



STATE OF INDIANA

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October 16, 2012

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

Re: Informal Inquiry 12-INF-46

Dear Mr. Auxier:

This is in response to your informal inquiry regarding the Scott County Economic Development Corporation ("SCEDC"). Pursuant to Ind. Code § 5-14-3-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.*

BACKGROUND

In a previous advisory opinion in response to your formal complaint filed against the SCEDC, it was my opinion that that the SCEDC was 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. *See Opinion of the Public Access Counselor 12-FC-253.* Your request for records that was submitted to the SCEDC covered the years 2009, 2010, 2011, and 2012. The State Board of Accounts ("SBOA") has indicated that the SCEDC has been subject to audit for the following years: 2005, 2006, 2007, 2008, and 2011. The SCEDC was not subject to audit in 2009 and in 2010 it failed to submit its E-1 to the SBOA. The SBOA has yet to determine whether the SCEDC is subject to audit for the 2012. You submit the following inquiries:

- In light of the SBOA finding that that the SCEDC is subject to audit for the year 2011, is the SCEDC considered to be a public agency for the purposes of the APRA until such time the SBOA finds that they are not subject to audit;
- Are the records created or received by the SCEDC in 2012 subject to the APRA;
- Are all records created or received by the SCEDC in 2011 subject to the APRA; and,
- Are all records created or received by the SCEDC in 2009 and 2010 subject to the APRA.

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 public 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). I will address each issue presented in your informal inquiry separately:

In light of the SBOA’s finding that the SCEDC is subject to audit for the year 2011, is the SCEDC considered to be a public agency for the purposes of the APRA until such time the SBOA finds that they are not subject to audit?

As noted in your inquiry, many of the issues that you have raised were addressed by Counselor Hurst in a 2004 advisory opinion. *See Opinions of the Public Access Counselor 04-FC-03 and 04-FC-04.* I would agree with Counselor Hurst and your analysis that the SCEDC’s status as a public agency for 2012 will not be known until the SBOA makes its determination upon review of the E-1 that is submitted. Until the SBOA’s determination is made, the SCEDC would not be required to comply with the APRA as it relates to records created or maintained by the SCEDC during 2012. However, as noted by Counselor Hurst, this does not mean that the SCEDC can simply ignore all APRA requests that are received during 2012 or until the SBOA makes its determination. Counselor Hurst opined:

“The APRA cannot be circumvented by asserting that requests made after the period has passed may be ignored on the theory that the entity is no longer a public agency. Rather, it is my opinion that once an entity is determined to be a public agency for a specific period, a request for records may be brought at any time so long as the request is for records of the entity that were maintained during the relevant period.”*Id.*

Are the records created or received by the SCEDC in 2012 subject to the APRA

As noted above, records created or received by the SCEDC in 2012 would not be subject to APRA until the SBOA makes its determination regarding whether the SCEDC is subject to audit for that time period.

Are all records created or received by the SCEDC in 2011 subject to the APRA

Yes, minus any applicable exceptions. As the SBOA has determined that the SCEDC was subject to audit for that time period, the SCEDC’s records would be considered “public records” under the APRA. Under the APRA, a public agency denying

access in response to a written public records request must put that 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).

Are all records created or received by the SCEDC in 2009 and 2010 subject to the APRA

The SBOA determined that the SCEDC was not subject to audit in 2009. As such, it would not be required to produce records created or received by the SCEDC for that time period. However, as noted by Counselor Hurst, records created or maintained by the SCEDC during 2009 as it relates to the audit would be considered public records and thus discloseable. *See Opinions of the Public Access Counselor 04-FC-03 and 04-FC-04; See also* I.C. § 5-11-5-1.

As to 2010, the SBOA has provided that it has been unable to make a determination whether the SCEDC was subject to audit. Until the SBOA is able to make such determination, it is my opinion that the SCEDC would not be required to produce records created or maintained in 2010. It is not my opinion that an entity can avoid the requirements of the APRA by simply not providing the relevant information to the SBOA. As the SCEDC is now aware of the SBOA's inability to make a determination for 2010, I would strongly encourage it to submit the requisite paperwork in order for the relevant determination to be made.

As the only year that the SBOA has definitively stated that the SCEDC was not subject to audit was 2009, at this time all records in possession of the SCEDC from 1984 through 2008 and 2011 would be subject to disclosure under the APRA, minus any applicable exceptions. *See Opinions of the Public Access Counselor 04-FC-03 and 04-FC-04; See also Indianapolis Convention & Visitors Ass'n v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208, 212 (Ind. 1991).

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor