STATE OF INDIANA

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May 9, 2011

Ms. Virginia Perry
102 Fountain Drive
Mooresville, IN 46158

Re: Formal Complaint 11-FC-95; Alleged Violation of the Access to Public Records Act by the Morgan County Economic Development Corporation

Dear Ms. Perry:

This advisory opinion is in response to your formal complaint alleging the Morgan County Economic Development Corporation ("Corporation") violated the Open Door Law ("ODL"), Ind. Code § 5-14-3-1 *et seq*. The Corporation's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that the Corporation violated the ODL by holding a meeting on April 7, 2011, that was not advertised to the public. When you asked Corporation Director Joy Sessing about the meeting, she informed you that it was a "Board/Executive meeting."

In response to your complaint, the Corporation argues that it is not an entity subject to the ODL. Specifically, although the Corporation receives some public funds, those funds are disbursed pursuant to fee-for-services agreements with Morgan County, the City of Martinsville, the Town of Mooresville, and the Town of Monrovia. Each of the agreements requires the provision of services by the Corporation in consideration for the fees paid by these governmental entities. Consequently, the Corporation does not consider itself an entity that is supported and maintained with public funds.

The Corporation also claims that, even if it is subject to the ODL, the April 7th meeting was not a "meeting" under the ODL because it was not a gathering of the Corporation's governing body, which is its board of directors ("Board"). Rather, the gathering was of the Corporation's executive committee, which was established by the Corporation's bylaws and was not appointed by either the board president or the board of directors itself.

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 APRA and the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq*. 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). The term "public agency" is broadly defined. The issue presented here, however, is whether the Corporation 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 Tammy Baker, SBOA's supervisor of its Not-for-Profit division, who confirmed that SBOA determined that the Corporation is subject to a required audit

[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(l)(3)(B); 5-14-1.5-2(a)(3)(B).

based upon the amount of government funds received. If the Corporation is correct that the public funds it receives are merely fee-for-services disbursements, the Corporation might be able to show SBOA that an audit is not required. At this time, however, SBOA's determination is sufficient for me to conclude that the Corporation is a public agency within the meaning of subsection 2(a)(3)(B) of the ODL.[2]

With regard to the April 7th meeting itself, the Corporation is correct that the ODL applies only to meetings of "governing bodies" of public agencies:

> (b) "Governing body" means two (2) or more individuals who are:
> (1) a public agency that:
> (A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and
> (B) takes official action on public business;
> (2) the board, commission, council, or other body of a public agency which takes official action upon public business; or
> (3) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter.

I.C. § 5-14-1.5-2(b). The Corporation maintains that the executive committee is not a "governing body" as defined in this section. Because it is unclear who attended the meeting, it is difficult for me to confirm whether or not this is accurate. If, for example, the members of the executive committee are also members of the board of directors, and enough members of the board of directors sit on the executive committee such that a meeting of the executive committee includes a quorum of the board of directors, that would be a "meeting" under the ODL. 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). Moreover, the Corporation states that the executive committee was not formed by the Corporation but by its bylaws, but it is unclear how those bylaws were adopted in the first place. If, for example, the board of directors adopted those bylaws or amended them to create the executive committee, in my opinion that would be a "committee appointed directly by the governing body" under subsection 2(b)(3) of the ODL. If, however, none of these circumstances occurred, the Corporation's April 7th meeting of its executive committee did not violate the ODL.

CONCLUSION

For the foregoing reasons, it is my opinion that the Corporation is a public agency within the meaning of the ODL because it is subject to a required audit by the SBOA. The Corporation's April 7th meeting did not violate the ODL unless a quorum of its

[2] I also note that current legislation might impact future determinations regarding the Corporation's status. House Bill 1004, which has passed both houses of the Indiana General Assembly and is awaiting action by the Governor, modifies the threshold that triggers required SBOA audits.

board of directors was present at the meeting or unless the board of directors formed the executive committee through the Corporation's bylaws.

Best regards,

Andrew J. Kossack
Public Access Counselor

cc: Karen L. Arland