



STATE OF INDIANA

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January 8, 2013

Ms. Violette W. Wysong
KPC Media Group Inc.
102 N. Main Street
Kendallville, Indiana 46755

Re: Formal Complaint 13-FC-10; Alleged Violation of the Access to Public Records Act by the LaGrange County Auditor

Dear Ms. Wysong:

This advisory opinion is in response to your formal complaint alleging the LaGrange County Auditor ("Auditor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Timothy L. Claxton, Attorney, responded in writing on behalf of the Auditor to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on January 2, 2013, a written request for records was filed with the Auditor by the Patrick Redmond, a reporter for the KPC Media Group. The records that were sought were provided by the LaGrange County Commissioners ("Commissioners") to the State Board of Accounts ("SBOA") and are referred to in the SBOA's Audit Report of the Commissioners.

Mr. Redmond was informed that the County was allowed seven days to respond. On January 7, 2013, Mr. Redmond received a written response from Mr. Claxton on behalf of the Auditor. Mr. Claxton's correspondence confirmed the receipt of the request and advised that County personnel were now working on securing the records that would be responsive to your request. Mr. Claxton stated in light of the breadth and scope of the request, he expected that the documents would be available within the next few weeks. You believe that Mr. Claxton's response on behalf of the Auditor is non-responsive, a denial under I.C. 5-14-3-9, and there is no applicable exception that would allow the Auditor to deny your request.

In the interim of the filing of your formal complaint and the issuance of this advisory opinion, the Auditor provided, in part, records that it maintained in response to your request. In response to your request for copies of the Indiana Inheritance Tax

Return for Alvin E. Lambright (“Indiana Return”) and the Trust Fiduciary Tax Returns (“Fiduciary Return”), as discussed *infra*, Mr. Claxton advised that the Indiana Return was prohibited from being disclosed pursuant to state and federal law and the Auditor did not maintain copies of the Fiduciary Return. You believe that because the County is the remainder beneficiary, the records should be made public, minus any applicable redactions for personal information (i.e. social security numbers). You maintain that while the statute requires receiving tax authorities to keep returns confidential, the law does not apply to parties who file or trust beneficiaries, and should certainly not apply to filings involving income and assets, whether tangible or intangible, of governmental entities. In addition, you argue that as the remainderman at the time of the trust income tax filing, the County has a right and duty to possess and inspect a copy of the Fiduciary Return. You allege that copies were provided to the State Board of Account (“SBOA”); thus as some point the Fiduciary Return was in the County’s possession through its attorney.

In response to your formal complaint and subsequent correspondence, Mr. Claxton advised that all records were provided by the Auditor in response to your request with the exception of the Indiana Return and the Fiduciary Return. With regard to the Fiduciary Return, the County does not have a copy of the documents in its possession. Although the County may have a right to inspect the Fiduciary Return as the remainder beneficiary, the County does not have a duty to maintain a copy of the return. Mr. Claxton is not aware of any statutory authority mandating that a political subdivision maintain this type of record. To require the County to obtain documents in response to an APRA request would impose a substantial burden on political subdivisions, outside the authority and purpose of the APRA. The Fiduciary Return and associated records were provided to the SBOA by Mr. Bachman, in his capacity as the Trustee for the Lambright Trust, not as an attorney representing the County. Mr. Bachman withdrew as attorney for the County with respect to the Lambright Trust.

In addition, the APRA requires documents declared confidential by state statute may not be disclosed by a public agency. *See* I.C. § 5-14-3-4(a)(1). I.C. § 6-8.1-7-1 specifically calls for the confidentiality of tax information; subdivision (a) provides that “. . . any other person may not divulge the amount of tax paid by any taxpayer, terms of a settlement agreement executed between a taxpayer and the department, investigation records, investigation reports, or any other information disclosed by the reports filed.” In addition, I.C. § 6-4.1-12-12 stated that “. . . any other person who gains access to the inheritance tax files shall not divulge any information disclosed by the documents.” By the plain terms of both statutes, the confidentiality provisions apply to all persons and entities, not just the Department of Revenue. Thus, the County has no discretion in this regard and is prohibited from disclose the returns in response to your request. Further, the County is not aware of any state statute that would except the records from confidentiality.

Similar to state law, federal law requires that return and return information shall be made confidential. *See* 26 U.S.C. § 6103. Pursuant to I.C. § 5-14-3-4(a)(3), documents made confidential by federal law are not subject to disclosure. In light of the

applicable federal statute, the County again would be prohibited from disclosing the records in response to your request.

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 Auditor 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 Auditor’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).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, you hand-delivered a written request for records to the Auditor on January 2, 2013. On January 4, 2013, Mr. Claxton responded on behalf of the Auditor provided written acknowledgment of the receipt of your request. The Auditor was required to respond, in writing, within twenty-four hours of receipt of your hand-delivered written request and acted contrary to section 9 of the APRA when it failed to do so. *See Opinions of the Public Access Counselor 05-FC-176; 11-FC-84; 11-FC-308; 12-FC-63; 12-FC-316.*

Beyond the response times required under section 9 of the APRA, section 3(b) requires that a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered in determining if the requirements of section 3(b) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45.* This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See*

Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121.*

In Mr. Claxton January 4, 2013 response he advised that the Auditor was in receipt of your request, was now working on retrieving any records that may be responsive, and believed the request could be fulfilled within the next several weeks. Mr. Claxton advised that should the time period referenced be an issue; do not hesitate to contact him directly by response letter. If the requested records could be handled and/or released prior to that time, Mr. Claxton provided that he would contact you on how to make arrangements for you to inspect and copy the records. The correspondence does not deny your request in any fashion and outlines a timetable that the Auditor would follow in responding to your request. It is my opinion that Mr. Claxton's January 4, 2013 correspondence was responsive to your request and cannot be described as a denial under section 9 of the APRA.

