



STATE OF ARKANSAS

House of Representatives

August 14, 2012

The Honorable Dustin McDaniel, Attorney General
Office of the Attorney General
ATTN: Opinions Department
323 Center Street, Suite 1100
Little Rock, AR 72201

Dear Attorney General McDaniel:

I write to request an Opinion concerning the Walton Arts Center Council, Inc. ("WAC"), a non-profit corporation that is organized and existing pursuant to the laws of the State of Arkansas. My specific question is whether WAC is subject to Ark. Code Ann. §25-19-106 – the Open Public Meetings provision of the Arkansas Freedom of Information Act.

WAC was formed on January 19, 1987 as "The University of Arkansas/City of Fayetteville Arts Center Council, Inc." WAC's formation resulted from an Interlocal Cooperation Agreement executed by and between the University of Arkansas ("UA") and the City of Fayetteville ("City") in 1986. The initial funding was intended to be provided equally by the UA and City. Each provided \$3 million towards the construction of what is now known as the Walton Arts Center, and each provided \$1.5 million to a separate foundation as an endowment for WAC. When the funding from the City and UA was determined to be inadequate to construct the Walton Arts Center, an estimated additional \$9 million was raised from private donors in Northwest Arkansas for the project. The City and UA also were dropped from the name, and the entity became known as Walton Arts Center. The Walton Arts Center opened in 1992.

The purposes of WAC are listed in its articles of incorporation, as amended, as follows:

(a) To have all powers and authorities set forth in or contemplated by the Arkansas Nonprofit Corporation Act, Ark. Code Ann. §§ 4-28-201, *et seq.* and any amendments thereto.

(b) To construct, operate, manage, and maintain the Walton Arts Center as agent for the University of Arkansas and the City of Fayetteville.

REPRESENTATIVE

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DISTRICT 88

Counties:
Part Washington

COMMITTEES:

Revenue and Taxation
Vice Chairperson,
Sales, Use, Miscellaneous Taxes and
Exemptions Subcommittee

Agriculture, Forestry and Economic
Development
Small Business and Economic
Development Subcommittee

Joint Performance Review

Vice Chairperson,
Joint Budget

- (c) To construct the Walton Arts Center to be located in Fayetteville, Arkansas, in accordance with the program specified in the Interlocal Cooperation Agreement between the City of Fayetteville and the University of Arkansas entered into on December 9, 1986.
- (d) To employ a President/CEO for the Walton Arts Center, and such other agents and employees as it shall deem proper.
- (e) To promulgate reasonable rules and regulations for operation and use of the Walton Arts Center, including, where appropriate, to set reasonable fees for use of the Walton Arts Center, assuring always that the greatest access to the facilities is provided for users and user groups
- (f) To promote interest in the arts in Northwest Arkansas.
- (g) To enter into agreements with the City, the University, any other city or country, the State of Arkansas, the U.S. Government, or any agency or instrumentality thereof, or with any private group, to exchange, borrow or loan property of the corporation.
- (h) To enlist volunteers to assist in promoting the Walton Arts Center.
- (i) To acquire, by gift, bequest or purchase, works of art of all types, and to hold the same as a permanent collection.
- (j) To acquire by gift, lease, purchase, or otherwise, and to hold, own or lease any real, personal or mixed property, for the uses and benefit of the Walton Arts Center; and to solicit and receive contributions, and to engage in fund-raising activities for the benefit of the Walton Arts Center. Any funds received may be turned over to the Walton Arts Center Foundation, Inc., for investment and management. Funds received which will not be expended within one year, or endowment funds, shall be promptly be turned over to the Walton Arts Center Foundation, Inc., for investment and management.
- (k) To sell, lease, or dispose of any property of the corporation conditioned upon approval of the Fayetteville City Council and the Board of Trustees of the University, except that it shall not be necessary to obtain approval to sell any property which is donated, sold in the ordinary course of business, or purchased by the corporation for the purpose of immediate resale, nor to transfer property held in permanent collection maintained by the Walton Arts Center Council, Inc.
- (l) To enter into any lawful contracts and to do such other things as may be convenient or necessary to fulfill the purposes of the corporation.

