# STATE OF INDIANA

**MITCHELL E. DANIELS, JR., Governor**

**PUBLIC ACCESS COUNSELOR**
**ANDREW J. KOSSACK**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac


October 4, 2010

Ms. Kristen S. Brown
918 Shorewood Ct.
Columbus, IN 47201

*Re: Formal Complaint 10-FC-202; Alleged Violation of the Access to Public Records Act by Columbus Downtown, Inc.*

Dear Ms. Brown:

This advisory opinion is in response to your formal complaint alleging Columbus Downtown, Inc. ("CDI") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*.

## BACKGROUND

In your complaint, you allege that CDI denied your request for access to its records on September 3, 2010. CDI's attorney, Terry Coriden, informed you that he denied your request based on his view that CDI is not a public agency subject to the APRA. You argue that CDI is required to comply with the APRA because it is subject to audit by the State Board of Account ("SBOA"). You note that the SBOA requested on June 30th that CDI perform a public audit, and that Mr. Coriden informed the SBOA in a letter dated August 11th that CDI would comply with SBOA's request.

In response to your complaint, Mr. Coriden enclosed a letter from attorney Bruce Donaldson, whose analysis and conclusions Mr. Coriden adopts as CDI's response. Mr. Donaldson maintains that CDI is not a public agency subject to the APRA because it is not subject to an audit by the SBOA. Moreover, he asserts that even if CDI were subject to an audit, the APRA would only apply to CDI's records regarding the use of the public money received by CDI rather than all of CDI's records.

Mr. Donaldson notes that CDI is a private, nonprofit corporation formed under the Indiana Nonprofit Corporation Act of 1991, I.C. § 23-17 *et seq*. CDI's purpose is to support redevelopment and economic development activities of the City of Columbus (the "City"). On June 3rd, CDI filed an Entity Annual Report ("E-1") with the SBOA. The determination of whether an entity is subject to audit is made by the SBOA annually, following submission of the E-1. *See Opinion of the Public Access Counselor 05-FC-*

*226*. On the E-1, CDI reported that it received and disbursed $425,903.34 of government funds from the City of Columbus in 2009. CDI's total expenditures during the same period totaled $763,758.72. Based on that information, SBOA issued a memorandum dated June 30th that stated, "According to the information submitted, your organization is subject to a complete organization-wide audit performed in accordance with the guidelines issued by our agency." However, Mr. Donaldson claims that SBOA's determination was made without the benefit of additional facts show CDI is not subject to audit by SBOA. Mr. Donaldson outlines those facts in his response:

> In September of 2007 the City of Columbus issued bonds through its Redevelopment Commission to raise funds for the construction of a downtown parking garage commonly known as the Jackson Street garage. In 2008 the Redevelopment Commission entered into a master lease of the Jackson Street garage with CDI as master lessee. In 2009, after the shell of the garage was substantially completed, the Redevelopment Commission set aside the $425,903.34 at issue for the build out of retail tenant space on the first floor of the garage. Because CDI was the master lessee who would then be responsible for subleasing retail space to subtenants, the Redevelopment Commission contracted with CDI to complete the build out work. The Clerk-Treasurer of the City continued to hold the funds to be used for the build out until she was presented with claims by CDI for contract or vendor work performed along with substantiating documentation. The Clerk-Treasurer would then deposit funds into a special CDI bank account to be used for the payment of those claims. This bank account was used *solely* for the payment of claims related to the build out of the retail space in the Jackson Street garage, and was kept separate and apart from any other funds or accounts of CDI. CDI never had any use of these funds (or any other public funds) to support its general operations.

Based on this information, Mr. Donaldson argues that CDI was not "maintained" or "supported" in whole or in part by public funds and, as a result, does not qualify as an "entity" subject to audit by the SBOA. He cites to the Indiana Supreme Court's decision in *Indianapolis Convention & Visitors Association, Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991), in which the court noted that if a relationship between a government entity and a private entity is a fee-for-services or goods agreement involving a *quid pro quo*, the private entity is not transformed into a public entity merely because it receives public funds through such an arrangement. Mr. Donaldson notes that CDI agreed to provide specific services (i.e., the build out of the parking garage) to the City in exchange for the City's disbursement of the $425,903.34 to CDI. None of the funds went to CDI's general operations; they were paid to CDI "only when proof of work performed was presented to the Clerk-Treasurer and were even maintained by CDI in a separate dedicated project account."

