February 9, 2004

Mr. Warren A. Auxier
P.O. Box 215
Hanover, Indiana 47243

Re: Formal Complaints 04-FC-03, 04-FC-04
Alleged Denial of Access to Public Records and Open Door Law Violations by the Madison Industrial Development Corporation.

Dear Mr. Auxier:

I am writing in response to your complaints alleging that the Madison-Jefferson Industrial Development Corporation (MIDCOR) denied you access to public records in violation of the Indiana Access to Public Records Act (APRA) (Ind. Code § 5-14-3), and that it held meetings in violation of the Indiana Open Door Law (Open Door Law) (IC 5-14-1.5). MIDCOR has submitted a response to your complaints, and a copy of that response is attached for your review. It is my opinion that MIDCOR is a public agency for purposes of the APRA and the Open Door Law to the extent and for those periods that it is subject to an audit by the State Board of Accounts (SBOA), and that its failure to produce records or hold open meetings for the applicable periods would be in violation of the APRA and the Open Door Law.

BACKGROUND

MIDCOR is a Madison, Indiana, "not for profit" entity established in 1983. Its corporate paperwork states that it was established to help local industries expand and to bring new industries into Madison and Jefferson counties for the betterment of the community. According to MIDCOR, that entity did not receive any public funds from any governmental body until 1988. At that time, MIDCOR began entering into annual contracts with either the City of Madison or with Jefferson County or both "to perform the services of industrial development." In addition, pursuant to Jefferson County ordinance (Ordinance 2000-7), MIDCOR receives a percentage of gaming tax revenue allocated to Jefferson County, and distributed to MIDCOR on a frequency to be determined by the Jefferson County Commissioners.

On November 24, 2003, you made an informal inquiry with this office to determine whether MIDCOR would be considered to be a "public agency" for purposes of the APRA and thus subject to a request for records brought pursuant to that statute. In support of that inquiry, you provided copies of the above-referenced ordinance and copies of contracts MIDCOR entered into with Jefferson County and the City of Madison for 2002. Those supporting documents indicated that public fund distributions to MIDCOR for calendar year 2002 totaled in excess of $100,000. You also provided a copy of MIDCOR's Entity Annual Report (State Form E-1) filed

on February 3, 2003, with the Indiana State Board of Accounts (SBOA). A State Form E-1 is the form required to be filed with the SBOA for that agency to determine, pursuant to Indiana Code 5-11-1-9(b)(2), the nature and extent of its audit responsibilities for entities receiving public funds. The State Form E-1 indicates that MIDCOR accounted for $123,504 in "Government Funds Received During Year [2002]," and that more than $120,000 of that amount were local and state funds making up one-hundred (100%) percent of its disbursements for the year. On April 29, 2003, the SBOA determined that for the period 2002 MIDCOR met the threshold requirements and was "subject to a complete organization-wide audit performed in accordance with guidelines" issued by the SBOA. MIDCOR did not challenge that determination.

Based on the information you provided, on December 17, 2003, I issued an informal inquiry response finding that MIDCOR was a public agency for purposes of the APRA for the audit period 2002, and that its records for that period and any of its ongoing records at the time it became subject to audit were subject to disclosure under the APRA.

On December 19, 2003, you submitted your written request for records to MIDCOR. Your request sought the following records:

- MIDCOR's Articles of Incorporation and Bylaws;
- All minutes of Board and Executive Board meetings for 1984 to present;
- Federal Income Tax Returns and Schedules for 1984 to present;
- Annual Audit and Financial Reports for 1984 to present;
- Detailed listing of monthly cash receipts and disbursements for the past 60 months;
- Check Register covering the past five years; and
- All information provided to Board members for their meetings for the past three years.

Your request further stated that until such time that MIDCOR can demonstrate that their public funding receipts do not make them subject to an SBOA audit, they hold all of their meetings in accordance with the Open Door Law. MIDCOR responded to your request in writing and on the same day. MIDCOR agreed to provide you with copies of its Articles of Incorporation and Bylaws, and with responsive records limited to the years 2002 and 2003. MIDCOR declined to provide you with copies of any responsive documents for any year prior to 2002 on the basis that they were not considered a public agency for purposes of the APRA for any year prior to 2002. Your complaints followed on January 9, 2004.

In Formal Complaint 04-FC-03, you allege that MIDCOR's response denies you access to public records in violation of the APRA where MIDCOR declined to provide you with responsive records from 1984 (the effective date of the APRA) through 2001. In Formal Complaint 04-FC-04, you allege that MIDCOR violated the Open Door Law with regard to each meeting of their Board for the entire year 2002. Your complaints are based on the informal opinion issued on December 17, 2003, that MIDCOR was a public agency for that period. I invited MIDCOR to respond to the complaints and to consolidate its responses if appropriate.

