

November 1, 2007

Michael Muenich
Suite 304
3235 45th Street
Highland, Indiana 46322

Re: Your informal inquiry regarding the Crown Point Volunteer Fire Department

Dear Mr. Muenich:

This is in response to your informal inquiry dated September 11, 2006. I apologize for the delay in the response. Upon my appointment by Governor Daniels effective July 1 of this year, I found a backlog of informal inquiries. I am currently endeavoring to address those inquiries and issue an opinion in each matter pursuant to Indiana Code §5-14-4-10(5). Your inquiry concerns records requested from the Crown Point Volunteer Fire Department ("CPVFD") and involves the question whether the CPVFD is a public agency.

Apparently former Counselor Davis wrote an opinion in response to your inquiry. I have found her opinion dated September 13, 2006 contained in the file with your correspondence. I am unsure why the opinion was never sent to you, but I am enclosing it now. I agree with the opinion and analysis set forth by Counselor Davis in this matter.

I again apologize for the delay. Please do not hesitate to contact me if I can be of further assistance.

Best regards,



Heather Willis Neal

cc: Timothy Kuiper

September 13, 2006

Sent Via Facsimile

Michael L. Muenich
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Re: Informal Inquiry Response

Dear Mr. Muenich:

You have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

You complain that the Crown Point Volunteer Fire Department, Inc., (“CPVFD”) has denied you a record in violation of the Access to Public Records Act. Following your August 30, 2006 letter to the CPVFD requesting records of that entity, you received a letter from counsel to CPVFD, Mr. Timothy Kuiper, asserting that the CPVFD is not subject to the Access to Public Records Act because it is not a “public agency.” Hence, the denial of records maintained by the entity.

You contend that the CPVFD is a public agency under the Access to Public Records Act. In your September 11 letter to me, you state that the CPVFD, by virtue of its exercise of part of the executive power of the state and delegated local governmental powers, the CPVFD is indeed a public agency within the meaning of IC 5-14-3-2(1)(1) and (2)(C). The fire protection and emergency services that the CPVFD purports to provide are exercises of the executive power. You also extrapolate from Ind. Code 16-31-2-11 regarding disclosure of ambulance reports documenting services “that are provided by or under a contract with an entity that is a public agency for purposes of IC 5-14-3” that the records of the CPVFD are public information and must be made available for inspection and copying.

Mr. Kuiper has responded to your allegations by letter dated September 12, 2006. Mr. Kuiper asserts that because the CPVFD is a nonprofit corporation and is not subject to audit by the state board of accounts, it is not a public agency. Moreover, the CPVFD does not provide fire fighting or emergency services for the City of Crown Point. The CPVFD's main purpose is to raise funds to support the Crown Point Fire Rescue ("Fire Rescue") through the purchase of equipment and further training for Fire Rescue personnel. The CPVFD does not contract with the City to provide services to the City. Rather, the CPFR provides services. The CPVFD owns certain equipment and property which is leased to the City.

Under the Access to Public Records Act, the definition of "public agency" is, in pertinent part, any county, township, school corporation, **city**, or town, or any board, commission, department, division, bureau, committee, office, instrumentality, or authority of any county, township, school corporation, city, or town. IC 5-14-3-2(1)(2)(A). In addition, a public agency is any other entity, or any office thereof, by whatever name designated, exercising in a limited geographical area, the executive, administrative, judicial, or legislative power of the state or a delegated local governmental power. IC 5-14-3-2(1)(2)(C). Finally, the term "public agency" also applies to any entity or office that is subject to an audit by the state board of accounts. IC 5-14-3-2(1)(3).

The CPVFD has stated that it is a nonprofit corporation that is not subject to audit by the state board of accounts. An entity that is not subject to audit by the state board of accounts is not a public agency by virtue of that provision. However, you have not advanced the argument that the CPVFD is a public agency because it is subject to audit by the state board of accounts. Rather, you contend that the CPVFD, the entity to whom you addressed your records request, is exercising a portion of the executive power of the state or a delegated local governmental power by providing firefighting and emergency services to the City.

