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October 29, 2012

David Penticuff
Chronicle-Tribune
610 S. Adams Street
Marion, Indiana 46953

Re: Informal Inquiry 12-INF-40; Grant County Economic Development Growth Council

Dear Mr. Penticuff:

This is in response to your informal inquiry regarding the Grant County Economic Development Growth Council ("Council"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.* and the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.* Mr. Holderead, Attorney, responded to your informal inquiry on behalf of the Council. His response is enclosed for your reference.

BACKGROUND

Your informal inquiry concerns the Council and its practice of denying the public access to its board meetings regarding the collection and disbursal of taxpayer funds and its refusal to make records related to the collection and disbursal of taxpayer funds available pursuant to the APRA. The Council currently receives .03 percent of County Economic Development Income Tax ("CEDIT") funds that are collected annually. The tax money has been delivered directly to the Council since the tax was established in 2009 by municipalities in Grant County, along with the Grant County Council. In 2011, the Council collected $270,000 of CEDIT tax money.

The Grant County Council does not oversee the spending of the tax dollars, nor do any other publically accountable councils, boards, or members of the public. There is currently not a fee-for-service agreement ("Agreement") between the Council and the Grant County Council, although in June the Council attempted to bring such an Agreement to the Grant County Commissioners. You provide that the Grant County Commissioners refused to enter into an Agreement with the Council. The Council does have an Agreement with the Cities of Marion, Fowlerton, and Converse. All of those municipalities have historically appropriated money from their annual budgets as

contributions to the Council.

The Council was formed in 1984. Its mission is to attract and encourage economic growth in Grant County. It collects dues from private memberships, as well as local public entities, such as city councils, town boards, and county councils to fund its programs, along with a dedicated portion of CEDIT for the past three years. In May, the *Chronicle-Tribune* approached the Council and expressed concern about its inability to cover the Council's meetings when so much money was being funneled to it with no oversight. You sought to assure the Council that the *Chronicle-Tribune* was not seeking information to publish concerning specific employers the Council might be recruiting to the area or personal financial data of people and enterprises that approach the Growth Council for loans or gifts. You have consistently made clear that the *Chronicle-Tribune* only sought to cover that which would be a matter of discussion and action should the same matters come before any public council or board under the ODL and APRA. The *Chronicle-Tribune* and the Council have recently been unsuccessful in an attempt to reach an agreement regarding access. You provide that Mr. Tim Eckerle, Council Executive Director, has stated that he is opposed to allowing any newspaper to cover the Council's meetings as if it were a public body. Mr. Eckerle has maintained that the Council is a legally private organization because it has not been audited by the Indiana State Board of Accounts ("SBOA").

The *Chronicle-Tribune* inquired with the SBOA regarding the Council. The SBOA reported that the Council was last audited by the state in 2007, which you note was prior to when the Council began receiving CEDIT money directly. The Council has filed a yearly E-1 showing the percentages of public versus private money disbursed by the Council. The E-1 forms consistently demonstrate that public money disbursements amounted to less than half of the total yearly disbursements. As a result, the Council has not been subject to a state audit for those years. However, you provide that Mr. Eckerle has stated that the Council maintains its private and public monies in "one pot" and that there is no separate funding tracking. When asked how the Council could report such percentages of private versus public spending to the SBOA, you provide that Mr. Eckerle was unable to state how that was done, only that it was handled by the accountants.

Sherry Parton with the SBOA stated that the Council submitted independent audits as supporting documentation for the 2009 and 2011 E-1 forms. She informed the *Chronicle-Tribune* that the SBOA did not receive an E-1 from the Council in 2010 and the SBOA has submitted to the Council a request for the information. Mr. Eckerle has stated that the Council does receive an audit waiver and performs its own audit annually. This audit and monthly financial reports are provided to elected officials. However, you state that the *Chronicle-Tribune* was denied a request for a copy of the internal audit.

