



STATE OF INDIANA

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August 30, 2012

Robert Nicholson
910 Euclid Avenue
Marion, Indiana 46952

Re: Formal Complaint 12-FC-217; Alleged Violation of the Access to Public Records Act by the Indiana State Board of Accounts

Dear Mr. Nicholson:

This advisory opinion is in response to your formal complaint alleging the Indiana State Board of Accounts ("SBOA") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Paul D. Joyce, Deputy State Examiner, and Paul Lottes, General Counsel, responded on behalf of the SBOA. Their response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on May 9, 2012 you submitted the following written request for records to the SBOA:

1. All records as defined by I.C. § 5-14-3-2 related to administrative procedures for contesting a finding in a SBOA report;
2. All records as defined by I.C. § 5-14-3-2 related to statutes, regulations, internal guidelines or procedures, agency guidance documents or other requirements that must be met before the SBOA can determine and include in a finding or report allegations that a specific person has committed Malfeasance, Misfeasance, or Nonfeasance as defined by statute or regulation;
3. All records as defined by I.C. § 5-14-3-2 related to statutes, regulations, internal guidelines or procedures, agency guidance documents, training presentations or other requirements that audits conducted by the SBOA identify or recognize conflicts of interest when evaluating the statements of any person involved in such a proceeding;
4. All records as defined by I.C. § 5-14-3-2 related to internal guidelines or procedures, agency guidance documents, training presentations or other requirements that SBOA employees recognize and avoid instances where a member of an audited entity attempts to use the proceedings to resolve grievances against or act on animosity toward another member of that entity;

5. All records as defined by I.C. § 5-14-3-2 related to internal guidelines or procedures, agency guidance documents, training presentations, or other requirements that SBOA employees rely on to identify the “responsible officer of employee . . .” as required in Accounting and Uniform Compliance Guidelines Manual for Extra-Curricular Accounts, Chapter 7; and
6. Specific to Audit Report B40064:
 - a. All records as defined by IC 5-14-3-2 related to the issues discussed primarily on pages 55 and 76 of the subject report identified by Marion Community Schools (“MCS”) as their official investigation of the ticket number anomaly identified in the subject report. If no such records exist, please state so affirmatively;
 - b. All records as defined by I.C. § 5-14-3-2 related to the book fair receipts not deposited issue discussed primarily on page 52 of the subject report identified by MCS as their official investigation into the issue as identified in the subject report. If no such records exist, please state so affirmatively;
 - c. All records as defined by I.C. § 5-14-3-2 related to the ticket number anomaly identified on page 55 of the subject report supporting your conclusion that MCS did actually receive and have possession of the alleged missing tickets. Your response should include, but not limited to: the ticket inventory completed by MCS at the retirement of Mr. Rocky Kent as Athletic Director; ticket purchase orders; ticket receiving slips or equivalent documents; ticket receiving inspection reports; and ticket provider guarantees or warranties that tickets are serially numbered. If no such records exist please state so affirmatively;
 - d. All records as identified by I.C. § 5-14-3-2 related to the ticket number anomaly identified on page 55 of the subject report identifying all MCS personnel having access during calendar year 2009, including secondary access, to the physical area where the alleged tickets (if they exist) were stored. Your response should include, but not be limited to, key assignment logs or such similar listings and missing key reports. If no such records exist, please state so affirmatively;
 - e. All records as defined by I.C. § 5-14-3-2 related to the ticket anomaly identified on page 55 of the subject report supporting your conclusions that the alleged tickets (if they exist) were sold at the Marion High School home varsity football game on September 11, 2009. Your response should include, but not limited to: affidavits or testimony (either sworn or unsworn) of ticket sale and gate personnel on duty at that event as to the number of tickets sold; video images, still or motion, showing any portion of the audience at the subject event and analyses or statistical evaluations comparing the alleged number of tickets sold for that event with the amounts sold at previous and subsequent events. If no such records exist, please state so affirmatively;
 - f. All records as defined by I.C. § 5-14-3-2 related to the ticket anomaly identified on page 55 of the subject report supporting your conclusion that the alleged tickets (if they exist) were sold at the Marion High School

varsity football game on September 11, 2009 for a total of \$1,505. Your response should include, but not be limited to: specimen tickets with a marked price; policies or other procedures adopted by the Board of Trustees of MCS allowing an admission fee to be charged for the admittance to an athletic event; policies or other procedures adopted by the Board of Trustees of MCS requiring an admission fee to be charged for admittance to an athletic event; policies or other procedures adopted by the Board of Trustees of MCS allowing establishing a specific admission fee amount to be charged for admittance to an athletic event; and identification of all persons claiming to have seen the \$1505 generated from the sale of the alleged tickets. If no such records exist, please state so affirmatively;

