

Opinion No. 2012-108

January 15, 2013

The Honorable Uvalde Lindsey
State Senator
2257 East Gentle Oaks Lane
Fayetteville, Arkansas 72703-6142

Dear Senator Lindsey:

This is in response to your request for my opinion concerning the Walton Arts Center Council (“WAC”). Your specific question is whether the WAC is subject to A.C.A. § 25-19-106, which is the open meetings provision of the Arkansas Freedom of Information Act (“FOIA,” codified at A.C.A. §§ 25-19-101 – 110 (Repl. 2002 and Supp. 2011)).

RESPONSE

I am unable for the reasons explained below to definitively opine on your question. Only a finder of fact can ultimately determine whether the WAC is “supported wholly or in part by public funds or expending public funds” as contemplated by the FOIA. In my opinion, this will depend upon whether there is sufficient alignment with government, or so-called “intertwining” of functions so as to trigger the FOIA under the analysis discussed below. Because I am neither authorized nor equipped to perform the inquiry necessary to identify all the relevant factors in this regard, I cannot conclusively decide the matter. I can and will, however, offer my analysis of the operative legal principles and the factors of which I am aware that I believe are relevant to the inquiry.

DISCUSSION

The WAC’s history is tied to a 1986 Interlocal Cooperation Agreement (“Agreement”) entered between the City of Fayetteville (“City”) and the University of Arkansas (“University”) for the financing, construction and

management of a multi-purpose center for the arts to serve Northwest Arkansas.¹ Under the Agreement, each contributed \$3,000,000 for construction and \$1,500,000 for an endowment fund.² The Agreement further called for the creation of a nonprofit corporation to serve as agent for the City and University:³

There shall be created pursuant to the Arkansas Non-Profit Corporation Act, codified at Ark. Stat. Ann. §§ 64-1901 et seq., a non-profit corporation to be named *the University of Arkansas/City of Fayetteville Arts Center Council, Inc.* (“*Arts Center Council*”), *which shall serve as agent for the University and the City to construct, manage, operate and maintain a Center for the Arts.* The Center for the Arts shall be owned by the City and the University as tenants in common. The purposes, powers and duties of the corporation shall be those set out in the Articles of Incorporation and By-Laws, which are attached hereto and incorporated herein by reference.⁴

The Arts Center Council⁵ was established as the operating arm of the Center for the Arts⁶, and its Board of Directors was further charged with selecting an architect to design and supervise the Center’s construction.⁷

¹ Interlocal Cooperation Agreement (Dec., 1986). The agreement was entered pursuant to the Interlocal Cooperation Act, which authorizes the creation of any joint enterprise between or among public entities that each of the entities would have been authorized to undertake individually. See A.C.A. § 25-20-101 – 108 (Repl. 2002 and Supp. 2011).

² As reflected in a related tax case, the primary source of the funds for the University’s contribution was a private donation from Sam and Helen Walton of Bentonville. The City’s contribution came from its general fund and from a sales tax capital improvement bond issue backed by the City’s portion of county sales tax revenues. *City of Fayetteville v. Phillips*, 306 Ark. 87, 89, 811 S.W.2d 308 (1991).

³ The Interlocal Cooperation Act specifically authorizes the creation of a “separate legal entity” to conduct the joint undertaking. A.C.A. § 25-20-104(c)(2) and (d) (Supp. 2011).

⁴ Interlocal Cooperation Agreement at 1-2 (emphasis added).

⁵ As noted further herein, the Arts Center Council was later renamed the “Walton Arts Center Council, Inc.” See Second Amendment to Interlocal Cooperation Agreement (Oct., 1993) at 2 (also referring to the Center for the Arts as the “Walton Arts Center.”)

⁶ A separate entity – the “University of Arkansas/City of Fayetteville Arts Foundation, Inc.” (“Arts Foundation”) – was created to establish and manage an endowment fund to finance the operation of the Center for the Arts. See Interlocal Cooperation Agreement (Dec. 9, 1986) at 2. The Foundation was subsequently renamed the Walton Arts Center Foundation, Inc. See Second Amendment to Interlocal Cooperation Agreement at 3.