In response, MIDCOR denies that it violated the APRA when it declined to provide you with access to MIDCOR's records for any of the years requested based on its conclusion that it was never properly subject to an audit by the SBOA and was therefore never a public agency for purposes of the APRA. MIDCOR further responds that, while it does not concede that it was a public agency even for the period 2002, it agreed to voluntarily furnish you with documents for that period. MIDCOR's response also states that it will provide responsive records for 2001 and 2003. MIDCOR's argument that it was never subject to an audit and thus not a public agency under the APRA is founded on its assertion that its receipt of public funds was pursuant to contracts that provided a fee for services. MIDCOR's response does not directly address your complaint that it violated the Open Door Law, but I read it in context to assert the same argument that it was not properly subject to audit and thus not a public agency for that purpose.

I have consolidated the complaints for opinion.

ANALYSIS

The public policy of the APRA states:

> [I]t is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing 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.

IC 5-14-3-1. This preamble to the APRA contemplates that all of the provisions that follow will be interpreted in a manner that opens *the affairs of government and the acts of those who serve as public officials and employees of government* to public scrutiny.

As a threshold matter, an entity must be considered a "public agency" in order to be subject to the requirements of the APRA and the Open Door Law, and both statutes define "public agency" broadly and in various ways so as to give effect to the intent of the legislature. At issue here is those parts of the APRA and the Open Door Law that define a public agency as "any entity or office that is subject to … audit by the state board of accounts." IC 5-14-3-2; IC 5-14-1.5-2(a)(3)(B). Pursuant to its own code, the SBOA is responsible for making an examination of "all accounts of all financial affairs of every public office and officer, state office, state institution, *and entity*." 5-11-1-9(a) (emphasis added). An "entity" is defined as "any provider of goods, services, or other benefits that is … maintained in whole or in part at public expense[,] or … supported in whole or in part by appropriations or public funds or by taxation." IC 5-11-1-16(e); *see State Board of Accounts v. Indiana University Foundation*, 647 N.E.2d 342, 352-53 (Ind. Ct. App. 1995). Thus, pursuant to these provisions, a *private entity* that is supported in whole or in part by public funds may be considered to be a public agency and subject to all of the requirements of open government and public access in the same manner as if it were an entity more traditionally understood to be an office of government. Whether such an entity is subject to an audit by the SBOA is determined by the nature and extent to which they

receive public funds. Pursuant to Indiana Code 5-11-1-9(b)(2), a not for profit entity that derives at least fifty (50%) and more than $100,000 in public funds shall be subject to an audit. This determination is made by the SBOA annually and at the end of the entity's year.

MIDCOR does not dispute that it received public funds pursuant to local ordinance and contracts with Jefferson County and the City of Madison for the calendar year 2002, and for that period received more than $100,000 dollars in public funds. MIDCOR also does not dispute that the SBOA determined that it was an entity subject to audit for the year 2002. However, MIDCOR seeks to avoid application of the APRA and the Open Door Law on the argument that its 2002 revenues were received as a "fee for services," and with the suggestion that it was not properly the subject of an audit by SBOA for that period.

MIDCOR's argument is founded on *Indianapolis Convention & Visitors Association v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991) (*ICVA*). In that case, the supreme court acknowledged the policy behind the APRA but applied a narrow view of when a private entity receiving public funds can be determined to be an entity subject to audit by the SBOA. There, the court found that an entity is not "maintained" and "supported" by public funds as contemplated by Indiana Code 5-11-1-9 merely because public funds make up a certain percentage of its revenue. The court looked at the relationship between the private entity and its public funder, establishing the rule that if the relationship is in fact a fee for services or fee for goods relationship, then the entity cannot be said to be maintained or supported; that is, subsidized or kept in existence by public funds. *ICVA*, 577 N.E.2d at 212-13.

MIDCOR's argument is a nonstarter. Ultimately, the question of whether MIDCOR is an "entity" subject to audit is a determination for the SBOA. For my purposes in interpreting the APRA and the Open Door Law, the determination set forth by the SBOA controls whether a not-for-profit entity is a "public agency" subject to the public records and open door provisions. The APRA does not permit this office to void or otherwise disregard the determination by the SBOA that MIDCOR was subject to an audit for the period 2002. While MIDCOR could have challenged, and may yet still contest with the SBOA that agency's determination that MIDCOR was subject to an audit, once that determination has been made and for as long as it stands, any entity declared by the SBOA to be subject to an audit is by definition in the APRA a "public agency," and its records are therefor subject to disclosure under the APRA. IC 5-14-3-2.

