

July 8, 2003

Paul McAuliffe, Editor  
*The Evansville Courier*  
300 East Walnut Street  
Evansville, IN 47702

Re: *Advisory Opinion 03-FC-44*: Alleged Denial of Access to Public Records by the Washington Court Redevelopment Corporation.

Dear Mr. McAuliffe:

This is written in response to your formal complaint, which was received in this Office on June 9, 2003. You have alleged that the Washington Court Redevelopment Corporation ("Washington Court") has violated the Indiana Access to Public Records Act ("APRA," ) Indiana Code chapter 5-14-3. According to your complaint, Washington Court denied you access to records claiming it is not a "public agency" under the APRA. Ms. Angela Freel, Attorney for Washington Court, responded in writing to your complaint. A copy of her response is enclosed for your reference.

On July 7, 2003 Mr. Mike Bozyski, Supervisor for Not for Profit with State Board of Accounts, met with Mr. Wayne Crowe, Executive Director of Washington Court. Mr. Bozyski advised me later that day that Mr. Crowe did not have information available to fill out the E-1. Therefore, State Board of Accounts is unable to make a determination at this points as to whether Washington Court is subject to audit and consequently subject to the provisions of the APRA.

#### BACKGROUND

According to your complaint, your newspaper submitted a written request for access to public records to Washington Court on May 9, 2003. You requested copies of public records, including information on salaries, operating budgets, property holdings, board member information and a schedule of board meetings. On May 17<sup>th</sup>, you received a letter from Ms. Freel denying your request on the basis that Washington Court is not subject to the APRA. It is your position that Washington Court is a public agency as defined under Indiana Code section 5-14-3-2. For this reason, you filed your formal complaint with this Office.

In her response to your complaint, Ms. Freel states that Washington Court is not a "public agency" under the APRA as it is not subject to audit by the State Board of Accounts nor does it qualify

under any other of the listed definitions of public agency under Indiana Code section 5-14-3-2. Ms. Freel points to the *Perry County Development Corporation v. Kempf*<sup>1</sup> case to show that it is your burden to show that Washington Court is a public agency, and not Washington Court's to prove it is not. In any event, Ms. Freel provided information about the formation of Washington Court as a private, nonprofit corporation with various purposes, including the acquisition, redevelopment, ownership and operation of a residential rental housing project in Evansville and the development of moderate income housing, especially housing for special needs populations. According to her letter, the board members for Washington Court are not selected by a public agency, but rather by the majority of the remaining members on the board for one (1) year terms. Other than confirmation of elections by the Board of Commissioners of the Evansville Housing Authority, there is no public agency input on board member selection.

After a meeting with Mr. Crowe on July 7, 2003, Mr. Bozyski advised me that the necessary information for completing the E-1 was not available to Mr. Crowe at the time of the meeting. Consequently, Mr. Bozyski cannot make a determination at this time as to whether Washington Court is subject to State Board of Accounts' 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 Washington Court 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 Washington Court, 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 Washington Court 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 Washington Court would be subject to audit as an entity, as opposed to limiting their audit to the public funds at issue.

On July 7, 2003 Mr. Mike Bozyski, Supervisor for Not for Profit with State Board of Accounts, met with Mr. Wayne Crowe, Executive Director of Washington Court. Mr. Bozyski advised me later that day that Mr. Crowe did not have information to fill out the E-1 during the meeting. Therefore, Mr. Bozyski is unable to make a determination at this points as to whether Washington Court is subject to audit and consequently subject to the provisions of the APRA. State Board of Accounts is the proper agency to determine whether Washington Court is subject to audit. It is beyond the authority of this Office to make the determination regarding whether Washington Court is subject to audit by the State Board of Accounts. Therefore, I cannot make a determination as to whether Washington Court violated the APRA by improperly denying you access to public records.

However, if Washington Court were subject to audit by State Board of Accounts, then it would be subject to the provisions of the APRA. In that case, in order for Washington Court to properly withhold the records you requested it must cite to the specific statutory authority that allows them to do so. If Washington Court is not subject to audit by State Board of Accounts, then it has no obligations under the APRA.

## CONCLUSION

It is my opinion that if the Washington Court Redevelopment Corporation is subject to audit by State Board of Accounts, then it would be subject to the provisions of the Indiana Access to Public Records Act. Therefore, it would be required to provide statutory authority for the withholding of the records in question. If, however, the Washington Court is not subject to audit by the State Board of Accounts, then it would not be subject to the Indiana Access to Public Records Act. Consequently, its denial of your public records request would not be in violation of the Access to Public Records Act.

Sincerely,

Sandra K. Barger  
Acting Public Access Counselor

Enclosures

cc: Ms. Angela L. Freel, Attorney for WCRC

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<sup>1</sup> 712 N.E.2d 1020, 1023 (Ind. App. 1999).