



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 22, 2009

Mr. Richard Shea Van Hoy
The Evening News
221 Spring Street
Jeffersonville, IN 47130

Re: Formal Complaint 09-FC-216; Alleged Violation of the Access to Public Records Act by the State Board of Accounts

Dear Mr. Van Hoy:

This advisory opinion is in response to your formal complaint alleging the State Board of Accounts ("SBOA") violated the Access to Public Records Act ("APRA"), Ind. Code §5-14-3-1 *et seq.* by denying you access to credit card statements that SBOA obtained during the course of an audit of the City of Jeffersonville (the "City"). For the following reasons, my opinion is that the SBOA did not violate the APRA.

BACKGROUND

In your complaint, you allege the following: On August 25, 2009, you sent an email to Charlie Pride of SBOA requesting access to the statements. Mr. Pride responded that same day and forwarded your request to SBOA's general counsel, Paul Lottes. On August 1, 2009, Mr. Lottes responded to your request via email. Mr. Lottes stated that SBOA was denying your request for access because the records are confidential pursuant to state statute. Specifically, Mr. Lottes cited to Indiana's accountant-client privilege and to the APRA's exception to disclosure for records that constitute interagency and intra-agency deliberative material.

On September 14, 2009, you replied to Mr. Lottes with another email in which you argue that the statutes cited by Mr. Lottes do not apply to the City's credit card statements. Specifically, you disagree with SBOA's invocation of the accountant-client privilege because you do not believe that SBOA has "clients." Rather, you state that SBOA is a public agency that audits government units which are not its clients. You also state that the intent of the accountant-client privilege is to "protect private businesses from having their records accessed through their private accounting firms." You further disagree with SBOA's claim that the statement is interagency or intra-agency deliberative material. You note that the APRA provides an exception for such material for that portion of records "that are expressions of opinion or are of a speculative nature." You

argue that “because a credit card bill contains no one’s opinion and is not speculative,” it is not interagency or intra-agency deliberative material.

My office forwarded a copy of your complaint to SBOA. Mr. Lottes’ response on behalf of SBOA is enclosed for your review. Mr. Lottes states that SBOA’s position is that governmental officers and entities that SBOA audits under state law are “clients” as that term is understood in the accounting profession. Mr. Lottes explains that in the same way private accounting firms issue reports to management upon the completion of an audit, SBOA issues a report to the officer or person examined, the auditing department of the municipality examined and reported upon, and files its report with the Legislative Services Agency pursuant to state law (I.C. § 5-11-5-1(a)). Also in accordance with state law, the report is posted on SBOA’s website immediately after filing. Mr. Lottes quotes the pertinent language from section 1(a):

Upon filing, the report becomes a part of the *public records* of the office of the state examiner, of the office or the person examined, of the auditing department of the municipality examined and reported upon, and of the legislative services agency, as staff to the general assembly. A report is *open to public inspection* at all reasonable times after it is filed.

Id. (emphasis by Mr. Lottes). Mr. Lottes further notes that the General Assembly has “protected the confidentiality of the audit and examination process conducted by [SBOA] by making it unlawful ‘to make any disclosure of the result of any examination of any public account’ before the report is made public by I.C. § 5-11-5-1.”

Mr. Lottes states that many SBOA employees are Certified Public Accountants (“CPAs”) who serve clients including public officers and state citizens. Mr. Lottes compares the SBOA’s CPAs to government attorneys who serve clients in the course of their government work who are not “private” clients or “private businesses,” but who are afforded the protections of the attorney-client privilege nonetheless. Mr. Lottes argues that this same protection applies to the SBOA and its governmental clients under the accountant-client privilege found in I.C. § 25-2.1-14-1 *et seq.*

Mr. Lottes further notes that you should have been able to receive copies of the credit card statements from the City if they are public records because the City is required to maintain such records in accordance with applicable public records retention laws.

Finally, Mr. Lottes reiterates SBOA’s invocation of the “deliberative materials” exception to APRA. He notes that the City’s credit card statements are used, as are most of the City’s documents that are assembled by SBOA field examiners during the course of an audit, to make various decisions during the auditing process. Such decisions include, among others, whether further audit or sampling procedures are required, whether the field examiner must consider if fraud or theft has occurred, whether risks are present that the internal controls of the client are not adequate, and whether the field examiner should refer to the matter to the state examiner or deputy state examiner for consideration of attorney general involvement. Mr. Lottes argues that the decision making process can involve all of the documents used by a party to carry out its

operations and the deliberative material exception applies to the documents as a whole (citing *The Journal Gazette v. The Board of Trustees of Purdue University*, 698 N.E.2d 826, 831-32 (Ind. Ct. App. 1998)).

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

The accountant-client privilege is governed by Ind. Code § 25-2.1-14, which 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.” Further, Ind. Code § 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.” I.C. § 25-2.1-10.3. 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.¹

CONCLUSION

For the foregoing reasons, it is my opinion that the SBOA did not violate the APRA when it denied your request.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Paul Lottes, General Counsel, State Board of Accounts

¹ Because I agree with SBOA’s arguments with respect to the accountant-client privilege and the confidentiality provisions related to the auditing process, it is unnecessary to address SBOA’s remaining arguments.