



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

July 1, 2013

Louis J. Mahern
940 E. Garfield Dr.
Indianapolis, Indiana 46203

Re: Formal Complaint 13-FC-162; Alleged Violation of the Access to Public Records Act by Develop Indy, Inc.

Dear Mr. Mahern:

This advisory opinion is in response to your formal complaint alleging that Develop Indy, Inc. ("Develop Indy") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Libby Goodknight, Attorney, responded on behalf of Develop Indy to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you have submitted written requests for records to Develop Indy for travel records relating to its International Travel Program. You provide that Develop Indy has refused to provide you with any records and claims that it is not subject to the APRA. Included with your formal complaint you have provided copies of your correspondence with the State Board of Accounts ("SBOA"). Mike Bozyski, Deputy Examiner, in the correspondence stated that the SBOA has received Develop Indy's E-1 for the 2012 calendar year. Based on the information contained in the E-1, Mr. Bozyski advised that Develop Indy was subject to audit pursuant to I.C. § 5-11-1-9 and that the entity was to be advised by the SBOA that an audit is required. In further support of your argument that Develop Indy is a public agency under the APRA, you note that fifteen (15) of its twenty (20) members are direct mayoral appointments and that the entity's Form 990 non-profit tax return provides that the Mayor of Indianapolis is the sole stockholder.

In response to your formal complaint, Ms. Goodknight advised that the Greater Indianapolis Chamber of Commerce ("GIGC") acquired the assets of Develop Indy pursuant to an asset purchase agreement effective July 16, 2012. Develop Indy was a private, nonprofit corporation exempts from federal income tax pursuant to Section 501(c)(6) of the Internal Revenue Code. GIGC is likewise a private, nonprofit corporation exempt from federal income tax pursuant to Section 501(c)(6) of the Internal

Revenue Code. Develop Indy is now operated as a division within the GIGC. GIGC continues Develop Indy's previous work as Marion County's local economic development organization, dedicated to attracting businesses, retaining and expanding existing businesses, and serving as a catalyst for capital investment and qualify job grown in Marion County. Both entities have received funds from government agencies and from private sources, such as corporate and individual donors. Neither Develop Indy nor GIGC is a "public agency" within the meaning set forth in the APRA.

Both Develop Indy and GIGC are exempt from the definition of a public agency under the APRA pursuant to I.C. § 5-14-3-2.1. If any entity receives public funds under a fee-for-services agreement and is not subject to be audited by the SBOA pursuant to statute, rule, or regulation, then the entity is not considered to be a public agency pursuant to the APRA. Both Develop Indy and GIGC meet the requirements of I.C. § 5-14-3-2.1. Develop Indy had previously entered into a "Professional Services Agreement" ("Agreement") with the City of Indianapolis, Department of Metropolitan Development; the City of Indianapolis, Department of Code Enforcement, and the Indianapolis Local Improvement Bond Bank. The Agreement is for a specific term and was negotiated by the parties, usually on an annual basis. The amount of fees received by Develop Indy pursuant to the Agreement varied depending on the contract negotiated and were not based or linked in any way to the consideration of tax revenues or receipts. When GIGC acquired the assets of Develop Indy, it assumed Develop Indy's contracts pursuant to the Agreement. After Develop Indy's existing contracts expired, GIGC negotiated a new Agreement with the respective entities. The only public dollars that Develop Indy has received, other than the fee-for-services arrangements, has been in accordance with the grant agreements under which Develop Indy has served as the pass-through fiscal agent for the grant.

GIGC is not subject to a full audit by the SBOA as it derives less than 50% of its incoming revenue from public funds. GIGC's total incoming revenue from 2012 was 9.49 million. Of that, only \$700,000 came from the Agreement with the City and only \$2.5 million represented purely pass-through grant money from the City to various grantee organizations. Further, a facial review of Develop Indy's E-1 would not disclose the fact that it received public funds only through fee-for-services or pass-through grant agreements. Thus, any conclusion that Develop Indy is subject to audit by the SBOA pursuant to I.C. § 5-11-1-9(b) based exclusively on the E-1 is not a complete and accurate reflection of what the law requires for an entity to be subject to audit.

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. Accordingly, any person has the right to inspect and copy a public agency's 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).



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

Under the APRA, a party seeking records has the burden of proving that the party with the records is a public agency within the meaning of the APRA. *Indianapolis Convention and Visitors Ass'n., Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991); *Kempf*, 712 N.E.2d at 1023. If the non-moving party is determined to be a "public agency," then it bears the burden of establishing that a requested record is included within one of the categories of records that are exempt under the APRA. *ICVA*, 577 N.E.2d 208, 212.

As applicable here, "public agency", except as provided in section 2.1 of the APRA, means the following:

- (1) Any board, commission, department, agency, authority, or other entity, by whatever name designated, exercising a portion of the executive, administrative, or legislative power of the state.
- (2) Any county, township, school corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power.
- (3) Any entity which is subject to either:
 - (A) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or
 - (B) audit by the state board of accounts that is required by statute, rule, or regulation. I.C. § 5-14-3-2(m).