- (m) The purposes of this corporation are expressly declared not to be for gain or individual profit and it shall be operated entirely on a nonprofit basis. No part of its income shall be distributed to its members or directors; provided however, that officers, directors and employees may be reimbursed for expenses incurred in attending to their authorized duties. In the event this corporation is dissolved, voluntarily or involuntarily, all of its net assets shall be distributed and paid out for such charitable purposes as may be determined by the last Board of Directors of the corporation, subject to the approval of the Fayetteville City Council and the Board of Trustees of the University of Arkansas, in accordance with the provisions of the Arkansas Nonprofit Corporation Act, Ark. Code Ann. §§ 4-28-201 *et seq.*, and the Interlocal Cooperation Agreement dated December 9, 1986, between the City of Fayetteville, Arkansas, and the Board of Trustees of the University of Arkansas, and any amendments thereto.
- (n) To do each and every act, which is ordinary, necessary, or reasonable to obtain and maintain the status of a tax exempt organization for purposes of federal and state income taxation, and ad valorem taxation.
- (o) The purposes for which the corporation is organized are exclusively religious, charitable, scientific, literary and educational within the meaning of Internal Revenue Code 501(c)(3) or the corresponding provision.
- (p) Notwithstanding any other provisions of these articles, this organization shall not carry on any other activities not permitted to be carried on by an organization exempt from Federal income tax under Internal Revenue Code 501(c)(3) or the corresponding provision of any future United States Internal Revenue Law.
- (q) In the event of dissolution, the residual assets of the organization will be turned over to one or more organizations which themselves are exempt as organizations described in sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code or corresponding sections of any prior or future Internal Revenue Code, or to the Federal, State or local government for exclusive public purpose.

The affairs and business of WAC are controlled and conducted by 20 Board of Directors, of which 5 were appointed by the UA, 5 were appointed by the City, and the remaining 10 were appointed from the general public. None of the current City appointees are employed or

otherwise affiliated with the City. The current UA appointees are employees of the UA, although this is not a requirement for appointment.

The function of WAC is to bring great artists and entertainers to Northwest Arkansas. This month, Pat Benatar and The Second City Comedy Troupe will perform. In the past, WAC has seen performances from Bill Cosby, Lyle Lovett, Yo Yo Ma, and the Blue Man Group, many Broadway shows such as Mama Mia and Beauty and the Beast, and other performances such as Scooby Doo Live and Dora the Explorer, to name a few. WAC has been providing high quality arts and entertainment in Northwest Arkansas since its opening in 1992.

WAC has grown substantially since its formation in 1987. Its current operating budget is \$9.8 million. Overwhelmingly, WAC's budget is funded by private donations and earned income. The City's portion of endowment funding in the foundation has averaged a 0.036% return over the last three years, amounting to a \$938 contribution to WAC annually. The UA endowment funding has returned an average of 6.92% over the past three years, which will result in approximately \$69,000 to WAC in fiscal year 2012.

WAC has a few more sources of public funding. In fiscal year 2012, it received a total of \$420,913 as follows:

\$309,000	City / A&P (\$289,000 of this is from the City for parking)
\$78,413	State – from the Arkansas Arts Council and the Department of Arkansas Heritage
\$16,000	“Regional” (a multi-state alliance funded partially by the participating states and partially by the National Endowment for the Arts)
\$17,500	Federal (National Endowment for the Arts)

The remaining \$9,309,149, or 95% of the budget, is funded exclusively by private sources.

While electing to operate largely in public view, including frequent invitations for the public and media to attend its meetings, WAC has not believed that it is subject to the FOIA, and despite requesting multiple private legal opinions over the years, it has received no definitive advice suggesting that its position is incorrect.

The WAC's opinion that it is not subject to the FOIA is based on 4 basic facts:

- (1) 95% of its money comes from private sources;

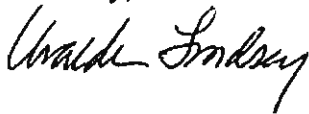
- (2) The mere receipt of public money is not sufficient to bring a private corporation within the FOIA;¹
- (3) WAC is not a government entity, and it does not engage in public business (i.e., providing entertainment such as the Blue Man Group to Northwest Arkansas does not rise to the level of public business such as police and fire protection, sanitation pick up, water service, sewage service, etc.); and
- (4) The lease of property from the City and UA does not equate to public funding.²

Additionally, even if FOIA could be deemed to apply, it would appear to apply only to the extent relevant to the task of public business, which would not appear to include its management of private money, entertainment decisions and the like, but only to its use of the 5% of its annual operating budget that constitutes public money.³

WAC desires to operate correctly and in compliance with the law. As such, we respectfully request that you issue an opinion on whether Ark. Code Ann. §25-19-106 – the Open Public Meetings provision of the Arkansas Freedom of Information Act applies to WAC so that WAC can ensure that it is operating properly.

Thank you.

Sincerely,



Uvalde Lindsey
State Representative
District 88

¹ Attorney General Opinion No. 2007-227; *City of Fayetteville v. Edmark*, 304 Ark 179 (1990).

² *Sebastian County Chapter of the American Red Cross v. Weatherford*, 311 Ark. 656 (1993). WAC leases its facility from the City and UA. Like *Weatherford*, the lease required a payment of \$1.00. Since the first year, no rent has been required.

³ Attorney General Opinion No. 2008-154; *City of Fayetteville v. Edmark*, 304 Ark 179 (1990).