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May 18, 2018

Sam Pratt  
175 Hoyle Road  
Craryville, NY 12521

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Mr. Pratt:

We are in receipt of your request for an advisory opinion regarding the application of the Freedom of Information Law (FOIL) to records maintained by the Hudson Development Corporation (HDC).

On April 20, 2018, you submitted a FOIL request to HDC. In response, HDC responded that it was "reviewing your request and will respond accordingly in due course." You followed up with HDC pointing out its obligation to respond to your FOIL request within certain time limits set forth in the statute and it responded by stating in relevant part:

"After consultation with legal council (sic), HDC reserves the right to object to your request under the grounds that HDC, as a not-for-profit corporation not under substantial government control, is not subject to the provisions of the Freedom of Information Law ('FOIL') regarding production."

Based on the following analysis, I believe that HDC constitutes an "agency" required to give effect to FOIL. As you are aware, FOIL pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

While profit or not-for-profit corporations would not in most instances be subject to FOIL because they are not governmental entities, there are several determinations in which it was held that certain not-for-profit corporations, due to their functions and the nature of their relationship with government, are "agencies" that fall within the scope of FOIL. Specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development corporations. The cited provision describes the purpose of those corporations and states in part that:

"it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

Therefore, due to its status as a not-for-profit corporation, it is not clear in every instance that a local development corporation is a governmental entity; however, it is clear that such a corporation performs a governmental function.

According to the New York State Authority Budget Office's (ABO) website, HDC is a local development corporation over which the ABO has oversight. The ABO's website indicates that, pursuant to Article 9, Title I of the Public Authorities Law,

HDC has filed an Annual Report, a Budget Report, an Audit Report, and a Procurement Report for, at least, calendar years 2013-2016. Article 9 of the Public Authorities Law governs the activities of Public Authorities. Section 2 of the Public Authorities Law defines the term "local authority," in pertinent part, to mean: "a not-for-profit corporation affiliated with, sponsored by, or created by a county, city, town or village government." According to the HDC's Certificate of Incorporation, the HDC's purposes are to undertake certain activities:

"for the purpose of aiding the territory in which its operations are principally to be conducted by attracting new business and industry to such area, or by encouraging the development of, or retention of business in such territory and lessening the burdens of government and acting in the public interest."

The Certificate also states that "[t]he territory in which the operations of the corporation are principally to be conducted is the City of Hudson, New York." We note that both the Mayor of the City of Hudson and the President of the City's Common Council serve as ex-officio members of the HDC's Board of Directors and as you noted in your communication to us, the HDC is listed as under City "Boards and Committees" on the City of Hudson's website.

Given the information above, it is our opinion that the HDC is a local public authority, i.e., "a not-for-profit corporation affiliated with" the City of Hudson performing "an essential governmental function" on the city's behalf. As FOIL defines the term "agency" to include public authorities, it is also our opinion that HDC is an agency required to comply with FOIL.

In the first decision in which it was held that a not-for-profit corporation may indeed be an "agency" required to comply with FOIL, Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575 (1980), a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to FOIL. In so holding, the Court stated that:

"We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

"For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (*id.* at 579).

It is noted that in Westchester-Rockland, the Court rejected the contention that a distinction must be made between a volunteer fire company, also a not-for-profit corporation, "on which a local government relies for the performance of an essential public service...and an organic arm of government" (*id.*, 579).

Another decision rendered by the Court of Appeals involved an entity that, in my view, is analogous in many respects to HDC. Buffalo News v. Buffalo Enterprise Development Corporation, 84 NY2d 488 (1994) involved the status of a not-for-profit corporation, a local development corporation created under §1411 of the Not-for-Profit Corporation Law. In its finding that the entity (BEDC) "channels funds into the community and enjoys many attributes of public entities" (*id.*, 492) and in holding that the BEDC is an "agency," the Court highlighted and italicized the portion of the definition of that term that refers to any "*governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof.*" In the discussion of the matter, the decision states that:

"The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents in interpreting FOIL's Federal counterpart, the Freedom of Information Act (5 U.S.C § 552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.

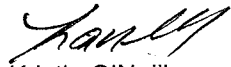
"The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in buffalo's downtown and neighbor-hoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

Although there may be distinctions in the functions of the HDC and the entities referenced above that were found to be "agencies," there are, based on the direction offered by the courts, and particularly the Court of Appeals, a variety of similarities, which, in my opinion, would lead a court to conclude that HDC is an "agency" subject to FOIL.

In an effort to enhance compliance with FOIL, copies of this opinion will be sent to the HDC.

I hope I have been of assistance.

Sincerely,



Kristin O'Neill  
Assistant Director

cc: Sheena Salvino, Director HDC