



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Court South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 5, 2009

Michelle Carson
235 East Main Street
Peru, Indiana 46970

Re: Addendum to Formal Complaint 08-FC-238; Alleged Violation of the Access to Public Records Act by the Area Five Agency on Aging & Community Services, Inc.

Dear Ms. Carson:

As you know, I issued an advisory opinion on December 14, 2008 in response to a formal complaint you filed against Area Five Agency on Aging & Community Services, Inc. ("Agency"). You alleged the Agency violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to public records. Based on the Indiana State Board of Accounts' ("SBOA") assertion that the Agency is subject to SBOA audit, I indicated it was my opinion the Agency is a public agency as defined by the APRA and as such is required to provide you access to the requested public records unless an exception to disclosure applies to the records.

Since my December 14 opinion, I have learned that while the SBOA still considers the Agency to be an entity subject to audit, SBOA cannot verify that audit is required by statute, rule or regulation. As provided in the APRA, the definition of "public agency" includes an entity subject to audit by the SBOA, but that audit must be required by statute, rule or regulation. *See* I.C. § 5-14-3-2(m)(3)(B).

Since at least 2003, this office has relied upon the SBOA to make the determination whether an entity is subject to an audit by the SBOA. *See Opinion of the Public Access Counselor 04-FC-03*. I have recently learned from SBOA General Counsel Paul Lottes, though, that my office should not rely entirely on the SBOA's determination when I.C. § 5-14-3-2.1 is at issue. Generally, I.C. § 5-14-3-2.1 excepts from the definition of "public agency" entities which provide goods, services or other benefits that meet the specific requirements listed in the statute. But while those entities are excluded from the definition of public agency and may not be required by statute, rule, or regulation to be subject to audit by the SBOA, such entities will sometimes agree contractually to submit to SBOA audit. Such is the case here. And as Mr. Lottes has indicated to me, the form submitted to the SBOA by an entity required by statute, rule or

regulation to submit to audit is the same form submitted to the SBOA by an entity which contractually agrees to submit to audit. This form, Form E-1 (“Entity Annual Report”) does not provide a mechanism for the SBOA to differentiate between those entities which are required by statute, rule or regulation to submit to audit and those which are required contractually to submit to audit. But the APRA makes a distinction.

For those reasons, my office will now rely in part on the SBOA determination whether an entity is subject to audit as well as on the evidence presented by the entity. Here, the Agency has provided evidence it has contractually agreed to submit to SBOA audit (a copy of the Agency’s correspondence on the matter is enclosed for your reference). Further, I find no statute, rule, or regulation requiring the Agency to submit to SBOA audit. As such, and based on this new information from the SBOA, it is now my opinion the Agency is not a public agency for the purposes of the APRA and therefore is not required to disclose to you the records you have requested.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Cathleen Nevin, Katz & Korin PC
Dan Casserly, Area Five Agency on Aging & Community Services, Inc.