In sum, you believe that the Council is subject to Indiana's public access laws in light of the money received by the directly by the Council from the CEDIT is clearly a subsidy rather than a fee-for-service agreement with Grant County. Further, the SBOA has stated that it did not provide an audit of the Council based on the E-1 forms that were submitted. There is a profound reason to question the accuracy of those forms since the

Council has stated that it maintain private and public contributions separately. Lastly, it is a violation of the spirit and intent of the ODL and APRA by denying access and accountability for a local group spending hundreds of thousands in public dollars on an annual basis.

In response to your informal inquiry, Mr. Holderead advised that the Council is a private non-profit corporation whose prime focus is to promote economic growth and development in Grant County. The Council is not considered to be a "public agency" pursuant to either the APRA or ODL as it meets the statutory requirements of I.C. § 5-14-3-2.1. The Council is not required by statute, rule, or regulation to be audited by the SBOA and it has the appropriate Agreement in place for services it provides to respective cities and counties. The Council just recently received notice from the SBOA waiving an audit of the Council for the year ending December 31, 2011. Contrary to your assertions, Mr. Holderead advised that the Council does have an Agreement in place with Grant County and has had for a number of years.

Mr. Holderead argues that the cases cited by the *Chronicle-Tribune* in previous discussions with the Council supports the Council's argument. In *Indianapolis Convention and Visitor's Association*, a case decided by the Indiana Supreme Court in 1991, the entity in question was subject to audit by the SBOA, which is not the circumstance here. *Indianapolis Convention & Visitors Ass'n v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991). In *Kempf*, case decided by the Indiana Court of Appeals in 1999, a final determination was not made regarding the applicability of the ODL and APRA to the entity in question. *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999). Further, after these cases were decided by the Court, the General Assembly amended the ODL and the APRA in regards to the definition of a public agency. Mr. Holderead argues that if the General Assembly had intended for groups such as the Council to be considered a public agency, it would have amended the language of the statute at that time. As such, the Council is not considered to be a public agency pursuant to either the ODL or the APRA.

In reply to the Council's response, you challenge the assertion made by Mr. Holderead that there is an Agreement between the Council and the Grant County Council. The *Chronicle-Tribune* has been unable to find such an Agreement. The Council has declined a request by the *Chronicle-Tribune* for a copy.[1] The *Chronicle-Tribune* inquired with the Council's attorney, Mr. Holderead, regarding the existence of the Agreement, to which Mr. Holderead advised that he had not reviewed the Agreement and his contentions was based on the Mr. Eckerle's statements. Mr. Eckerle has provided that an Agreement was entered into in 2007, which was prior to the receipt of CEDIT as described in the inquiry. The *Chronicle-Tribune* does not assert that all records and meetings of the Council should be open to the public; only that it must comply with the APRA and ODL in regards to the records of the entity and the meetings that are conducted.

[1] A copy of the Agreement has not been provided with the Council's response.

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).

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 an agency's public 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). 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 & Visitors Ass'n.,* 577 N.E.2d at 212*; 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, the key question is whether the Council is considered to be a "public agency" pursuant to the ODL and the APRA. The ODL defines a public agency as:

> (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 medicals staffs or the committees of any such staff.

(6) The Indiana Gaming Commission established by I.C. 4-33, including any department, division, or office of the commission.
(7) The Indiana Horse Racing Commission established by I.C. 4-31, including any department, division, or office of the commission. *See* § I.C. § 5-14-1.5-2(a).

The APRA defines a public agency as:

(1) Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.
(2) Any:
(A) county, township, school corporation, city, or town, or any board, commission, department, division, bureau, committee, office, instrumentality, or authority of any county, township, school corporation, city, or town;
(B) political subdivision (as defined by IC 36-1-2-13); or
(C) other entity, or any office thereof, by whatever name designated, exercising in a limited geographical area the executive, administrative, judicial, or legislative power of the state or a delegated local governmental power.
(3) Any entity or office that is subject to:
(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) an audit by the state board of accounts that is required by statute, rule, or regulation.
(4) Any building corporation of a political subdivision 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) Any law enforcement agency, which means an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff's department of a political subdivision, prosecuting attorneys, members of the excise police division of the alcohol and tobacco commission, conservation officers of the department of natural resources, gaming agents of the Indiana gaming commission, gaming control officers of the Indiana gaming commission, and the security division of the state lottery commission.
(7) Any license branch staffed by employees of the bureau of motor vehicles commission under IC 9-16.
(8) The state lottery commission established by IC 4-30-3-1, including any department, division, or office of the commission.

