STATE OF INDIANA

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June 7, 2011

Mr. Jon D. Baker
City of Connersville
621 Central Avenue
Connersville, IN 47331

Re: Informal Inquiry 11-INF-19; Fayette County Industrial Development Corporation

Dear Mr. Baker:

This is in response to your informal inquiry submitted regarding the Fayette County Industrial Development Group ("Group") in Connersville and Fayette County. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion. My opinion is based on applicable provisions of the Indiana Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq*.

Your inquiry seeks advice regarding the Economic Development Group, which is a "non-for-profit" entity established to help bring new industries and foster economic development in the City of Connersville and Fayette County. You question whether or not the Group is considered to be a "public agency" for purposes of the ODL and thus subject to its requirements. You claim that the Group is a provider of goods, services, or other benefits, disqualifying the Group as a public agency for purposes of ODL. In support of that notion, you provide copies of local ordinances establishing the Group, copies of contracts the Group entered into with the City of Connersville and Fayette County, as well as correspondence from the Indiana State Board of Accounts that tentatively waives audit requirements.

As an initial matter, I note that the Access to Public Records Act ("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.

As a threshold matter, an entity must be considered a "public agency" in order to be subject to the requirements of the APRA and the Open Door Law. The ODL defines a public agency rather broadly as "any entity or office that is subject to…an audit by the state board of accounts." I.C. § 5-14-1.5-2(a)(3)(B). 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. *See Indianapolis Convention & Visitors Association v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991). In *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"). *ICVA*, 577 N.E.2d 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 University 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.

I spoke with Tammy Baker with the SBOA regarding whether the Group was subject to Audit by the SBOA. Ms. Baker provided the following historical information on the Group since 2007:

2007	Not Qualified for Waiver
2008	Not Qualified for Waiver
2009	Received tentative waiver from SBOA, but the supporting documentation that was requested by SBOA was not received by September 30, 2010 deadline.
2010	The Group's E-1 was not filed by the March 1, 2011 deadline
2011	E-1 deadline is March 1, 2012

Ms. Baker advised that an agency receiving a tentative waiver by SBOA is still subject to audit until the agency provides the requested supporting information. Since the Group did not provide the supporting information in 2009, they were still subject to audit in that year. With the information that I have before me, the Group is and has been subject to audit by the SBOA since at least 2007. The Group, therefore, would be subject to audit and thus would be considered a state agency subject to the requirements of the ODL and the APRA.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Jon D. Baker