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March 5, 2012

Mr. Mark J. Wuellner
Indiana Housing & Community Development Authority
30 S. Meridian, Suite 1000
Indianapolis, Indiana 46204
Via email: mawuellner@ihcda.in.gov

Re: Informal Inquiry 12-INF-07; Community Action Agencies

Dear Mr. Wuellner:

This is in response to your informal inquiry regarding whether Community Action Agencies ("CAA") are considered to be to be public agencies for the purposes of Indiana's Open Door Law ("ODL") and the Access to Public Records Act ("APRA"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the APRA, I.C. § 5-14-3-1 *et seq.*, and the ODL, I.C. § 5-14-1.5-1 *et seq.*

BACKGROUND

I.C. § 12-14-23-2 provides that a CAA means an entity that meets the following conditions:

(1) Is any of the following:
  (A) A private nonprofit organization that is geographically located within a community.
  (B) A private nonprofit organization that is located in a county or counties contiguous to or within reasonably proximity of a community.
  (C) A political subdivision, if there is no qualified nonprofit organization identified that meets the criteria set for in clause A or B.
(2) Has the authority under state or federal law to receive money to support community action programs described in section 3 and 4 of this chapter.
(3) Is designated as a CAA by the governor or federal law.

A Community Action Program ("CAP") is defined as a community based and operated program that meets the following conditions:

(1) Includes or is designed to include a sufficient number of projects or components to provide a range of services and activities that have a measurable and potentially major impact on the cause of poverty in:
    (A) The community; or
    (B) those areas of the community where poverty is a particularly acute problem.
(2) Has been developed and organizes and combines the program's component projected and activities, in a manner appropriate to carry out all the purposes of this chapter.
(3) Conforms to any other criteria that the governor prescribes consistent with this chapter. I.C. § 12-14-23-3.

A CAA may not receive state or federal money appropriated or allocated by the state to carry out community action programs unless the agency is organized in accordance with I.C. § 12-14-23 *et seq*. *See* I.C. § 12-14-23-5. A CAA may enter into interlocal cooperation agreements with units of government. *See* I.C. § 12-24-23-10. The CAPs shall be administered by the CAA through a volunteer community action board who members are selected pursuant to I.C. § 12-13-23-6.

Our office inquired with the Indiana State Board of Accounts ("SBOA") whether CAAs are required to be audited pursuant to statute, rule, or regulation. Sherry Parton, Quality Control Supervisor, provided that several non-governmental entities that would be considered CAAs are required to be audited by the SBOA. The SBOA oversees the audit that is performed by an outside CPA firm. Ms. Parton cited Community Action of Southern Indiana as a CAA she was able to find that was audited by the SBOA; in my review of the SBOA database, I found that Community Action of Indiana (Allen County) and PACE Community Action Agency submitted for audit to the SBOA in 2011.

Our office also inquired with Ed Gerardot, Executive Director of the Indiana Community Action Association, who advised that it was the Association's belief that the ODL would apply to CAAs, mainly due to the fact that CAA audits must be submitted to the SBOA for review.

ANALYSIS

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a).

An entity must be considered a "public agency" in order to be subject to the requirements of ODL and the APRA. The ODL defines a public agency, except as provided in I.C. § 5-14-1.5-2.1, as 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.
> (4) Any building corporation of a political subdivision of the state of Indiana that issues bonds for the purpose of constructing public facilities.
> (5) Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff.
> (6) The Indiana gaming commission established by IC 4-33, including any department, division, or office of the commission.
> (7) The Indiana horse racing commission established by IC 4-31, including any department, division, or office of the commission. I.C. § 5-14-1.5-2(a).

At the outset I would note that any CAA that is subject to audit by the SBOA by statute, rule or regulation would be considered a public agency pursuant to I.C. § 5-14-1.5-2(a)(3)(B). 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. *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).

As to those CAAs that are not subject to audit by the SBOA, if any, it is my opinion that they would still generally qualify as a public agency under either I.C. § 5-14-1.5-2(a)(1) or (2). A CAP must conform to any criteria that the governor (i.e. executive branch) prescribes that is consistent with I.C. § 12-14-23 *et seq.* A CAA has to be designated as such by the governor or by federal law pursuant to I.C. § 12-14-23-2(3). A CAA would not be able to exist without the governor's appointment (unless designated

by federal law) and must conform to any criteria that the governor prescribes. Further, a CAA may not receive state or federal money appropriated or allocated by the state to carry out CAPs unless the agency is organized in accordance with I.C. § 12-14-23. Based on these factors, it is my opinion that a CAA would be exercising a portion of the executive power of the State or possibly local governmental power (i.e. I.C. § 12-14-23-2(1)(C)) and would qualify as a public agency pursuant to the ODL.

I would note that it would appear that each CAA is unique in how they are formed, governed, and designated by the state or federal government. In that vein, 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. *Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc*. 577 N.E.2d 208, 212 (Ind. 1991). This same holding would likely apply to a person seeking admission to a meeting of an entity pursuant to the ODL, although the holding has never been specifically extended by the Indiana courts to the ODL. *See Opinion of the Public Access Counselor 11-FC-95.* Accordingly, if a CAA maintained that it did not qualify as a public agency, the burden to prove that it did meet the criteria would shift to the party seeking access. As outlined prior, many times the burden will be met by establishing that the CAA is required to be audited by the SBOA pursuant to statute, rule, or regulations. *See* I.C. § 5-14-1.5-2(a)(3)(B).

An exception to the definition of a public agency is provided in I.C. § 5-14-1.5-2.1. Section 2.1 provides that certain providers are exempt from being classified as public agencies:

> "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. I.C. § 5-14-1.5-2.1.

A key factor in section 2.1 is that the entity must not be required by statute, rule, or regulation to be audited by the SBOA, which as discussed earlier would likely disqualify many of those CAA's that might otherwise qualify. I am not aware of any state or federal law that specifically exempts CAAs from complying with the ODL.

Similar to the ODL, the APRA provides that a public agency, except as provided in section I.C. § 5-14-3-2.1, means any entity or office that is subject to audit by the SBOA that is required by statute, rule, or regulation. *See* I.C. § 5-14-3-2(m)(3)(B). A provider would not qualify under the exceptions of I.C. § 5-14-3-2.1, if it is subject to audit by the SBOA. The definition of a public agency pursuant to the APRA is nearly identical to that of the ODL. Further, I am not aware of any entity that would be required to comply with the ODL and alternatively, not required to comply with the APRA.

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

Best regards,

Joseph B. Hoage
Public Access Counselor