

ATKIN & ASSOCIATES

CENTER FOR NONPROFIT LAW

August 14, 2013

TO: Board of Directors of Open Source GeoSpatial Foundation

RE: Tax exempt status

Dear Board Members:

The first letter I wrote to you was intended to help you answer the question, **“What would we have to do to gain 501(c)(3) status from the IRS for the Open Source GeoSpatial Foundation.”** Today I am writing to answer a different question: **“What are the advantages and disadvantages of moving to a ‘Plan B’ and deciding to get a different type of tax exempt status instead?”**

I can answer this by addressing some questions asked by Daniel, which are as follows: (It makes most sense to answer them in the reverse order he asked, so I will begin with his question number #4 and proceed to number #1.

Question 4- If we wanted to have a single entity, what about creating a new c6 entity and dissolving the current corporation after donating all its money and transferring all activities to the new c6? Would that be an acceptable scenario with minimal tax impact and do you think that our activities that don't qualify for c3 would qualify for c6?

Answer #4: If you would like to have a single nonprofit entity instead of two, then your best outcome would be to have it be a nonprofit, tax exempt organization that is NOT a 501(c)(3). There are two possibilities: you could either ask for 501(c)(6) status as a Professional Association or Trade Association that operates for the benefit of professionals and businesses involved in Open Source GeoSpatial activities; or you could ask for 501(c)(4) status as a “Civic Welfare” organization. Both of these types of nonprofit organizations have much greater freedom to conduct a wider variety of activities, and they are subject to less governmental regulation and restrictions.

“Helping the People Who Change the World”

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I just learned today from Jeff McKenna and Daniel Morissette that the IRS has recently granted 501(c)(4) status to OpenNTF, a similar open source organization. A 501(c)(4) organization is a Public Benefit corporation and like a 501(c)(3) it must be operated for public benefit purposes - but those are defined more broadly to include various kinds of civic welfare. Given the IRS complaints that OS Geo's activities would provide too many private benefits to businesses, it seems contradictory that they would grant it 501(c)(4) status. However, there is a long history of the IRS using the 501(c)(4) category as a "catch-all" for odd nonprofit organizations that seem like they should be tax exempt but don't fit very well in any of the other official categories. I suspect that this was the IRS' rationale and strategy in granting 501(c)(4) status to OpenNTF.

I believe that as either a 501(c)(4) or a 501(c)(6) organization you could engage in most or all of the activities that you originally wanted to conduct through the Open Source GeoSpatial Foundation. In return for that increased freedom from IRS and state regulations and restrictions, you would be giving up just two things: 1) the opportunity to receive tax deductible charitable donations from the public, and 2) giving up the opportunity to receive foundation grants from most 501(c)(3) Foundations (you could still receive grants from any level of government and from public Universities). On the other hand, if you were a 501(c)(4) organization or a 501(c)(6) organization, then businesses and individuals involved with open source work could pay membership dues and make donations to your organization even if it is not a 501(c)(3) organization, and take a tax deduction for the dues or donations as a business expense, which is generally even more advantageous than taking a charitable donation deduction for the same amount.

In addition, you could charge for participation in all of the organization's activities such as your annual conference, on-line forums, and any other similar activities. If you retained a profit to build up a reserve fund for future conferences or activities, as a tax exempt organization you would not be taxed on that retained profit.

Based on what I have learned about your organization, it appears that you have not received much money in the form of charitable contributions from the public, and that you have not received foundation

grants from 501(c)(3) foundations. Accordingly, it seems likely that giving up those opportunities that come with 501(c)(3) status might not decrease your revenues very much in the future.

If you decide to that you would like to operate as a single nonprofit entity and are willing to give up tax deductible donations from the public and foundation grants in return for the increased freedom from regulations and restrictions that can come with tax exempt status as a 501(c)(4) Civic Welfare organization or a 501(c)(6) Professional Association or Trade Association, then the best, quickest and least expensive way to proceed would be to just tell the IRS you want to change your current IRS application to an application for 501(c)(4) or 501(c)(6) status. Given the recent experience of OpenNTF, it would be a good idea to apply for 501(c)(4) status first, and if the IRS has any objections we can ask them to consider the precedent they set with OpenNTF. It is also admissible to even just ask the IRS itself to determine which status is more appropriate, and process the application accordingly.

