



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

December 9, 2013

Ms. Nancy Garbrecht
6170 Joliet Road, Ste. 200
Countryside, IL 60525

Re: Formal Complaint 13-FC-318; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation

Dear Ms. Garbrecht,

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Transportation ("INDOT") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.*, Ms. Lynn M. Butcher responded to your formal complaint. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on November 1, 2013.

BACKGROUND

Your complaint dated November 1, 2013 alleges the Indiana Department of Transportation violated the Access to Public Records Act by denying your request for records in violation of Ind. Code § 5-14-3-3(b) on October 31, 2013.

On or about July 31, 2013, you served upon INDOT a request for the following records:

A copy of the 2011 through 2013 contractor prequalification documents by the above mentioned contractor (Niblock Excavating, Inc.)

It is unclear when or if your request was acknowledged before October 31, 2013, however, INDOT responded they considered the material to be deliberative and were unable to produce the records you seek due to confidentiality considerations.

ANALYSIS

The public policy of the APRA states that “(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.” See Ind. Code § 5-14-3-1. The Indiana Department of Transportation is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy INDOT’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See Ind. Code § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. See Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

Your request was denied in part due to the determination by INDOT the records you seek are confidential. Ind. Code § 5-14-3-4 states:

- (a) The following public records ... may not be disclosed by a public agency, 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:
 - (1) Those declared confidential by state statute.
 - (2) Those declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute.
 - (3) Those required to be kept confidential by federal law.
 - (4) Records containing trade secrets.
 - (5) Confidential financial information obtained, upon request, from a person. However, this does not include information that is filed with or received by a public agency pursuant to state statute.

At first glance, considering Section 5 of the statute, financial information required to be filed with INDOT should be disclosed. Ind. Code § 8-23-10-6 requires bidders for projects submit prequalification financial statements. Earlier in the Chapter, however, Ind. Code § 8-23-10-3(f) states:

Notwithstanding IC 5-14-3-4(a)(5), a financial statement submitted to the department under this chapter is considered confidential financial information for the purposes of IC 5-14-3.

This would trigger the portion of the APRA in the statute referenced above that those records declared confidential by state statute may not be disclosed. It is clear from Ind. Code § 8-23-10-3(f) this is the case.

The response from INDOT also indicates the record should be withheld because it is deliberative material under Ind. Code § 5-14-3-4(b)(6). I disagree with INDOT that the financial information contained in the prequalification disclosure is deliberative material. Factual information is not of a speculative or opinion-based nature. The information may be used in the decision-making process, but it is not contemplative as intended by the APRA. Nevertheless, the information is still confidential under Ind. Code § 8-23-10-3(f).

CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access Counselor the Indiana Department of Transportation did not violate the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Ms. Lynn M. Butcher