
OPINION OF THE PUBLIC ACCESS COUNSELOR

EVANSVILLE COURIER & PRESS,
Complainant,

v.

UNIVERSITY OF SOUTHERN INDIANA,
Respondent.

Formal Complaint No.
22-FC-39

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the University of Southern Indiana violated the Access to Public Records Act.¹ Chief Government and Legal Affairs Officer Aaron Trump filed an answer on behalf of the university. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received

¹ Ind. Code § 5-14-3-1-10.

by the Office of the Public Access Counselor on March 14, 2022.

BACKGROUND

This case involves a dispute over access to a copy of an agreement between the University of Southern Indiana (USI) and the Ohio Valley Conference (OVC) that outlines the terms and conditions of OVC's offer of full membership to USI.

On February 10, 2022, Hendrix Magley, a sports reporter with the *Evansville Courier & Press* (Complainant), filed a public records request with USI seeking the following:

All contracts signed between the University of Southern Indiana and the Ohio Valley Conference

USI acknowledged receipt of the request the next day. On February 21, 2022, USI emailed the Courier & Press a redacted copy of the agreement. USI based the redactions on APRA's trade secret exemption.²

On March 14, 2022, the Courier & Press filed a formal complaint alleging USI violated APRA. Specifically, the newspaper argues that the agreement is improperly redacted because APRA's trade secret exemption does not apply.

On April 4, 2022, USI filed an answer to the complaint denying any violation of APRA. It argues the document contains trade secrets as defined by Indiana Code. Notably, at the time of contract negotiations, the Ohio Valley Conference expressed concern that certain provisions, eight in

² Ind. Code § 5-14-3-4(a)(4).

total, met the standards for Indiana’s trade secret exception. USI also conducted an audit of prior PAC guidance to ensure consistency.

USI, vis-à-vis OVC, argues that the conference attracts membership candidates pursuant to the terms and conditions in its admissions agreements and maintains secrecy in order to maintain a competitive advantage over rival conferences. If known, the terms and conditions may jeopardize the conferences ability to attract preferred universities.

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. The University of Southern Indiana (USI) 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 USI’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

This case involves APRA’s trade secrets exemption.

2. Trade secrets

Under APRA, trade secrets are exempted from disclosure. *See* Ind. Code § 5-14-3-4(a)(1).

Notably, by statute, “trade secret” means:

[I]nformation, 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.

Ind. Code § 24-2-3-2. 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”).

USI goes to significant lengths to justify its application of the exception. Insofar as effort is concerned, the university scores high marks for its response.

Even so, this office famously bristles at the existence of trade secrets in agreements and contracts between public agencies and private entities. Reason being that the public, who at least partially contributes to the funding streams of public universities, has the right to scrutinize those agreements to determine if a public agency has received the benefit of the bargain. Toward that end, any substantive terms and conditions should be disclosed (and publicly discussed in a public meeting).

Nevertheless, this office recognizes that partners doing business with public sector agencies do often wish to maintain a competitive advantage within its respective marketplace. Therefore, it will seek to limit exposure within the public records process.

This issue here, at it appears from the information provided, is the extent of the redactions. Approximately half of the agreement is redacted, seemingly the benefits extended to USI by OVC. This would seem to rob the public of critical knowledge needed to evaluate the advantages or disadvantages of OVC over another similarly situated conference. There is a public utility in that kind of knowledge, which APRA recognizes and safeguards.

This is not to say that certain bespoke, unique, and closely held provisions cannot be redacted, but only to the extent necessary to truly preserve the integrity of those secrets and the impact of their disclosure on the cottage industry of conferences soliciting membership. The fact that the conference

is incorporated as a nonprofit and reports to the IRS as a charitable organization only enfeebles its position.

Unfortunately, a limitation of this office in situations like these is the inability to peek past the black ink of redaction to the substantive words beneath. It is not our practice to solicit unredacted copies or make it a requirement of the complaint process.

Therefore, we offer guidance to public agencies to reevaluate redactions through the lens of transparency benefitting the public they serve and not necessarily through those of private sector actors. If the redactions stand, so be it, this office's role ends there. But we would be remiss not to provide counsel in this regard.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the University of Southern Indiana should reevaluate its decision to revisit the portions of the agreement letter consistent with this opinion.



Luke H. Britt
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