The benefits of just changing your current IRS application to ask for 501(c)(4) status or 501(c)(6) status, instead of starting a new nonprofit to apply for that status, or for 501(c)(3) status, are as follows:

- 1) You won't have to start over and create a new nonprofit corporation, or figure out how to transfer a significant portion of your activities to the new organization.
- 2) You won't have to deal with the complexity of operating as two separate nonprofit corporations with separate Boards and Board meetings, different activities, separate and different finances, and separate and different legal restrictions and regulations.
- 3) You won't have to start over and write and submit a new application to the IRS (or pay a new IRS Application processing fee of \$850).
- 4) If you are willing to give up on gaining 501(c)(3) tax status for the current organization and ask for tax exempt status as a 501(c)(4) or 501(c)(6) organization, that tax exempt status will very likely be granted retroactively, so you will not have to pay any taxes on the prior years' retained profit you used for the reserve fund that you built up during the past years.

In the 25 years I have worked as an attorney specializing in working for nonprofit organizations, I have had similar situations arise at least a dozen times in which organizations with activities similar to yours had originally applied for 501(c)(3) status and found the IRS was not willing to grant that status without significant changes in the organization's activities; these organizations decided they wanted to change their IRS application to a request for 501(c)(4), 501(c)(6) or 501(c)(7) status instead, in order to be able to engage in all of the activities they wanted to conduct, which were similar to yours. Hopefully, it will be reassuring to you that I can report that I have been successful in gaining the desired tax exempt status in these previous situations 100% of the time. So I am confident that we would have a high likelihood of success if you decide to take this approach.

Question 3- If we go with a c3 for the conference and educational stuff, and a for-profit for the rest of the activities, can the new C3 entity transfer some funds each year to the for-profit entity for use to support its non-admissible activities? Will this be allowed? i.e. can a c3 donate some of its money to an affiliated for-profit entity?

Answer #3: No, if you have a 501(c)(3) organization it cannot give any of its funds to any other type of entity for use to support any activities that the 501(c)(3) organization could not have done itself with its money.

Question 2- Your letter doesn't touch the aspect of taxes vs the surplus accumulated by the current entity to serve as a cushion for organizing the yearly conference. We discussed in the conference call that donating it (or most of it) to the new C3 would save us from a potentially big tax bill. Is there a reason why that was not in the letter as I believe this is part of the strategy and the reasons to create the c3 as a new entity instead of just converting the existing application?

Answer #2: The only good way to insure that you will not have to pay a potentially very large tax bill from prior years is to gain tax exempt status for the existing organization. You can do that by gaining 501(c)(6) status for the existing organization, whether or not you also start a separate, new nonprofit corporation and apply for 501(c)(3) status for it.

If you want to operate as just one organization and are willing to give up on gaining 501(c)(3) tax exempt status for the existing organization, and ask the IRS to change your application to a request for 501(c)(4) or

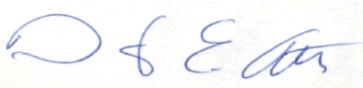
501(c)(6) status, that tax exempt status will very likely be granted retroactively back to the very beginning – meaning the date that your corporation was incorporated. That will mean that you would owe no taxes for any prior years. Just to let you know the basis for my confidence on this point, I have gained retroactive tax exempt status for other organizations in similar situations, and the IRS has had no objection to granting it.

Question 1- The naming of the new c3 corporation without the terms open source in it may not be very popular since that's what defines our activities and mission. We'll have some work to do to find a good variant that is still meaningful.

Answer #1: If you want to continue to try and get 501(c)(3) status, and keep the words “Open Source” in the name, it will be a red flag to the IRS, but it is not a legal requirement that you must omit those words. On the other hand, if you want to operate as a single organization with 501(c)(4) or 501(c)(6) tax exempt status, the current name “Open Source GeoSpatial Foundation” is just fine. If you leave your name as it is, you will be judged by the IRS on what your activities are, and not on your name.

I hope this adequately answers your follow-up questions. Please let me know if you have further questions.

All the best,



David Atkin, Attorney