

May 1, 2008

Bill Vaughn
597 East 300 North
New Castle, Indiana 47362

Re: Formal Complaint 08-FC-95; Alleged Violation of the Access to Public Records Act by the New Castle/Henry County Economic Development Corporation

Dear Mr. Vaughn:

This advisory opinion is in response to your formal complaint alleging New Castle/Henry County Economic Development Corporation (“Corporation”) violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the Corporation’s response to the complaint for your reference. It is my opinion that if all the email correspondence you requested is related to negotiations between the Corporation and an industrial, commercial or research prospect and was created while the negotiations were in progress *and* the agency is a local economic development organization as defined in I.C. § 5-28-11-2(3), the Corporation may deny access to those records.

BACKGROUND

You allege that you requested from the Corporation a number of records related to a proposed ethanol plant. You allege that the Corporation denied you access to email correspondence to which you requested access. You allege March 19, 2008 was the date of denial, and you filed this complaint on April 16.

The Corporation responded to your complaint by undated letter from Bryan Coats, President and CEO of the Corporation. My office received the response on April 18. Mr. Coats contends that the Corporation has been cooperative and has provided a number of records to you. Regarding the emails, the Corporation contends the following: “We feel that the Economic Development Corporation is a little different than some public office [sic], when it comes to e-mail conversations.”

ANALYSIS

The public policy of the APRA states, "(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." I.C. § 5-14-3-1. Any person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The question here is whether the Corporation is a public agency for the purposes of the APRA. While it is generally the case that private and not-for-profit corporations are not considered public agencies, the APRA defines as a public agency, among others, any entity that is subject to audit by the state board of accounts ("SBOA") that is required by statute, rule, or regulation. I.C. § 5-14-3-2(1)(3).

I have spoken with a representative of the SBOA on this matter to determine whether the Corporation is subject to an SBOA audit. If less than fifty percent or more than fifty percent but less than \$100,000 of the Corporation's disbursements are derived from public funds, an SBOA audit is limited to matters relevant to the use of public monies. I.C. § 5-11-1-9. If more than \$100,000 of the Corporation's disbursements are derived from public funds, the entire entity is subject to audit by the SBOA. *Id.* The SBOA does not always personally audit such entities, but the SBOA reviews the audit performed by a certified public accountant. The SBOA representative confirmed that the Corporation is subject to audit by the SBOA. As such, it is a public agency for purposes of the APRA, pursuant to I.C. § 5-14-3-2(1)(3).

As noted by Counselor Hurst in *Opinion of the Public Access Counselor 04-FC-03*, the determination whether an entity is subject to an audit by the SBOA is not the public access counselor's to make. The APRA is clear that when an entity is subject to an audit by the SBOA, it is a public agency, even if its makeup or actions do not otherwise conform to the definition of public agency in the APRA.

Since the Corporation is a public agency for the purposes of the APRA, any person has the right to inspect and copy the public records of the Corporation during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A public agency may deny access to records only for the reasons set forth in I.C. § 5-14-3-4. Certain records relating to negotiations between a local economic development organization (as defined in I.C. § 5-28-11-2(3)) with industrial, research, or commercial prospects may be withheld at the discretion of the public agency, if the records are created while the negotiations are in progress. I.C. § 5-14-3-4(b)(5). The public agency bears the burden of proof to sustain the denial. I.C. § 5-14-3-9(f).

Here, the Corporation denied you access to email correspondence on the basis that the Corporation asserts its emails are not a matter of public record and many times the agency enters a non disclosure agreement with a prospective client. Nothing in the APRA allows an agency to

declare records confidential, whether by non disclosure agreement or other means, absent the statutory authority to declare such records confidential. *See* I.C. § 5-14-3-4(a)(2). If, however, the records at issue are excepted from disclosure by statute, nothing would prohibit the agency from entering a nondisclosure agreement. It is my opinion that if all the email correspondence you requested is related to negotiations between the Corporation and an industrial, commercial or research prospect and was created while the negotiations were in progress *and* the agency is a local economic development organization as defined in I.C. § 5-28-11-2(3), the Corporation may deny access to those records.

It is important to note that the exception found in I.C. § 5-14-3-4(b)(5) does not except from disclosure all emails sent or received by a local economic development organization. To the extent any of the emails contained in your request fall outside the description of emails excepted by I.C. § 5-14-3-4(b)(5), the Corporation would be required to disclose those emails unless another exception to disclosure applies.

CONCLUSION

For the foregoing reasons, it is my opinion that if all the email correspondence you requested is related to negotiations between the Corporation and an industrial, commercial or research prospect and was created while the negotiations were in progress *and* the agency is a local economic development organization as defined in I.C. § 5-28-11-2(3), the Corporation may deny access to those records.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Bryan Coats, New Castle/Henry County Economic Development Corporation