



STATE OF INDIANA

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Mr. Keith E. Stormes
Executive Director
LifeSpan Resources, Inc., Area Agency on Aging #14
33 State St., 3rd Flr.
P.O. Box 995
New Albany, IN 47151-0995

*Re: Formal Complaint 10-INF-43; Applicability of the Access to
Public Records Act to LifeSpan Resources, Inc., Area Agency on
Aging #14*

Dear Mr. Stormes:

This advisory opinion is in response to your informal inquiry regarding LifeSpan Resources, Inc., Area Agency on Aging #14 ("LifeSpan"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.*

Your inquiry asks whether or not LifeSpan is subject to the requirements of the APRA. You reference a previous opinion from Counselor Neal concerning the Area Agency on Aging #5 ("AAA #5"). See *Addendum to Formal Complaint 08-FC-238*, available at http://www.in.gov/pac/advisory/files/formal_opinion_08-FC-238.pdf. In that opinion, Counselor Neal decided that AAA #5 was not subject to the APRA because it was not subject to an audit by the State Board of Accounts ("SBOA") that was required by statute, rule, or regulation under I.C. § 5-14-3-2(m)(3)(B).

The public policy of the APRA states, "[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. An entity must be considered a "public agency" in order to be subject to the requirements of the APRA and the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.* The party seeking to inspect and copy records has the burden of proving that the entity in possession of the records is a public agency within the meaning of the APRA. *Indianapolis Convention & Visitors Ass'n v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208, 212 (Ind. 1991). The term "public agency" is broadly defined in the APRA. The issue presented here, however, is whether LifeSpan is a public agency subject to the

APRA because it is “subject to . . . an audit by the state board of accounts that is required by statute, rule, or regulation.” I.C. § 5-14-3-2(1)(3)(B).

Generally, the public access counselors has relied solely on the SBOA’s determination of whether an entity is subject to an audit that is required by statute, rule, or regulation. *See, e.g., Opinion of the Public Access Counselor 05-FC-226* (Counselor Davis, noting that “[t]he public access counselor cannot and will not look behind the determination of the State Board of Accounts . . . For as long as the [SBOA’s determination that the entity is subject to audit] stands, the entity is a ‘public agency’ and its records are subject to disclosure under the [APRA]”); *04-FC-03* (Counselor Hurst, opining that “the determination set forth by SBOA controls whether a not-for-profit entity is a ‘public agency’ [and that] the APRA does not permit this office to void or otherwise disregard the determination by the SBOA [that an entity is subject to audit for a certain period]). However, Counselor Neal noted that whether or not an entity is subject to an SBOA audit is a necessary but not sufficient fact for determining whether the entity is subject to an SBOA audit that is required by a statute, rule or regulation. In Counselor Neal’s *Addendum to Formal Complaint 08-FC-238*, she wrote that nonprofit entities “will sometimes agree contractually to submit to SBOA audit.” *Id.* In such instances, the E-1 sent to SBOA does not contain enough information to permit the public access counselor to determine whether the audit was required by “statute, rule, or regulation,” or whether the entity voluntarily submitted to it. In the latter case, the entity would not be subject to the APRA, so the fact that SBOA informed Counselor Neal that the entity was subject to audit was not dispositive. Counselor Neal did not disagree with any SBOA subject to audit determination. Rather, she required additional information in order to determine whether the audit was voluntary or required by statute, rule or regulation.

In the course of investigating your inquiry, I spoke with SBOA Non-Governmental Entities Supervisor Tammy Baker. Ms. Baker informed me that LifeSpan is subject to an audit that is required by statute. It is my understanding that LifeSpan has not voluntarily submitted to the SBOA audit, and that even if LifeSpan did voluntarily submit to it, the audit is still required by statute. *See* I.C. § 5-11-1-9. As such, LifeSpan is a “public agency” within the meaning of I.C. § 5-14-3-2(1)(3)(B) because it is subject to an audit by the SBOA that is required by statute, rule, or regulation. Accordingly, LifeSpan should disclose all records responsive to public records requests unless the requested records fall within one of the APRA’s exceptions to disclosure in section 4. *See* I.C. § 5-14-3-4(a) and 4(b). I note that LifeSpan is not obligated to create new records or otherwise disclose records that it does not maintain.

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

Best regards,



Andrew J. Kossack
Public Access Counselor