



# STATE OF INDIANA

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December 27, 2016

Mr. Michael A. Marturello  
45 South Public Square  
Angola, Indiana 46703

*Re: Formal Complaint 16-FC-289; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Steuben County Economic Development Corporation*

Dear Mr. Marturello:

This advisory opinion is in response to your formal complaint alleging the Steuben County Economic Development Corporation ("SCEDC") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-3-1 et. seq., and the Indiana Open Door Law, Indiana Code § 5-14-1.5 et.al. SCEDC has not responded despite an invitation to do so on November 15, 2016. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on November 9, 2016.

## BACKGROUND

Your complaint dated November 8, 2016, alleges SCEDC is subject to both the Access to Public Records Act and the Open Door Law due to the makeup of its budget and funding levels from public appropriations and monies. While you are told SCEDC is planning to meet in public beginning in 2017, you are unsure whether this is voluntary or mandatory.

You supplement your complaint with budgetary data obtained from the SCEDC. In summary, in 2016 the SCEDC received \$211,600 from government sources (cities, towns and county). Part of that revenue was derived from a fee-for-services arrangement from the City of Angola. In 2017, the public funding levels will be similar. Prior tax information and revenue forecasts obtained reflect a similar analysis. The SCEDC only provides voluntary public access. You imply the funding levels indicate the entity should be subject to the Indiana public access laws.

## 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 Indiana Code § 5-14-3-1.*

The Steuben County Economic Development Corporation is registered in Indiana as a non-profit entity. The State Board of Accounts has the authority to audit an entity receiving public funds. 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 *Indiana Code § 5-11-1-16(e)* Private corporations are not subject to the audit or the access laws unless they meet certain criteria. Local economic development corporations are not considered a de facto public agency by virtue of exercising a core governmental duty, as economic development is not an essential government function. The first criteria is found in the Access to Public Records Act at *Indiana Code § 5-14-3-2.1*:

"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, goods, or other benefits.
- (B) The amount of fees received by the entity under the agreement is not based upon or does not involve a 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.

Subsection 2 is the key element in the analysis. Fee-for-services agreements between local economic development organizations ("LEDOs") and local governments are common. Most LEDOs rely on Subsection 1 to avoid audit. The entity is still subject to audit, but such an audit is discretionary on the part of the State Board of Accounts ("SBOA") pursuant to *Indiana Code § 5-11-1-9(c)*, as long as the entity's revenues from public funds are less than fifty percent of its budget, or, if revenues from public disbursements are greater than fifty percent, and its total budget is less than \$200,000.

Historically, SBOA has exercised its discretion to waive those audits. Therefore, because funding does not meet a statutory threshold and/or most arrangements are on a fee-for-services basis, most LEDOs are not subject to the Indiana access laws. SBOA's audit is not discretionary in the inverse. Therefore, if the entity's budget is comprised of fifty percent or more of public funds exceeding \$200,000, it is required to be audited. This is why you see some LEDOs with total budgets of \$199,000 comprised exclusively of public funds, but they are not audited. Those entities would likewise not be subject to the access laws.

What you have provided in the instant case, however, is information about an entity deriving its revenue from both public appropriations from various political subdivisions in addition to a fee

for services agreement. The mandatory audit statute includes appropriations, public funds, taxes, and other sources of public expense in the budget calculation. It does not *exclude* fee-for-services contracts as part of the 'public money' equation nor does it say the funds have to be from a sole political subdivision. From the information provided, it appears as if SCEDC's total operating budget is in the \$250,000 range. Because over \$200,000 came from public money in total, Indiana Code § 5-14-3-2.1(2) is triggered, making SCEDC statutorily subject to audit and also subject to the access laws.

Whether SBOA actually audits an entity is ultimately at its discretion. An entity is required to submit an Entity Annual Report ("E-1") within 60 days of its fiscal year end. An entity cannot avoid audit requirements by not filing the appropriate paperwork. Similarly, if an entity is statutorily subject to mandatory audit (which SCEDC appears to be), it cannot avoid the public access laws.

Without the benefit of a response from SCEDC, I cannot take into consideration any other element which may exclude them under this analysis. Based upon the information provided, SCEDC should follow the Indiana public access laws.

Please do not hesitate to contact me with any questions.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor

Cc: Mr. Paul Lottes, Esq.