STATE OF INDIANA

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October 13, 2010

Mr. Gregory Halling
The Elkhart Truth
P.O. Box 487, 421 S. Second St.
Elkhart, IN 46515

Re: Formal Complaint 10-FC-208; Alleged Violation of the Access to Public Records Act by the Bristol Fire Department

Dear Mr. Halling:

This advisory opinion is in response to your formal complaint alleging the Bristol Fire Department ("BFD") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. BFD's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that BFD, a nonprofit fire department, is a public agency subject to the APRA. BFD received public funds from the Town of Bristol ("Town") and Washington Township ("Township"). After confirming that the State Board of Accounts ("SBOA") audits the financials of the BFD, your newspaper requested personnel file information that the APRA mandates must be made available upon request. Within seven days of that request, an attorney for the BFD sent you a letter informing you that your request was denied on the basis that the BFD is not subject to the APRA.

Attorney Andrew Hicks responded to your complaint on behalf of the BFD. Mr. Hicks maintains that BFD is not a public agency subject to the APRA. He notes that BFD is a nonprofit corporation with a five-member board of directors filled by private citizens. BFD owns its own real estate, which was financed through private donations and by a private loan from Chase Bank. The loan is not guaranteed by any municipality. BFD operates as a volunteer fire department with five employees and 21 volunteers. BFD receives public funds as a result of annually negotiating fee-for-service contracts with various municipalities, including the Town, the Township, and part of York Township. The contract between BFD and the Town, for example, is titled "AGREEMENT FOR SERVICES" and details an annual fee paid to BFD by the Town in exchange for fire-fighting and ambulance services. The terms of the contract also require

the BFD to comply with the audit requirements of the SBOA and to provide the Town with a profit and loss statement biannually. The contracts are negotiated with the governmental entities annually, and the service fees are billed and paid biannually. The BFD provides its services on a full-time basis. The fees charged are not dependent upon the amount of tax revenue collected. The entities are free to negotiate with other area fire departments to provide services instead of the BFD. None of the governmental entities are involved in the general operations of BFD; they do not participate in hiring, firing, discipline, training, insurance programs, retirement plans, budgeting, purchasing, financial planning, or any other aspect of the BFD's operations. The equipment and supplies used by BFD are owned or leased by BFD itself. Based upon these facts, Mr. Hicks argues that BFD is not a public agency subject to the APRA because it receives funds from public entities through fee-for-services contracts rather than through general funding for the maintenance and support of the BFD's operations.

ANALYSIS

The public policy of the APRA states, "[p]roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." I.C. § 5-14-3-1. An entity must be considered a "public agency" in order to be subject to the requirements of the APRA and the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq*. The party seeking to inspect and copy records has the burden of proving that the entity in possession of the records is a public agency within the meaning of the APRA. *Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc*. 577 N.E.2d 208, 212 (Ind. 1991) ("*ICVA*). The term "public agency" is broadly defined. The issue presented here, however, is whether BFD is a public agency subject to the APRA because it is "subject to . . . an audit by the state board of accounts that is required by statute, rule, or regulation." I.C. § 5-14-3-2(l)(3)(B).

I recently issued an advisory opinion in response to a similar issue in *Opinion of the Public Access Counselor 10-FC-208*. In that matter, I issued an opinion stating that Columbus Downtown, Inc. ("CDI") is a public agency by virtue of the fact that SBOA ruled it is subject to an audit that is required by statute. However, I noted that SBOA made its determination on the basis of limited information and expressed my opinion that based on additional information presented by CDI, it appeared that CDI was not subject to an audit that is required by statute, rule, or regulation. However, I deferred to SBOA for the ultimate determination regarding whether or not CDI is subject to a required audit. If and when SBOA determined that CDI is not subject to a required audit, CDI would not be an entity subject to the APRA at that time.