- g. All records as defined by IC 5-14-3-2 related to the ticket number anomaly identified on page 55 of the subject report suggesting any alternative explanation of the disposition of the alleged ticket (if they exist) considered by the audit team. If no such records exist, please state so affirmatively;
- h. All records as defined by I.C. § 5-14-3-2 related to the issues discussed primarily on pages 55 and 76 of the subject report alleging Malfeasance, Misfeasance, or Nonfeasance and ECA Deposits. Your response should include, but not be limited to: identification of all SBOA employees (including contractors) materially involved in the creation of the subject report; all SBOA working papers related to or mentioning these issues; all material presented by MCS referred to in the first sentence of page 55, "From the information presented for audit, . . ."; all communications in any form between any SBOA employee (including contractors) and any employee, former employee, or Board of Trustee member of MCS including (but not limited to) those specifically mentioned on page 2 and 75 of the subject report; all communications in any form between any SBOA employee (including contractors) and any other third party concerning these matters; any records provided to the SBOA by MCS related to these matters; any notes, minutes, transcripts or other records (including records that state that those participating in the conference were under oath) of the exit conference referred to on page 75 of the subject report; any notes, minutes, transcripts, or other records of statements, testimony, interviews, discussions, exchange of correspondence or other interactions with the MCS employee identified on pages 55 and 76 as being alleged to have committed Malfeasance, Misfeasance, or Nonfeasance as defined by statute or regulation; any notes, minutes, transcripts, or other records used to determine if the restitution mentioned on pages 55 and 76 was obtained under threat, coercion, or duress; and all affidavits, affirmations, sworn statements or other documents executed by any employee, former employee, of Board of Trustee member of MCS stating that any interview, statement, discussion, testimony, or material information provided to the SBOA about any matter addressed in the subject report was true, accurate, and complete and no relevant

information was withheld. If no such records exist, please state so affirmatively.

On May 15, 2012, the SBOA acknowledged in writing the receipt of your request for records made pursuant to the APRA. On June 12, 2012, the SBOA issued the following response to your May 9, 2012 request:

1. I.C. § 5-11-5-1(b) provides that the officer examined must have an opportunity to review the report and file with the state examiner a written response to the report. The subsection is available for viewing at <http://www.in.gov/legislative/ic/code/>.
2. The Indiana Code (see internet access above), the SBOA's Indiana Public School Corporation Manual available at <http://www.in.gov/sboa/2821.htm>, and "The School Administrator and Uniform Compliance Guidelines" issued by the SBOA. If you can identify with reasonable particularity the School Administrator issue that you are requesting (such as date of publication), we will make it available or provide a copy of that bulletin to you.
3. There is no specific document that lists the requirements that must be met to identify or recognize conflicts of interest when evaluating statements of persons questioned during an audit.
4. No such document exists.
5. No such document exists.
6. Specific to request pertaining Audit Report B40064:
 - a. Such records, if they exist, would be part of our work papers. These records are excepted from disclosure pursuant to I.C. § 5-14-3-4(a)(1), I.C. § 25-2.1-14-1 and I.C. 25-2.1-14-2 as subject to the accountant-client privilege, and I.C. § 5-14-3-4(b)(6) as excepted from disclosure as deliberative materials.
 - b. See response 6(a).
 - c. See response 6(a).
 - d. See response 6(a).
 - e. See response 6(a).
 - f. See response 6(a).
 - g. See response 6(a).
 - h. Specific to (h):
 - i. The SBOA employee materially involved in the creation of the report: Such records are part of our work papers. These records are excepted from disclosure pursuant to I.C. § 5-14-3-4(a)(1), I.C. § 25-2.1-14-1 and I.C. 25-2.1-14-2 as subject to the accountant-client privilege.
 - ii. All SBOA working papers related to or mentioning these issues: Such records, if they exist, would be a part of our work papers. These records are excepted from disclosure pursuant to I.C. § 5-14-3-4(a)(1), I.C. § 25-2.1-14-1 and I.C. § 25-2.1-14-2 as subject to the accountant-client privilege; and I.C. § 5-14-3-4(b)(6) as excepted from disclosure as deliberative materials.

- iii. All materials presented by MCS referred to in first sentence of page 55: See response h(ii).
- iv. "All communications in any form between any SBOA employee . . . and any employee, . . . , of MCS. . .": See response h(ii).
- v. All communications in any form between any SBOA employee . . . and any other third party . . .": See response h(ii).
- vi. Any records provided to the SBOA by MCS related to these matters: See response h(ii).
- vii. Any notes, minutes, transcripts or other records of statements, testimony, interviews, discussions, exchange of correspondence or other interactions with the MCS employee identified on pages 55 and 76: See response h(ii).
- viii. Any notes, minutes, transcripts or other records used to determine if the restitution mentioned on pages 55 and 76 was obtained under threat, coercion, or duress: See response h(ii).
- ix. All affidavits, affirmations, sworn statements, or other documents executed by any employee, former employee, or Board of Trustee member of MCS: See response h(ii).

You allege that the SBOA violated the APRA by failing to provide records related to the administrative procedures for contesting a finding in a SBOA audit by persons other than the officer being examined as per your first request, for failing to provide records responsive to request for requirements that the SBOA must meet to issue a finding of malfeasance as per your second request, and failure to provide the discloseable portion of records responsive to your sixth request.

In response to your formal complaint, the SBOA advised that as to your first request, you were provided with a link to I.C. § 5-11-5-1(b), which is the only record that the SBOA is aware of that is responsive to your request. The SBOA advised that if you would like to review the statute in its offices, the agency will make a copy available to you. As to your second request, you were provided with the links for the respective Indiana Code, the SBOA's Indiana Public School Corporation Manual, and The School Administrator and Uniform Compliance Guidelines manual. The SBOA provided that if you can identify the particular issue of The School Administrator that you are seeking (such as date of publication), a copy of the bulletin will be made available to you.

As to your sixth request, the records that are sought are exempt from disclosure pursuant to the accountant-client privilege. See I.C. § 25-2.1-14-1; I.C. § 25-2.1-14-2; and *Opinion of the Public Access Counselor 09-FC-216*. All records that are responsive to your request fall within this privilege; as such there would not be any disclosable portions from the records that were sought. Further, the records would qualify as deliberative materials pursuant to I.C. § 5-14-3-4(b)(6) to the extent the work papers consist of expressions of opinion related to all aspects of the finding being developed as part of the audit. Said portions would be discloseable at the discretion of the SBOA, to which the SBOA has exercised its discretion to not disclose these parts of the record. Since certain parts of your request failed to identify with reasonable particularity the

records that are sought (i.e. “all material”, “all communications”, etc. . .), the request included records that may fall within the deliberative materials exception and there is no way of determining whether any such record has a discloseable portion.

ANALYSIS

The public policy of the APRA states that “(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.” *See* I.C. § 5-14-3-1. The SBOA is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the SBOA’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the SBOA acknowledged receipt of your request in writing within seven days of receiving your original request. As such, it is my opinion that the SBOA complied with the requirements of section 9 of the APRA in responding to your request.

As to your first request, you allege that the SBOA failed to provide all records related to the administrative procedures for contesting a finding in a SBOA audit by persons other than the officer being examined. In response the SBOA provided that the only record that was responsive to your request would be I.C. § 5-11-5-1(b) and a link to this portion of the Indiana Code was provided. The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. If the SBOA provided all records that were responsive to your first request, it complied with the requirements of the APRA. Although not made entirely clear by your formal complaint, if you alternatively are alleging that the SBOA violated the APRA by not actually providing you with a physical copy of I.C. § 5-11-5-1(b) (as opposed to the SBOA’s providing you with an internet link to the respective record), I would communicate this issue to the SBOA. The SBOA provided in its response to your formal complaint that if you would like to review a copy of the statute in their office, a copy will be made available to you. If you desire a

copy of the statute for your own records that is provided by the SBOA, the agency would be allowed to charge you a fee pursuant to I.C. § 5-14-3-8.

As to your second request, you provide that the SBOA failed to provide all records responsive your records for records that define the requirements that the SBOA must meet to issue a finding of malfeasance. The SBOA in response, provided in part, access to I.C. § 5-1-5-1(a), SBOA Indiana Public School Corporation Manual, and The School Administrator and Uniform Guidelines issued by the SBOA. As to a specific School Administrator issue, the SBOA provided that upon being notified of the particular School Administrator involved, (such as the date of publication) a copy of that bulletin will be provided.

The APRA requires that a records request “identify with reasonable particularity the record being requested.” I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but the public access counselor has repeatedly opined that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *See Opinions of the Public Access Counselor 08-FC-176 and 10-FC-57*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* I.C. § 5-14-3-1; *See Opinion of the Public Access Counselor 02-FC-13*. As to the School Administrator issue, the SBOA provided that it needed further information in order to provide you with any records that were responsive. The SBOA did not deny your request, which would have violated the requirements of the APRA. The SBOA has provided that as soon as you are able to provide further information, a copy of the respective bulletin will be made available. Accordingly, it is my opinion that the SBOA did not violate the APRA in seeking further information from you in order to clarify and particularize your request. As to the remaining issues related to your second request, as provided *supra*, if the SBOA provided all records that are responsive to your request, it is my opinion that it did not violate the APRA.

As to your sixth request, under the APRA a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O’Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either “establish

the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit” to the court. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47.*

As applicable here, the SBOA denied your sixth request citing I.C. § 5-14-3-4(a)(1), I.C. § 25-2.1-14-1, I.C. § 25-2.1-14-2, and I.C. § 5-14-3-4(b)(6) and provided the name and title of the person responsible for the denial. As such, it is my opinion that the SBOA denial of your sixth request complied with the requirements of section 9 of the APRA.

