



STATE OF INDIANA

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May 11, 2016

Mr. Anthony Cook
130 South Meridian Street
Indianapolis, Indiana 46225

Re: Formal Complaint 16-FC-75; Alleged Violation of the Access to Public Records Act by the Indiana Economic Development Corporation

This advisory opinion is in response to your formal complaint alleging the Indiana Economic Development Corporation ("IEDC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 et. seq. The IEDC has responded via counsel, Mr. Bryan Babb, Esq. His 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 March 28, 2016.

BACKGROUND

Your complaint dated March 25, 2016, alleges the Indiana Economic Development Corporation violated the Access to Public Records Act by improperly withholding and redacting records.

You requested records relating to the Porter Novelli contract, the subject of your previous complaint against IEDC, addressed in *Advisory Opinion of the Public Access Counselor 16-FC-15*. On February 29, 2016, IEDC provided 1100 pages of records to you but redacted many of those pages and withheld 50 pages. In a letter to you, IEDC raised the deliberative materials exemption and the trade secrets exemption. You contend IEDC redacted more information than is necessary under the deliberative materials exemption and argue IEDC cannot raise the trade secrets exemption, because it is a nonprofit which cannot generate independent economic value.

On April 13, 2016, IEDC responded via counsel. Counsel asserts its actions were proper. It asserts releasing the materials would compromise trade secrets which would put it at a competitive disadvantage against other states. IEDC also notes the APRA mandates withholding trade secrets.

IEDC acknowledges it is a nonprofit entity, but disputes that status affects its ability to raise the trade secret exemption. It also notes disclosing trade secrets would be at odds with the Uniform Trade Secrets Act, codified in Ind. Code § 24-2-3-2, which permits governmental entities to protect their own trade secrets. Deviating from this standard would also put IEDC in conflict with legislative and judicial statements in which Indiana must apply the UTSA consistent with the laws of other states.

Finally, IEDC contends it may withhold the Reputation Analysis under the deliberative materials exemption, because the document was created for IEDC under contract and is an advisory document which is speculative in nature.

DISCUSSION

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 Economic Development Corporation (“IEDC”) 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 the IEDC’s disclosable 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)*.

As for the deliberative materials issue, I addressed this most recently in *Advisory Opinion of the Public Access Counselor 16-FC-23*:

The General Assembly has provided that records which qualify as deliberative materials may be disclosed at the discretion of the public agency. *See Ind. Code § 5-14-3-4(b)(6)*.

The subdivision provides:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Consider the following from *Advisory Opinion of the Public Access Counselor 14-FC-201*:

Deliberative materials include information which reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Advisory Opinion of the Public Access Counselor 98-FC-1*. Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Advisory Opinion(s) of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64*. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002).

The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at

12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must also be inter-agency or intra-agency records, which are advisory or deliberative and are expressions of opinion or speculative in nature. *See Advisory Opinion(s) of the Public Access Counselor 98-INF-8 and 03-FC-17.*

The deliberative materials exemption is indeed broad but can be subject to abuse. Some have called it the exception which swallows the rule.

You have taken exception, generally, to the redacted version of the public records provided to you. I have reviewed the version of the records you reference in your complaint, but have not been made privy to an un-redacted version. Unless specifically asked to do so, this Office does not review public records *in camera* to determine the propriety of redactions. A value judgment, as to whether a redaction is proper, is better left to a trier of fact. *See Ind. Code § 5-14-3-9(d)*. This mechanism gives the judiciary the discretion to review public records redactions. The occasions when this Office has done so, have been in a non-adversarial situation outside the formal complaint process. Pursuant to Ind. Code § 5-14-3-6, redactions should be made with precision so non-disclosable records are separated from disclosable material. It appears as if steps were taken to comply with this provision.

You also contend IEDC may not raise the trade secrets exemption because it is a nonprofit government organization. While it is true government does not enjoy a profit from commercial activity, it collects revenue for the public benefit, an inherent economic activity. Neither case law nor statute prohibits the government from claiming a trade secret when engaging in economic competition with other states. Specifically, the IEDC innovates and develops business-like strategy to bring jobs and economic development to the State. Those innovations and strategies can ostensibly fall under the definition of trade secret found at Ind. Code § 24-2-3-2(c):

“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.

Ind. Code § 5-14-3-4(a)(4) prohibits the disclosure of trade secrets by a public agency pursuant to a public records request unless compelled to do so by a court of law. Indiana Courts have declared trade secrets to be "one of the most elusive and difficult concepts in law to define." *See Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (1993). Moreover, the Courts have determined information is not a trade secret if it “is not secret in the first place--if it is 'readily ascertainable' by other proper means." *Id.* The Court in *Amoco* goes on to hold: “The threshold factors to be considered are the extent to which the information is known by others and the ease by which the information could be duplicated by legitimate means.”

Again, the judiciary has the ability under the mechanism found at Ind. Code § 5-14-3-9(f) to review any public agency's decision to declare something confidential. This Office would be overstepping its bounds to make a determination without first reviewing all of the documents in question.

However, even though it is a nonprofit governmental entity, the IEDC can certainly be the custodian of a government trade secret based upon its purpose and charter to engage in economic functions. It is a player in economic competition amongst rival states and its methodology and strategies can have economic value. To the extent it considers a piece of information a trade secret, it may do so in order to maintain a competitive advantage with other states to generate revenue. This, as I understand it, was the entire purpose of the Porter Novelli contract: to brand Indiana as a desirable place to do business. The records associated with this initiative may contain proprietary strategies, the release of which could do harm to its goals and programs.

The application of the trade secret to governments is not to enable or encourage government *secrecy*. Government transparency and access to public records should serve to make governments more accountable *and* more efficient. Therefore, exceptions to disclosure should be invoked judiciously and conservatively, with mindfulness that the functions of the government are for the public benefit. Your previous complaint notwithstanding, I generally do find the IEDC to be forthcoming with its information and records. They regularly solicit my advice and are receptive to my suggestions and recommendations. From the information provided, it is my opinion they have not overreached or stretched to unreasonably apply an exception to disclosure.

Please do not hesitate to contact me with any questions.

Regards,

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

Luke H. Britt
Public Access Counselor

Cc: Mr. Bryan Babb, Esq.