

Notes to \*\*\*\*\* re: Indiana HOA  
February 17, 2011  
George Schuhmann  
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*ISSUE: A member of a homeowner's association is agitating to see certain HOA records. What open records laws may apply?*

There are some fact-based issues to be considered here, because certainly a homeowners' association can be argued to be a quasi-governmental entity, but I'm guessing that the HOA involved here was not established as an arm of state or federal government, requires that members be property owners, doesn't get audited by the state board of accounts, has very limited decision-making functions that do not impinge on the powers traditionally held by governments, and otherwise has all the hallmarks of a private entity or corporation.

I address FOIA, Indiana's sunshine law, and the HOA statute below.

### **I. Federal Freedom of Information Act**

FOIA applies only to executive branch agencies of the federal government:

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

5 U.S.C. § 552(f)(1). *See also* Jones v. City of Indianapolis, 216 F.R.D. 440, 443 (S.D.Ind.2003), citing the above subsection of U.S.C. § 552 and citing Grand Cent. Partnership, Inc. v. Cuomo, 166 F.3d 473, 484 (2nd Cir.1999), and Philip Morris, Inc., v. Harshbarger, 122 F.3d 58, 83 (1st Cir.1997) for the proposition that "**FOIA ... applies only to federal executive branch agencies.**" (emphasis added)

So you're in the clear on FOIA concerns here.

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## **II. Indiana's Access to Public Records Act (APRA)**

Although this sunshine act states that it “shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record,” anyone arguing that an HOA is a “public agency” has a long row to hoe. Nevertheless, you must at least investigate the following question, which will be fact-based:

**Question: Does the homeowners' association in this case meet the definition of a “public agency” under IC 5-14-1.5-2(m)?**

In relevant part, IC 5-14-1.5-2(m) reads thus:

(m) “Public agency”, except as provided in section 2.1<sup>1</sup> of this chapter, means the following:

(1) Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.

(2) **Any:**

(A) county, township, school corporation, city, or town, or any board, commission, department, division, bureau, committee, office, instrumentality, or authority of any county, township, school corporation, city, or town;

(B) political subdivision (as defined by IC 36-1-2-13)<sup>2</sup>; or

(C) **other entity, or any office thereof, by whatever name designated, exercising in a limited geographical area the executive, administrative, judicial, or legislative power of the state or a delegated local governmental power.**

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<sup>1</sup> Section 2.1 concerns only providers of goods, services, or other benefits who receive public funds, which shouldn't apply to this HOA.

<sup>2</sup> IC 36-1-2-13 read as follows in its entirety: “Political subdivision” means municipal corporation or special taxing district.” Indiana case law and atty gen'l opinions show that a “municipal corporation” can mean a hospital or a library, but has never been construed to mean a homeowners' association.

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(3) Any entity or office that is subject to:

(A) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or

(B) an audit by the state board of accounts that is required by statute, rule, or regulation.

(4) Any building corporation of a political subdivision that issues bonds for the purpose of constructing public facilities.

(5) Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff.

So, the closest call here is subsection (2)(C), if the HOA could be construed as an entity “exercising in a limited geographical area the executive, administrative, judicial, or legislative power of the state or a delegated local governmental power.” You can make arguments both ways here, but the winning argument would probably be that the HOA is a private entity that is entitled to enforce the terms of its contract. I found no Indiana cases in which an HOA is alleged to have exercised “the executive, administrative, judicial, or legislative power of the state” or related terms (searching these individual words + “power”, “document”, “homeowner!”, “HOA” etc. in Westlaw). I also found no Indiana cases in which the terms “Access to Public Records Act” and “homeowners” (or “APRA” and “HOA”) both appear, so this issue appears never have been litigated to the appellate level.

Incidentally, there is also the fact question to be asked as to whether the HOA is subject to budget review or an audit by the state board of accounts, as noted in subsection (3) of the APRA, above. I wouldn't think so, but you should ask.

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### **III. Indiana's HOA statute**

I've looked through IC 32-25.5, and there doesn't appear to be anything there regarding HOAs being "public agencies" or having to make certain records available to members. IC 32-25.5-3-1 concerns member rosters, mailing lists, and legal descriptions, but that's it. Nothing about having to disclose any particular records to the members.

Importantly, of course, the articles, covenants & restrictions of the association most likely outline exactly what documents the members are allowed access to. Usually these seem to be limited to records pertaining to bookkeeping, finances, etc., but do not extend to correspondence, contracts with vendors or independent contractors, letters from other members, etc. In any event, you'll have to glance over the articles, covenants and bylaws to see what the homeowner is actually entitled to see on the basis of that contract.

### **IV. Other thoughts**

From the tone and content of the letter, I would guess that Mr. \*\*\*\*\* has a lot of time on his hands that could be put to better use, but I also must acknowledge that his arguments are cogent enough (his "ultra vires" argument is probably meritless, but is still very clever; he doesn't appear to know it, but IC 32-25.5-3-4 regarding "Contract restrictions" for contracts over \$500 may apply!).

If he gets it in his head to prove that the HOA falls within the definition of a "public agency" under IC 5-14-1.5-2(m), he probably wouldn't succeed. Nevertheless, he might strike upon the notion of portraying his woes as the result of a "taking" by the HOA, bringing in constitutional concerns about just how "quasi" the HOA's governmental function is.