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January 26, 2018

Rachel Barnhart
rachel@rochesterforall.com

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 Ms. Barnhart:

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 Rochester Housing Charities, Inc.

Last fall you submitted FOIL requests to both Rochester Housing Charities, Inc. (RHC) and the Rochester Housing Authority (RHA) for records relating to the activities of RHC. You advise that RHC ignored your request and you provided copies of RHA's response indicating that RHA did not maintain the records you sought. RHA also advised, in a letter dated October 12, 2017, that "Rochester Housing Charities is not a public Authority. It is a separate 502(c)(e) (sic) entity with its own staff and records."

Based on the following analysis, I believe that RHC constitutes an "agency" required to give effect to FOIL, and further, that even if it is not an agency, its records are subject to rights of access conferred by FOIL. RHC's relationship with the RHA and the extent to which it is under the control of and functions for the RHA bring its records within the scope of 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.

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



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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 some respects to RHC. 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).

In a third decision involving a not-for-profit corporation, the Canandaigua Recreation Development Corporation (CDRC), which had an "intimate" relationship with an agency, it was found that:

"...the CRDC was admittedly formed for the purpose of financing the cost of and arranging for the construction and management of the Roseland Waterpark project. The bonds for the project were issued on behalf of the City and the City has pledged \$395,000 to finance capital improvements associated with the park...

"Most importantly, the City has a potential interest in the property in that it maintains an option to purchase the property at any time while the bonds are outstanding and will ultimately take a fee title to the property financed by the bonds, including any additions thereto, upon payment of the bonds in full. Further, under the Certificate of Incorporation, title to any real or personal property of the corporation will pass to the City without consideration upon dissolution of the corporation. As in Matter of Buffalo News, supra, the CRDC's intimate relationship with the City and the fact that the CRDC is performing its function in place of the City necessitates a finding that it constitutes an agency of the City of Canandaigua within the meaning of the Public Officers Law and therefore is subject to the requirements of the Freedom of Information Law..." (Canandaigua Messenger, Inc. V. Wharmby, Supreme Court, Ontario County, May 11, 2001).

The Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing [aff'd 739 NYS 2d 509, 292 AD2d 835 (2002)].

Although there may be distinctions in the functions of the RHC 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 RHC is an "agency" subject to FOIL.

In a letter dated October 16, 2017 addressed to John Hill, Executive Director of RHA, you advise that by resolution on March 22, 2012, the RHA approved the creation of RHC. You indicate that the resolution approving the creation reads:

"...it is in the best interests of the Authority to form an organization whose purposes will be to solicit private grants and other funding to financially support and promote programs and activities to residents of low-income housing projects in the Greater Rochester area, all on behalf of and to advance the purposes of the Authority in a manner consistent with the public and charitable objectives and policies of the Authority."

You also state that according to RHA meeting minutes, "RHA will be the sole member of the not-for-profit and will approve budgets and appointment of officers." Further, you state that minutes reflect that RHA legal counsel "recommended by by-laws of the 501(c)(3) contain restrictions to ensure that RHA will maintain control of the not-for-profit."

I obtained a copy of RHC's 2015 Form 990-EZ (copy enclosed) through Guidestar.org. In response to the question "What is the organization's primary exempt purpose?", RHA wrote: "To benefit and support the charitable activities of the Rochester Housing Authority." I note that the individual named as Treasurer for the organization also serves on the RHA Board of Commissioners. Finally, I note that the Form 990 indicates that the organization's books are in the care of the Rochester Housing Authority located at 675 West Main Street, Rochester, New York. This address is the same address provided for RHC.

To suggest that RHC, despite its not-for-profit status, is not governmental in nature or does not perform its functions solely for RHA elevates form over substance. The RHC carries out its functions for and on behalf of RHA. According to RHA meeting minutes, the RHA is the "sole member of the not-for-profit" and took steps to ensure that it would maintain control of RHC. The RHC would not exist but for its relationship with the RHA.

Finally, I believe that the records you seek are agency records, even if, *arguendo*, RHC is not an agency. FOIL pertains to all agency records, and §86(4) defines the term "record" expansively to include:

"any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

As RHC's Form 990 indicates, the not-for-profit's "books" are in the care of the Rochester Housing Authority located 675 West Main Street, Rochester, New York. It appears that the RHA maintains the records of the RHC and as such, the RHC's records are records maintained by the RHA and are subject to rights of access conferred by FOIL.

In an effort to enhance compliance with FOIL, copies of this opinion will be sent to both the RHA and the RHC.

I hope I have been of assistance.

Sincerely,



Kristin O'Neill
Assistant Director

Enclosure

cc: Cynthia Herriott, Rochester Housing Authority
Rochester Housing Charities, Inc.