STATE OF INDIANA

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December 16, 2009

Gregg Montgomery
The Indianapolis Star Media Group
307 North Pennsylvania Street
Indianapolis, Indiana 46206

Re: Formal Complaint 09-FC-222; Alleged Violation of the Access to Public Records Act by Zionsville Community School Corporation

Dear Mr. Montgomery:

This advisory opinion is in response to your formal complaint alleging Zionsville Community School Corporation (the "School") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records, specifically by inappropriately redacting information from records you requested. I have enclosed a copy of the School's response to your complaint for your reference. It is my opinion the School has not discharged the burden of proof to sustain the denial of the School-Based Health Center Service Agreement or the bids for nursing and related medical services, to the extent that the document does not disclose individual employee benefit amounts. The School did properly withhold the amount in the Sponsorship Agreement as a trade secret.

BACKGROUND

In a complaint filed September 30, 2009, you allege that on August 20 and September 21, 2009 you were denied access to certain information contained in records maintained by the School. Specifically, you allege that while the School provided you copies of the bids and the final contract for nursing and medical services provided to the School, the financial terms were redacted from those documents. You also allege the School refused to provide the amount of money St. Vincent gave to the school district as a "sponsorship amount" to gain naming rights for the Zionsville Community High School's new athletic facilities. You contend the School did not provide you with justification of the denial except to say the information was redacted for competitive purposes. However, it appears the School sent a copy of a letter dated October 28, 2009 to the School's attorney, outlining why the School believed the redacted information contains nondisclosable trade secrets.

The School responded to your complaint by electronic mail message dated October 1, 2009 from attorney Jeffery Qualkinbush. The School contends the "parties that need to be named in this complaint should be Clarian and St. Vincent, not the School Corporation." The School contends that those two entities redacted the information. The School provided a copy of an August 26, 2009 electronic mail message to Rob Annis of the newspaper. In that message, the School claims the redacted information was required to be redacted pursuant to I.C. § 5-14-3-4(a)(4), the mandatory exception to disclosure for records containing trade secrets.

ANALYSIS

The public policy of the APRA states, "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." I.C. § 5-14-3-1. The School is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the School during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A public agency may not disclose certain records, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery. I.C. § 5-14-3-4(a). Among these, records containing trade secrets may not be disclosed. I.C. § 5-14-3-4(a)(4). For the purposes of the APRA, a person is an individual, a corporation, a limited liability company, a partnership, an unincorporated association, or a governmental entity. I.C. § 5-14-3-2(j).

The APRA places the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record. I.C. § 5-14-3-1. In a court action challenging the denial of a record, the court determines the matter de novo, with the burden of proof on the public agency to sustain its denial. The public agency meets its burden in the case of records exempt under section 4(a) by establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. I.C. § 5-14-3-9(f).

The School claims that the two entities involved in the bidding, Clarian and St. Vincent (the latter of which was awarded the contract), should be named in the complaint. Pursuant to the APRA, though, the School is a public agency and as such must provide access to the public records it maintains. I.C. § 5-14-3-3. Clarian and St. Vincent are not the public agencies involved in this matter. The question is not whether those private entities desire to have the information withheld. The question is whether the School can bear the burden of proof to sustain the denial of access.

The School claims the redacted portions of the requested records are excepted from disclosure pursuant to I.C. § 5-14-3-4(a)(4), the mandatory exception for trade

secrets. The APRA defines "trade secret" as having the meaning set forth in I.C. § 24-2-3-2. I.C. § 5-14-3-2(o).

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
> (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. I.C. § 24-2-3-2.

The School is required to withhold from disclosure any records containing trade secrets. I.C. § 5-14-3-4(a)(4). Both elements of the trade secret definition must be met for the School to maintain the information as confidential. Here, the School would need to prove the redacted information derives independent economic value from not being generally known and is the subject of efforts reasonable under the circumstances to maintain its secrecy. *See* I.C. § 24-2-3-2. A conclusory statement that the records contain trade secrets is not sufficient proof in a court action. I.C. § 5-14-3-9(f).

In the School's October 28, 2009 letter to the Public Access Counselor, the School states that certain information requested is considered a trade secret. They go on to explain why three separate documents should be considered trade secrets and therefore not disclosable.

Bids for Nursing and Related Medical Services

The School claims the St. Vincent bid and other bids for the provision of nursing and related medical services "utilizes an 'actual expenses' compensation formula to quote the cost of proposed services...relate[d] primarily to the compensation and value of employee benefits…" Oct. 28 ltr, pg. 4. According to the School, hospitals "closely maintain[] the confidential nature of compensation, salary, and employee benefits information." *Id*. The School maintains that the bid is a trade secret because compensation information, "particularly given chronic nursing shortages could be helpful to a competitor…among other reasons, [because] it would enable them to better evaluate market potential and provider recruitment."

Indiana courts have noted that defining what may constitute a trade secret can be difficult. There are no cases directly on point about employee compensation, but there is some support for the notion that financial information may qualify as trade secrets. *Amoco Production Co. v. Laird*, 622 N.E.2d 912, 916 (Ind. 1993). In *Bridgestone/Firestone, Inc. v. Lockhart, et al*, 5 F. Supp. 2d 667, 680-81 (S.D. Ind. 1997), a federal district court, interpreting the Indiana Uniform Trade Secrets Act ("IUTSA"), found that 'knowledge of financial information indicating a company's strengths and weaknesses . . . sales information . . . broken down by product . . . could be helpful to another manufacturer of competing products, especially in highly competitive, relatively fungible products' have been considered protectable trade secrets by the Indiana courts. Also, the Indiana Supreme Court has held that "where duplication or acquisition of

alleged trade secret information requires a substantial investment of time, expense, or effort, such information may be found 'not being readily ascertainable' so as to qualify for protection under the" IUTSA. *Amoco Production Co*., at 919. *See also* Ind. PAC Op. 99-8.

Arguably, employee compensation in this context could indicate a company's weaknesses. As the School points out, it could enable competitors to better evaluate market potential and provider recruitment.[1] However, it appears that the School is not trying to redact those numbers, but rather a bid that was calculated using those numbers. It does not appear that one could obtain economic value from the disclosure of the final bid amount. To the extent that the bid does not disclose individual employee benefit amounts, the information should be disclosed.

School-Based Health Center Service Agreement

In addition to the bid information, the School asserts that the Role Specific Accountabilities and Responsibilities Addendum contains trade secrets. This document "outlines specific competencies and responsibilities of individual health care providers in relation to the actual expensed compensation."

The School does not indicate how knowing their employees' specific competencies and responsibilities alone could derive economic benefit. Therefore, I do not have enough information to determine that the School can sustain its burden to prove the redacted information is a trade secret. If the School can show that there is economic value, actual or potential, from the redacted information not being generally known, the information would be considered a nondisclosable trade secret.[2] As above, to the extent that the document does not disclose individual employee benefit amounts, the information should be disclosed.

Sponsorship Agreement

Finally, the School asserts that the sponsorship fee within the sponsorship agreement contains trade secrets. It states, "Healthcare organizations such as St. Vincent are constantly evaluating ways to stay competitive…One of these ways is through strategic promotional and sponsorship arrangements with various organizations." The cost of a promotional arrangement could be seen as a "competing product" as in *Lockhart*. In addition, the School rightly notes that exposing the sponsorship fee "potentially affects St Vincent's ability to successfully negotiate with other

[1] The second part of the analysis asks whether the information is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. In the School's letter, they note that St. Vincent's bid "clearly indicate[d] that the compensation and employee benefits information…are considered confidential." Oct. 28 ltr, pg. 4. That, coupled with the School's insistence on redacting the information, meets the requirements for the second part of the analysis.

[2] The School's letter notes, "From its initial bid response to the express terms of the services agreement, St. Vincent has clearly indicated that it considers such information as proprietary and protected trade secrets." p. 5. That, coupled with the School's insistence on redacting the information, meets the requirements for the second part of the analysis.

organizations." Oct. 28 ltr, pg. 6. These two factors demonstrate the economic value that could result from disclosure.[3] Therefore, the School is correct in its assertion that the sponsorship fee is a trade secret.

If a public record contains disclosable and nondisclosable information, the agency shall, upon receipt of a request under the APRA, separate the material that may be disclosed and make it available for inspection and copying. I.C. § 5-14-3-6(a). As such, to the extent the records contain information not covered by one of the exceptions, the nondisclosable information should be redacted, and the disclosable information should be provided upon request. If the School can bear the burden of proof to sustain the denial of access, it would be appropriate for the School to redact the nondisclosable information and provide the balance of the documents to you.

CONCLUSION

For the foregoing reasons, it is my opinion that the School has not discharged the burden of proof to sustain the denial of access to the School-Based Health Center Service Agreement or the bids for nursing and related medical services, to the extent that the document does not disclose individual employee benefit amounts. The School did properly withhold the amount in the Sponsorship Agreement as a nondisclosable trade secret.

Best regards,

DeAnna L. Brunner
Acting Public Access Counselor

Cc: Jeffery Qualkinbush, Barnes & Thornburg LLP
Andrew Kossack, Indiana Public Access Counselor

[3] The School's letter notes that the School and St. Vincent undertook various obligations under the sponsorship agreement "[i]n exchange for a confidential sponsorship fee." That, coupled with the School's insistence on redacting the information, meets the requirements for the second part of the analysis.