I.C. § 5-14-3-2.1 relieves certain public agencies from the requirements of the APRA, provided the following requirements are met:

"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, good, or other benefits.

- (B) The amount of fees received by the entity under the agreement is not based upon or does not have 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.

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 \$200,000 in public funds shall be subject to an audit. *See* 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.” *See* I.C. § 5-11-1-16(e); *See Opinion of the Public Access Counselor 10-FC-202*. The Court of Appeals in *Kempf* held that an entity (here, a non-profit corporation) “does not become a ‘public agency,’ thus coming within the purview of the statutes in question, by contractually agreeing to submit to an audit. . . Rather, an entity is ‘subject to’ those procedures only if compelled to submit by statute, rule, or regulation.” *Kempf*, 712 N.E.2d at 1025; *See also Opinion of the Public Access Counselor 09-FC-126*. As noted by Develop Indy, the composition of Develop Indy’s Board is not determinative whether the entity qualifies as a “public agency.” *Id.* “Moreover, the fact that PCDC’s fifteen person board of directors includes twelve public agencies does not compel the conclusion that the PCDC is itself a public agency. *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020, 1024-25 (Ind. Ct. App. 1999); *see also State Bd. of Accounts v. Indiana Univ. Found.*, 647 N.E.2d 342, 345 (Ind. Ct. App. 1995).

It is my opinion that the Agreement noted and described in great detail by Develop Indy’s in its response to your formal complaint would qualify as a fee-for-services contract pursuant to I.C. § 5-14-3-2.1(1). Your formal complaint does not take exception to the details of the Agreement; rather you note that pursuant to the E-1 submitted by Develop Indy to the SBOA for the calendar year 2012, the SBOA has concluded that Develop Indy is subject to audit pursuant to I.C. § 5-11-9-1(b). In light of the SBOA’s decision, you maintain that Develop Indy is ineligible to qualify for the exception to the APRA provided by I.C. § 5-14-3-2.1. In response, Develop Indy argues that any determination made by the SBOA based solely on the E-1 that has been submitted is not a complete and accurate reflection of what the law requires for an entity to be subject to audit.

Counselor Kossack provided the following analysis regarding this issue in a 2011 advisory opinion:



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

Previous public access counselors and I have chosen to rely solely on the SBOA's determination of whether or not an entity is subject to an audit that is required by statute, rule or regulation. *See, e.g., Ops. of the Public Access Counselor 10-FC-202; 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]). *See Opinion of the Public Access Counselor 11-FC-100.*

I would agree with the analysis provided by Counselors Hurst, Davis, and Kossack, and also note that this is not a situation regarding an entity who contractually agreed to be subject to audit, as opposed to being subject to audit by statute, rule, or regulation. *See Kempf*, 712 N.E.2d at 1025; *see also Opinion of the Public Access Counselor 08-FC-238*. Pursuant to the correspondence provided in your formal complaint, Mr. Bozyski, stated that the SBOA has received Develop Indy's E-1 for the 2012 calendar year. Based on the information contained in the E-1, Mr. Bozyski advised that Develop Indy was subject to audit pursuant to I.C. § 5-11-1-9. Accordingly, it is my opinion that Develop Indy does not qualify as a public agency exempt from the requirements of the APRA pursuant to I.C. § 5-14-3-2.1 for the 2012 calendar year and would be required to comply with the APRA for those years it was subject to audit by statute, rule, or regulation. If the SBOA, upon receipt and review of additional records provided by Develop Indy, amended its determination, that would directly affect whether Develop Indy is required to comply with the APRA for the 2012 calendar year. As Develop Indy has indicated that further documentation will clearly demonstrate that it does not qualify for audit pursuant to I.C. § 5-11-1-9(b), I would strongly encourage that such documentation be provided to the SBOA as soon as possible.

If the SBOA does not amend its determination, a public agency denying access in response to a written public records request must put the 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). In such circumstances, Develop Indy would be required to comply with the requirements of

section 9 of the APRA in response to your request for those years the SBOA has determined it would be subject to audit pursuant to I.C. § 5-11-1-9(b).

CONCLUSION

For the foregoing reasons, it is my opinion that Develop Indy is a public agency pursuant to the APRA for the years in which it was required by statute, rule, or regulation to be audited by the SBOA. Based on the E-1 submitted by Develop Indy, the SBOA has determined that Develop Indy is subject to audit pursuant to I.C. 5-11-1-9(b) for the 2012 calendar year. If, as Develop Indy maintains, that the SBOA determination is inaccurate and will be amended upon further documentation and review, I strongly encourage Develop Indy to submit such documentation at its first opportunity. If the SBOA determination remains unchanged, then Develop Indy would be required to comply with requirements of section 9 of the APRA in response to your request.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" at the end.

Joseph B. Hoage
Public Access Counselor

cc: Libby Goodknight