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November 20, 2009

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

Catherine Turcer, Director
Money in Politics Project
Ohio Citizen Action
85 East Gay Street, Suite 713
Columbus, Ohio 43215

Re: October 19, 2009 Public Records Request Regarding the Proposed
American Municipal Power Generating Station in Meigs County, Ohio

Dear Ms. Turcer:

Please accept this letter as American Municipal Power, Inc.'s ("AMP") response to the October 19, 2009 public records request you made on behalf of Ohio Citizen Action ("OCA"). This request provided three alternate bases supporting the position that AMP is subject to the Ohio Public Records Act. We have analyzed each of these bases, and, for the reasons set forth below, have concluded that AMP is not subject to the Public Records Act and is not obligated to produce the requested information. We would also note that AMP members have replied to the myriad of the redundant public records requests to AMP's members from OCA and its allies with thousands of pages of documents regarding AMP and the AMPGS project.

I. AMP is not a "public office" as defined by R.C. §149.011(A) of the Public Records Act.

Your letter contends that AMP is subject to the Public Records Act based upon an email from Darrel A. Fields in which Mr. Fields states, in a completely different context, that AMP is a governmental entity that borrows on a tax exempt basis. While it is true that AMP is authorized under the Internal Revenue Code to issue bonds on a tax exempt basis, this status does not make AMP a "public office" under §149.011(A) of the Public Records Act. This provision defines "public office" as follows:

[A]ny state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.

AMP is a non-profit corporation formed under Chapter 1702 of the Ohio Revised Code. Thus, AMP does not meet this definition of "public office" because AMP is not a "state agency," a "public institution," or a "political subdivision." Nor is AMP an entity "established by the laws of

this state for the exercise of any function of government.” As a non-profit corporation, AMP was clearly not established “by” the laws of this state. Further, Ohio law is clear that a municipality that operates a utility does so, not in a governmental capacity, but rather in a proprietary or business capacity akin to a similarly-situated private business. *City of Niles v. Union Ice Corp.* (1938), 133 Ohio St. 169, 181; *Travelers’ Ins. Co. of Hartford, Conn. v. Village of Wadsworth* (1924), 109 Ohio St. 440, 447-448; see also, R.C. §2744.01(G)(2) that defines “proprietary function” for purposes of political subdivision tort liability to include “[t]he establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant ***.” Accordingly, AMP is not a “public office” as defined by R.C. §149.011(A) of the Public Records Act.

II. AMP is not a private entity that is subject to the Public Records Act.

Next, your letter contends that AMP is subject to the Public Records Act because AMP meets the functional equivalency test established by the Ohio Supreme Court in *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006 Ohio 4854 (paragraphs one and two of the syllabus). This test states as follows:

In determining whether a private entity is a public institution under R.C. 149.011(A) and thus a public office for purposes of the Public Records Act, R.C. 149.43, a court shall apply the functional-equivalency test. Under this test, the court must analyze all pertinent factors, including (1) whether the entity performs a governmental function, (2) the level of government funding, (3) the extent of government involvement or regulation, and (4) whether the entity was created by the government or to avoid the requirements of the Public Records Act.

Applying these four factors to AMP, it is clear that AMP does not meet this functional equivalency test.

First, AMP’s purpose of providing the generation and transmission of electric power and energy to its members at the lowest cost possible is not a historically governmental function (such as the administration of prisons or community mental-health services). See, *City of Niles, Village of Wadsworth*, and R.C. §2744.01(G)(2), *supra*. Rather, the vast majority of such electric power and energy services in Ohio and elsewhere are performed by private, for-profit companies such as AEP and Ohio Edison with no tie whatsoever to any government. Accordingly, the first prong of the functional equivalency test is not met because, as noted above, Ohio law holds that the provision of electricity is a proprietary, not governmental, function.

Second, AMP’s revenues come overwhelmingly from the wholesale sale of electricity to its members for resale to their customers. These electric revenues, even though they may be collected and passed through by AMP’s municipal members, are derived from residential, business and industrial customers paying their electric bills, and – importantly – these revenues do not come from the payment of taxes or other governmental distributions. Additional revenues are produced from various services and programs provided by AMP and arise in the same fashion. Moreover, even if AMP did receive government funds, this fact does not convert the entity into a public office for purposes of the Public Records Act. *Oriana House*, ¶ 29. Accordingly, the second prong of the functional equivalency test is not met.