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

Here, we are dealing with your request for the Fiduciary Return, which the Auditor provided that it did not maintain, and the Indiana Return, which the Auditor denied pursuant to a specific state and federal statute. I will address both requests separately.

Fiduciary Return

The Auditor has provided that it does not maintain a copy of the Fiduciary Returns. The Fiduciary Return was provided to the SBOA by Mr. Bachman, in his capacity as Trustee for the Lambright Trust, not as an attorney representing the Auditor and/or County. A “public record” means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2. Generally, the APRA does not require public agencies to produce records that the agency does not physically maintain. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”).

However, in 2005 the Court of Appeals in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005) (“*Knightstown*”), held that because a private entity created a settlement agreement for a public agency, the settlement agreement was a public record subject to disclosure under the APRA. *Id.* at 1134. The Court did not find that the language “created, received, retained, maintained or filed by or with a public agency” in I.C. §5-14-3-2 excepted from the definition records created for or on behalf of a public agency. Furthermore, the Court said it would amount to a tortured interpretation of the statute if private attorneys could ensconce public records in their file room in order to deny the public access. *Id.* at 1133. In other words, where records are created or maintained for a public agency but kept in the possession of an outside entity, the Court of Appeals ruled that the agency is obligated to retrieve the records and make them available for inspection and copying upon request. *Id.*; see also *Opinion of the Public Access Counselor 08-FC-223*; *10-FC-219*; and *11-INF-43*.

Here, if the attorney in question received a copy of the Fiduciary Return while representing the Auditor and/or County, the agency could not provide that the Fiduciary Return was not a public record under the APRA or state that it did not maintain any records that were responsive to the request. However, Mr. Claxton has advised that Mr. Bachman, in his capacity as Trustee for the Lambright Trust, retained a copy of the Fiduciary Return and provided a copy to the SBOA. As such, it is my opinion that the records retained by an attorney for a separate client or entity, would not become public records of the agency simply because the attorney in a separate capacity also represents a public agency. I am not aware of any statute that would require a remainderman or beneficiary, regardless of their status as a public agency, to retain certain records of the trust. As such, it is my opinion that the Auditor did not violate the APRA by failing to

provide a copy of the Fiduciary Return in response to your request as the Auditor has never maintained a copy of the record.

Indiana Return

The Auditor denied your request for a copy of the Indiana Return pursuant to I.C. § 5-14-3-4(a)(1); I.C. § 6-8.1-7-1; I.C. § 6-4.1-12-12; I.C. § 5-14-3-4(a)(3); and 26 U.S.C. § 6103. As it is my opinion that the Auditor would be prohibited from disclosing the Indiana Return pursuant to I.C. § 6-4.1-12-12, I will not discuss the other exceptions that have been raised.

I.C. § 5-14-3-4(a)(1) provides that records declared confidential by state statute may not be disclosed by a public agency, unless access to the record is specifically required by a state or federal statute or is ordered by a court under the rules of discovery. I.C. § 6-4.1-12-12 provides the following regarding inheritance tax information:

- (a) The department, the department's counsel, agents, clerks, stenographers, other employees, or former employees, or any other person who gains access to the inheritance tax files shall not divulge any information disclosed by the documents required to be filed under this article. However, disclosure may be made in the following cases:
 - (1) To comply with an order of a court.
 - (2) To the members and employees of the department.
 - (3) To the members and employees of county offices and courts to the extent they need the information for inheritance tax purposes. IC 5-14-3-6.5 does not apply to this subdivision.
 - (4) To the governor.
 - (5) To the attorney general.
 - (6) To any other legal representative of the state in any action pertaining to the tax due under this article.
 - (7) To any authorized officer of the United States, when the recipient agrees that the information is confidential and will be used solely for official purposes.
 - (8) Upon the receipt of a certified request, to any designated officer of a tax department of any other state, district, territory, or possession of the United States, when the state, district, territory, or possession permits the exchange of like information with the taxing officials of Indiana and when the recipient agrees that the information is confidential and will be used solely for tax collection purposes.
 - (9) Upon receipt of a written request, to the director of the department of child services or to the director of the division of family resources and to any county director of family and children, when the recipient agrees that the information is confidential and will be used only in connection with their official duties.
 - (10) To the attorney listed on the inheritance tax return under IC 6-4.1-4-1 or IC 6-4.1-4-7.
 - (11) To a devisee, an heir, a successor in interest, or a surviving joint tenant of the decedent for whom an inheritance tax return was filed or, upon the receipt

of a written request, to an agent or attorney of a devisee, an heir, a successor in interest, or a surviving joint tenant of the decedent.

(b) Any person who knowingly violates this section:

(1) commits a Class C misdemeanor; and

(2) shall be immediately dismissed from the person's office or employment, if the person is an officer or employee of the state.

I do not think that it can be disputed that the Indiana Return would fall under the provisions of I.C. § 6-4.1-12-12. The prohibition against disclosure applies to any person who gains access to the inheritance tax files and requires that the information disclosed by the records may only be divulged under certain, specific instances. *See also Opinion of the Public Access Counselor 11-FC-6.* Thus, while the County may have the ability to access and maintain a copy of the Indiana Return, it would be prohibited with providing the record to anyone not specifically provided for in the list of exceptions. As such, it is my opinion that the Auditor did not violate the APRA in denying your request for a copy of the Indiana Return.

CONCLUSION

Based on the foregoing reasons, it is my opinion that the Auditor acted contrary to the requirements of section 9 of the APRA by failing to respond in writing within twenty-four hours of the receipt of your hand-delivered written request. As to all other issues, it is my opinion that the Auditor did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Timothy L. Claxton