This factual background is critical, in my opinion, to an understanding of the issues that must be resolved in order to determine whether the WAC is subject to the FOIA. I have little doubt, based on the documents related to its creation, that the Arts Center Council was obliged to comply with the FOIA. This conclusion may follow directly from the Interlocal Cooperation Act. An entity created pursuant to an interlocal agreement⁸ (in this case the Arts Center Council) can exercise only those powers that the political subdivisions or state agencies creating it could exercise.⁹ Additionally, the participating public entities are not relieved of any obligations imposed by law:

No agreement made pursuant to this chapter shall relieve any public agency of any obligation or responsibility imposed upon it by law except that, to the extent of actual and timely performance thereof by a joint board or other legal or administrative entity created by an agreement made hereunder, performance may be offered in satisfaction of the obligation or responsibility.¹⁰

As stated by one of my predecessors, “[t]his section ... requires an entity created pursuant to an interlocal agreement to comply with ‘obligations imposed by law’ ... if the public agencies involved would, in the same situation, have to comply.”¹¹ The statute seems to be premised upon the assumption that the parties to the interlocal agreement are acting through the joint board or separate entity of their creation to accomplish the undertaking. With regard to the FOIA, therefore, the statute may be understood to mean that the board or entity created by interlocal agreement will be subject to the FOIA, at least to the extent the parties would be had they individually undertaken the enterprise and the board or entity is conducting the joint undertaking as their agent.

⁷ Interlocal Cooperation Agreement at 4.

⁸ *See generally* n. 4, *supra*, regarding creation of a separate legal entity by interlocal agreement.

⁹ *See generally* A.C.A. 25-20-104.

¹⁰ *Id.* at subsection (e).

¹¹ Op. Att’y Gen. 89-079 (regarding application of competitive bidding requirements to the Arts Center Council when it contracts for services and materials in connection with the Center for the Arts). *See also* Op. Att’y Gen. 2007-178 (regarding the investment authority of the Walton Arts Center Foundation, Inc., the Walton Arts Center’s financial arm).

These conditions were undoubtedly met in the case of the Arts Center Council. The City and the University each would have been subject to the FOIA had they individually undertaken to construct and operate a center for the arts. And the interlocal agreement clearly called for the Art Center Council's creation as a separate entity to conduct the undertaking as agent for the City and the University. This latter fact, along with a number of factors that are evident from the documents pertaining to its creation, further leads me to conclude that the Arts Center Council was likely subject to the FOIA under the terms of the FOIA itself, that is, apart from the above provision in the Interlocal Cooperation Act. Some preliminary review of the FOIA is necessary before expanding upon this conclusion.

As reflected by the act's definition of "public meetings," the FOIA applies to governmental entities and to other entities that are "supported wholly or in part by public funds or expending public funds."¹²

"Public meetings" means the meetings of any bureau, commission, or agency of the state or any political subdivision of the state, including municipalities and counties, boards of education, and all other boards, bureaus, commissions, or organizations in the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds[.]¹³

Private organizations that receive direct public funding are therefore potentially covered by the FOIA.¹⁴ However, the mere receipt of public funds will not bring a

¹² The FOIA applies to all governmental entities, regardless of whether they receive public funds. *See* Ops. Att'y Gen. Nos. 2006-059; 99-407; 95-128.

¹³ A.C.A. § 25-19-103(4) (Supp. 2011). *See also* A.C.A. § 25-19-106(a) (slightly different so-called "public funding" language under the open meetings requirement). Other versions of the "public funding" language are found in A.C.A. § 25-19-103(5)(a) ("public records" definition, referring to "a governmental agency, or any other agency ... that is wholly or partially supported by public funds or expending public funds.") *See also* A.C.A. § 25-19-107(a) (providing a right of appeal in FOIA cases and referring to "an agency of a county, municipality, ... or a private organization supported by or expending public funds..."). As noted by two recognized authorities on the FOIA, "[t]he Arkansas Supreme Court has used these provisions interchangeably, thereby indicating that the minor variations in wording are irrelevant and that the same analysis applies to both meetings and records." John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 60, n. 95 (citations omitted) (Arkansas Law Press, 5th ed., 2009).

