



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 4, 2012

Warren A. Auxier
P.O. Box 215
Hanover, Indiana 47243

Re: Formal Complaint 12-FC-253; Alleged Violation of the Access to Public Records Act by the Scott County Economic Development Corporation

Dear Mr. Auxier:

This advisory opinion is in response to your formal complaint alleging the Scott County Economic Development Corporation ("SCEDC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Kerry Thompson, Attorney, responded on behalf of the SCEDC. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that the SCEDC violated the APRA by failing to timely respond in writing to your written request for public records as required by section 9 of the APRA and by denying your request by claiming that it was not a public agency as defined under the law.

On August 15, 2012, you delivered a written request for records to the SCEDC. After not receiving a response, you inquired with the entity regarding the status of your request. You were initially informed that the entity was working on providing the requested records and that the delay was due to a recent relocation. After further time passed, you again inquired regarding the status of your request. You were then informed that you would need to speak with Mr. Robert Peacock, Executive Director of the SCEDC. You allege that Mr. Peacock failed to return any of your messages.

On August 31, 2012, you received a letter from the SCEDC's attorney advising that the entity is not a public agency as defined under I.C. § 5-14-3, I.C. § 5-14-3-2.1 was applicable, and the SCEDC was not subject to audit by the Indiana State Board of Accounts ("SBOA"). You thereafter inquired with the SBOA, who provided you with a copy of correspondence that was submitted to the SCEDC by the SBOA on May 21, 2012. The correspondence provided that the SBOA had reviewed the Entity Annual Report for the 2011 and based on the information presented, the SCEDC was subject to a complete organization wide audit performed in accordance with the guidelines issued by

the SBOA. SBOA records indicate that the SCEDC has routinely been subject to audit since 2002.

In response to your formal complaint, Mr. Thompson advised that the SCEDC is a private, non-profit corporation that is operated as a 501(c)(3). It is the opinion of the SCEDC that it is not a public agency that is subject to the APRA and operates in the same manner as the Perry Development Corporation, as provided in *Perry County Development Corporation v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999). In *Kempf*, the development corporation was determined to not be a public agency even though its fees were paid by public funds. In support, Mr. Thompson has provided copies of contracts between the SCEDC and the City of Scottsburg and Scott County, which set forth that the City shall pay for the services in the amount of \$55,100 and \$65,000 in 2012, respectively. Mr. Thompson maintains that the contracts do not make the SCEDC subject to the APRA or require that the entity be audited by the SBOA. The SBOA has yet to make a determination whether the SCEDC is required to be audited for 2012. The SCEDC has never been audited by the SBOA and contracts for private, periodic audits by a regional CPA firm.

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.” See I.C. § 5-14-3-1. Accordingly, any person has the right to inspect and copy a public agency’s 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 and Visitors Ass’n., Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991); *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, “public agency”, except as provided in section 2.1 of this chapter [I.C. 5-14-3-2.1], means 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.



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

- (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.

I.C. § 5-14-3-2.1 relieves certain public agencies from the requirements of the APRA, provided the following requirements are met:

“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.

Pursuant to state statute, 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 \$200,000 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); See *Opinion of the Public Access Counselor* 10-FC-202.

The Court of Appeals in *Kempf* held that an entity (here, a non-profit corporation) “does not become a ‘public agency,’ thus coming within the purview of the statutes in question, by contractually agreeing to submit to an audit. . . Rather, an entity is ‘subject to’ those procedures only if compelled to submit by statute, rule, or regulation.” *Kempf*, 712 N.E.2d at 1025; See also *Opinion of the Public Access Counselor* 09-FC-126. Here, there is no indication that the SCEDC contractually agreed to submit to an audit performed by the SBOA. Our office contacted Sherry Parton with the SBOA regarding the SCEDC. Ms. Parton advised that going back to 2005, the SCEDC was required to submit to an audit by the SBOA for the years 2005, 2006, 2007, 2008, and 2011. The SCEDC was not subject to audit in 2009 and in 2010 the SCEDC failed to submit the appropriate paperwork and the SBOA was unable to make a determination. As to 2012, a determination has yet to have been made. As provided *supra*, the burden rests with the person making the request under the APRA to show that an entity is a public agency. It is my opinion that you have sustained your burden to demonstrate that SCEDC is a public agency for the years it was required to be audited by the SBOA by statute, rule, or regulation. See also *Opinions of the Public Access Counselor* 04-FC-03 and 04-FC-04. I.C. § 5-14-3-2.1 would not be applicable, as again the SBOA has determined that the SCEDC is subject to audit for the years referenced above.¹

A request for records may be oral or written. See I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. See I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. See I.C. § 5-14-3-9(b). Under the APRA a public agency denying access in response to a written public records request must put the denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. See I.C. § 5-14-3-9(c). As the SCEDC failed to comply with the requirements of section 9 in response to your request for records, it is my opinion that it violated the APRA.

¹ I would also note that the SBOA does not require that the actual audit be performed by the SBOA itself; rather generally the SBOA will review an audit that is submitted by an independent public accountant. Thus, the SCEDC cannot claim that it is not a public agency under the APRA simply by stating that the SBOA itself has never conducted an audit of the entity.



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

CONCLUSION

For the foregoing reasons, it is my opinion that the SCEDC is a public agency pursuant to the APRA for the years that it was required by statute, rule, or regulation to be audited by the SBOA. Further, it is my opinion that the SCEDC violated the APRA by failing to comply with section 9 of the APRA in response to your request for records.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage", written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Kerry Thompson