Even if the APRA permitted me to look behind the curtain of the SBOA determination, I do not believe *based on the information now before me* that MIDCOR would be successfully heard to argue that it is not an "entity" subject to an SBOA audit. In *ICVA*, the court found that the private entity received public funds through contracts with the Indianapolis Capital Improvement Board (CIB), but the fact that the funds were distributed in that manner was not dispositive. The court found, among other things, that the entity received monthly payments from the CIB regardless of whether any specific functions were performed under those agreements, the amounts of payments and total contract amount were not negotiated, and the entity was supported by the CIB through tax receipts. *ICVA*, 577 N.E.2d at 213. In contrast, the court of appeals in *Indiana University Foundation*, found that the private entity was not subject to audit because it met the fee for services test. 647 N.E.2d at 353-54. In that case the

Foundation maintained a financial relationship with Indiana University pursuant to two contracts under which the Foundation performed fundraising and investment management services for the university. 647 N.E.2d at 346. The court found that the Foundation maintained a fee for services relationship where the payments under the contracts were not calculated with reference to any specific amount of tax revenue or appropriations received in a particular year, and where the contract provided that the service fee to be paid by the university would be negotiated on an annual basis. 647 N.E.2d at 353-54. In short, unlike was the case in *ICVA*, the Foundation received fees (or, public funds) from the university each year and pursuant to its contracts based on investment and management services it actually performed. 647 N.E.2d at 354.

MIDCOR asserts that its contracts with Jefferson County and the City of Madison "specifically tie payment to performance of services" and constitute a "quid pro quo," but I fail to discern the support for this in reviewing the specific contracts. While the contracts do characterize the relationship as involving payment for services, not unlike the contracts at issue in *ICVA* they are otherwise devoid of any detail that tethers any payment to any deliverable. Pursuant to county ordinance MIDCOR derives a specific percentage of gaming revenue from the Jefferson County Commissioners regardless of the performance of any specific act or function that it may do in support of its general mission or under the terms of either contract it had with the City of Madison or Jefferson County. It does not appear that the contract with the City of Madison affects that revenue. Moreover, pursuant to its contract with the City of Madison, MIDCOR was responsible only for providing general services consistent with its corporate mission, and for those general services received $30,000 in equal quarterly installments regardless of performance of any deliverable. Pursuant to its contract with Jefferson County, MIDCOR had similar general responsibility and received a total of $5,000 in two installments regardless of performance of any specific deliverable.

As noted above, MIDCOR has not challenged the SBOA determination that it was subject to audit for 2002. That determination controls whether or not it is a public agency under the APRA and under the Open Door Law. Should MIDCOR successfully challenge that determination with the SBOA or in a subsequent court proceeding, it would not be a public agency under any other provision of the APRA or the Open Door Law, and it would not be required to disclose its records or conduct open meetings under the provisions of those statutes. Until that time, it is my opinion that MIDCOR was a "public agency" for purposes of the APRA and the Open Door Law for the audit period 2002. IC 5-14-3-2 and 5-14-1.5-2(a)(3)(B) (defining Public Agency); IC 5-11-1-9(b)(2); *see Advisory Opinion 02-FC-41, Alleged Denial of Access to Public Records by the Fort Wayne-Allen County Economic Development Alliance; Advisory Opinion 03-FC-44, Alleged Denial of Access to Public Records by the Washington Court Redevelopment Corporation.*[1]

[1] The statutory scheme and my finding regarding the Open Door Law and Formal Complaint 04-FC-04 presents a unique challenge for MIDCOR and any other private not-for-profit entity that accepts public funds at a level that subjects them to SBOA audit. That is to say, such an entity is determined to be a public agency by operation of law without notice and after the fact. *See* IC 5-14-1.5-2. Such an entity may find itself, by operation of law, to be in violation of the Open Door Law because it did not conduct its meetings during the relevant period pursuant to the provisions of that law. *Cf.*, *ICVA*, 577 N.E.2d at 215. Absent further guidance from the courts, entities that rely on support from public funds should therefore be attentive to the provisions of the Open Door Law.

