
OPINION OF THE PUBLIC ACCESS COUNSELOR

CHOU-IL LEE,
Complainant,

v.

INDIANA DEPARTMENT OF ADMINISTRATION,
Respondent.

Formal Complaint No.
20-FC-80

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Department of Administration violated the Access to Public Records Act.¹ General Counsel John Snethen filed a response to the complaint. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on June 3, 2020.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over access to materials related to the request for proposals process administered by the Indiana State Department of Administration (IDOA).

On May 26, 2020, Edward L. Stubbers, Vice President of Legal and General Counsel for CareSource filed a public records request with the IDOA seeking the following:

[a]ll records and solicitation files associated with RFP 20-041.

On the same day, IDOA acknowledged the request but cautioned that score sheets, evaluator's names, notes and related materials would be withheld as deliberative material.

Mr. Lee, outside counsel for CareSource, emailed Mr. Snethen of IDOA arguing that the score sheets and related material would compromise the ability of CareSource to file an adequate Award Recommendation Protest – a mechanism through which unsuccessful bidders can ask IDOA for reconsideration based on certain factors. Mr. Snethen confirmed those materials would not be provided.

Mr. Lee then reached out to the public access counselor who compared the situation to *Opinion of the Indiana Public Access Counselor 19-FC-63* wherein the PAC opined that while raw data and rote numerical scoring is typically not considered deliberative, in the context of the RFP process, it can be and ratified IDOA's position.

Lee filed his complaint on June 2 disagreeing with that position and supplying an additional argument that CareSource cannot reasonably submit a successful protest without the information requested.

For its part, IDOA submitted a response detailing how the procurement process works internally and why the process is deliberative in nature, including the materials that result from that process.

ANALYSIS

The key issue in this complaint is whether the Access to Public Records Act requires the Indiana Department of Administration to release RFP score sheets and evaluator's names to the requestor.

1. The Access to Public Records Act

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.

The Access to Public Records Act (APRA) says "(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.*

There is no dispute that the Indiana Department of Administration is a public agency for the purposes of the APRA; and thus, subject to the law's disclosure requirements. Ind. Code § 5-14-3-2(q)(6). Therefore, unless otherwise provided by statute, any person may inspect and copy the IDOA's public records during regular business hours. *See* Ind. Code § 5-14-3-3(a). Even so, APRA contains both mandatory and

discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)-(b).

This case involves the application of APRA's deliberative materials exception and this office's interpretation of that subsection of the statute.

2. Deliberative materials

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 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 score sheets, evaluator's names, and related materials used in the scoring of the subject RFP in accordance with the deliberative materials exception.

It is first important to explore the IDOA procurement process itself, which is governed by statute. *See generally* Ind. Code §§ 5-22-1, to -23. Specifically, Indiana Code section 5-22-9-5 lists the materials that must be made publicly available in a register of proposals. While the basis on which the award was made is to be included, the statute does not describe specific materials that are to be published. The criteria and factors for a successful award are set out in the RFP and not set by statute. *See* Ind. Code § 5-22-9-10.

Insofar as that basis is concerned, it is subjective in nature pursuant to Indiana Code section 5-22-9-7(a) in that the award is not necessarily based on a blind objective set of parameters, but can be awarded to the proposal “most advantageous to the governing body.” *See also* Ind. Code § 5-22-18-2(a)(2).

While IDOA does have a Protest Policy for unsuccessful bidders, my understanding is that it is a courtesy and not a statutory requirement. Toward that end, Indiana courts have held that there is no property interest for a losing bidder or a cause of action to review an award.²

Thus, procurement agencies have a significant amount of discretion to award contracts based upon their best interest as a market participant. IDOA’s response to this complaint goes to significant lengths to provide policy reasons as to why the decision to withhold under the deliberative materials exception.

This is not to say CareSource and Mr. Lee’s arguments are not meritorious from a policy perspective, only that IDOA’s position is equally sound from a public access perspective.

In 19-FC-63, I wrote:

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

² *City of Fort Wayne v. Pierce Manufacturing, Inc.*, 853 N.E.2d 508 (Ind. Ct. App. 2006)

estimates and determinations of individual assessors. Therefore the materials in question are deliberative.

I remain unconvinced this position is one that requires revision at this point in time.

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 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor