STATE OF INDIANA

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To: IDOA Vendors
From: Luke Britt, Indiana Public Access Counselor
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Redaction of public procurement documents

This informal opinion is in response to multiple inquiries as to what materials are subject to disclosure and redaction under the Access to Public Records Act ("APRA") in context of public procurement. In accordance with Indiana Code section 5-14-4-10(5), I issue the following informal opinion.

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1. Further, 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." *Id.*

No more so is this policy as crucial as in the case of public procurement. Transparency in the bidding process ensures fairness, credibility and integrity. I am confident the Indiana Department of Administration ("IDOA") supports transparency and accountability to the maximum extent possible. Therefore, unless otherwise provided by statute, any person may inspect and copy IDOA's public records. *See* Ind. Code § 5-14-3-3(a).

The Indiana General Assembly was clear that APRA is not intended to be strictly or conservatively construed as is evident in Indiana Code section 5-14-3-1. Instead, the Act is to be liberally interpreted in favor of transparency and openness with a presumption of disclosure.

It is important to note that APRA's provisions are not intended to be an exhaustive comprehensive compendium to every conceivable factual scenario in the day-to-day operations of State and local government. Thus, when the PAC addresses an issue, the Office does not serve as a fact-finder, but does nonetheless consider the factual circumstances presented by the parties in the analysis. Each scenario (and bid) is different and the analyses herein are not intended to be absolute.

This Office recognizes that some bids invite private parties to submit information that is not readily known and that the firm considers trade secret or confidential financial information. These factors are not easy to qualify or quantify. To begin, however, all parties doing business with the State of Indiana should be mindful that all materials submitted to the State are public records by definition. See Ind. Code § 5-14-3-2(r).

APRA contains both mandatory and discretionary exceptions to the general rule of disclosure. Specifically, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

For the purposes of this discussion we will focus on two critical exemptions to disclosure inherently germane to the public procurement process: trade secrets and confidential financial information.

1. **Trade secrets**

Some requests for proposals ("RFPs")[1] will call for information which is considered the unique proprietary information of the bidder. If the information disclosed would place the bidder at an economic disadvantage within its marketplace and the information is not readily known, then it could be considered a trade secret. This can apply to both a cottage industry and large business environments. Naturally, a firm will seek to keep the trade secret strictly between the bidder and the State of Indiana. The Indiana Access to Public Records allows this pursuant to Indiana Code section 5-14-3-4(a)(4) which exempts trade secrets from disclosure.

"Trade secret" has the meaning set forth in Indiana Code section 24-2- 3-2:

[1] This memo also applies to requests for information, qualifications, and services.

"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.
Based on this statutory definition, Indiana courts have long held that a trade secret has four general characteristics: 1) it is information; 2) that derives independent economic value; 3) from not being generally known, or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and 4) that is the subject of efforts, reasonable under the circumstances, to maintain its secrecy. See, e.g., *Ackerman v. Kimball Int'l, Inc.*, 634 N.E.2d 778, 783 (Ind. Ct. App. 1994), vacated in part, adopted in part, 652 N.E.2d 507 (Ind. 1995). See *Bridgestone Americas Holding, Inc. v. Mayberry*, 878 N.E.2d 189, 192 (Ind. 2007) (stating that "[u]nlike other assets, the value of a trade secret hinges on its secrecy. As more people or organizations learn the secret, [its] value quickly diminishes").

Indiana Courts have declared trade secrets to be "one of the most elusive and difficult concepts in law to define." *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." *Id.*

What is clear is the Courts will scrutinize a trade secret claim by its individual uniqueness and proprietary exclusivity. This Office simply does not, and cannot, have the resources, however, to inspect each bid from distinct industries and clear them for public consumption. I can say that the few bids I have reviewed *in camera* appear to be over-redacted and do not meet a credible standard of exceptionality. Therefore they have been sent back to the private bidder for more precise redaction.

The bottom line is that for a trade secret to qualify, it must meet the statutory criteria. Formulas, patterns, strategy, methodology, technical specifications, techniques and processes may be declared trade secret so long as they are exclusively proprietary to the bidder and protective measures have been taken to protect them as secret.

Commonly known or non-unique information would not qualify. Therefore previously published information, generic marketing material, public relations puffery, employee bios and qualifications which are readily known, other public agency customers, and the like would not meet the standard of a trade secret.

Doing business with a public agency does not erode your protections under the law, however, all bidders should be mindful that information submitted to the government is subject to a public records request and, ultimately it is up to the bidder to proactively take steps to identify sensitive material. If not, those protections could be waived.

2. Confidential Financial Information

The APRA also provides an exception from disclosure for confidential financial records obtained from a person under Indiana Code section 5-14-3-4(a)(5). This exception provides that public agencies may not disclose public records that are: (c)onfidential 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.

Since there are no Indiana cases that explain just what is "confidential financial information" contemplated in this exception, we must therefore rely upon the rules of statutory construction to ascertain its meaning. "Generally, when construing a statute, the interpreting body attempts to give words their plain and ordinary meanings." Indiana *Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99, 103 (Ind. 1998), citations omitted. Non-technical, undefined words are to be defined by their ordinary and accepted dictionary meaning. *Bulkomatic Transport v. Department of Revenue*,

629 N.E.2d 955, 957 (Ind. Tax 1994), citations omitted. The plain meaning of "confidential" is "private" or secret." MERRIAM-WEBSTER COLLEGIATE ONLINE DICTIONARY, www.m-w.com (2018) "Financial" means of or relating to "finance," which is further defined as "money or other liquid resources of a government, business, group, or individual." *Id.*

A similar analysis applies to confidential information as with trade secrets: efforts must have been made to keep the information private and it must be of a financial nature. Therefore customer lists, supplier lists, financial modeling, forecasts, revenue projections, terms of other private contracts, costs and pricing could all ostensibly qualify as confidential financial information if this information is not previously published and is not readily available to the public.

On the other hand - to an extent - there is an interest on the part of the public to know that their state government is engaging with firms that are on solid financial footing. Therefore if an RFP solicits current financial standing, there may not always be a compelling reason to qualify a piece of information as confidential. While detailed balance sheets and other financial statements can be considered confidential, a basic statement of financial standing would likely be available for public inspection.

3. Recommendations

These considerations must be reconciled with the fact that bids and responses to RFPs are highly public documents. Therefore a practical approach should be employed to ensure proprietary secrecy while allowing transparency to the fullest extent possible.

Bids should be crafted in a way that – while certainly consistent with RFP requirements – allows disclosable information to be separated from trade secrets and confidential financial information. Consider identifying sensitive material via watermark, cordoned off by section, or simply placed in an appendix or addendum to the main body of the bid. I trust IDOA will be flexible with these approaches. This applies to the initial submission and any subsequent requests for information.

Any redactions or confidentiality designations should be precise and used judiciously only when absolutely necessary to preserve the integrity of the bid. Redactions should be accompanied by the statute authorizing the redaction as well as a reasonably detailed explanation as to why it is sensitive. Specificity is important. In making a determination whether something is appropriate for redaction or omission, the burden is on the bidder to establish the justification with adequate specificity and not by relying on a conclusory statement or affidavit.

Finally, the Office of the Public Access Counselor can be a resource in determining some of these elements on an as-needed basis. We are available for discussion on any of these matters in a piecemeal manner, however, due to the nature of the Office, we cannot authorize wholesale redactions except in extraordinary circumstances. We thank you in advance for your patience and understanding in this process.

Please do not hesitate to contact me with any questions.

Best regards,

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