

May 20, 2008

Benjamin Elgin  
901 Mariner's Island Blvd; Suite 545  
San Mateo, California 94404

*Re: Formal Complaint 08-FC-106; Alleged Violation of the Access to Public Records Act by Indiana University*

Dear Mr. Elgin:

This advisory opinion is in response to your formal complaint alleging Indiana University ("the University") 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 University's response to your complaint for your reference. It is my opinion the University has not violated the Access to Public Records Act by redacting information, so long as the University can bear the burden of proof to sustain the denial.

#### BACKGROUND

In your complaint you allege you requested records from the University on March 7, 2008. On April 16 the University provided you with a "heavily redacted" copy of the contract you requested between the University and MBNA as well as "heavily redacted" copies of additional records, including a contract between the University's alumni association and MBNA. The University claimed the trade secrets exception in redacting the records. You allege the exception is inappropriately used because the information is more than ten years old and because you have obtained other non-redacted contracts, several of which involve MBNA. You allege that some of the contracts are available online for public viewing. You mailed this complaint on April 22, and I received it on April 28.

The University responded to the complaint by letter dated May 12 from Dorothy Frapwell, Vice President and General Counsel of the University. The University contends first that you requested copies of "all contracts involving Indiana University and credit card issuers." The University contends that the only contract which exists between the University and a credit card issuer is a two page letter signed October 23, 1997 between the University and MBNA. Ms.

Frapwell provides a copy of the letter, and it shows that one word plus one part of a sentence was redacted.

The University further contends that you have mischaracterized the other records provided by the University. The other documents represent a contract between two private entities, the Indiana University Alumni Association (“IUAA”) and MBNA, which is now Bank of America (“BAC”). IUAA is a separate 501(c)(3) organization. Because the University has had possession of the IUAA/BAC contract and associated amendments, the University provided you a redacted copy of the documents. The University contends the portions of the documents it redacted were required to be redacted pursuant to I.C. § 5-14-3-4(a)(4) and (5), mandatory exceptions for records containing trade secrets and for confidential information obtained upon request from a person.

The University contends that your allegation that the records are old is not determinative in rejecting the trade secrets exception. Because the University cannot make a determination as to what provisions of the contract have economic value to BAC, the University consulted with BAC to determine what portions it considers to be its trade secrets or proprietary information. Ms. Frapwell contends that the University is not in a position to question BAC’s determination.

Finally, the University indicates that in response to your continuing concerns, the University has gone back to BAC and requested BAC, as a courtesy to the University, review the documents again. BAC reviewed the records again and provided a copy to the University with only the amount BAC considers to be the absolute minimum necessary to preserve its intellectual property redacted.

## 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 University 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 University 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). Also exempt from disclosure is 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. I.C. § 5-14-3-4(a)(5). 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 do 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 University claims the redacted portions of the requested records are excepted from disclosure pursuant to I.C. § 5-14-3-4(a)(4) and (5), the mandatory exceptions for trade secrets and confidential financial information.

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 University is required to withhold from disclosure any records containing trade secrets. I.C. § 5-14-3-4(a)(4). The elements of a trade secret must be met for the University to maintain the information's confidentiality. Here, the University has indicated it has relied upon BAC's assertion as to what constitutes a trade secret. While nothing in the APRA prevents an agency from relying upon a non-public entity to assert trade secrets, in a court action the University ultimately bears the burden of proof for nondisclosure. I.C. § 5-14-3-9(f). Here, the University 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).

I do not have enough information to determine whether the University can sustain its burden to prove the redacted information is a trade secret. Certainly I agree with the University that the mere fact that the records are several to ten years old is not determinative. If the University (or BAC through the University) can show that there is economic value, actual or potential, from the redacted information not being generally known, it would meet the first part of the definition. In my opinion and based on the information provided, the University will likely be able to meet this element.

As to the second part of the definition, you have alleged that you have obtained several other similar contracts, and you have provided a web address at which one can view an agreement. If BAC has not made efforts that are reasonable under the circumstances to maintain the secrecy of the information, the University may not be able to meet the second part of the trade secret definition. If, however, reasonable efforts have been made to maintain the secrecy of

the information, this may be an appropriate use of the trade secret exception. I do not have enough information to provide an opinion regarding this element.

The University further asserts the information is confidential financial information obtained upon request from a person. To the extent the University can show it requested a copy of the contract between IUAA and BAC and the contract was not required to be filed with or received by a public agency pursuant to state statute, the University could likely sustain the denial of confidential financial information contained in the records. See *Opinion of the Public Access Counselor 03-FC-56* for a discussion of the meaning of the confidential financial information exemption. Information contained in the records which is secret financial information that would not ordinarily be released to the public may be withheld. I.C. § 5-14-3-4(a)(5).

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. It is my opinion the University has done so here, so long as it can bear the burden of proof to sustain the denial of the redacted information.

#### CONCLUSION

For the foregoing reasons, it is my opinion the University has not violated the Access to Public Records Act by redacting information, so long as the University can bear the burden of proof to sustain the denial.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Dorothy Frapwell, Indiana University