¹⁴ *See* Op. Att'y Gen. 97-148 (noting that the test for applying the FOIA to private organizations is satisfied only if there is a direct transfer to the private entity of money belonging to the government, citing *Sebastian County Chapter of the American Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993)).

private organization within the FOIA's reach. In declaring the FOIA's purpose and policy, the legislature stated:

It is vital in a democratic society that **public business** be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in **public activity** and in making public policy.¹⁵

In order for a private entity to be subject to the FOIA, therefore, it must also be carrying on "public business" or, as stated in previous Attorney General opinions, be "otherwise intertwined with" the activities of government.¹⁶ Professors Watkins and Peltz have summarized the test with respect to private organizations by observing that "***the FOIA applies only to private organizations that (1) receive public funds, (2) engage in activities that are of public concern, and (3) carry on work that is intertwined with that of government bodies.***"¹⁷ As these commentators further note, the Supreme Court has recognized that the FOIA should apply when the government "seeks to conduct its affairs through private entities," for in that situation "the entities are for all practical purposes the government itself."¹⁸

Although it may be unclear just how "intertwined" a private entity must be with the government before the FOIA will be deemed applicable,¹⁹ it is my opinion that

¹⁵ A.C.A. § 25-19-102 (Repl. 2002) (emphasis added).

¹⁶ E.g. Op. Att'y Gen. 2009-063 (citing John J. Watkins & Richard J. Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 50-52 (m & m Press, 4th ed. 2004). *Accord* Ops. Att'y Gen. Nos. 2001-352 and 1996-013 (positing the question whether there is "sufficient alignment with the government or 'intertwining of functions, to trigger the FOIA.")

¹⁷ *THE ARKANSAS FREEDOM OF INFORMATION ACT*, *supra* n. 13, at 63 (emphasis added).

¹⁸ *Id.* (quoting *City of Fayetteville v. Edmark*, 304 Ark. 179, 187, 801 S.W.2d 275 (1990), involving private attorneys retained by the city, which in turn quotes John J. Watkins, *Access to Public Records under the Arkansas FOIA*, 37 Ark. I. Rev. 741, 768-69 (1984)).

¹⁹ It seems that a clear case is presented when the nature of the services or activities involved are so aligned with government that the private entity and the governmental entity are deemed "intertwined" on that basis. E.g. *Waterworks v. Kristen Investment Properties*, 72 Ark. App. 37, 42-43, 32 S.W.3d 60 (2000) (FOIA held applicable to a private nonprofit volunteer fire department under contract with a fire protection district to provide public safety and utility functions traditionally performed by governmental entities); *Rehab. Hospital Services Corp. v. Delta-Hills Health Systems Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985) (private entity incorporated under federal law as a regional health planning corporation to assist in reviewing proposed changes in the state's health care delivery system); *Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989) (private organization responsible for administering rules and regulations governing public school athletics); *North Central Ass'n of Colleges & Schools v. Troutt Brothers, Inc.*, 261 Ark. 378,

this test was in all likelihood met with respect to the Arts Center Council. As explained above, the City and University jointly undertook to construct and operate a center for the arts through the Council as their agent; and they each contributed substantial funds for this purpose. That funding in itself is probably a significant factor, given the general constitutional prohibition against the award or transfer of city funds to private, nonprofit corporations.²⁰ As one of my predecessors observed, the funding of a private corporation by a city or county suggests “some alignment of governmental operations or functions with the private organization.”²¹

In the case of the Arts Center Council, that alignment is further evidenced by a number of factors. Perhaps foremost apart from the Council’s service as “agent” for the City and University in conducting the public project is the appointment of the Council’s six-member Board of Directors (the “Joint City and University Arts Center Board”)²² by the City Board of Directors and the University Board of Trustees.²³ The City and the University each appointed three members, and the members were subject to removal by the appointing authority.²⁴ The Board, which controlled and conducted all the Art Center Council’s affairs,²⁵ was therefore subject to significant control by the City and University. The Board was further required to report annually to the City and University on the Council’s

548 S.W.2d 825 (1977) (private nonprofit corporation setting educational standards and policies for colleges and secondary schools). *See also* Ops. Att’y Gen. Nos. 2000-039 (private nonprofit corporation licensed by the Department of Human Services to provide services for the developmentally disabled); 95-273 (private nonprofit area on agency designated to provide services to older Arkansas under a federal grant program); 90-243 (nonprofit organizations receiving grants from cities or counties under A.C.A. §§ 14-173-101 to -105 to promote economic development); 90-236 (911 Communications Center supported by public funds); 89-372 (administrative body for a regional hazardous materials response team); 89-082 (nonprofit organization assisting local law enforcement in emergency situations).

²⁰ Ark. Const. art. 12, § 5 (“No county, city, town or other municipal corporation, shall become a stockholder in any company, association or corporation; or obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual.”).

