

July 11, 2005

Bob Kentner
718 W. Mulberry St., No. 3
Kokomo, IN 46901

Re: Formal Complaint 05-FC-117; Alleged Violation of the Access to Public Records Act by the Indiana Public Employers' Plan, Inc.

Dear Mr. Kentner:

This is in response to your formal complaint alleging that the Indiana Public Employers' Plan, Inc. ("IPEP"), a non-profit domestic corporation, violated the Access to Public Records Act ("APRA") by denying your request for records.

BACKGROUND

On June 9, 2005 you filed a formal complaint with the Office of the Public Access Counselor alleging that the IPEP had violated the APRA by failing to respond to your request for records within seven days. You stated that a request for records was mailed, by certified mail, return receipt requested on May 25, 2005. The letter was received by IPEP on May 27, 2005.

My office forwarded a copy of your complaint to the IPEP. Attorney Karoline E. Jackson responded on behalf of the IPEP by letter dated June 24, 2005. A copy of that response has already been forwarded to you. Ms. Jackson included a copy of a letter dated June 8, 2005, which she had mailed to you. The letter explained that the IPEP was denying your request for records. The IPEP provided as its reason for denial the fact that it is not a public agency subject to the APRA.

You replied by letter dated June 29, 2005. In your letter you provided numerous arguments to support your position that the IPEP is a public agency subject to the APRA.

ANALYSIS

Both parties have argued strenuously the issue of whether the IPEP is a public agency, subject to the APRA. Additionally, many issues have been raised that are not relevant to the APRA. This Office declines to address issues that are outside of the scope of its authority.¹

Any person may inspect and copy the public records of any public agency during the agency's regular business hours. Ind.Code 5-14-3-3(a). It is the responsibility of the public agency to respond to requests for access to public records within a specified time period. For requests that are delivered by mail, a denial is deemed to have occurred if seven (7) days elapse after the agency receives the request and there has been no response. IC 5-14-3-9(b). If the IPEP were a public agency it would have been required to respond to your request within seven (7) days.

A "public agency" is defined in the APRA at IC 5-14-3-2(l). An entity that is subject to an audit by the state board of accounts is a public agency under the APRA. IC 5-14-3-2(l)(3). The burden of proving that an entity is a "public agency" within the meaning of the Access to Public Records Act is on the person asserting his rights under the APRA. *Perry County Development Corp. v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999).

Although you did not clearly raise the issue in your complaint the sole question is whether the IPEP is a public agency subject to the APRA. Generally, APRA places the burden of proof on the agency denying access to records; however, APRA places the initial burden of proving that an entity is a public agency upon the requestor. Your original complaint did not identify which subsection of IC 5-14-3-2(l) you believe subjects the IPEP to the APRA. However, through the subsequent letters presented by both parties it has become apparent that the issue is whether the IPEP is subject to audit by the State Board of Accounts ("SBA") and therefore, a public agency subject to the APRA.

While you have provided many public policy arguments as to why you believe the IPEP should be considered a public agency subject to the APRA, the only argument that bears merit under the APRA is whether the entity is subject to audit by the SBA.² The IPEP is registered by the Indiana Secretary of State's Office as a non-profit domestic corporation.³ Therefore, in

¹ I understand that the parties are involved in federal litigation over matters that may correlate with the issues raised in the instant action. I caution the parties that I write today solely to address the status of the IPEP for purposes of the Access to Public Records Act.

² Whether the IPEP is subject to regulation by other governmental agencies, such as the Workers' Compensation Board or the Insurance Department, has no bearing on whether the IPEP is subject to the APRA. If that were the case, then a majority of the private businesses in this State would be required to open their records up to public scrutiny. Additionally, the APRA does not concern itself with the tax status of a corporation and it is not apparent that this is a consideration by the SBA in determining whether an entity is subject to audit.

³ You believe that the original incorporation under IC 36-1-7 would necessarily make the IPEP a public agency. However, it does not appear that the IPEP is incorporated under IC 36-1-7. While you disagree with the incorporation of the IPEP as a non-profit corporation under IC 23-7-1.1, the Secretary of State has approved such incorporation and lists the IPEP as a non-profit domestic corporation. It appears from the amended articles of incorporation, which you did not provide, that currently, the IPEP is incorporated solely under IC 23-7-1.1.

determining whether the IPEP is subject to the APRA it is necessary to determine whether it is subject to audit by the SBA.

Under I.C. 5-11-1-9, certain entities, including for profit and not-for-profit entities may be subject to audit by the state board of accounts if they meet certain conditions. The determination of whether an entity is subject to audit is the sole responsibility of the State Board of Accounts. While both parties provided copious argument about whether the IPEP is a public entity and subject to audit, neither provided information concerning whether the State Board of Accounts had determined whether the IPEP is subject to audit. My office contacted the SBA to inquire whether the IPEP is “subject to audit” by that agency. Mr. Mike Bozyski informed me that he did not believe that the IPEP is subject to audit. He stated that he believes that the IPEP is funded by premiums paid by its members. He also stated that the agency had done a one-time audit of them over 10 years ago due to a senate enrolled act.⁴

Given that the State Board of Accounts has not determined that the IPEP is subject to audit, I cannot find that it is a public agency subject to the APRA. If an entity is not a public agency, it does not come within the ambit of APRA, and therefore has no duty to comply with it. Because you have not sustained your burden of proving that the IPEP is a “public agency” under APRA, I cannot find that its initial failure to respond to your request or make its records available was a violation of the APRA.

CONCLUSION

For the foregoing reasons, I find that unless the Indiana Public Employers’ Plan, Inc. is determined to be “subject to audit” by the State Board of Accounts, it is not a public agency for the purposes of the Access to Public Records Act and therefore, is not subject to its requirements.

Sincerely,

Karen Davis
Public Access Counselor

cc: Karoline E. Jackson

Therefore I decline to address the issue of whether incorporation under IC 36-7-1 would create an entity that is necessarily a public agency and subject to the APRA.

⁴ Mr. Bozyski did not state whether this was any indication that the IPEP should currently be subject to audit.