
OPINION OF THE PUBLIC ACCESS COUNSELOR

STEVEN L. WILMETH,
Complainant,

v.

CITY OF AUBURN,
Respondent.

Formal Complaint No.
18-FC-77

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to the formal complaint alleging that the City of Auburn (“City”) violated the Access to Public Records Act¹ (“APRA”). The City responded to the complaint through attorney W. Erik Weber. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on May 11, 2018.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

Steven L. Wilmeth (“Complainant”), president of Scot Industries, Inc., filed a formal complaint alleging the City of Auburn (“City”) violated the Access to Public Records Act (“APRA”) by failing to provide a contractual agreement between the City and electricity supplier American Electric Power; and three months of bills from AEP to the City.

On April 10, 2018, Wilmeth filed two requests with the City seeking the following records:

1. The agreement in force to supply the City of Auburn with electric power; and
2. The last three months bills for electric power from the organization supplying electric power to the city, such bills should display detailed charges for electric power.

On May 1, 2018, after review, the City released a redacted copy of its contract with AEP and denied Wilmeth’s request for the billing statements. In its denial, the City stated its belief that the invoices from AEP to the City for the purchase of electric power are proprietary and contain trade secrets. Further, the City acknowledged a confidentiality agreement limiting what is disclosable.

As a result, Wilmeth filed an unsigned, undated formal complaint form that provides no narrative and presumably—based on the attached email exchanges between himself and other third parties—asks this Office to extrapolate the grounds for his complaint. Nonetheless, the issue appears to be relatively clear and the complainant had previously indicated the issues to this Office.

For its part, the City disputes that it violated APRA. In its answer, the City argues that the reason for the redactions in the contract and the nondisclosure of the billing invoices is that the information contains proprietary information that is considered a trade secret. The City claims that releasing the entire billing document and contract between Auburn and AEP would be “an impediment to competition and would place AEP at risk of economic disadvantage.”

ANALYSIS

This formal complaint presents an issue of whether the City of Auburn (“City”) over-redacted a public agreement and was justified in withholding the entirety of bills submitted by a vendor to the City.

1. The Access to Public Records Act (“APRA”)

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.” Ind. Code § 5-14-3-1. The City of Auburn is a public agency for purposes of APRA; and therefore, subject to its requirements. Ind. Code § 5-14-3-2(n). Thus, any person has the right to inspect and copy the City’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. Ind. Code § 5-14-3-3(a).

Still, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, 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).⁶ 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).

1.1 Trade Secrets

Under APRA, a public agency may not deny or interfere with the exercise of the right for any person to inspect and copy a public agency's disclosable public records. Ind. Code § 5-14-3-3(a).

A noteworthy exception to the rule of disclosure under APRA is the exception for trade secrets a public agency may receive from third-party vendors and contractors. Records containing trade secrets may be withheld pursuant to Indiana code section 5-14-3-4(a)(4). "Trade secret" has the meaning set forth in Indiana code section 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.

Here, the parties disagree about whether the records the City withheld from disclosure satisfy this statutory definition.

1.2 Contract Redactions and Wholesale Withholding of Bills

The City argues that the contract contains proprietary information so sensitive to the third-party that it rises to the level of a trade secret. Specifically, that the agreement contains formulas and methodology of which, if disclosed, would place the vendor at an economic advantage in its marketplace.

This Office is asked to review documents at all levels of state government and weigh in on whether a piece of information is a trade secret. This agency has become an expert of sorts on the matter. Typically, the documents reviewed are in the form of an appendix or addendum to an agreement. If an RFP calls for methodology, then a portion of the bid may be trade secret, for example. In these cases, the determination is made based upon the uniqueness of the information to the private vendor and how carefully it would normally treat that information.

Rarely is a trade secret embedded in a public contract itself. This is due to an agreement with a public agency being almost universally disclosable. The public has the right to scrutinize a contract and decide whether their public officials are being good stewards of public resources and getting a benefit from the bargain. The money used to pay for a municipally-owned utility (or local distribution) comes from taxpayer's pockets. Someone earned that money and remitted it to the municipality to pay for the public infrastructure. Simply put, the public is entitled to full and complete information regarding the affairs of government and public agen-

cies have a duty under the law to carry out the essential function of providing that information, subject to some exceptions.

Therefore, whenever a public agency enters into an agreement with set terms, agreed-upon consideration, offers and acceptances, the final terms of the contract are disclosable. *See* Ind. Code § 5-14-3-4(b)(5)(B). No confidentiality or non-disclosure clause can bargain away the public's right to know. Those types of legal mechanisms are largely absent from the public procurement process and rightfully so. The utility goes so far as calling it a confidential wholesale contract. This type of secret agreement is not contemplated in Indiana law by and with a public agency.

Thus, the argument that the supplier's "trade secret" was part of reasonable efforts to maintain secrecy fails on its face when they insert or allow it to be inserted into a public document that is commonly considered to be an unequivocally disclosable public record. 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." *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (Ind.1993). There are means no more proper than a request for a public contract.

In any case, it is clear to the casual observer that much more than "rates and calculations" were redacted. Redactions of public documents, in any kind of public record, should be done with precision and accuracy. Big square blocks of black ink will always raise a red flag with this office.

So too with the monthly bills but to a slightly lesser degree. Once again, the money a municipality spends on its commodities is comprehensively disclosable at any level of government in Indiana. That said, the per-unit pricing may indeed carry with it some level of secrecy. To the extent it does, the per-unit price can be withheld, but not the entirety of a bill. Read in harmony with the entirety of the statute, it is not reasonable to interpret the trade secret exception to disclosure to apply to the entirety of a claim, invoice or another demand for public money.

While the determination of whether a piece of information of trade secret is indeed a fact-sensitive conclusion, this Office has rarely, if ever, encountered a public contract redacted to the extent the City has redacted its agreement.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the City of Auburn, to fully fulfill its statutory obligations, should provide the public agreement and the monthly bills with much more precise redactions.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor