



STATE OF INDIANA

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March 19, 2013

Mr. David Garrett
1010 Sycamore Street
Evansville, Indiana 47706

Re: Informal Inquiry 13-INF-16; Indiana Professional Licensing Agency

Dear Mr. Garrett:

This informal opinion is in response to your inquiry regarding the Indiana Professional Licensing Agency's ("IPLA") response to your request for records. Marty Allain, General Counsel, responded in writing on behalf of the IPLA. His response is enclosed for your reference. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

BACKGROUND

You currently work as a consultant for the City of Evansville. On February 8, 2013, you received a phone call from a reporter at the *Evansville Courier & Press* who asked for your comment on an investigation being conducted by the IPLA into a complaint that had been filed against you. The complaint alleged that you were holding yourself out to be a CPA, despite your license having expired in 1997. You informed the reporter that you had no knowledge of any investigation and that you had not represented yourself as a practicing CPA.

On February 9, 2013, the *Evansville Courier & Press* ran a front page article stating that "Accountant under investigation . . ." An investigator from the IPLA, Brian Cusimano, stated in the article that you had represented that you were a CPA and the IPLA was unsure whether you had made such representations to the Evansville City Council ("Council") prior to receiving a contract. You provide that not only did the IPLA make comments to the media informing them of an active investigation based on a complaint that was received, it also provided conclusions the agency had reached despite the investigation having not been completed.

Sometime after February 9, 2013, your attorney submitted your resume to the IPLA that you had previously provided to the Council prior to the Council's decision to retain your services. You provide the IPLA quickly realized that it had made a mistake

and closed the case because there were no findings to support the complaint that had been filed. On February 13, 2013, a request was submitted to the IPLA for a copy of the complaint that had been filed. The IPLA denied your request pursuant to I.C. § 25-2.1-9-2(c). Your inquiry seeks a review on the appropriateness of the denial that was issued.

In response to your inquiry, Mr. Allain reiterated that under the existing circumstances, the complaint and information pertaining to the complaint that was filed is confidential pursuant to I.C. § 25-2.1-9-2(c). Information may only be disclosed pursuant to I.C. § 25-2.1-9-2(c) if certain conditions are met. If the Board of Accountancy (“Board”) determined that there is reason to believe that the subject of the investigation has violated professional standards of practice, the complaint would be disclosable. As applicable here, this condition has not been met. The investigation into the complaint has been closed, no violations were found, and the Board has no intent of pursuing any disciplinary action against you. Further, the Board may disclose a complaint “to law enforcement authorities and, to the extent necessary to conduct an investigation, the subject of the investigation.” *See* I.C. § 25-2.1-9-2(c). Again, this condition has not been met, as the matter has been closed and no investigation is being conducted.

The stance that the confidentiality provisions of the statute were waived by the Board after an IPLA staff member mistakenly made comments to the local news media is not supported by the law, specifically I.C. § 5-14-3-10. The IPLA and the Board do share in your concern that confidential information was released and have addressed the employee’s actions in accordance with the applicable law.

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 IPLA 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 IPLA’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).

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*.

The APRA provides that records declared confidential by state statute may not be disclosed by a public agency unless access to the record is specifically required by a state or federal statute or ordered by a court under the rules of discovery. *See* I.C. § 5-14-3-4(a)(1). The Board may, upon receipt of a complaint or other information suggesting a violation of article 2.1 or IC § 25-1-11, conduct an investigation to determine whether a violation has occurred. *See* I.C. § 25-2.1-9-1. Specifically, I.C. § 25-2.1-9-2 provides that:

- (a) The Board may designate a member or other individual of appropriate competence to serve as investigating officer to conduct an investigation.
- (b) After completion of an investigation, the investigating officer shall file a report with the board.
- (c) Unless the board has determined that there is a reason to believe that the subject of an investigation has violation this article or IC 25-1-11, the report of the investigating officer, the complaint, if any, the testimony and documents submitted in support of the complaint or gathered in the investigation and the fact of pendency of the investigation are confidential information and may not be disclosed to any individual except law enforcement authorities, and to the extent necessary to conduct the investigation, the subject of the investigation, individuals whose complaints are being investigated, and witnesses questioned in the course of the investigation. I.C. § 25-2.1-9-2.

I.C. § 25-2.1-9-2 does provide specific exceptions to confidentiality regarding the investigating officer’s report, the complaint, and any records or testimony gathered in the investigation of the complaint. The first exception provides disclosure would not be prohibited if the Board determined that there is reason to believe that the subject of the investigation has acted contrary to professional practice standards. Mr. Allain has advised that no violations were found in the Board’s investigation and the Board has no intent of pursuing any disciplinary actions against you. As the Board has found no

violation, the initial exception to confidentiality would not apply. The statute further provides that regardless of the Board's determination, the records may be released to law enforcement. There is no dispute amongst the parties that you would not qualify as "law enforcement" under the statute. Lastly, the statute provides that the records may be disclosed to the subject of the investigation to the extent necessary to conduct the investigation. As applicable here, Mr. Allain has provided that the matter is closed and no further investigation is being conducted. As the investigation into the complaint is complete, it is my opinion that the last exception to confidentiality found under I.C. § 25-2.1-9-2 would not apply.

As to the issue of waiver, the Court of Appeals has recognized that a public agency may waive an applicable APRA exception if the agency allowed access to its material to one party and denied access to another based on an APRA exception. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003). However, there has not been any showing that the Board or the IPLA has provided the complaint or any records related to the complaint to any party. Further, the IPLA is not denying your request pursuant to a discretionary exception found under section 4(b) of the APRA. The records are made confidential pursuant to state statute and the statute explicitly specifies when the records may be disclosed. As outlined *supra*, it is my opinion that none of the exceptions provided in I.C. § 25-2.1-9-2 have been met. I.C. § 5-14-3-10(a) provides that a public employee who knowingly discloses information classified as confidential by state statute commits a Class A infraction. It is my opinion that should the records be disclosed, the employee responsible for the disclosure will have acted in violation of section 10(a) of the APRA .

Please let me know if I can be of any further assistance.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: Marty Allain