²¹ Op. Att’y Gen. 96-287 (further noting that a fact question may arise regarding the degree or extent to which the FOIA is applicable). *Accord* Op. Att’y Gen. 96-290 (and opinions cited therein).

²² Interlocal Cooperation Agreement (Dec., 1986) at 5.

²³ *Id.* at 2.

²⁴ *Id.* at 3.

²⁵ *See* Articles of Incorporation of the University of Arkansas/City of Fayetteville Arts Center Council, Inc. (Jan., 1987) at 6.

management, operation and activities.²⁶ And the Council's annual budget had to be approved by the City and University before any funds could be distributed to the Council by the Arts Foundation.²⁷ In the event the Council dissolved, all of its assets were to be distributed for charitable purposes as determined by the Board, subject to City and University approval.²⁸ Finally, although the Council was to have no members, the City and University were designated as the only members should the Non-Profit Corporation Act require membership.²⁹

In my opinion, these factors relating to the creation, funding, and purpose of the University of Arkansas/City of Fayetteville Arts Center Council weigh heavily in favor of it having been subject to the FOIA as an entity "supported wholly or in part by public funds or expending public funds." While it may not have been a clear case of intertwining based simply upon the services or functions involved,³⁰ I believe the above factors, taken together, likely established the "public concern" element, as well as the requisite "intertwining."

I cannot reach the same conclusion, however, regarding the WAC. This uncertainty arises from several changes in administration and financing that may signal some lesser degree of alignment than first existed between the City and University and the Arts Center Council. These amendments occurred a few years before the Council was renamed the "Walton Arts Center Council, Inc." Of initial note is the amendment to the Interlocal Cooperation Agreement to provide for an expanded Board of Directors. Pursuant to that amendment, the Board "shall consist of at least ten (10) members, and not more than twenty (20)," with their "selection, replacement and terms" to be specified in the Council's Articles and Incorporation and Bylaws.³¹ The Board was thus expanded from the original six (6) City and University appointees to a potential 20-member Board, as determined

²⁶ Interlocal Cooperation Agreement (Dec., 1986) at 3.

²⁷ *Id.*

²⁸ *Id.* at 5.

²⁹ Articles of Incorporation, *supra* n. 25, at 7.

³⁰ I do not believe it can be fairly said that the construction and operation of a regional, multi-purpose center for the arts is a service or function that is "routinely provided" or "traditionally performed" by the City or the University. See *Kristen Investment Properties*, *supra* n. 19, 72 Ark. App. at 43 (using this language when applying the FOIA to a private nonprofit volunteer fire department under contract to provide water service under a contract with fire protection district.)

³¹ Second Amendment to the Articles of Incorporation of the University of Arkansas/City of Fayetteville Arts Center Council, Inc. (April, 1990) at 3.

by the Board of Directors with the approval of the City and University.³² The Articles of Incorporation were then amended to provide for the appointment of 10 members by the City and University (5 each) and up to 10 members by the Board, and to require that the latter be residents of the region served by the Center.³³ This is all in contrast to the original Bylaws, which contemplated that any increase in the Board's membership would be decided directly by the City Board and the University Board of Trustees.³⁴

These amendments suggest that the City and the University have less control of the operating entity's Board of Directors. I believe it is also of note that the Arts Center Council's Articles of Incorporation were amended at this time to include soliciting contributions and "fund-raising activities" among the Council's purposes and activities.³⁵ This afforded the Council an independent source of revenue, as it was previously funded primarily through the endowment. The Interlocal Agreement and the incorporation documents were further amended to require approval of the Arts Center Council's annual budget by the Foundation,³⁶ rather than by the City and University as previously provided.³⁷

Then, apparently in recognition of the expanded Board and substantial private financial contributions, the Interlocal Cooperation Agreement was amended to

³² See Articles of Incorporation, *supra* n. 25, at 7 and Bylaws of the University of Arkansas/City of Fayetteville Arts Center Council, Inc. (Sept. 1986) at 8 (both providing for amendment by 2/3 of the members of the Board, with approval of the City Board of Directors and University Board of Trustees).

³³ Second Amendment to the Articles of Incorporation of the University of Arkansas/City of Fayetteville Arts Center Council, Inc. (April, 1990) at 3.

