



STATE OF INDIANA

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May 13, 2011

Ms. Carlotta L. King
1004 Highland
Hammond, IN 46320

Re: Formal Complaint 11-FC-100; Alleged Violation of the Access to Public Records Act by United Neighborhoods, Inc.

Dear Ms. King:

This advisory opinion is in response to your formal complaint alleging United Neighborhoods, Inc. ("UNI") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* UNI's response to your complaint is enclosed for your reference.

BACKGROUND

You are the former executive director of UNI. In your complaint, you allege that UNI violated the ODL by excluding you from its March 11, 2011, meeting. At that meeting, UNI's board of directors ("Board") voted to terminate your employment effective that day. You claim that a quorum of the Board was present at the meeting, but that the Board refused to permit the Board secretary to record the meeting.

In response to your complaint, Board President Phil Taillon forwarded an email from the Board's attorney that states UNI is not a public agency subject to the ODL.

ANALYSIS

The public policy of the APRA states, "[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." I.C. § 5-14-3-1. An entity must be considered a "public agency" in order to be subject to the requirements of the ODL. The party alleging a violation of the ODL 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). The term "public agency" is broadly defined. The issue presented here, however, is whether UNI is a public agency subject to

the ODL because it is “subject to . . . an audit by the state board of accounts that is required by statute, rule, or regulation.” I.C. § 5-14-3-2(a)(3)(B).¹

Previous public access counselors and I have chosen to rely solely on the SBOA’s determination of whether or not an entity is subject to an audit that is required by statute, rule or regulation. *See, e.g., Ops. of the Public Access Counselor 10-FC-202; 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.

I spoke with SBOA’s supervisor of its Not-for-Profit division, who confirmed that SBOA determined that the UNI is subject to a required audit based upon the amount of government funds received. As such, UNI is a public agency within the meaning of subsection 2(a)(3)(B) of the ODL.²

The ODL defines a “meeting” as “a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.” I.C. § 5-14-1.5-2(c). UNI has not contested your allegations that its March 11th meeting included a quorum of the Board, which you further claim took official action upon public

¹ I note that much of the analysis in the opinion is based upon reasoning from other cases and advisory opinions involving the applicability of the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.*, to various entities. However, because both the APRA and ODL define a public agency as “[a]ny entity which is subject to . . . audit by the state board of accounts that is required by statute, rule, or regulation,” the analysis of whether receipt of governmental funds triggers the applicability of either law is substantially similar. *See I.C. §§ 5-14-3-2(1)(3)(B); 5-14-1.5-2(a)(3)(B).*

² I also note that current legislation might impact future determinations regarding UNI’s status. House Bill 1004, which passed both houses of the Indiana General Assembly and was signed into law by the Governor on May 10, 2011, modifies the threshold that triggers required SBOA audits. The new provisions, however, do not take effect until July 1, 2011.

business by terminating your employment. Under those circumstances, the Board conducted a “meeting” under the ODL that should have been open to the public to observe and record. *See* I.C. § 5-14-1.5-3(a). Thus, if the Board denied you access to the meeting and refused to permit recording of the meeting, the Board violated the ODL.

CONCLUSION

For the foregoing reasons, it is my opinion that UNI is a public agency subject to the ODL because it is subject to audit by the SBOA. As such, the March 11, 2011, meeting of UNI’s Board should have been open to the public for observation and recording.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

cc: Phil Taillon