

November 28, 2005

Sent Via Facsimile

Mr. Warren Auxier
P.O. Box 21
Hanover, IN 47243

*Re: Formal Complaint 05-FC-226; Alleged Violation of the Open Door Law and
Access to Public Records Act by the Harrison County Chamber of Commerce*

Dear Mr. Auxier:

This is in response to your formal complaint alleging that the Harrison County Chamber of Commerce (“Chamber”) violated the Open Door Law and Access to Public Records Act because it refuses to hold open meetings and has denied you the Chamber’s annual financial reports for 2003 and 2004.

BACKGROUND

You filed your formal complaint with the Office of the Public Access Counselor on October 27, 2005. On October 17, 2005, you requested of the Chamber copies of minutes and annual financial reports for 2003 and 2004. The Chamber responded in a letter to you dated October 24. The Chamber declined to provide you with copies of the records, claiming that as a private, not-for-profit corporation, the Chamber is not subject to the Access to Public Records Act. You also alleged in your complaint that the Chamber does not hold meetings open to the public.

I sent a copy of your complaint to the Chamber. In response, I received a letter from Jeff Allen, Executive Director of the Harrison County Chamber of Commerce. The Chamber acknowledges that it receives public funds. However, the Chamber argues that the public revenues are derived through two contracts for services. Both arrangements were developed with the understanding of all involved that the contracts were purchases for services and should not be considered “government funds” as described by IC 5-11-1.

Further, Mr. Allen contends that the Chamber has never submitted to an organization-wide audit mandated by the State Board of Accounts. Rather, any audit reports have been filed with the State Board of Accounts on a strictly voluntary basis. The Chamber has submitted E-1 annual reports that listed the fee-for-service contracts in the interest of thorough disclosure; the Chamber would submit that the State Board of Accounts erred in including those contracts in any determination that the Chamber is a public agency under the Open Door Law or the Access to Public Records Act. Mr. Allen has not stated in his complaint response whether the Chamber had received any notification from the State Board of Accounts whether the Board considered the Chamber “subject to audit.”

I contacted Mike Bozyski of the State Board of Accounts. He informed me that for 2003 and 2004, the Harrison County Chamber of Commerce was deemed to be subject to audit by the State Board of Accounts.

ANALYSIS

It is the public policy of the APRA 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.” Ind. Code 5-14-3-1.

An entity must be considered a “public agency” in order to be subject to the requirements of the Access to Public Records Act and the Open Door Law. “Public agency” is broadly defined in both laws. The issue presented in this complaint is whether the Chamber is a public agency by virtue of the Chamber being “subject to audit by the state board of accounts.” IC 5-14-1.5-2(a)(3)(B); IC 5-14-3-2(l)(3)(B).

Pursuant to state statute, the State Board of Accounts 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*.” IC 5-11-1-9(a) (emphasis added). Under this provision, an entity organized as a not-for-profit corporation that derives at least 50% and more than \$100,000 in public funds shall be subject to an audit. IC 5-11-1-9(b).

The determination of whether an entity is subject to audit is made by the State Board of Accounts annually, following submission of an annual report called an E-1. The Chamber did not provide me with evidence regarding whether or not the State Board of Accounts had waived submission of an audit or not. Usually, the entity will receive official notification by the State Board of Accounts following its examination of the E-1. Upon my inquiry, the State Board of Accounts indicated that the Harrison County Chamber of Commerce had been deemed by the State Board of Accounts to be “subject to audit” for 2003 and 2004.

The Chamber appears to take issue with the State Board of Account’s determination that the Chamber is subject to audit. As this office has previously stated, the determination of

whether an entity is subject to audit is for the State Board of Accounts.¹ The public access counselor cannot and will not look behind the determination of the State Board of Accounts. Similarly, this office cannot void or disregard the determination by the State Board of Accounts. For as long as the State Board of Account's determination stands, the entity is a "public agency" and its records are subject to disclosure under the Access to Public Records Act. *See Opinion of the Public Access Counselor 04-FC-03, 04-FC-04.*

The Chamber is also a public agency for purposes of the Open Door Law. However, your complaint does not specify what governing body of the Chamber meets in violation of the Open Door Law. Meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. IC 5-14-1.5-3(a). "Governing body," in relevant part, means two or more individuals who are 1) a public agency that is a board, a commission, an authority, a council, a committee, a body, or other entity; and takes official action on public business, or 2) the board, commission, council, or other body of a public agency which takes official action upon public business. IC 5-14-1.5-2(b).

I cannot determine whether the Chamber has conducted any meetings in violation of the Open Door Law. Meetings of staff of the Chamber would not be subject to the Open Door Law, just as meetings of staff of a state agency, for example, would not be subject to the Open Door Law, where the staff is not a governing body. *Indiana State Board of Health v. Journal-Gazette Co.* 608 N.E.2d 989 (Ind. Ct. App. 1993), *aff'd*. 619 N.E.2d 273 (Ind. 1993).

Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of the Access to Public Records Act. IC 5-14-3-3(a). If a public agency intends to deny a written request for a record, it must do so in writing, and cite the exemption or exemptions authorizing the public agency to withhold the record. IC 5-14-3-9(c). The Chamber is a public agency because it is "subject to audit by the state board of accounts." Therefore, where the Chamber refused to disclose its annual financial reports and minutes to you without citing an exemption in section 4, the Chamber denied you a record in violation of the Access to Public Records Act.

CONCLUSION

The Harrison County Chamber of Commerce is a public agency under the Access to Public Records Act and the Open Door Law. The Chamber violated the Access to Public Records Act when it refused to disclose its records without citing any exemption that applied to the record or records.

Sincerely,

Karen Davis
Public Access Counselor

¹ The State Board of Accounts does not determine that an entity is a "public agency." Rather, the State Board of Accounts determines whether an entity is "subject to audit" under IC 5-11-1-9. By operation of IC 5-14-3-2(1)(3)(B), an entity that is subject to audit by the state board of accounts is a "public agency."

cc: Jeff Allen