



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 2, 2009

Jamie Grabert
815 John Street, Suite 110 C
Evansville, Indiana 47713

*Re: Formal Complaint 09-FC-126; Alleged Violation of the Open Door Law
by the Evansville Brownfields Corporation*

Dear Ms. Grabert:

This advisory opinion is in response to your formal complaint alleging the Evansville Brownfields Corporation ("Corporation") violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5) by failing to provide notice for its meetings. A copy of the Corporation's response to the complaint is enclosed for your reference. It is my opinion the Corporation is not a public agency for the purposes of the Open Door Law.

BACKGROUND

You filed the present complaint on May 15, 2009, alleging that the Corporation has violated the ODL by declining to provide notice of its meetings. You allege you telephoned the office on May 14 and inquired about the next meeting date and time. You did not receive the information. You allege that because the Corporation is in violation of the ODL because the Corporation's board makes decisions at its meetings about the use of public funds.

The Corporation responded to the complaint by letter dated May 29 from attorney Bradley Salmon. The Corporation contends it is not a public agency and is therefore not subject to the ODL. The Corporation is a non-profit corporation organized on March 24, 2003. The Corporation is controlled by a five-member Board, some members of which are also public officials. The Corporation is a tax exempt entity, files IRS Form 990, maintains a separate bank account, approves its own contracts, maintains its own insurance, and maintains its own records. The Corporation contends it is not subject to audit by the Indiana State Board of Accounts ("SBOA") that is required by statute, rule or regulation but does agree contractually to be subject to an audit. To date, the Corporation has not been audited by the SBOA. The Corporation contends that its arrangement is similar to a fee-for-services agreement and as such it is not subject to the ODL.

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. I.C. § 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, 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. I.C. § 5-14-1.5-3(a).

The issue presented is whether the Corporation is a public agency for the purposes of the ODL. The ODL defines a public agency as follows:

"Public agency", except as provided in section 2.1 [IC 5-14-1.5-2.1] of this chapter, 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.

(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 medical staffs or the committees of any such staff.

(6) The Indiana gaming commission established by IC 4-33, including any department, division, or office of the commission.

(7) The Indiana horse racing commission established by IC 4-31, including any department, division, or office of the commission.

I.C. § 5-14-1.5-2(a).

Because the entity is a non-profit corporation not formed by statute, ordinance or executive order, most of the entity types listed in I.C. § 5-14-1.5-2(a) are not applicable. Our analysis, then, turns to the one provision which may apply, I.C. § 5-14-1.5-2(a)(3)(B). It is often the case that a non-profit corporation is also considered a public agency for the purposes of the ODL because it is subject to SBOA audit and the audit is required by statute, rule or regulation. You have indicated you believe the Corporation is a public agency because at its meetings the Board makes decisions regarding the use of public funds. That the Board may make decisions regarding its use of public funds,

though, is not determinative on the issue. The question is whether the Corporation is subject to audit by the SBOA and whether that audit is required by statute, rule, or regulation.

Here, the Corporation indicates that it has contractually agreed to be subjected to audit by the SBOA. Contractual obligation to an SBOA audit, though, is not the same as an audit *required by* statute, rule, or regulation. I find no statute, rule, or regulation requiring the Corporation to be subjected to an SBOA audit. Rather, as the Corporation points out, its arrangement is more like a fee-for-services arrangement as contemplated in I.C. § 5-14-1.5-2.1 and *Perry County Development Corporation v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999). The *Kempf* court said 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.” *Id.* at 1025.

The facts here are similar to those in *Kempf*. The Corporation contends the continued funding of grants is dependent on the continued performance under the applicable statutes. If the Corporation fails to perform as required, the Corporation would be required to return the money. As was the case in *Kempf*, “[t]he fact that said funds were derived from public sources does not transform [the entity] into a public agency.” *Id.* Based on the information provided and on the decision in *Kempf*, it is my opinion the Corporation is not a public agency for the purposes of the ODL. As such, the Corporation did not violate the ODL by failing to provide you with information regarding its meeting dates and times.

CONCLUSION

For the foregoing reasons, it is my opinion the Corporation is not a public agency.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Bradley Salmon, Terrell, Baugh, Salmon & Born, LLP
Carolyn Rusk, Evansville Brownfields Corporation