³⁴ Bylaws of the University of Arkansas/City of Fayetteville Arts Center Council, Inc. (Sept. 1986) at 7 ("Upon appropriate amendment to the Articles of Incorporation and these By-laws, the Trustees of the University of Arkansas and the Board of Directors of the City of Fayetteville may increase the number of directors, and provide for their terms of office and appointment at such time.").

³⁵ Second Amendment to the Articles of Incorporation of the University of Arkansas/City of Fayetteville Arts Center Council, Inc. (April, 1990) at 1.

³⁶ First Amendment to Interlocal Cooperation at 2 ("The annual budget of the Arts Center Council shall be approved by the Arts Foundation and incorporated into and made a part of the annual budget of the Arts Foundation.").

³⁷ See n. 28, *supra*. The impact of this change is somewhat attenuated by the fact that the Foundation's board members are appointed by the City Board and the University Board of Trustees. See Articles of Incorporation of the University of Arkansas/City of Fayetteville Arts Foundation, Inc. But the fact remains that the City and University no longer approved the Art Center Council's annual budget.

rename the Arts Center Council the “Walton Arts Center Council, Inc.”³⁸ The amended agreement states that “contributions from throughout Northwest Arkansas have provided substantial support for construction and operation of the Walton Arts Center.” It then states in explanation of the name change that “the name of the corporation [University of Arkansas/City of Fayetteville Arts Center Council, Inc]. *does not accurately reflect its purposes or the community representation on the corporation’s Board of Directors*[.]”³⁹

This name change on the heels of the above changes related to administration and funding may reflect a different relationship between the WAC and the City and University. It is unclear precisely why the former name “does not accurately reflect [the corporation’s] purposes,” but the renaming coupled with the other changes does indicate some movement toward independence and possibly away from the agency relationship created under the Interlocal Cooperation Agreement. I believe this could have implications for the FOIA analysis. This movement may be further suggested or reinforced by the relatively nominal public financial support of the WAC’s current operations, as compared to the initial level of funding by the City and University. You have stated that only 5% of the WAC’s current operating budget constitutes public funds. In my opinion, a finder of fact might find this de-minimus level of funding significant. My immediate predecessor had occasion to consider a somewhat similar funding issue. Attorney General Opinion 2006-086 addressed the FOIA’s applicability to the tax-supported Arkansas Children’s Hospital. My predecessor opined therein that a relatively small public contribution might factor into the intertwining analysis. After reviewing the hospital’s history, he concluded that, in addition to certain other factors, “[t]he small percentage of ACH’s operating revenue that actually comes from tax proceeds (reported less than 3%) might be cited as further undermining the intertwining prong of the FOIA test.”⁴⁰

I cannot be certain of the extent to which the somewhat attenuated control by the City and University, coupled with the name change and limited public funding, evidence some realignment with the City and University such that it can accurately be said that they are no longer conducting their affairs through the WAC.⁴¹ In my

³⁸ Second Amendment to Interlocal Cooperation Agreement (June 1993) (also renaming the Arts Foundation the “Walton Arts Center Foundation, Inc.”).

³⁹ *Id.* at 2 (emphasis added).

⁴⁰ Op. Att’y Gen. 2006-086 at 11.

⁴¹ It should be noted that the resolution of this issue will probably have implications for the provision in the Interlocal Cooperation Act requiring compliance with “obligations imposed by law.” As discussed above,

opinion, the above changes likely signal the need for further inquiry into the extent to which the WAC is “intertwined” with the functions of government.

In sum, this is a unique set of circumstances and there undoubtedly are other factors to consider in deciding the FOIA question. However, this will require a full development of all relevant surrounding facts, a task I am neither authorized nor equipped to undertake in the limited context of this opinion. Only a finder of fact can ultimately determine whether the WAC is “supported wholly or in part by public funds or expending public funds” as contemplated by the FOIA. As stated by my predecessor, “[t]he question of whether any private, non-profit organization is subject to the FOIA is always a question of fact. *See* Op. Att’y Gen. 2004-223. A judicial action may ultimately be necessary to resolve the issue.”⁴²

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/EAW:cyh

this statute seems to assume that the parties to the interlocal agreement are acting through the separate entity to accomplish the undertaking. If, as may be suggested in the case of the WAC, the parties and the separate entity are no longer sufficiently aligned, then it would seem to follow that the parties’ legal obligations would no longer be imposed on that entity pursuant to the Interlocal Cooperation Act.

⁴² Op. 2006-086 at 11.