STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 12, 2012

Tom DeArk
P.O. Box 2062
Clarksville, Indiana 47131

Re: Informal Inquiry 12-INF-45; State Board of Accounts and I.C. § 5-11-5-1.

Dear Mr. DeArk:

This is in response to your informal inquiry regarding the State Board of Accounts ("SBOA") and Ind. Code § 5-11-5-1. 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"), I.C. § 5-14-3-1 *et seq.* Michael H. Bozymski, Deputy State Examiner, and Paul F. Lottes, General Counsel, responded on behalf of the SBOA. Their response is enclosed for your reference.

BACKGROUND

In your informal inquiry, you provide that on September 7, 2012, you submitted a written request for records to the SBOA for a copy of a preliminary audit report created prior to the filing and release of the final SBOA audit report on Clarksville, Indiana. On September 19, 2012, the SBOA denied your request pursuant to I.C. § 5-14-3-4(a)(1), I.C. § 5-11-5-1, I.C. § 25-2.1-14-1, I.C. § 25-2.1-14-2, and I.C. § 5-14-3-4(b)(6). You allege that the SBOA's denial of the record was improper under the APRA, based partly on your prior consultation with the Public Access Counselor's Office and the Attorney General. You do not believe that the accountant-client privilege as cited by the SBOA is applicable and that the deliberate materials exception should not apply to the preliminary audit.

In response to your informal inquiry, Mr. Bozymski and Mr. Lottes advised that the SBOA issued a report on its examination of Clarksville, Indiana on April 26, 2011 under report number B38668. The SBOA did not issue a preliminary report in this matter as contemplated by I.C. §§ 5-11-5-1(d)-(g). You are requesting a copy of the draft examination report and comments that were discussed with the officials at Clarksville during the exit conference. The SBOA gives the officials an opportunity to respond to these draft comments. This is the standard procedure adopted by the SBOA and the public agency is informed that the draft comments may change prior to the final report

being issued. The SBOA estimates that 95% of the time the draft comments discussed at the exit conference end up in the final public report. In certain instances, changes are made (some material, some not) to the draft comments based on the agency's response or during internal reviews in the Indianapolis office. In rare instances, entire comments are removed from the draft report.

The SBOA maintains that the draft comments are part of the SBOA's work papers and are used as deliberative materials in arriving at the final public report. Pursuant to I.C. § 5-11-5-1(e), the state examiners may provide a copy of the preliminary report to the Attorney General. Due to the attorney-client privilege, the SBOA cannot share our communications with a Deputy Attorney General with respect to this matter. The Attorney General's office would be able to confirm that the SBOA did not provide a preliminary report to the Attorney General in this matter.

Inasmuch as we did not issue a preliminary draft report pursuant to I.C. § 5-11-5-1(d)-(g), the SBOA would provide that your reliance on I.C. § 5-11-5-1 for authority to require use to release a draft of our report issued pursuant to I.C. § 5-11-5-1(a) is without merit. The draft copy may be properly denied pursuant to following:

1. Confidential Record: Pursuant to I.C. § 5-11-5-1, the documents prepared by the SBOA prior to filing of the report are confidential. This is in reliance on subsection (a), which provides that the report becomes public after it is filed: . . ."Upon filing, the report becomes a part of the public records of the office of the state examiner, of the office of 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 . . ." I.C. § 5-11-5-1(a).

   Pursuant to subsection (c), it is unlawful to disclose any documents related to the audit: " . . .except as required by subsection (b) and (d), it is unlawful for any deputy examiner, field examiner, or private examiner, before an examination report is made public as provided by this section, to make any disclosure of the result of any examination of any public account, except to the state examiner or it directed to give publicity to the examination report by the state examiner or by any court . . ." I.C. § 5-11-5-1(c).

   The Public Access Counselor confirmed this position in 09-FC-216: There, the counselor opined: "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), and (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."

As such, the draft report is declared confidential pursuant to I.C. §§ 5-14-3-4(a)(1) and 5-11-5-1.

2. Further, the draft report is covered by the accountant-client privilege as provided under I.C. § 25-2.1-14, which provides that, "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, I.C. § 25-2.1-14-2 provides that "information derived form or as the result of professional services is confidential and privileged." "Professional services" are 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. § 25-2.1-1-10.3. Accordingly, the SBOA provides a number of accounting services for public agencies.

