OPINION OF THE PUBLIC ACCESS COUNSELOR

ALEXANDRA WELIEVER,
Complainant,

v.

PURDUE UNIVERSITY,
Respondent.

Formal Complaint No.
20-FC-171

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging Purdue University violated the Access to Public Records Act.[1] Legal Services Coordinator Kaitlyn Heide filed an answer on behalf of Purdue. 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 December 10, 2020.

[1] Ind. Code §§ 5-14-3-1–10.

BACKGROUND

This case involves a dispute over the access to Purdue University's food services contract and a settlement agreement with a student.

On June 2, 2020, Alexandra Weliever (Complainant) submitted a public records request to Purdue seeking the contract between the university and food services vendor Aramark. On November 12, 2020, Purdue provided Weliever a heavily redacted copy of the contract. Purdue contends that the redactions are based on the disclosure exemption for trade secrets under the Access to Public Records Act (APRA).

Weliever argues the redactions are overbroad.

Purdue responded by explaining its process of reaching out to third party contractors to identify any sensitive proprietary material that may need redacted before disclosure. Aramark indicated those portions and Purdue contends it acted accordingly with the standards set forth by this office and statute.

Weliever also requested a settlement agreement between Purdue and a student stemming from a United States District Court case. Purdue denied the request for the settlement agreement in accordance with the Family Educational Rights and Privacy Act (FERPA).

As a result, Weliever filed a formal complaint on December 10, 2020.

For its part, Purdue responded by justifying its application of APRA's trade secret exemption and FERPA.

ANALYSIS

1. The Access to Public Records Act

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." Ind. Code § 5-14-3-1. Purdue University is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy Purdue's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, 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).

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).

2. Proprietary information of a third party

Indiana law recognizes the value of protecting proprietary information and trade secrets. APRA allows redaction in accordance with Indiana Code section 5-14-3-4(a)(4), which exempts trade secrets from disclosure.

While not defined in the Title 16 provisions, "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.

Based on this statutory definition, Indiana courts have long held that a trade secret has four general characteristics: 1) it is information; 2) that derives independent economic value; 3) from not being generally known, or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and 4) that is the subject of efforts, reasonable under the circumstances, to maintain its secrecy. *See Ackerman v. Kimball Int'l, Inc.*, 634 N.E.2d 778, 783 (Ind. Ct. App. 1994), *vacated in part, adopted in part*, 652 N.E.2d 507 (Ind. 1995). *See also Bridgestone Americas Holding, Inc. v. Mayberry*, 878 N.E.2d 189, 192 (Ind. 2007) (stating that "[u]nlike other assets, the value of a trade secret hinges on its secrecy. As more people or organizations learn the secret, [its] value quickly diminishes").

At the same time, Indiana courts have observed trade secrets to be "one of the most elusive and difficult concepts in law

to define." *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (1993). Even so, our courts have concluded that information is not a trade secret if it "is not secret in the first place--if it is 'readily ascertainable' by other proper means." Notably, the *Amoco* court held: "The threshold factors to be considered are the extent to which the information is known by others and the ease by which the information could be duplicated by legitimate means." *Id.* What is clear is the courts will scrutinize a trade secret claim by its individual uniqueness and proprietary exclusivity. This office follows suit in that regard.

As a practice, Purdue will reach out to a vendor or contractor pursuant to a public record request in order to seek input on any sensitive proprietary information that may need to be redacted. Per recommendations of this office, the Indiana Department of Administration does the same. *See Informal Opinion of the Public Access Counselor*, 18-INF-6 (2018).

That does not imply that the public agency simply take the third party's word for it. The information must also fit the definition of a trade secret. A private sector contractor, likely unfamiliar or even dismissive of APRA, may naturally be territorial of all of its information and not just the material that is truly secret under the law. This is why a public agency should accept those suggestions with a measure of scrutiny.

What is clear, however, is that the extension of public resources is always disclosable. The bottom line of a contract and its substantive terms between a public agency and a private third-party should be revealed without question.

It is difficult to imagine a more rote and ordinary contract than that a food services agreement. While per unit pricing might qualify as trade secret, nothing in the agreement would likely disclose any patterns, process flow, strategy, or secret proprietary methodology putting Aramark at an economic disadvantage. State contracts rarely do. Aramark should have known full well that engaging in an agreement with a public university would create public documentation. Such is the cost of doing business with a public entity.

Purdue should revisit its redactions.

3. Settlement agreements and FERPA

Similarly, settlement agreements often extend public resources. If there are financial terms to an agreement, it must be disclosed.

Indeed, an agency is prohibited from granting access to inspect and copy a public record that is declared confidential pursuant to federal law. *See* Ind. Code § 5-14-3-4(a)(3).

The Family Educational Rights and Privacy Act (FERPA) is administered by the Family Policy Compliance Office, a division of the United States Department of Education. FERPA applies to educational agencies and institutions that receive funding under any program administered by the USDOE. *See* 34 CFR 99.1.

FERPA operates to classify all "education record[s]" as confidential: "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records or personally identifiable information contained therein…." 20 U.S.C. § 1232g(b)(1).

Purdue claims the settlement agreement is not a court record, yet it is an immediate result of litigation in the United States District Court of Northern Indiana. Notice was given to the court of the settlement agreement in July 2020 *with the student's name in the caption.* The pleadings in the case are publicly available and presumably contain much of the information contained in the agreement.

This office is overwhelmingly confident that the USDOE would not consider it a systemic practice of violating FERPA if settlement agreements stemming from publicly-facing litigation are disclosed pursuant to a public records request.

FERPA is famously misapplied in an inappropriate manner by some schools and universities. While some redactions may be appropriate to protect educational considerations, the involvement of a student in an agreement does not make the entire document off-limits. *See Opinion of the Public Access Counselor*, 20-FC-37 (2020). Purdue should revisit the document accordingly.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Purdue University violated the Access to Public Records Act. Purdue should review its redactions of the food service contract and provide the substantive portions of the settlement agreement in question.

Luke H. Britt
Public Access Counselor