(9) The Indiana gaming commission established under IC 4-33, including any department, division, or office of the commission.
(10) The Indiana horse racing commission established by IC 4-31, including any department, division, or office of the commission. *See* I.C. § 5-14-3-2(m).

However, both the ODL and APRA provide that certain entities, who might otherwise qualify as a public agency, are exempt from the requirements of Indiana's public access laws if certain requirements are met. Specifically:

> "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. *See* I.C. § 5-14-1.5-2.1; I.C. § 5-14-3-2.1.

The Council has provided that it meets the statutory requirements of I.C. § 5-14-1.5-2.1 and I.C. § 5-14-3-2.1 and is exempt from the requirements of the ODL and the APRA. You challenge the assertions made by the Council, in that the Council has failed to provide a copy of the Agreement, Mr. Eckerle has publically stated that the Council's private and public contributions are not maintained separately, and that the Agreement the Council relies on was created in 2007, at a time when the County was making an annual contribution to the Council. The current arrangement does not provide for an annual contribution, rather the Council receives .03 percent of CEDIT funds that are collected annually.

It is my opinion that the Council is not currently required to be audited by the SBOA by statute, rule, or regulation. The SBOA is responsible for determining whether an entity is subject to audit by statute, rule, or regulation. It is not disputed that the SBOA has stated that the Council has not been subject to audit since 2007. To the extent you take issue with the SBOA's determination, the proper redress would be with the SBOA and not the Public Access Counselor's Office. Until such time that the SBOA makes an alternative determination, it is my opinion that the Council has met the requirements of 2.1(c) and is not required to be audited by statute, rule, or regulation by the SBOA.

As to the Agreement contemplated under 2.1, the Indiana Court of Appeals have noted the importance that the Agreement reference the term "fees", that the fees be based on services that are actually performed, the amount of fees do not fluctuate based on the tax revenues collected, and that the fees are negotiated on a semi-regular basis. *Kempf*, 712 N.E.2d at 1024; *State Bd. of Accounts v. Ind. Univ. Found.*, 647 N.E.2d 342 (Ind. Ct. App. 1995). As provided in *Kempf*, the determination of whether a fee-for-services agreement meets the statutory requirements of 2.1 can turn on a question of fact of whether payment and the amount of fees are liked to performance. *Kempf*, 712 N.E.2d at 1024. As noted supra, I have not been provided with a copy of the Agreement. Further, the public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* Even if a copy of the Agreement had been provided, it is likely that there would still remain questions of fact regarding whether the Agreement met the requirements of 2.1. From what has been provided, it is my opinion that *if* the Agreement meets the requirements of 2.1, then the Council would not be required to comply with either the ODL or the APRA (emphasis added).

In response your attempts to gain access to a copy of the Agreement, I would note that the Agreement is entered into between the provider and either a state, county, or local municipality. A copy of such Agreement would be required to be maintained by the respective agency, to which a citizen could make a request for a copy under the APRA. Further, section 2.1 requires that the public agency be billed by the provider for the services, goods, or other benefits that are provided under the agreement. *See* I.C. § 5-14-1.5-2.1(1)(D); I.C. § 5-14-3.2.1(1)(D). To which again, a citizen could make a request for a copy of such billings or invoices under the APRA. The point being, although the Council, if it meets the requirements of 2.1, could deny any request made pursuant to the APRA; the county or local municipality would not have such authority. If the county or local municipality is unable to provide copies of the referenced records, it logically casts doubt on whether an Agreement, that meets the requirements of 2.1., exists.

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

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Jerome Holderead, Tim Eckerle