   The definition of "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 the SBOA to act, in many respects, as the in-house accountant for public agencies by performing a variety of accounting functions. Consequently, "information derived from or as the result of such services, is exempt from disclosure pursuant to the accountant-client privilege. *See also Orban v. Krull*, 805 N.E.2d 450, 453-54 (Ind. Ct. App. 2004).

3. The draft report is also excepted from disclosure at the discretion of the SBOA pursuant to the deliberative materials exception provided under I.C. § 5-14-3-4(b)(6). The record in question was "interagency", it contained advise from the SBOA about what has been found in the audit and is used for deliberation or discussion at the final exit conference, allowing for a written response to be delivered to the SBOA pursuant to I.C. § 5-11-5-1(b). The draft report includes expressions of opinion and is speculative in nature, as the SBOA reports what has been uncovered during the audit, which may include opinions or be speculative in nature, subject to revision based on the auditees' response. The majority of the draft report is factual, but it may have some opinions or speculation for presentation to the auditee for clarification. Lastly, the report is communicated to the auditee at the exit conference for the purpose of a decision making; that is, the auditee must decide whether the auditee believes the SBOA's findings are correct and reports to the SBOA's draft report with a written response (unless waived) pursuant to I.C. § 5-11-5-1(b).

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 SBOA 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 SBOA'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).

The APRA provides that a public agency denying access in response to a written public records request must put the 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.*

I.C. § 5-11-5-1 provides:

> Sec. 1. (a) Whenever an examination is made under this article, a report of the examination shall be made. The report must include a list of findings and shall be signed and verified by the examiner making the examination. A finding that is critical of an examined entity must be based upon one (1)

of the following:

(1) Failure of the entity to observe a uniform compliance guideline established under IC 5-11-1-24(a).

(2) Failure of the entity to comply with a specific law.

A report that includes a finding that is critical of an examined entity must designate the uniform compliance guideline or the specific law upon which the finding is based. The reports shall immediately be filed with the state examiner, and, after inspection of the report, the state examiner shall immediately file one (1) copy with the officer or person examined, one (1) copy with the auditing department of the municipality examined and reported upon, and one (1) copy in an electronic format under IC 5-14-6 of the reports of examination of state agencies, instrumentalities of the state, and federal funds administered by the state with the legislative services agency, as staff to the general assembly. 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. If an examination discloses malfeasance, misfeasance, or nonfeasance in office or of any officer or employee, a copy of the report, signed and verified, shall be placed by the state examiner with the attorney general and the inspector general. The attorney general shall diligently institute and prosecute civil proceedings against the delinquent officer, or upon the officer's official bond, or both, and against any other proper person that will secure to the state or to the proper municipality the recovery of any funds misappropriated, diverted, or unaccounted for.

(b) Before an examination report is signed, verified, and filed as required by subsection (a), the officer or the chief executive officer of the state office, municipality, or entity examined must have an opportunity to review the report and to file with the state examiner a written response to that report. If a written response is filed, it becomes a part of the examination report that is signed, verified, and filed as required by subsection (a).

(c) Except as required by subsections (b) and (d), it is unlawful for any deputy examiner, field examiner, or private examiner, before an examination report is made public as provided by this section, to make any disclosure of the result of any examination of any public account, except to the state examiner or if directed to give publicity to the examination report by the state examiner or by any court. If an examination report shows or discloses the commission of a crime by any person, it is the duty of the state examiner to transmit and present the examination report to the grand jury of the county in which the crime was committed at its first session after the making of the examination report and at any subsequent sessions that may be required. The state examiner shall furnish to the grand jury all evidence at the state examiner's command necessary in the

> investigation and prosecution of the crime.
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> (d) If, during an examination under this article, a deputy examiner, field examiner, or private examiner acting as an agent of the state examiner determines that the following conditions are satisfied, the examiner shall report the determination to the state examiner:
>
> (1) A substantial amount of public funds has been misappropriated or diverted.
>
> (2) The deputy examiner, field examiner, or private examiner acting as an agent of the state examiner has a reasonable belief that the malfeasance or misfeasance that resulted in the misappropriation or diversion of the public funds was committed by the officer or an employee of the office.
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> (e) After receiving a preliminary report under subsection (d), the state examiner may provide a copy of the report to the attorney general. The attorney general may institute and prosecute civil proceedings against the delinquent officer or employee, or upon the officer's or employee's official bond, or both, and against any other proper person that will secure to the state or to the proper municipality the recovery of any funds misappropriated, diverted, or unaccounted for.
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> (f) In an action under subsection (e), the attorney general may attach the defendant's property under IC 34-25-2.
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> (g) A preliminary report under subsection (d) is confidential until the final report under subsection (a) is issued, unless the attorney general institutes an action under subsection (e) on the basis of the preliminary report.

