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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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ATTENTI US, INC,  
*Complainant,*

v.

INDIANA DEPARTMENT OF ADMINISTRATION,  
*Respondent.*

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Formal Complaint No.  
19-FC-63

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Department of Administration (“IDOA”) violated the Access to Public Records Act.<sup>1</sup> General Counsel John D. Snethen filed a response on behalf of IDOA. 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 August 7, 2019.

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<sup>1</sup> Ind. Code § 5-14-3-1 to 10.

## BACKGROUND

This case involves a dispute over access to records related to a request for proposals (“RFP”) issued by the Indiana Department of Administration on September 25, 2018. The RFP sought proposals for a contract to provide electronic monitoring equipment and services. Attenti US, Inc. (“Attenti”) submitted a proposal to IDOA seeking to continue as the incumbent provider of equipment and services covered by the RFP.

On July 16, 2019, the IDOA awarded the contract to another entity. The next day, Attenti submitted a request to IDOA in accordance with the Access to Public Records Act (“APRA”) requesting access to the following public records related to RFP 19-022:

- (1) A complete copy of Sentinel Offender Services, LLC response including all of the BAFO submission.
- (2) Copies of the written scoring and tabulations from the individual evaluators for all stages of the process
- (3) Copies of summary scoring and tabulations and any worksheets used to calculate the final scores as well as all written notes.
- (4) Copies of summary scoring and tabulations and any worksheets used to calculate the following five categories: Indiana Economic Impact; Buy Indiana/ Indiana Company; Minority Business Participation; Women Business Participation; Indiana Veteran Participation.”

On July 19, 2019, IDOA denied access to items 2 through 4 of Attenti's request on the grounds that the requested records are exempt from disclosure under APRA as inter-agency or intra-agency deliberative materials in accordance with Indiana Code section 5-14-3-4(b)(6).

Attenti contends that it was not seeking deliberative materials. Toward that end, Attenti submitted a revised request to IDOA, seeking only "final score sheets, final scores, final data and related materials used in the scoring of the subject RFP with the names of the evaluators redacted."

On July 31, 2019, IDOA denied Attenti's revised request. IDOA again relied on APRA's deliberative materials exception to disclosure.

The agency asserted that even with the evaluators' names redacted the records still qualify for the deliberative materials exception because the records contain the internal thoughts and deliberations of agency personnel, which IDOA uses to reach a final agency decision.

As a result, Attenti filed a formal complaint with this office.

In essence, Attenti argues that IDOA's refusal to produce the scoring records violates APRA. Specifically, Attenti asserts that the scoring records are not deliberative, but rather are part of the final tabulations and calculations that went into IDOA's award. Attenti contends that shielding the final scores from review fundamentally misapplies the deliberative materials exception.

IDOA disputes Attenti's claim that the agency violated APRA by withholding the requested records. Essentially,

IDOA argues that evaluator scorecards, even with names redacted, qualify under APRA's deliberative materials exception because the scorecards serve as a proprietary deliberative tool based on the subjective opinion of agency personnel, and are used by IDOA to decide which bid proposal is in the state's best interest.

### ANALYSIS

The primary issue in this case is whether the evaluator scoring records, with individual evaluator names redacted, qualify as deliberative materials under the Access to Public Records Act.

#### 1. The Access to Public Records Act ("APRA")

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 § 5-14-3-1.5-1.

The Access to Public Records Act ("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.* The Indiana Department of Administration is a public agency for the purposes of APRA; and thus, subject to the act's requirements. Ind. Code § 5-14-3-2(n). Unless otherwise provided by statute, any person may inspect and copy the IDOA's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Under APRA, “public record” means:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Here, the records requested by Attenti are public records for purposes of APRA. Although public records are presumptively disclosable, APRA contains both mandatory and discretionary exceptions to the general rule of disclosure.<sup>2</sup>

This case involves the applicability of one of APRA’s discretionary exceptions to disclosure: the deliberative materials exception.

## **2. APRA’s Deliberative Materials Exception**

The crux of this dispute is whether APRA’s deliberative materials exception applies to the scoring records requested by Attenti if IDOA redacts the names of the individual evaluators.

APRA gives a public agency discretion to deny disclosure to the following:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a

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<sup>2</sup> Ind. Code § 5-14-3-4(a) and (b).

contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). Here, the IDOA denied disclosure of “final score sheets, final scores, final data and related materials used in the scoring of the subject RFP with the names of the evaluators redacted” in accordance with the deliberative materials exception.

Attenti argues the exception does not apply, in part, because the final scores ascribed by evaluators are not deliberative but rather are final values that arise after the evaluator’s work is done.

This office has indeed posited that raw data or numbers will rarely qualify as deliberative material, especially in the aggregate. That is a contextual determination, however. Methodology, formulation and procedures used in decision making are part of the deliberative process. To the extent IDOA relies on the evaluations as part of its systemic appraisal of bids – which appears to be the case – the valuations can be deliberative and meet the definition of the statutory exemption.

The scoring and tabulation are inherently speculative and based upon the subjective estimates and determinations of individual assessors. Therefore the materials in question are deliberative.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that the Indiana Department of Administration did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LHB', with a long horizontal flourish extending to the left.

Luke H. Britt  
Public Access Counselor