



**State of New York
Department of State
Committee on Open Government**

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FOIL-AO-16320

December 7, 2006

E-Mail

TO:

FROM: Robert J. Freeman, Executive Director

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.

Dear

As you are aware, I have received your letter and a variety of materials relating to it. You have requested an advisory opinion concerning the status of the World Trade Center Captive Insurance Company, Inc. (hereafter "Captive") under the Freedom of Information and the Open Meetings Laws. Based on the analysis offered in the following commentary, I believe that Captive is subject to and required to comply with both of those statutes.

By way of background, a captive insurance company is a company that only insures all or part of the risks of its parent. Captive was required to be created pursuant to a grant agreement executed in November of 2004 and signed by Michael D. Brown, Under Secretary for Emergency Preparedness and Response at the U.S. Department of Homeland Security, and James W. Duffy, Governor Pataki's Authorized Representative. The Agreement identifies the State Emergency Management Office ("SEMO") as the Grantee and New York City as the Sub-Grantee. Article I, paragraph 2 of the Agreement provides that:

"The Grantee through its Sub-Grant Agreement with the City attached hereto and incorporated by reference (Attachment A) shall ensure that the City will establish and incorporate a captive insurance company to be known as the WTC Captive Insurance Company, Inc. in the State of New York pursuant

to the Certificate of Incorporation, the By-Laws, and the Liability Insurance Policy (attached hereto and incorporated herein as Attachments B, C, and D, respectively) to insure the City and its debris removal contractors, subcontractors and consultants at every tier, for claims arising from debris removal at the WTC site from September 11, 2001 (post collapse) through August 30, 2002."

A Sub-Grant Agreement was also executed in November 2004 and signed by the Governor's Authorized Representative and Mark Page, the City's Director of the Office of Management and Budget. That agreement states that Captive "would insure the City and the contractors for claims arising from the debris removal project, including for any environmental or professional liability."

Most significantly, its Certificate of Incorporation indicates that Captive is a not-for-profit corporation and that the Mayor of New York City appoints the members of and has control over the Captive's Board of Directors. Specifically, Paragraph Fifth provides that:

"(a) The Board of Directors shall consist of five directors. All directors of the Company shall be appointed annually by the Mayor of the City of New York prior to the Company's annual meeting; provided, however, that one of such directors shall be appointed by the Mayor upon nomination of a person, which person shall be acceptable to the Mayor, in his sole discretion, by the Representative of the Contractors (as selected in accordance with paragraph (d) of this Article FIFTH); provided, further, that in event a nominee is not acceptable to the Mayor, the Representative, on behalf of the Contractors, shall have the right to select additional nominees until a nominee is deemed acceptable to the Mayor. Each year, immediately following the beginning of the Company's fiscal year, the Mayor shall be notified in writing by the President of the Company of the requirement to make the annual appointments to the Board of Directors of the Company. Directors shall succeed to office at the next annual meeting of the Board of Directors following their appointment.

"(b) Each director shall be an employee, former employee or employee-on-leave of the City of New York or a person experienced in the insurance, construction, financial, professional, or other business or governmental communities of the City of New York. Each director shall be at least eighteen years of age and a citizen of the United States. At least two (2) of the directors shall be residents of New York State.

"(c) The Mayor may appoint an alternate for each director, which alternate, upon written notice to the Secretary, may attend meetings and exercise therein all the rights, powers, and privileges of the absent director; provided that in the event an alternate for the director nominated on behalf of the Contractors is nominated by the Representative thereof, such alternate, if acceptable to the Mayor in his sole discretion, shall be appointed by the Mayor; provided, further, that in the event of such nominee is not acceptable to the Mayor, the Representative of the Contractors shall have the right to select additional nominees until a nominee is deemed acceptable to the Mayor."

In consideration of the control of Captive exercised by the Mayor and judicial decisions rendered by the Court of Appeals, the state's highest court, regarding the application of the Freedom of Information and Open Meetings Laws, again, I believe that Captive's records and meetings fall within the coverage of those statutes.

The Freedom of Information Law is applicable to agency records, and §86(3) 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."

In consideration of the foregoing, as a general matter, the Freedom of Information Law pertains to entities of state and local government in New York.

Although not-for-profit corporations typically are not governmental entities and, therefore, fall beyond the scope of the Freedom of Information and Open Meetings Laws, the courts have found that the incorporation status of those entities is, alone, not determinative of their status under the statutes in question. Rather, they have considered the extent to which there is governmental control over those corporations in determining whether they fall within the coverage of those statutes.

In the first such decision, Westchester-Rockland Newspapers v. Kimball [50 NY2d 575 (1980)], the issue involved 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 the Freedom of Information Law. 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].

In another decision rendered by the Court of Appeals, Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court found that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

"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 (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). 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...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 the context of your inquiry, again, based on Captive's Certificate of Incorporation, each member of its Board of Directors is appointed by or "acceptable to" the Mayor.

Most recently, in a case involving a not-for-profit corporation, the "CRDC", the court 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. The CRDC denies the City has a controlling interest in the corporation. Presently the Board has eleven members, all of whom were appointed by the City (see Resolution #99-083). The Board is empowered to fill any vacancies of six members not reserved for City

appointment. Of those reserved to the City, two are paid City employees and the other three include the City mayor and council members. Formerly the Canandaigua City Manager was president of the CRDC. Additionally, the number of members may be reduced to nine by a board vote (see Amended Certificate of Incorporation Article V(a)). Thus the CRDC's claim that the City lacks control is at best questionable.

"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).

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

Even if Captive is not itself an "agency", I believe that its records would fall within the scope of the Freedom of Information Law due to its relationship with the State and the City of New York. As indicated at the outset, that statute pertains to 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".

The Court of Appeals has construed the definition as broadly as its specific language suggests. An early decision that dealt squarely with the scope of the term "record" involved a case cited previously concerning documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" (see Westchester Rockland, supra, 581) and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

"The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there appears to be "considerable crossover" in the activities of City officials and Captive.

Perhaps most pertinent is a determination rendered by the Court of Appeals in which it was found that materials received by a corporation providing services by contract for a branch of the State University were "kept" on behalf of the University, and, therefore, constituted "records" falling within the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)]. Therefore, if a document

is produced for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency.

The foregoing is not intended to suggest that all Captive records must be disclosed. However, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Lastly, the Open Meetings Law is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body.

In Smith v. City University of New York, the Court of Appeals held that:

"in determining whether the entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity is created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" [92 NYS2d 707, 714 (1998)].

A review of the by-laws of Captive clearly indicates that the government exercises substantial if not total control over the corporation and its Board of Directors. That being so, I believe that the Board constitutes a "public body" required to comply with the Open Meetings Law.

In a manner analogous to the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness requiring that meetings of public bodies be conducted open to the public, except to the extent that an executive session may be held in accordance with paragraphs (a) through (h) of §105(1).

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

RJF:jm

cc: David R. Biester

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