Third, there is no “governmental body” that controls the operations of AMP. Like any other non-profit corporation formed under Chapter 1702, AMP is governed by its board of trustees. As your request notes, AMP’s trustees are elected from among its municipal members who then appoint a person to represent them on the AMP Board. This does not, however, equate to a governmental entity controlling AMP’s operations as required under the functional equivalency test. Indeed, a number of trustees are from states other than Ohio. Accordingly, the third prong of this test is not met.

Fourth, as your request acknowledges, AMP was not created by a governmental entity nor was it established pursuant to any special legislation. Accordingly, the fourth prong of the functional equivalency test is not met.

Since none of these factors apply to AMP, we conclude that the *Oriana House* functional equivalency test does not make AMP subject to the Ohio Public Records Act.

III. AMP is not a private entity that is responsible for public records.

Lastly, your letter contends that AMP is a private entity that is “a person responsible” for the allegedly public records you’ve requested. The Ohio Supreme Court has established the following analysis to determine whether a private entity that is responsible for public records is obligated to provide access to such records:

[W]here (1) a private entity prepares records in order to carry out a public office’s responsibilities, (2) the public office is able to monitor the private entity’s performance, and (3) the public office has access to the records for this purpose, a relator in an R.C. 149.43(C) mandamus action is entitled to relief regardless of whether he also shows that the private entity is acting as the public office’s agent. *State ex rel. Carr v. City of Akron*, 112 Ohio St.3d 351, 2006 Ohio 6714, at ¶36, citing, *State ex rel. Mazzaro v. Ferguson* (1990), 49 Ohio St.3d 37, 39.

We do not believe the above *Carr v. City of Akron* analysis applies in this situation because in *Carr* and similar cases, unlike here, the public entity contracts with the private entity to perform government work. However, even if this analysis did apply, applying these three factors to AMP and the records you’ve requested, it is clear that AMP is not required to produce these records. If you consider AMP to be the private entity involved in this analysis, AMP did not prepare the requested records in order to carry out the responsibilities of a public office. None of AMP’s member municipalities have the responsibility to generate electricity, and, as referenced above, AMP’s services are not governmental functions under Ohio law. Rather, any documents responsive to your request would have been prepared to carry out AMP’s own responsibilities and business operations, not those of a public office. Importantly, the requested documents would not have been prepared at the request of, or for the benefit of any governmental entity or any AMP member, but rather, would have been prepared in the normal course of AMP’s business – and for AMP’s benefit – as a non-profit corporation.

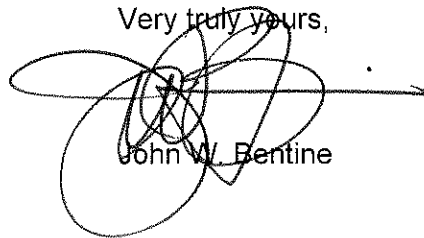
Additionally, the second and third prongs of the *Carr* analysis do not apply to the records you have requested. Specifically, no participating member has access to the requested records for the purpose of monitoring AMP’s performance under its contract. For these reasons, AMP is not obligated to produce the requested documents.

IV. Conclusion.

In closing, AMP reserves the right to raise additional objections in the future as may be required and applicable under Ohio law, and the above analysis is not intended to be an exhaustive list of objections related to your requests. For example, even if AMP were subject to the Ohio Public Records Act, the requested documents are trade secrets and exempt from disclosure under the "state or federal law" exception set forth in R.C. §149.43(v) and *State ex rel Besser v. Ohio State Univ.* (2000), 87 Ohio St.3d 535, 540. The PowerSpan-related documents you've requested derive independent economic value from not being generally known to other persons who can obtain economic value from their disclosure or use, and these documents are the subject of AMP's efforts that are reasonable under the circumstances to maintain their secrecy. Indeed, these records are subject to a confidentiality agreement between AMP and PowerSpan. Accordingly, the requested documents are trade secrets and exempt from disclosure.

For the reasons set forth above, AMP does not believe it is subject to the Ohio Public Records Act and will not be producing records pursuant to your October 19, 2009 request. If you have any questions, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "John W. Bentine", is written over a horizontal line. The signature is highly stylized and somewhat illegible due to the cursive and overlapping loops.

John W. Bentine

cc: Marc S. Gerken/AMP
David J. Butler/CWS
Frank A. Ray/CWS