

September 24, 2002

Mr. Andrew M. Gammill
The Journal Gazette
600 W. Main Street
Fort Wayne, IN 46802

Re: Advisory Opinion 02-FC-41; Alleged Denial of Access to Public Records by the Fort Wayne-Allen County Economic Development Alliance.

Dear Mr. Gammill:

This is in response to your formal complaint, which was received in this Office on August 26, 2001. You have alleged that the Fort Wayne-Allen County Economic Development Alliance ("Alliance") has violated the Indiana Access to Public Records Act ("APRA,") Indiana Code chapter 5-14-3. According to your complaint, the Alliance denied you access to records claiming it is not a "public agency" under the APRA. Mr. Andrew Welborn, Attorney for the Alliance, responded in writing to your complaint. A copy of his response is enclosed for your reference.

After the filing of your complaint, the State Board of Accounts revised its determination, finding that the Alliance is not subject to audit under Indiana Code section 5-11-1-9 and therefore, not a public agency under Indiana Code section 5-14-1.5-2(a)(3)(B). For this reason, it is my opinion that the denial of your August 22nd request did not violate the APRA.

BACKGROUND

According to your complaint, on August 22, 2002 you requested access to several records from the Alliance. This request was based upon the State Board of Accounts' recent determination that the Alliance is subject to audit, making the public access laws applicable to the Alliance. Your written request was hand-delivered to the Alliance and you received a written response from Mr. Rob Young, President of the Alliance, and Mr. Timothy Haffner, Chairman of the Board for the Alliance informing you that your request was denied because the Alliance is not a "public agency." You then filed your formal complaint with this Office.

In his response to your complaint, Mr. Wellborn stated that the Alliance is a private nonprofit corporation that performs economic development and related marketing services. According to Mr. Welborn, the Alliance's E-1¹ form filed with the State Board of Accounts in July of this year provided incomplete information. While the Alliance has a contractual relationship with the City of Fort Wayne and Allen County and receive public funds from both governmental entities, those are "fee for service" arrangements that do not bring the Alliance into the requirements for audit by the State Board of Accounts. The Alliance apparently receives a \$50,000 grant from the Indiana Department of Commerce, but this does not reach the minimum \$100,000 threshold for auditing nonprofit entities under Indiana Code section 5-11-1-9. Mr. Wellborn also provides a review of recent Indiana case law on this subject

suggesting that the Alliance is more akin to organizations that have been determined by the Courts not to be subject to audit by the State Board of Accounts. Mr. Wellborn concludes that, based upon this information, the Alliance is not subject to the state's public access laws, and in particular the APRA, and that the denial of your request did not violate state law.

On September 23, 2002, Mr. Welborn supplemented his response with a copy of a memorandum from Mr. Michael Bozyski, State Board of Accounts, concerning the audit status of the Alliance. A copy of that correspondence is enclosed for your reference. According to the State Board of Accounts, a revised E-1 submitted by the Alliance indicates that the entity is not subject to audit under Indiana Code section 5-11-1-9. According to a telephone conversation I had with Mr. Bozyski this morning, the revised E-1 indicates that since the Alliance reported only \$50,000 in public funds assistance, which brings the entity below the threshold for audit. In his memorandum, Mr. Bozyski references the fact that the \$200,000 received from the City of Fort Wayne and Allen County, which was originally reported by the Alliance as public assistance, are apparently part of fee-for-service arrangements with those units of government. Based upon this revised information, therefore, the State Board of Accounts has determined that the Alliance is not currently subject to their 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." Ind. Code § 5-14-3-1. Accordingly, any person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana code section 5-14-3-4. Ind. Code § 5-14-3-3(a). The question raised by your complaint is whether the Alliance is, in fact, a "public agency" for the purposes of the APRA. Ind. Code §5-14-3-2.

Under the APRA, an entity must be considered a "public agency" in order to be subject to the requirements of the Act. One type of public agency is "(a)ny entity which is subject to . . . audit by the state board of accounts." Ind. Code § 5-14-1.5-2(a)(3)(B). Indiana Code section 5-11-1-9(a) provides that the State Board of Accounts "shall examine all accounts and all financial affairs of every public office and officer, state office, state institution and entity."

For private, nonprofit corporations such as the Alliance, the State Board of Accounts' enabling act provides a threshold for determining when an entity becomes subject to their audit. This threshold is outlined in Indiana Code section 5-11-1-9(b):

An examination of an entity deriving:

- (1) less than fifty percent (50%); or
 - (2) at least fifty percent (50%) but less than one hundred thousand dollars (\$100,000) if the entity is organized as a not-for-profit corporation;
- of its disbursements during the period of time subject to an examination from appropriations, public funds, taxes and other sources of public expense shall be limited to matters relevant to the

use of the public money received by the entity.

To illustrate how this provision works, suppose that in a given year the Alliance had received and disbursed at least \$100,000 in public dollars and this amount constituted at least one-half (1/2) of its disbursements. Given these facts, the Alliance would be subject to audit as an entity, as opposed to limiting their audit to the public funds at issue.

Mr. Welborn stated in his response that the original E-1 form submitted by the Alliance over-reported the amount of public assistance received. He stated that the \$200,000 in combined income from the City of Fort Wayne and Allen County were actually payments for fee-for-service arrangements and not public assistance in the form of grants or subsidies, which is contemplated under Indiana Code section 5-11-1-9(b).

The Indiana Court of Appeals has considered the application of the State Board of Accounts' statutes to private, nonprofit entities. In *Perry County Development Corporation v. Kempf*, 712 N.E.2d 1020 (1999), the Court held that funds provided to the Development Corporation in a fee-for-services contract with governmental entities did not subject the entity to audit by the State Board of Accounts. In short, when a private entity receives funds from a governmental entity in a fee-for-service arrangement, the Court distinguished this from grants, subsidies or other public fund allowances given to private entities where no services are provided in exchange for the funds.

In the September 23rd memorandum from the State Board of Accounts to the Alliance, the fee-for-service arrangement with the City of Fort Wayne and Allen County is acknowledged. Consequently, this brings the amount of public funds received and reported on the E-1 from \$250,000 of a total disbursement of \$450,000 by the Alliance to only \$50,000. The State Board of Accounts, therefore, does not consider the Alliance subject to their audit. As a result of this determination, it is my opinion that the Alliance is not a public agency under the APRA, and the denial of your August 22nd request for public records to the Alliance did not violate the APRA.

CONCLUSION

It is my opinion that the Fort Wayne-Allen County Economic Development Alliance, having a determination from the State Board of Accounts that it is not subject to their audit, is not a public agency under the APRA. Consequently, the denial of your request for access to the records of the Alliance did not violate the APRA.

Sincerely,

Anne Mullin O'Connor

cc: Mr. Andrew J. Welborn, Attorney for FW-ACEDA

¹ - An E-1, the Entity Annual Report, is a form that is required to be filed with the State Board of Accounts by nongovernmental organizations receiving financial assistance from government in the form

of grants, subsidies or contributions. You may view this form at www.IN.gov/sboa/publications/manuals/forme1/forme1.pdf