STATE OF INDIANA

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OPINION OF THE PUBLIC ACCESS COUNSELOR

JOHN D. RICHARDSON	)	
	)	
Complainant	)	
	)	
v.	)	**17-FC-25**
	)	
DAVIESS COUNTY	)	
ECONOMIC DEVELOPMENT CORPORATION	)	
Respondent	)	

ADVISORY OPINION
March 15, 2017

This advisory opinion is in response to the formal complaint alleging the Daviess County Economic Development Corporation ("DCEDC") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-1.5-1 et. seq., and the Open Door Law ("ODL"), Indiana Code § 5-14-1.5-1 et. seq. The DCEDC has responded via Mr. Harry W. Hanson, Esq. His response is included for review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on February 21, 2017.

BACKGROUND

The formal complaint dated February 21, 2017 alleges the DCEDC violated the ODL by not holding regular meetings. While the complaint lacks any factual detail, it is assumed the Complainant is requesting a determination why the DCEDC is not subject to the Open Door Law or Access to Public Records Act.

The DCEDC responded by arguing it is a non-profit entity which is not statutorily subject to an audit by the Indiana State Board of Accounts (SBOA). Instead, they maintain a fee for services arrangement with the county and is therefore exempt from the public access laws pursuant to Indiana Code § 5-14-1.5-2.1 and the holding by the Indiana Supreme Court in *Perry County Development Corporation v. Kempf*, 712 N.E. 2nd, 1020 (1999).

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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 Indiana Code § 5-14-3-1*.

Without the benefit of a detailed complaint, I will not be making a determination either way whether the DCEDC is subject to the access laws, I will provide the following guidance from *Opinion of the Public Access Counselor 16-FC-289*:

> The State Board of Accounts has the authority to audit any entity receiving public funds. 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 Indiana Code § 5-11-1-16(e) Private corporations are not subject to the audit or the access laws unless they meet certain criteria. Local economic development corporations are not considered a de facto public agency by virtue of exercising a core governmental duty, as economic development is not an essential government function. The first criteria is found in the Access to Public Records Act at Indiana Code § 5-14-3-2.1:
>
> > "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.

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> Subsection 2 is the key element in the analysis. Fee-for-services agreements between local economic development organizations ("LEDOs") and local governments are common. Most LEDOs rely on Subsection 1 to avoid audit. The entity is still subject to audit, but such an audit is discretionary on the part of the State Board of Accounts ("SBOA") pursuant to Indiana Code § 5-11-1-9(c), as long as the entity's revenues from public funds are less than fifty percent of its budget, or, if revenues from public disbursements are greater than fifty percent, and its total budget is less than $200,000.
>
> Historically, SBOA has exercised its discretion to waive those audits. Therefore, because funding does not meet a statutory threshold and/or most arrangements are on a fee-for-services basis, most LEDOs are not subject to the Indiana access laws. SBOA's audit is not discretionary in the inverse. Therefore, if the entity's budget is comprised of fifty percent or more of public funds exceeding $200,000, it is required to be audited. This is why you see some LEDOs with total budgets of $199,000 comprised exclusively of public funds, but they are not audited. Those entities would likewise not be subject to the access laws.
>
> What you have provided in the instant case, however, is information about an entity deriving its revenue from both public appropriations from various political subdivisions in addition to a fee for services agreement. The mandatory audit statute includes appropriations, public funds, taxes, and other sources of public expense in the budget calculation. It does not exclude fee-for-services contracts as part of the 'public money' equation nor does it say the funds have to be from a sole political subdivision...
>
> Whether SBOA actually audits an entity is ultimately at its discretion. An entity is required to submit an Entity Annual Report ("E-1") within 60 days of its fiscal year end. An entity cannot avoid audit requirements by not filing the appropriate paperwork. Similarly, if an entity is statutorily subject to mandatory audit…, it cannot avoid the public access laws

In summation, if a non-profit entity is not subject to audit, they are not subject to the public records laws. The argument by DCEDC (and others around the state after the publication of (Opinion of the Public Access Counselor 16-FC-289) is fee-for-services contracts can never be calculated with 'public monies.' This is at odds with the very case they cite, *Perry County Development Corporation v. Kempf*. The *Perry* case concerned an entity which was only receiving a relatively small portion from public

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monies. It was certainly not wholly maintained and funded by public funds. Indiana Code § 5-11-1-9 never enters the equation as to the $200,000 threshold.

To be clear, fee-for-services arrangements with non-profits will not subject that entity to audit or the public access laws unless they receive $200,000 of aggregate public moneys (regardless of revenue stream, *and* the $200,000 or more comprises over 50 percent of the entity's budget. Simply put, if fee-for-services agreements were totally exempt from the Indiana Code § 5-11-1-9 test, then all a LEDO would have to do is call every source of revenue a fee-for-services agreement and never face scrutiny no matter how much taxpayer money they receive.

Based on the information supplementing the complaint, it does not appear as if the DCEDC meets the threshold. The entity report only lists the amounts received by government sources to be $164,968. What is more troubling, however, is the Complainant includes an entity report from the Daviess County Economic Development *Foundation* as well. While incorporated a separate entity, it lists the same P.O. Box, mailing address and President (assuming Anthony Graber and Tony Graber are the same person). It lists the source of government funds to be $182,500.

While the information available is extremely limited it appears as if this is an attempt to avoid the audit trigger of Indiana Code § 5-11-1-9 by setting up two (2) legally separate non-profits, giving them slightly different ambiguous mission statements, calling one a foundation and the other a corporation, receiving public funds in the aggregate of $347,000 of taxpayer money, yet keeping their separate respective public revenue below $200,000 for reporting purposes. This Office does not regulate such matters, however, I have copied the State Examiner to update him on the situation.

Please do not hesitate to contact me with any questions.

Luke H. Britt

Public Access Counselor

Cc: Mr. Harry W. Hanson, Esq.
Mr. Paul Joyce, CPA
Mr. Paul Lottes, Esq.
Ms. Susan Gordon