



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

February 17, 2015

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

Re: Formal Complaint 14-FC-331; Alleged Violation of the Access to Public Records Act by the Indiana Economic Development Corporation and the Indiana Economic Development Foundation

Dear Mr. Segall,

This advisory opinion is in response to your formal complaint alleging the Indiana Economic Development Corporation ("IEDC") and the Indiana Economic Development Foundation ("IEDF") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The IEDC/IEDF has responded via Mr. Bryan H. 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 December 31, 2014.

BACKGROUND

Your complaint dated December 31, 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 July 10, 2014, you submitted an access to public records act request to the IEDC seeking the following information:

All documents that show the specific sources and amounts of income – including all gifts, grants, contributions, membership fees and donations from private and public sources – obtained by IEDF from January 1, 2005 to July 9, 2014

All documentation that shows expenses incurred by IEDF from January 1, 2005 to July 9, 2014.

IEDC produced a portion of the documentation, however, also redacted or withheld a significant amount of information. Chiefly, the IEDC states it had:

Identified records related to confidential financial information, including banking information, and Social Security numbers, as well as, records relating to ongoing negotiations between the IEDC and commercial prospects, all of which are subject to redaction, under the Indiana Access to Public Records Act...

Your primary contention is IEDC has broadly interpreted “negotiations” to encompass information related to networking, hospitality and socialization. This includes information on meals, refreshments for meetings, sporting events, and locations of cocktail receptions, hosts, attendees, etc.

The IEDC responded initially to your complaint and consented to release certain information, however, withheld other items due to the information being germane to the negotiation process of which release is discretionary under the APRA.

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).

It would be counter-intuitive to address each and every subset of records listed in the correspondence between the parties since the filing of your complaint. This Opinion would also be significantly lengthy were I to do so. The operative argument boils down to whether the definition of “negotiation” encompasses information in documentation relating to networking-type activities.

IEDC courts all kinds of individuals and entities in order to effectuate their mission of bringing jobs and economic stimulus to Indiana. In doing so, it is true they are granted a significant amount of flexibility by the APRA when it comes to carrying out negotiations. In my dealings with IEDC, I know them to make good faith efforts to perform their duties as transparently as they deem possible.

So while IEDC is set apart to an extent due to the nature of its existence, it is still a government actor and accountable to the public. It is still subject to the Access to Public Records Act. Access to its information is critical in order for the public to scrutinize its activities and operations – to a practical degree.

The Public Access Counselor is not a subject matter expert on economic development, so it would be disingenuous of me to attempt to say what is or is not part of negotiations. What I can do, however, is to remind IEDC of a few considerations so the decision to release information can be made in a light consistent with access and thusly my expectations.

Indiana access laws are unique in that they set forth the Legislature's intent in the form of a preamble in section 1. It reads in Ind. Code § 5-14-3-1:

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state 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. Providing persons with the 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. This chapter shall be liberally construed to implement this policy and place 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.

Of particular relevance to this controversy is the portion of the preamble which states "this chapter shall be liberally construed". Accordingly, when an access law is to be liberally construed, its exceptions shall be narrowly constructed. See *Indianapolis Newspapers v. Ind. State Lottery Comm'n*, 739 N.E.2d 144, 154 (Ind. Ct. App. 2000). It may very well be the IEDC can find a definition of negotiation which encompasses mingling and hospitality events. Similarly, it may even make a technical argument such activities are trade secrets. Conversely, WTHR can surely find a definition with a narrower scope. But when it comes to ensuring IEDC - as a servant of the people of Indiana - is complying with the notion that its constituents be fully informed of their activities, perhaps the best course of action is to conservatively construe exceptions to access.

Even though I am skeptical networking and entertainment functions are trade secrets or negotiations, I cannot compel IEDC to release additional information to you. In fact, I believe they have met their burden of proof for nondisclosure. But, I also cannot say definitively they have acted in a light *most favorable* to transparency in this case. I encourage IEDC to reevaluate its decision in accordance with these considerations.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. Bryan H. Babb, Esq.