Due to the similarity of issues, I incorporate my analysis regarding CDI here. In that matter, I noted that the APRA is not entirely clear about whether the public access counselor or the SBOA is responsible for determining whether or not a nonprofit is "subject to audit" for purposes of determining the applicability of the APRA and ODL. Generally, previous public access counselors have relied solely on the SBOA's

determination. *See, e.g., Opinion of the Public Access Counselor 05-FC-226* (Counselor Davis, noting that "[t]he public access counselor cannot and will not look behind the determination of the State Board of Accounts . . . For as long as the [SBOA's determination that the entity is subject to audit] stands, the entity is a 'public agency' and its records are subject to disclosure under the [APRA]"); *04-FC-03* (Counselor Hurst, opining that "the determination set forth by SBOA controls whether a not-for-profit entity is a 'public agency' [and that] the APRA does not permit this office to void or otherwise disregard the determination by the SBOA [that an entity is subject to audit for a certain period]).

However, Counselor Neal noted that whether or not an entity is subject to an SBOA audit is a necessary but not sufficient fact for determining whether the entity is subject to an SBOA audit that is required by a statute, rule or regulation. In Counselor Neal's *Addendum to Formal Complaint 08-FC-238*, she wrote that nonprofit entities "will sometimes agree contractually to submit to SBOA audit." *Id.* In such instances, the E-1 sent to SBOA does not contain enough information to permit the public access counselor to determine whether the audit was required by "statute, rule, or regulation," or whether the entity voluntarily submitted to it. In the latter case, the entity would not be subject to the APRA, so the fact that SBOA informed Counselor Neal that the entity was subject to audit was not dispositive. Counselor Neal did not disagree with any SBOA subject to audit determination, however; rather, she required additional information in order to determine whether the audit was voluntary or required by statute, rule or regulation. Here, BFD maintains that the SBOA audits it as a result of the fact that BFD has contractually agreed to submit to the audit process. If that is the case and no statute, rule, or regulation requires the audit, BFD is not subject to the APRA.

It is necessary to analyze SBOA's governing statutes to determine whether an audit of BFD is required by statute. Pursuant to state statute, the SBOA is responsible for making an examination of "all accounts of all financial affairs of every public office and officer, state office, state institution, *and entity*." I.C. § 5-11-1-9(a) (emphasis added). Under this provision, an entity organized as a not-for-profit corporation that derives at least 50% and more than $100,000 in public funds shall be subject to an audit. I.C. § 5-11-1-9(b). An "entity" is defined as "any provider of goods, services, or other benefits that is: (1) maintained in whole or in part at public expense; or (2) supported in whole or in part by appropriations or public funds or by taxation." I.C. § 5-11-1-16(e).

Indiana courts have analyzed and applied these provisions to determine whether or not a nonprofit that receives public funds is subject to audit by SBOA. In the *ICVA* case, the supreme court was required to rule on whether the Indianapolis Convention & Visitors Association ("Association") was subject to a statutorily-required audit where a portion of the Association's revenue was received from the Indianapolis Capital Improvement Board, a public agency ("CIB"). *ICVA*, 577 N.E.2d at 209. The plaintiff, Indianapolis Newspapers, asserted that the revenues were in the nature of a grant rather than a "fee" for services provided to CIB, and that because the Association was maintained or supported in part by public funds its records were subject to examination under the SBOA statute and open to public inspection under the APRA.

The supreme court in *ICVA* held that a private entity is not maintained at public expense or supported by public funds "merely because public monies make up a certain percentage of its revenue." *Id*. Rather, if the relationship "is, in fact, a fee-for-services (or goods) agreement then, clearly, an entity is not maintained or supported by public funds." *Id*. at 212-13. The court reasoned:

> Otherwise, any entity who performed any service or provided any good for a governmental entity would find its business records available for public inspection under the Public Records Act. We do not perceive this to be the legislature's intent in passing the Public Records Act.

Id. at 213. In *ICVA*, the supreme court ultimately determined that the Association was supported by public funds and, thus, subject to the SBOA statute and the APRA based on the following facts:

> (1) the Association received monthly payments from CIB regardless of whether it booked conventions or performed tourism services; (2) the amount of those payments was not negotiated under their contract but predetermined by CIB as approximately 20% of the city hotel-motel tax collected in a given year; (3) the contract stated that the CIB "financially supported" the Association with those tax receipts; and (4) the Association's federal tax returns described money received from CIB as "indirect public support."

