



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)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

December 5, 2011

Brett S. Stowell
118 Main Street
P.O. Box 353
Rising Sun, Indiana 47040

Re: Formal Complaint 11-FC-294; Alleged Violation of the Access to Public Records Act by the Rising Sun/Ohio County First, Inc.

Dear Mr. Stowell:

This advisory opinion is in response to your formal complaint alleging the Rising Sun/Ohio County First, Inc. ("County First") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Michael Red responded on behalf of the County First. His response is enclosed for your reference. I have granted your request priority status pursuant to 62 Indiana Administrative Code 1-1-3(3).

BACKGROUND

In your formal complaint, you allege that on September 6, 2011, you submitted a written records request to the registered agent of County First, Mayor William A. Marksberry, at the registered address of the organization. On September 7, 2011, City Attorney, Leslie Votaw, acknowledged receipt of your request and provided that the requested records would be made available within sixty days. Later correspondence from Ms. Votaw confirmed that County First was preparing a response to your request. Approximately nine days after the expiration of the sixty-day time period, you submitted notice to Ms. Votaw that you would be filing a formal complaint with the Public Access Counselor's Office if there records were not released by November 21, 2011. On November 21, 2011, County First changed its registered agent from Mayor Marksberry to Kay Fleming and changed the registered address from City Hall to an address in Indianapolis. On November 21, 2011, County First provided notice that it was not providing the records requested as it was not subject to the APRA.

You allege that County First exercises a portion of the executive, administrative, or legislative power of the City of Rising Sun ("City") and thus is subject to the APRA. This position is supported by the State Board of Account ("SBOA"), who has noted that "a non-for-profit corporation was administrating Redevelopment Commission Funds."

The SBOA considered “payments made by the Developer [Rising Sun Riverboat Casino and Resort, LLC] to County First to be public funds. As the caretaker of public funds, headquartered at City Hall, and advised by the City Attorney, County First is clearly executing a portion of the executive, administrative, or legislative power of the City and thus subject to the APRA.

In response to your formal complaint, Mr. Red advised that County First does not administer public funds, is not audited by the SBOA, and does not exercise any part of the executive, administrative, or legislative power of the City. Mr. Red provided that Ms. Votaw’s initial responses to your request were premature and that she does not, nor has she ever, represented County First. Your request was inadvertently delivered to Ms. Votaw, who has only been retained by the City since July 2011. County First had not adequately educated Ms. Votaw regarding City First’s history, activities, and relationship with the City, which led to the misunderstanding that arose upon her receipt of your request made pursuant to the APRA.

Mr. Red provided that County First formerly administered funds attributable to the City’s Redevelopment Commission. Such funds had been described by the SBOA to be “public funds.” Following SBOA’s examination and recommendations as described in the report provided with your formal complaint, County First transferred such funds to the City Clerk-Treasurer in 2009. As County First is not administering the funds of the City’s Redevelopment Commission, it thus is not exercising a portion of the executive, administrative, or legislative power of the City.

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 the records of a public agency 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).

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. *Kentner v. Ind. Pub. Employers’ Plan, Inc.*, 852 N.E.2d 565, 572 (Ind. Ct. App. 2006); *Indianapolis Convention & Visitors Ass’n, Inc. v. Indianapolis Newspapers, Inc.* 577 N.E.2d 208, 212 (Ind. 1991). The APRA defines public agencies as follows:

"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.

(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. § 5-14-3-2(m).

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.

As County First is a non-profit corporation not formed by statute, ordinance or, executive order, most of the entity types listed in I.C. § 5-14-3-2(m) are not applicable.

See Opinion of the Public Access Counselor 09-FC-126. I am not aware nor have I been provided with any statute, ordinance, or executive order that authorizes or empowers County First to exercise the executive, administrative, or legislative power of the City. It is your contention that County First exercises a portion of the executive, administrative, or legislative power of the City, which is supported by a SBOA examination report which provided that County First was administering Redevelopment Commission funds. The report further delineated that payments made by the Developer to County First were considered by the SBOA to be public funds. Initially, I would note that the fact that funds are derived from public sources does not transform an entity into a public agency. *Perry County Development Corporation v. Kempf*, 712 N.E.2d 1020, 1025 (Ind. Ct. App. 1999).¹ In response to your formal complaint, County First has provided that is no longer administers the funds attributed to the City's Redevelopment Commission and has not done so since 2009, when it returned all funds to the City.

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 APRA provides that the determinative issue regarding the SBOA and County First's status as a public agency is whether County First is audited by the SBOA pursuant to statute, rule, or regulation. *See* I.C. § 5-15-3-2(m)(3)(b).

Our office contacted Tammy L. Baker, Supervisor of Schools, Townships, and Non-Governmental Entities, with the SBOA. Ms. Baker provided that County First has not submitted an E-1 with the SBOA, as such an audit determination could not be made. County First has provided that it does not administer public funds and is not audited by the SBOA. If County First were audited by the SBOA pursuant to statute, rule, or regulation it would be considered a public agency pursuant to the APRA. 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 not sustained your burden to show that County First is a public agency or alternatively, that it is required to be audited by the SBOA pursuant to a statute, rule, or regulation. As such, County First was not required to respond to public records requests received pursuant to the APRA.

¹ The Indiana Court of Appeals further noted in *Kempf* that the composition of an entity's board of directors is not relevant to the question of whether it is a public agency and subject to the APRA. *Kempf*, 712 N.E. 2d at 1025.

CONCLUSION

For the foregoing reasons, it is my opinion that your complaint filed against County First does not have merit as you have not satisfied your burden to show that County First is a “public agency” pursuant to the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Michael Red