



# STATE OF INDIANA

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July 17, 2015

Mr. Douglas Dwight Berky  
4720 Mounds Rd.  
Anderson, Indiana 46017

*Re: Formal Complaint 15-FC-178; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Anderson Corporation for Economic Development*

Dear Mr. Berky,

This advisory opinion is in response to your formal complaint, which alleges the Anderson Corporation for Economic Development (“Corporation”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et. seq.*, and the Open Door Law (“ODL”), Ind. Code § 5-14-1.5-1 *et. seq.* On June 24, 2015, the Corporation responded via Mr. Rob Sparks, Executive Director. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-3-3, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on June 8, 2015.

## BACKGROUND

Your complaint dated June 8, 2015 details several potential violations of the APRA and ODL. On May 18, 2015, you contacted the Indiana State Board of Accounts (“SBOA”), attempting to acquire information about the Corporation’s status as a public agency. SBOA was unable to answer your question at that time due to the Corporation allegedly not filing their Entity Annual Reports for 2013 and 2014.

On May 22, 2015, you delivered requests for public records to elected officials who may have had meetings with the Corporation. On May 29, 2015, the Corporation filed its reports with the SBOA. On June 1, 2015, you were informed the Corporation is subject to audit for 2013 and 2014.

In the meantime, the Corporation had established an Advisory Board for the Mound Lakes reservoir project (“Board”) made up of several local public officials. You argue that because the Board was established by a Corporation deemed subject to audit, all



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previous meetings of the Board were violations of the Open Door Law because notice was not given nor was the public able to observe.

The Corporation responded to your complaint by arguing the Advisory Board was made up of public officials from various other public agencies and entities and would not have been subject to the Open Door Law regardless of the Corporation's audit status.

## 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 Ind. Code § 5-14-3-1. Because the Anderson Economic Development Corporation is now subject to audit by the State Board of Accounts, it is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Corporation's disclosable, public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

The matter of whether the Entity Annual Reports were filed in a timely manner is between the State Board of Accounts and the regulated entity. It does indeed appear as if the filings were delinquent. However, the SBOA is the regulatory authority in that matter. Ind. Code § 5-14-1.5-2(a)(3)(B), an entity subject to audit by the State Board of Accounts is a public agency subject to the Open Door Law. This determination is made by SBOA on an annual basis. While the Corporation likely should have filed its annual reports within 60 days of the end of its fiscal year pursuant to Ind. Code § 5-11-1-9, this Office cannot apply the Open Door Law *ex post facto*.

Furthermore, if the Corporation was a public entity, this does not automatically qualify the Advisory Board as a governing body. As the corporation notes, a governing body includes 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. The Advisory Board was appointed by the Executive Director of the Corporation who is not the presiding officer of the Corporation's Board. The Corporation's Board of Directors would have to directly appoint the members of the Advisory Board in order for the Open Door Law to apply. A similar matter was addressed by the Indiana Court of Appeals in *Robinson v. Indiana Univ.*, 638 N.E.2d 435, Ind. App. (1994) which stated a committee



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subject to the ODL must have been *directly appointed* by a governing body or its presiding officer.

Finally, you have requested the ordinance partially developed in these unnoticed meetings be vacated and dissolved. I will note that even if there was a violation of Public Access Laws, the Public Access Counselor does not have the authority to vacate an ordinance. Only a court of local jurisdiction may vacate such an ordinance.

## CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Economic Development Corporation is subject to Open Door Law and the Access to Public Records Act going forward. However, any past meetings *which should have been* subject to the ODL were conducted while its status as a public entity was pending.

Regards,

A handwritten signature in black ink, appearing to read "LH Britt", written over a white background.

Luke H. Britt  
Public Access Counselor

Cc: Mr. Rob Sparks