It should be noted that the preliminary report referenced in subsection (d)-(g) is a separate and distinct record from the final report contemplated in (a). A preliminary report is not issued in connection with every audit that is performed; rather as outlined in (d), if during the examination the examiner determines that a substantial amount of public funds have been misappropriated or diverted and has a reasonable belief that the malfeasance or misfeasance that resulted in the misappropriation or diversion of the public funds was committed by the officer or employee of the office, the examiner shall report that determination to the state examiner. *See* I.C. § 5-11-5-1(d). Such report is referred to as a preliminary report in (e). *See* I.C. § 5-11-5-1(e). A preliminary report is not a draft copy of the final report that is issued under (a). The statute clearly provides that a preliminary report is confidential under subsection (d), *until* the final report under subsection (a) is issued, unless the attorney general institutes an action under subsection (e) on the basis of the preliminary report (emphasis added). *See* I.C. § 5-11-5-1(g). Thus, to the extent that the state examiner has received a preliminary report under subsection (d), if the final report under (a) has already been issued, unless the attorney general has instituted an action under subsection (e), the preliminary report is no longer confidential and must be disclosed. The SBOA has provided that it did not issue a preliminary report as contemplated under the statute in relation to the examination that was performed on Clarksville, Indiana. As such, it is my opinion that the SBOA did not

violate the APRA in response to your request for a copy of the preliminary report, as a preliminary report was not issued in relation to the audit in question.

As to the final report issued under (a), the statute provides that the final report becomes part of the public records of the office upon filing. To the extent you sought draft copies of the final report under (a) or the copy of the report that was presented to Clarksville to review under (b), the SBOA has denied the request pursuant to I.C. § 5-14-3-4(a)(1), I.C. § 25-2.1-14-1, I.C. § 25-2.1-14-2, and I.C. § 5-14-3-4(b)(6) and provided the name and title of the person responsible for the denial. It is my opinion that the SBOA's denial of your request for draft copies of the final report complied with the requirements of section 9(c) of the APRA.

The APRA excepts from disclosure, among others, the following:

> Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making. I.C. § 5-14-3-4(b)(6).

Pursuant to I.C. § 5-14-3-4(b)(6), the General Assembly has provided that records that qualify as deliberative materials may be disclosed at the discretion of the public agency. Deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1.* Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64.* The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must also be interagency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17.*

When a record contains both discloseable and nondiscloseable information and an agency receives a request for access, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1. The Indiana Court of Appeals provided the following guidance on a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate dislcoseable from non-dislcoseable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-dislcoseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
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> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id*. at 913-14.

To the extent information contained in the draft copies of the final report would be considered deliberative materials pursuant to I.C. § 5-14-3-4(b)(6), the SBOA would not have violated the APRA in denying your request. If the SBOA has solely relied on the deliberative materials exception in denying your request, it would have been required to redact and provide to you the remaining discloseable portions of the records that were sought. Here, the SBOA also cited to the accountant-client privilege, thus this particular provision of the Indiana Code must also be considered.

The accountant-client privilege 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." *See* I.C. § 25-2.1-14-1. Further, I.C. 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." *See* I.C. § 25-2.1-1-10.3. Counselor Kossack provided the following guidance regarding the accountant-client privilege:

> 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."
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> *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. *See Opinions of the Public Access Counselor 09-FC-216; 12-FC-217.*

I concur with the analysis provided by Counselor Kossack regarding the issue of the accountant-client privilege as it relates to the SBOA. Thus, it is my opinion that the SBOA did not violate the APRA in citing to the accountant-client privilege to deny your request for draft copies of the final report under I.C. § 5-11-5-1(a) or the report that was presented to Clarksville under I.C. § 5-11-5-1(b).

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Representative Steve Stemler, Paul Lottes, Mike Bozymski, Matt Light