



STATE OF INDIANA

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February 25, 2014

Mr. Bob Segall
1000 N. Meridian St.
Indianapolis, IN 46204

Re: Formal Complaint 14-FC-10; Alleged Violation of the Access to Public Records Act by the Indiana Economic Development Corporation

Dear Mr. Segall,

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 Mr. Stephen J. Akard, Esq., Vice President and General Counsel. 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 January 22, 2014.

BACKGROUND

Your complaint dated January 21, 2014, alleges the Indiana Economic Development Corporation violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On November 25, 2013, you submitted to the IEDC a public records request seeking to inspect (among other records):

“all contracts related to incentive agreements signed by IEDC between January 1, 2005 and November 22, 2013 that are NOT included on the IEDC transparency portal as of today’s date.”

The IEDC acknowledged the receipt of your demand and began review of records which may be responsive to your request. On December 23, 2013, the IEDC cited disclosure of information required by Ind. Code § 5-14-3-4(b)(5)(A-B) is maintained on the public IEDC Transparency Portal website. On December 30, 2013, you clarified and indicated to the IEDC, you were seeking signed executed agreements which may not be on the

Transparency Portal. Subsequently, on January 10, 2014, the IEDC responded stating all final offers of such a nature were on the Portal.

However, you suggest in your formal complaint not all of the contracts signed and executed by the State of Indiana are on the Transparency Portal. Some may have been cancelled or amended and replaced with revised final offers. Both parties have cited Public Access Counselor Hoage's *Informal Opinion 12-INF-12*. That particular Opinion focused on your request to the IEDC for a list of cancelled projects. You assert the current instance is distinguishable as you only seek those contracts actually signed and executed by the State of Indiana.

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 Economic Development Corporation 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 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.

The IEDC argues all final offers are indeed available for inspection on the IEDC's Transparency Portal. This is in compliance with Ind. Code § 5-28-28-5(a)(2) and also partially satisfies those seeking specific information under the APRA. Conversely, the Transparency Portal does not relieve the IEDC off all its public access requirements. Ind. Code § 5-28-28 *et. al.* is not an exhaustive list of the information IEDC is required to disclose upon a public records request. *The reporting statute amplifies the APRA, not the other way around as the IEDC implies.*

That being said, the Indiana General Assembly has recognized the importance of maintaining the integrity of the negotiation process between the State and its vendors. Ind. Code § 5-14-3-4(b) mandates the disclosure of the terms of the final offer of public financial resources communicated by the Indiana Economic Development Corporation to a commercial prospect *only after* negotiations have concluded.

The IEDC argues that your request has been satisfied as all final offers have been published to the Portal. Though, it goes on to claim certain contracts and final offers are

periodically amended to reflect changes in the agreements. The IEDC contends the new final offer is published; however, both the amendment and the original agreement as well are on the Transparency Portal.¹ If true, this would negate your complaint alleging the contract process could preclude disclosure of offers as the terms could potentially be altered in perpetuity.

While negotiations are certainly fluid before the execution of a contract or agreement, final offers are just what they purport to be – final. Thus, the inclusion of the original agreement, if in fact published on the portal, satisfies the IEDC’s obligation under Ind. Code § 5-14-3-4(b). It appears as if the IEDC’s actions in this regard are consistent with best practice. Once a contract is executed it is final, merely *subject* to amendment. Amendments do not undo the finality status of an accepted offer – they create a new agreement. Negotiations may resume in efforts to amend a final contract – and those negotiations would be confidential – although the original final offer must be disclosed as well. Yet, I have no evidence before me to suggest the IEDC withholds contracts merely because terms can be changed.

Additionally, you suggest “[t]here are currently hundreds of projects for which the ‘terms of the final offer communicated by the IEDC after negotiations with prospects have terminated’ but have not been disclosed by the IEDC. You have clarified in a telephone conversation you only seek those contract which have been signed and executed by the State of Indiana. If signed and executed contracts exist which extend public financial resources – *regardless of their status* – they must be disclosed. While Ind. Code § 5-28-28-5(a)(2) requires the IEDC to publish a report online of incentive agreement approved and reported, it does not require the publication of those signed, executed contracts which did not come to fruition for whatever reason. *Therefore, I disagree with IEDC’s assertion that the Transparency Portal requirement is somehow more exhaustive than the APRA.*

The term “final offer” is not defined in statute or Indiana case law for the purposes of Ind. Code § 5-14-3-4, however, it certainly can be reasonably concluded a final offer is included in any agreement wherein both parties have accepted terms involving public financial resources. From its response, as well as the statements in *Informal Opinion 12-INF-12*, the IEDC suggests the disclosure of non-active or cancelled agreements may compromise the integrity of future negotiations with that company. By that logic, all cancelled or rescinded final offers could be resurrected with a business prospect indefinitely. It should be noted the APRA contemplates successful and unsuccessful negotiations alike. If a final offer was extended, those terms are subject to public inspection.

Moreover, in the prior Opinion, IEDC argues the disclosure may place the company at a competitive disadvantage in their respective industry or when negotiating with the State of Indiana in the future. This Office recognizes there may be instances when this is the case, but to put forth a blanket statement declaring the disclosure of all cancelled contracts prejudicial to attracting commerce or chilling future negotiations is

¹ IEDC Response Pg 3.

questionable. *Informal Opinion 12-INF-12* uses the example of cancelled projects where there is an expectation of resurrecting negotiations with that particular business prospect. There may very well be instances in which this is the case, nonetheless, this expectation cannot be extended to *all* cancelled projects where a final offer was extended.

If there are instances where there is a signed executed contract between the state and a commercial prospect which includes in its terms public financial resources, the contract must be disclosed. It matters not if the information is placed on an online portal or maintained in some other way by an agency. The IEDC concedes citizens are entitled to information as to how their tax monies are spent. *But they are also entitled to information as to how their public officials and agencies operate* insofar as it does not hinder the agency's ability to carry out its appointed duties.

I decline to find a violation of the Access to Public Records Act by the Indiana Economic Development Corporation, as I do not have enough information before me to make a conclusive determination. Certainly not all negotiations and final offers come to fruition in the form of a contract. Likewise, it can be reasonably concluded not all contracts are honored. If there are signed, executed documents extending a final offer of public financial resources, they are not negotiation material and must be made available pursuant to Ind. Code § 5-14- 3-4(b)(5).

Regards,

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

Luke H. Britt
Public Access Counselor

Cc: Mr. Stephen J. Ackard, Esq.