

June 14, 2007

Michael Sylvester
625 Windrift Lane
Fort Wayne, IN 46845

Re: Formal Complaint 07-FC-132; Alleged Violation of the Access to Public Records Act by the City of Fort Wayne

Dear Mr. Sylvester:

This is in response to your formal complaint alleging that the City of Fort Wayne (“City”) violated the Access to Public Records Act by refusing to disclose records because the records are trade secrets or confidential financial information. I find that the City bears the burden of proof that a specific record is exempt.

BACKGROUND

You requested seven categories of records from the City on April 16. Your original complaint was that the City had failed to produce any of the records as of the date you sent your complaint, May 15, 2007. On May 16, the City produced some documents, stated that some documents did not exist, and denied access to one category of records. The city attorney Timothy Manges stated that for your request #4, for “All written documents associated with and including forms A1, A2, A3, and A4 that the respondent provided to the City of Fort Wayne in regards to the RFP issued on December 21, 2006.” The City stated that:

“Acquest Realty Advisors, Inc. (“Acquest”) provided information it presumably intended to be responsive to forms A1-A4 in sections 7.6.3, 7.6.4, and 7.1 of its response document. However, Acquest has asserted a claim that that information is proprietary. IC 5-14-3-4 provides that certain documents may not be disclosed by a public agency, including records containing trade secrets [IC 5-14-3-4(a)(4)] and confidential information obtained, upon request, from a person [IC 5-14-3-4(a)(5)]. Acquest confirmed by letter dated March 2, 2007, that it considers the financial information and narrative description of models identified in the letter to be proprietary information...Accordingly, the City is

invoking the above exceptions to production. The City will produce this material upon a determination, whether by agreement or otherwise, that the material does not contain trade secrets or is not confidential financial information.”

Mr. Manges provided me a copy of a March 2 letter of Acquest in which Acquest told the City that Acquest meant to clarify that parts of its proposal contains narrative describing the models and that the narrative was both “preliminary and proprietary.”

Having received the City’s letter after filing your original complaint, you supplemented your complaint in a letter challenging the denial of item #4. You state that the documents are financial projections based on projected hotel occupancy rates. You believe that many private companies project hotel occupancy rates, and there is no way this information would legally be considered proprietary or trade secret by statute. You further allege that the information on the forms was used by the City to create documents that were submitted to the state of Indiana to secure CRED and TIF funding for the project. Since this same information was provided directly or indirectly to the state by the City, the City should not now deny it to you.

You also state that the information that was produced was on the City’s website; therefore since no “new” information was provided, it should not have taken 32 days for the City to produce the records.

ANALYSIS

Any person may inspect and copy the public records of a public agency, except as provided in section 4 of the Access to Public Records Act. Ind. Code 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. IC 5-14-3-4(a). Among these types of records, records containing trade secrets may not be disclosed. IC 5-14-3-4(a)(4). Also exempt 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. IC 5-14-3-4(a)(5).

The Access to Public Records Act 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. IC 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. IC 5-14-3-9(f).

The APRA defines “trade secret.” "Trade secret" has the meaning set forth in IC 24-2-3-2. IC 5-14-3-2(o). Under IC 24-2-3-2:

"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 have no information indicating that the City has ascertained whether the claim of Acquest in its March 2 letter that the information is both preliminary and proprietary makes it subject to the trade secrets exemption. The City is required to disclose the information unless the City can assert that it is a trade secret. The elements of a trade secret must be met in order for the City to maintain the information's confidentiality. The City has not responded to the issue you raise concerning whether the City has already disclosed the information to the state. Indeed, if the City had disclosed the information to the state because Acquest's claim of confidentiality was belated, the issue may be whether the information claimed by Acquest to be trade secret was the subject of efforts that were reasonable to maintain its secrecy, one element of trade secret.

The City also asserts that the information is confidential financial information. No other information is provided by the City to explain why the information fits the exemption for confidential financial information. *See Opinion of the Public Access Counselor 03-FC-56* for a discussion of the meaning of this exemption. As with trade secrets, the City would bear the burden in a court proceeding to show that the information you seek is confidential financial information.

You also state that the City should have provided the information in fewer than 32 days. Records must be produced within a reasonable time given the absence of any specific time within the APRA to produce records. Again, the City has not specifically addressed your claim that the records were not timely provided. The City should have provided at least a preliminary response that some of the records were available on the website. The e-mail that you provided indicates that the request may have been dropped after April 24. In any case, it is my opinion that the records you requested could have been provided within 32 days, and perhaps were provided to the extent they were posted on the City's website before May 16.

CONCLUSION

For the foregoing reasons, I find that the City of Fort Wayne bears the burden of proof to show that the information you seek is confidential as a trade secret or confidential financial information.

Sincerely,

Karen Davis
Public Access Counselor

cc: Timothy Manges