The APRA excepts from disclosure, among others, the following:

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. I.C. § 5-14-3-4(b)(6).

Pursuant to I.C. § 5-14-3-4(b)(6), the General Assembly has provided that records that qualify as deliberative materials may be disclosed at the discretion of the public agency. Deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1.* Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64.* The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must also be interagency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17.*

When a record contains both disclosable and nondisclosable information and an agency receives a request for access, the agency shall “separate the material that may be disclosed and make it available for inspection and copying.” See I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. See I.C. § 5-14-3-1. The Indiana Court of Appeals provided the following guidance on a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2005):

However, *section 6 of APRA* requires a public agency to separate disclosable from non-disclosable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate “information” contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-disclosable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.

Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id.* at 913-14.

To the extent the records that were responsive to your request would be considered deliberative materials pursuant to I.C. § 5-14-3-4(b)(6), the SBOA would not have violated the APRA in denying your request. If the SBOA has solely relied on the deliberative materials exception in denying your request, it would have been required to redact and provide to you the remaining disclosable portions of the records that were sought. Here, the SBOA also cited to the accountant-client privilege, thus this particular provision of the Indiana Code must also be considered.

The accountant-client privilege provides, “A certified public accountant, a public accountant, an accounting practitioner, or any employee is not required to divulge information relative to and in connection with any professional service as a certified public accountant, a public accountant, or an accounting practitioner.” See I.C. § 25-2.1-14-1. Further, I.C. 25-2.1-14-2 provides that the “information derived from or as the result of professional services is confidential and privileged.” “Professional service” is

not defined, but the statute defines “professional” as: “For a certified public accountant, arising out of or related to the specialized knowledge or skills associated with certified public accountants.” See I.C. § 25-2.1-1-10.3. Counselor Kossack provided the following guidance regarding the accountant-client privilege:

According to the SBOA, it performs a number of accounting services for public agencies:

In addition to performing financial and compliance audits of state and local governments, we prescribe forms and uniform accounting systems; we provide training for public officials and employees; we publish manuals, newsletters, and technical bulletins; and our consulting services are always available to officials on the state and local level.

See *SBOA: Our Mission*, available at <http://www.in.gov/sboa/2445.htm> (last viewed October 22, 2009). The definition of a “client” applicable to Indiana’s accountant-client privilege is “an individual or entity retaining a licensee for the performance of professional services.” I.C. § 25-2.1-1-6. The State has permanently “retained” SBOA to act, in many respects, as the in-house accountant for public agencies by performing the above functions. The SBOA’s relationship with public agencies may not be the traditional accountant-client relationship enjoyed by individuals and businesses, but it seems to qualify under the plain meaning of Indiana’s accountant-client statute. Consequently, it is my opinion that “information derived from or as the result of” such services, including the City’s credit card statement, is exempt from disclosure under the APRA as confidential according to state statute. I.C. § 5-14-3-4(a)(1); § 25-2.1-14-1 *et seq.* As the Indiana Court of Appeals has held,

Indiana Code section 25-2.1-14-2 unambiguously states “the information derived from or as the result of professional services *is confidential* and privileged.” Ind. Code section 25-2.1-14-2 (emphasis added). Because [the accountant in this case] clearly obtained the information . . . as a result of his professional accounting services, the information “is confidential.”

Orban v. Krull, 805 N.E.2d 450, 453-54 (Ind. Ct. App. 2004).

Moreover, although the General Assembly appears to have intended that SBOA’s auditing reports be freely disclosed as public records, the auditing process is subject to several confidentiality requirements. See I.C. § 5-11-5-1(a), (b), (c), (e), (g). Inasmuch as the

General Assembly intended SBOA's final reports to be public information, the statute specifically notes such intention: "Upon filing, the report becomes a part of the public records of the office.... A report is open to public inspection at all reasonable times after it is filed." I.C. § 5-11-5-1(a). The statute lacks any similar language regarding the disclosure of records obtained or created during the remaining stages of the audit process and, in fact, includes several provisions requiring their confidentiality. Thus, it is my opinion that SBOA reasonably interpreted this statute to preclude it from releasing the City's credit card statements in response to your request. *See Opinion of the Public Access Counselor 09-FC-216.*

I concur with the analysis provided by Counselor Kossack regarding the issue of the accountant-client privilege as it relates to the SBOA. Thus, it is my opinion that the SBOA's citation to the accountant-client privilege to deny your request for records was not improper and the agency did not violate the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that as to your first and second request, the SBOA did not violate the APRA if all records that were responsive to your request were provided. As to your sixth request, it is my opinion that the SBOA issued a proper denial pursuant to section 9 of the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Paul Joyce and Paul Lottes