State Bd. Of Accounts v. Indiana Univ. Found., 647 N.E.2d 342 (Ind. Ct. App. 1995), *trans. denied* ("*IUF*"), citing *ICVA*, 577 N.E.2d at 213.

In the *IUF* case, the court of appeals held that money paid by Indiana University to the Indiana University Foundation consisted of fees for services rendered under the *ICVA* test applied by the supreme court. The court noted that: (1) the two relevant contracts between the university and the foundation were "replete" with references to the fees the foundation was to receive for performing its contractual obligations; (2) the foundation's tax returns described the moneys paid under its contracts with the university as "Management & Various Serv. Fees"; (3) unlike in *ICVA*, the foundation's fees were not calculated by reference to the amount of tax revenue or appropriations received in any particular year; (4) the foundation proposed a fee each year that the university's trustees normally approved (i.e., the fee was determined by the parties); and (5) one agreement provided that the foundation would "bill" the university for its investment management fees. *IUF*, 647 N.E.2d at 353-54.

Here, it appears that the contracts between BFD and the public agencies are fee-for-services arrangements between the entities that do not subject BFD to the APRA. The contracts obligate BFD to provide fire services in exchange for fees paid by the Town and the townships. The fees paid to BFD are not contingent upon the amount of tax received by the government entities; rather, they are negotiated annually between the parties and billed to the government agencies biannually. The BFD does not receive regular payments from the entities regardless of whether or not it performs its fire and

ambulance services, and in the event that one of the entities opted to contract with another such entity for fire services, it appears that BFD would no longer receive any fees or payments from that entity. Under such circumstances, it is my opinion that the BFD receives its public funds as a result of a fee-for-services contract. *ICVA*, 577 N.E.2d at 212-13. As such, BFD is not "maintained" or "supported" by the government entities within the meaning of I.C. § 5-11-1-16(e). As the court of appeals has held, "If the relationship is, *in fact*, a fee-for-services (or goods) agreement then, clearly, an entity is not maintained or supported by public funds." *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020, 1026 (Ind. Ct. App. 1999) (emphasis added); *see also Opinion of the Public Access Counselor 09-FC-126* (nonprofit corporation was not subject to APRA/ODL even though it received grants of public funds because receipt of grants was subject to continued performance of contract obligations). Because this leads to the conclusion that BFD is not subject to a required audit, BFD is also not subject to the APRA.

Moreover, the General Assembly amended the APRA in 2007 to specifically exclude from the definition of a "public agency" entities that meet certain conditions:

> "Public agency"; certain providers exempted
>
> Sec. 2.1. "Public agency", for purposes of this chapter, does not mean a provider of goods, services, or other benefits that meets the following requirements:
>
> (1) The provider receives public funds through an agreement with the state, a county, or a municipality that meets the following requirements:
>
> (A) The agreement provides for the payment of fees to the entity in exchange for services, goods, or other benefits.
>
> (B) The amount of fees received by the entity under the agreement is not based upon or does not involve a consideration of the tax revenues or receipts of the state, county, or municipality.
>
> (C) The amount of the fees is negotiated by the entity and the state, county, or municipality.
>
> (D) The state, county, or municipality is billed for fees by the entity for the services, goods, or other benefits actually provided by the entity.
>
> (2) The provider is not required by statute, rule, or regulation to be audited by the state board of accounts.

I.C. § 5-14-3-2.1. BFD appears to meet these conditions, which is all the more reason to conclude that it is not a "public agency" subject to the APRA.

However, as I stated in the CDI opinion, the SBOA makes the ultimate determination regarding whether or not an entity is subject to an audit that is required by statute, rule, or regulation. While I express the above opinion on the basis of the information before me at this time, I do not intend to replace the SBOA's determination with my own if SBOA should come to the opposite conclusion. If, however, it is the case that BFD is subject to audit merely because it contractually agreed to submit to the audit process, it is my opinion that BFD is not subject to the requirements of the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that if BFD is subject to an audit by the SBOA only because BFD contractually agreed to submit to the audit, BFD is not subject to the APRA and did not violate the APRA by denying your request.

Best regards,

Andrew J. Kossack
Public Access Counselor

Cc: Andrew M. Hicks