That conclusion does not end the inquiry. Your complaint challenges MIDCOR's stated intention to deny you access to its ongoing records at the time it was determined to be subject to audit and thus a public agency. Specifically, you requested records from 1984 through 2001, and MIDCOR expressly declined to produce those records.[2] It is my opinion that MIDCOR is required to produce its ongoing records, that is, the records in its possession *prior to and at the time* it became a public agency for purposes of the APRA.

Let me be clear. I do not find that once a private entity becomes a "public agency" because it is subject to an audit for a specific period that it becomes and remains a "public agency" for all purposes and for all times. Rather, its status as a public agency is dependent upon the annual review and determination of the SBOA regarding its status for audit. To find otherwise would suggest that once an entity of purely private origination and function accepts and disburses public funds at the threshold that triggers an SBOA audit, the private entity is thereafter and forever a public agency for purposes of the APRA regardless of whether and to what extent it receives any additional public dollars as revenue. Such an interpretation would be contrary to the public policy behind the APRA to open the affairs of *government* and of *public officials*, and the narrowing construction the courts have given the "subject to audit" definition of public agency. *ICVA* is instructive. In that case, the court limited the scope of the APRA as it applies to private entities. 577 N.E.2d at 212-13 (noting that if it were otherwise, an entity who performed any service for any governmental entity would find its business records available for public inspection, a result not perceived by the court to be the legislature's intent in passing the APRA); *see also Indiana State Board of Accounts v. Consolidated Health Group, Inc.*, 700 N.E.2d 247, 251-52 (Ind. Ct. App. 1998); *Indiana University Foundation*, 647 N.E.2d at 353-54. *Cf. Perry County Development Corporation v. Kempf*, 712 N.E.2d 1020, 1026-27 (Ind. Ct. App. 1999) (rejecting claim that Perry County Development Corporation was a public agency where it was not acting on behalf of or under the control of any governmental entity; "[w]orking closely with the County is not tantamount to being compelled to do the County's bidding or working subject to its control."). To the same extent that the courts were loathe to find that any private entity receiving public funds in any manner was transformed into a public agency for purposes of the APRA (*see ICVA*, 577 N.E.2d at 214 ("the holding today is that only those entities which are maintained and supported by public funds as defined by this opinion will have their records subject to public review")), a determination that an entity is a public agency because of its revenues during one period does not open up that entity's records for subsequent periods that it is not determined to be a "public agency" merely by virtue of it being subject to audit.

That said, I do not think that an entity can avoid disclosure of records simply because they were not created or maintained by the agency in the year covered by the audit period. The SBOA determination is made after the period at issue and the entity becomes a "public agency" for that period without notice and by operation of law. *See ICVA*, 577 N.E.2d at 215. That is to say, a public records request for the records of such an entity will necessarily come after the period for which it is considered a public agency. The APRA cannot be circumvented by asserting that requests made after the period has passed may be ignored on the theory that the entity is no longer a public agency. Rather, it is my opinion that once an entity is determined to

[2] MIDCOR has since agreed to produce records for 2001.

be a public agency for a specific period, a request for records may be brought at any time so long as the request is for records of the entity that were maintained during the relevant period.

In the same manner I believe that the entity is required to produce its ongoing records; that is, records that were maintained prior to the relevant period. IC 5-3-3-2 (defining Public Record); IC 5-5-3-3(a) (providing that any person may inspect or copy the public records of any public agency); *see ICVA*, 577 N.E.2d at 215 (entity required to provide access to its records from the effective date of the APRA (1984) up to and including 1989, the year it was determined to be subject to audit and thus a public agency).[3] I think too that a request for any records that are created or maintained by the entity after the relevant period, but which are related to the audit for the relevant period, is covered under the APRA. *See e.g.,* IC 5-11-5-1(a)(2) (final audit 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).

In summary, I believe that MIDCOR was a "public agency" under the APRA and the Open Door Law for the period 2002 based on the SBOA determination that it was subject to audit for that period, and I further find that MIDCOR retains that status at all times for records that were maintained by that entity prior to and during the audit period or that were created or maintained by MIDCOR after that period but which are related to the audit.

CONCLUSION

Based on the foregoing, I find that MIDCOR's response to your records request denying you access to records for the years 1984 through 2001 would violate the APRA. I further conclude that MIDCOR's meetings for the audit period 2002 were subject to the provisions of the Open Door Law, and any meetings conducted in a manner that did not comply with that statute would be in violation of the Open Door Law.[4]

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. J. David Huber

[3] The entity in that case was established prior to the effective date of the APRA. The court applied the APRA prospectively, and did not require that it provide records maintained by the entity prior to passage of the APRA.
[4] No information is provided about any specific meeting.