I have addressed previously the question whether a volunteer fire department is a public agency. In an opinion issued on February 15, 2005, I stated that the Anderson Township Volunteer Fire Department was a public agency because, in providing fire services, the entity was exercising a portion of the executive power of the township. In that opinion, I relied on the case of *Ayres v. Indian Heights Volunteer Fire Department, Inc.* 493 N.E.2d 1229 (Ind. 1986). In that decision, the Indiana Supreme Court, construing the Indiana Tort Claim Act, held that a volunteer fire department of a township is an instrumentality of local government regardless of which of the five ways that a township may arrange to provide local fire service under IC 36-8-13 is utilized by the township. When private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and are subject to the laws and statutes affecting governmental agencies and corporations. 493 N.E. 2d at 1235.

Here, the CPVFD seeks to avoid that result when it asserts that it does not provide fire protection services through any contract with the City. Rather, it provides training and equipment for the Crown Point Fire-Rescue. This relationship falls short of the exercise of executive power contemplated in the Access to Public Records Act, goes the argument of the CPVFD.

Under the APRA, a party seeking records has the burden of proving that the party with the records is a public agency within the meaning of the APRA. *Indianapolis Convention and Visitors Ass'n., Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991). If the non-moving party is determined to be a public agency, then the public agency bears the burden of establishing that a requested record is included within one of the categories of records that are exempt under the APRA. *Id.* At 212.

"Volunteer fire department" means a department or association organized for the purpose of answering fire alarms, extinguishing fires, and providing other emergency services, the majority of members of which receive no compensation or nominal compensation for their services. IC 36-8-12-2. If the CPVFD does not meet the above definition of volunteer fire department in its own right, where it merely provides apparatus and training services for personnel of the Fire-Rescue, it is not a public agency exercising a portion of the executive power of the state or a delegated local governmental power.

Notwithstanding the foregoing, one may consider whether a relationship exists between the CPVFD and the Fire-Rescue that would give rise to a claim that the CPVFD is a public agency. In *Opinion of the Public Access Counselor 05-FC-259*, the complainant alleged that a wholly-owned subsidiary of a county hospital was bound together by common board membership, rendering the subsidiary a public agency. I direct you to the discussion regarding when a subsidiary may not be entitled to the presumption of distinctness, such as when the subordinate entity is a mere instrumentality of the dominant corporation.

According to information compiled by the Indiana Secretary of State, the CPVFD is a nonprofit corporation, with an entity address of 126 N. East Street, Crown Point, Indiana. No other names are on file for the entity. Upon examination of the website of the Crown Point Fire-Rescue, the site is "owned and operated by "Crown Point Volunteer, Inc." There was no entity name in the Secretary of State's entity name database that corresponds to "Crown Point Volunteer, Inc." The address of the Fire-Rescue is 126 N. East Street, Crown Point.

You have not advanced any argument on this, and in fact have not established any relationship between CPVFD and Crown Point Fire-Rescue. However, you may wish to pursue this avenue of inquiry if you seek to challenge the assertion of CPVFD that it does not provide fire protection services to the City under any contract and is not, therefore, a public agency. I expressly offer no opinion on the matter herein.

Because your request for records of August 30 appeared to encompass the corporate records of the CPVFD and not records concerning the provision of services to the City, you may not deem it worthwhile to send a request for records to the Crown Point Fire-Rescue, the entity that apparently does provide fire and rescue services to the City of Crown Point and operates a volunteer fire department. Nevertheless, the Crown Point Fire-Rescue, if it is a volunteer fire department providing firefighting services to the City or any other government, is a public agency, in my opinion.

Sincerely,

Karen Davis
Public Access Counselor

cc: Timothy Kuiper