Mr. Donaldson also argues that even if CDI were subject to an audit by SBOA, the audit's jurisdiction would be limited to matters relevant to the use of the public funds received from the City. Accordingly, any required disclosure of public records would also be limited. Specifically, the APRA would only permit requesters to access records relating to CDI's receipt and disbursement of the City's public funds.

I also note that I am in receipt of your reply to CDI's response. You argue that there is no fee-for-service contract between CDI and the Columbus Redevelopment Commission ("CRC"). You note that the agreement was in the form of a grant, and include with your reply a copy of a grant request from CDI to CRC dated September 5, 2008. The grant request reads:

> We nearly have the tenant leases signed and will be ready to make these significant announcements. In preparation for having those leases signed and the need to start work on those spaces in order to get the spaces up and running CDI requests an initial grant of $250,000 in order to start the tenant build out. This allows us to engage a contractor and be able to pay in a timely manner. Thank you for your consideration.

You include minutes from the CRC's meeting of September 8, 2008, which show that the CRC approved CDI's request. The minutes read:

> [Item] 6) Grant Request for tenant build out in Jackson Street Garage -- The request is for $250,000 to help them get started and get the work completed as quickly as possible. The public announcement would be able to be made within the next 2-3 weeks. This is to get everyone to a starting point for there [sic] actual build out for there [sic] retail space. Motion is made by Mr. Van Horn for approval. Second by Mr. Skinner. Approved unanimously.

You also note that the bulk of the money paid to CDI from CRC was in a flat dollar amount and "not truly reflective of actual expenses." You provided a copy of the final invoice dated April 9, 2009. That document shows an amount of $400,000 in the "Total Earned" category for the "Tenant Build out" project. The invoice shows that $320,000 had been previously invoiced and $80,000 was due at that time. The dollar amounts are listed under a heading titled, "Fee Earned."

Moreover, you argue that the tenant build out "is a crucial component of CDI's general operations and is inextricably tied to CDI's subleases of the properties that were built out." The build was done to the specifications of restaurants leasing space from CDI, so you view the work as an obligation that CDI needed to meet for the subleases. Moreover, because CDI receives income from the lease of those properties, you argue that is tied to CDI's general operations.

Finally, it is my understanding that although CDI intends to ask SBOA to reconsider its determination that CDI is subject to audit, CDI has not formally done so. According to the SBOA, CDI would need to file an amended E-1 to begin that process.

## ANALYSIS

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. *IVCA*, 577 N.E.2d at 212. The term "public agency" is broadly defined. The issue presented here, however, is whether CDI 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(l)(3)(B).

As an initial matter, I note that the APRA is not entirely clear about whether the public access counselor or the SBOA is responsible for determining whether or not a nonprofit is "subject to audit" for purposes of determining the applicability of the APRA and ODL. Generally, previous public access counselors have relied solely on the SBOA's determination. *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, however; rather, she required additional information in order to determine whether the audit was voluntary or required by statute, rule or regulation.

Here, CDI alleges that the E-1 it submitted to SBOA did not contain sufficient information for SBOA to determine whether or not CDI is required by statute, rule, or regulation to be subject to audit. Specifically, although the document showed that CDI received $425,903.34 in government funds and disbursed the same amount of government funds, CDI claims that because that money was received via a *quid pro quo* arrangement with CRC it is not the type of government funding that would subject CDI to a required audit. Because the E-1 only asks for the amount of the funding and does not seek an explanation of what the funds were used for, CDI claims that it is necessary to consider additional information regarding the $425,903.34 at issue.

Pursuant to state statute, 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*." I.C. § 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. I.C. § 5-11-1-9(b). An "entity" is defined as "any provider of goods, services, or other benefits that is: (1) maintained in whole or in part at public expense; or (2) supported in whole or in part by appropriations or public funds or by taxation." I.C. § 5-11-1-16(e).

Indiana courts have analyzed and applied these provisions to determine whether or not a nonprofit that receives public funds is subject to audit by SBOA. In *Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc*. 577 N.E.2d 208 (Ind. 1991) ("*ICVA*), the supreme court was required to rule on whether the Indianapolis Convention & Visitors Association ("Association") was subject to a statutorily-required audit where a portion of the Association's revenue was received from the Indianapolis Capital Improvement Board, a public agency ("CIB"). *Id.* at 209. The plaintiff, Indianapolis Newspapers, asserted that the revenues were in the nature of a grant rather than a "fee" for services provided to CIB, and that because the Association was maintained or supported in part by public funds its records were subject to examination under the SBOA statute and open to public inspection under the APRA.

