



# STATE OF INDIANA

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April 15, 2015

Ms. Barbara Stein  
C/o Mr. Jim Brugh, Esq.  
204 Fourth Street  
Logansport, IN 46947

*Re: Formal Complaint 15-FC-93; Alleged Violation of the Access to Public Records Act by State Board of Accounts*

Dear Ms. Stein,

This advisory opinion is in response to your formal complaint alleging that State Board of Accounts ("SBOA") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The SBOA has responded to your complaint via Mr. Paul D. Joyce, State Examiner. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on March 12, 2015.

## BACKGROUND

Your complaint dated March 12, 2015 alleges SBOA violated the Access to Public Records Act by failing provide the records you requested.

On December 31, 2014, you attempted to obtain audit reports from the SBOA. Your request was acknowledged on January 5, 2015. Your request was denied on February 10, 2015. SBOA denied your request for a lack of reasonable particularity and an allegation the documents found may be under a work product exemption. Regardless, you were invited to resubmit your request with particularity and to check the records of the City of Logansport.

You contend SBOA records are disclosable because the General Assembly intends SBOA's auditing reports are disclosable, and therefore it is "reasonable to presume that any document that was considered or was the basis of the final report is discoverable and available as the final public record."

You also contend since accountant-client privilege is not a common law doctrine, it should be strictly construed in this case to limit its application.



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Finally, you allege the burden should be on SBOA to identify why it believes the request lacks particularity.

SBOA disputes your reading of APRA, asserting while the General Assembly has held auditing reports should be freely disclosed, the process is subject to restrictions. SBOA cites Ind. Code § 5-11-5-1(a), which provides a “report is open to public inspection at all reasonable times after it is filed.” SBOA interprets this statute to preclude it from releasing the records you requested.

SBOA also disputes your contentions about attorney-accountant privilege, noting no major changes have occurred since *Advisory Opinion 12-FC-217*, which upheld SBOA’s attorney-accountant privilege.

Finally, SBOA claims since you requested all documents relating to the City of Logansport, it is impossible to determine which records you requested. SBOA cites previous Public Access Counselor Opinions, which state if the public agency cannot determine what records you seek; your request is found to have lacked reasonable particularity.

## 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 Ind. Code § 5-14-3-1. State Board of Accounts is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Board’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

“Reasonable particularity” is not defined in the APRA. If a public agency cannot determine what records are sought, the request lacks reasonable particularity. That does not mean a large request lacks particularity. However, in this case, you do not specify particular records requested and instead make a request for all records. This request appears to lack reasonable particularity on its face.

You allege Ind. Code § 5-11-5-1 shows the legislature intended for SBOA’s records to be disclosable as public records. Ind. Code § 5-11-5-1 does state once a report is filed by the



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examiner, it becomes part of the public record. You maintain because the final report has been disclosed, the documents that were the basis of the report are also a matter of public record. The records used for the creation of the report are a matter for the deliberation of the SBOA and the mere fact the SBOA consulted a record prior to the creation of the report does not mean the record was intended to be disclosed.

Pursuant to Ind. Code § 5-14-3-4(b)(6), the General Assembly has provided records that qualify as deliberative materials may be disclosed at the discretion of the public agency. Deliberative materials include information which reflects, for example, one's ideas, opinions and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1.* The records SBOA used to compile its report appears to fall within the deliberative records exemption pursuant to Ind. Code § 5-14-3-4(b)(6) to the extent the work papers consist of expressions of opinion related to all aspects of the finding being developed as part of the audit.

Therefore, SBOA is correct in its reading of APRA, regarding the nature of SBOA's reports. The mere fact the final reports themselves are public records does not mean records are to be made available prior to a "reasonable inspection time."

You also raise concerns with SBOA's use of the accountant-client privilege. You contend the City of Logansport is not a client of the SBOA and the privilege belongs to the client, not the SBOA, to decide to disclose. The same argument was made in *Advisory Opinion 09-FC-216*, in a request for SBOA records. SBOA cites this opinion in his response.

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. [SBOA counsel] 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.

*See Opinion of the Public Access Counselor 09-FC-216.*

You are correct in asserting the accountant-client privilege is to be strictly construed. However, SBOA contends because the state has permanently "retained" SBOA to act as its accountant, SBOA is afforded the accountant-client privilege.



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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.” Ind. Code § 25-2.1-1-6. The performing of an audit would appear to fall within the designation of “professional services.” Further, Ind. Code § 25-2.1-1-10(1) reads the “[p]ractice of accountancy” means the performance or the offering to perform by a licensee of a service involving the use of accounting or auditing skills, including the issuance of reports on financial statements.”

The fact the Indiana Code lists the use of auditing skills under the practice of accounting shows the legislature intended for auditing work to be covered by the accountant-client privilege. Because municipalities are required by statute to be audited, the privilege naturally extends to the regulatory authority auditing the City.

## CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the State Board of Accounts has not violated the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read "LH Britt", written over a horizontal line.

Luke H. Britt  
Public Access Counselor

Cc: Mr. Paul Lottes, Esq.; Mr. Paul Joyce