is, within that public agency’s files, the public records of that agency. *See* IC 5-14-3-2. While some information within the public records of an agency may be confidential and subject to nondisclosure, that status is achieved by operation of law and not by the declaration of a party or even the agreement of multiple parties. Whether a record is confidential and subject to nondisclosure is the public agency’s burden to assert and establish. In the matter referenced, the SBOA did not maintain any exemption to disclosure of the records at issue, and considered itself bound to release the records in the absence of a statutory basis to support an exemption to disclosure. That agency’s production of responsive records cannot be found to be a violation of the APRA where it did not include documents that are classified as confidential by state law.

CONCLUSION

For all of the foregoing reasons, I find that the SBOA did not violate the APRA when it produced copies of correspondence between your counsel and the SBOA regarding an SBOA audit. That correspondence was public record in the possession of the SBOA, and was not confidential and subject to nondisclosure pursuant to state law.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Phil McGovern