The supreme court in *ICVA* noted that a private entity is not maintained at public expense or supported by public funds "merely because public monies make up a certain percentage of its revenue." *Id*. Rather, if the relationship "is, in fact, a fee-for-services (or goods) agreement then, clearly, an entity is not maintained or supported by public funds." *Id*. at 212-13. The court reasoned:

> Otherwise, any entity who performed any service or provided any good for a governmental entity would find its business records available for public inspection under the Public Records Act. We do not perceive this to be the legislature's intent in passing the Public Records Act.

*Id*. at 213. The supreme court ultimately held that the Association was supported by public funds and, thus, subject to the SBOA statute and the Public Records Act based on the following facts:

> (1) the Association received monthly payments from CIB regardless of whether it booked conventions or performed tourism services; (2) the amount of those payments was not negotiated under their contract but predetermined by CIB as approximately 20% of the city hotel-motel tax collected in a given year; (3) the contract stated that the CIB "financially supported" the Association with those tax receipts; and (4) the Association's federal tax returns described money received from CIB as "indirect public support."

*State Bd. Of Accounts v. Indiana Univ. Found.*, 647 N.E.2d 342 (Ind. Ct. App. 1995), *trans. denied* ("*IUF*"), citing *ICVA*, 577 N.E.2d at 213.

In the *IUF* case, the court of appeals held that money paid by Indiana Univeristy to the Indiana University Foundation consisted of fees for services rendered under the *ICVA* test applied by the supreme court. The court noted that: (1) the two relevant contracts between the university and the foundation were "replete" with references to the fees the foundation was to receive for performing its contractual obligations; (2) the foundation's tax returns described the moneys paid under its contracts with the university as "Management & Various Serv. Fees"; (3) unlike in *ICVA*, the foundation's fees were not calculated by reference to the amount of tax revenue or appropriations received in any particular year; (4) the foundation proposed a fee each year that the university's trustees normally approved (i.e., the fee was determined by the parties); and (5) one agreement provided that the foundation would "bill" the university for its investment management fees. *IUF*, 647 N.E.2d at 353-54.

In my opinion, the arrangement between CDI and CRC is more like the situation in the *IUF* case than the *ICVA* case. CDI does not receive any public funds towards its general operations. Funding for the garage project was not based upon a portion of CRC's tax receipts or appropriations; it was calculated based on the actual costs of work done for the garage. CDI requested specific amounts of funding from CRC, which the CRC then approved, which demonstrates that the parties determined the amount of fees payable to CDI. CDI billed its costs to the Clerk-Treasurer via the invoices labeled "Fees Earned." CDI did not and does not receive monthly or annual payments from CRC regardless of whether it performs work for CRC. Although CDI requested what it labeled as a grant from CRC, CDI also sent the CRC invoices indicating that the owed amounts were for "Fees Earned." Beyond that, however, is the fact that what is important is not the form so much as the substance of the arrangement. As the court of appeals has held, "If the relationship is, *in fact*, a fee-for-services (or goods) agreement then, clearly, an entity is not maintained or supported by public funds." *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020, 1026 (Ind. Ct. App. 1999) (emphasis added); *see also Opinion of the Public Access Counselor 09-FC-126* (nonprofit corporation was not subject to APRA/ODL even though it received grants of public funds because receipt of grants was subject to continued performance of contract obligations).

With regard to the allegation that CDI is subject to audit by virtue of the fact that it receives income from the tenants of the leased spaces, the court in *IUF* noted that the analysis "does not require that we consider the profitability of a private, not-for-profit corporation's business dealings with a public agency as a factor in determining whether the corporation is maintained or supported by public funds. . . . Beyond determining that the [Indiana University] Foundation actually performs services under its contracts for fundraising and investment management, this court may not inquire into the adequacy of the consideration exchanged in these contracts." *IUF*, 647 N.E.2d at 354. I agree with the court of appeals' reasoning. The opposite view would have the effect of transforming into a public agency virtually any provider of services or goods to government entities, because it is difficult to imagine a scenario in which the receipt of government funds in exchange for goods or services would not have some net positive effect -- even the most attenuated -- on the balance sheet of the entity when those funds are applied to the one or more particular projects.

The APRA specifically excludes from the definition of a "public agency" entities that meet certain conditions:

> "Public agency"; certain providers exempted
> Sec. 2.1. "Public agency", for purposes of this chapter, does not mean a provider of goods, services, or other benefits that meets the following requirements:
> (1) The provider receives public funds through an agreement with the state, a county, or a municipality that meets the following requirements:
> (A) The agreement provides for the payment of fees to the entity in exchange for services, goods, or other benefits.
> (B) The amount of fees received by the entity under the agreement is not based upon or does not involve a consideration of the tax revenues or receipts of the state, county, or municipality.
> (C) The amount of the fees are negotiated by the entity and the state, county, or municipality.
> (D) The state, county, or municipality is billed for fees by the entity for the services, goods, or other benefits actually provided by the entity.
> (2) The provider is not required by statute, rule, or regulation to be audited by the state board of accounts.

I.C. § 5-14-3-2.1. Here, CRC contracted with CDI to complete the build out work on the Jackson Street garage. The CRC agreed to pay CDI in exchange for CDI's services in completing the work. The amount of fees payable to CDI was not based upon tax revenues or receipts. The fees were negotiated between the parties by way of CDI's requests for grants and the CRC's approvals of the same. CDI billed its fees to CRC via the invoices calling for "Fees Earned." Thus, the arrangement between CDI and CRC appears to meet the requirements of subsection 2.1(1) of the APRA.

It is somewhat unclear whether or not CDI is "required by statute, rule, or regulation to be audited by the state board of accounts" under subsection 2.1(2) of the section above. Because the statute requires me to issue this opinion within 30 days of receiving the complaint, I am obligated to express an opinion on this matter on the basis of the information before me. For the aforementioned reasons, because CDI's agreement with the CRC is a project-specific arrangement rather than the type of ongoing subsidy typical of funds earmarked to "maintain" and "support" public agencies, and because the requester -- rather than the entity -- has the burden to show that an entity is subject to the APRA, it is my opinion that CDI is not subject to an audit by the SBOA because its agreement with CRC was akin to a fee-for-service agreement similar to the agreement in the *IUF* case.

However, as of the date of this opinion, SBOA's determination still stands. While I express the above opinion on the basis of the new information presented to me that was not available to SBOA at the time of its decision, I do not intend to replace the SBOA's determination with my own. At this time, CDI is still subject to a statutorily-required audit based on the fact that it receives in excess of $100,000 in public funds and that the total amount of funds exceeds 50% of CDI's budget for 2009. I.C. § 5-11-1-9.

Consequently, CDI is also subject to the APRA unless the SBOA reverses its decision. If that should occur, CDI would not be subject to the APRA. Further, if CDI asks SBOA to reconsider its position by filing an amended E-1, in my opinion it would be reasonable for CDI to withhold its records from public disclosure pending SBOA's determination. If CDI does not seek a new opinion from the SBOA, CDI should disclose its records upon request unless an exception to the APRA permits CDI to withhold them.

Finally, it is my opinion that nothing in the APRA supports CDI's argument that the laws would be limited to the subject of the audit if the audit's scope is limited by I.C. § 5-11-1-9(b). However, if CDI were subject to a limited audit, the public access laws would not apply anyway because the entity would not be subject to an audit that is *required* by statute, rule, or regulation. Under I.C. § 5-11-1-9(b), SBOA has the discretion to waive the audit requirements for certain entities under certain circumstances. Where SBOA has such discretion, the audit is not required by statute, and as a result the applicability of the APRA and ODL is not triggered.

## CONCLUSION

For the foregoing reasons, it is my opinion that CDI is currently subject to a statutorily-required audit by the state board of accounts. As such, it is also subject to the requirements of the APRA. However, in my opinion CDI has presented new information that appears to demonstrate that it is not subject to a statutorily-required audit. Thus, if CDI should file an amended E-1 form to the SBOA and the SBOA reverses its initial decision, CDI would not be a public agency subject to the APRA.

Best regards,

Andrew J. Kossack

Andrew J. Kossack
Public Access Counselor

Cc: Bruce Donaldson
Terry Coriden