STATE OF INDIANA

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April 10, 2012

Stephen J. Akard
Indiana Economic Development Corporation
One N. Capitol, Suite 700
Indianapolis, Indiana 46204

Bob Segall
WTHR-TV
1000 N. Meridian St.
Indianapolis, Indiana 46204

Re: Informal Inquiry 12-INF-12

Dear Sirs:

This informal opinion is in response to the Indiana Economic Development Corporation's ("IEDC") denial of a request for records submitted by WTHR-TV. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

BACKGROUND

On February 8, 2012, WTHR submitted a request for records to the IEDC, requesting in part, the names of the 145 cancelled projects (2005-2010) mentioned in IEDC's 2010 annual report and the number of jobs originally associated with each project. On February 9, 2012, Mr. Akard responded on behalf of the IEDC and acknowledged the receipt of WTHR's request.

On March 9, 2012, Mr. Akard denied WTHR's request in writing, providing that the records that were sought were exempt from disclosure pursuant to I.C. § 5-14-3-4(b)(5) and I.C. § 5-14-3-4.5. Mr. Akard stated:

> "Cancelled projects do not represent situations where there are terms of a final offer with a company. Rather, these are situations in which negotiations have ended, and there are not state resources committed to the project. We further advise that we have chosen to exercise our discretion to exclude the names of each of these projects because disclosure may

> have the potential to jeopardize our negotiating position in securing new deals. Please refer to our annual report which contains the information in the aggregate."

On March 19, 2012, Bob Segall, responded on behalf of WTHR to IEDC's denial and challenged the withholding of the records. Mr. Segall provided that the information requested did not include records that were created while negotiations were in progress. The information requested was prepared in early 2011, long after IEDC's negotiations had ended for each of the projects that had been cancelled. Thus, I.C. § 5-14-3-4(b)(5) is not applicable. Mr. Segall also provided that in January 2011, IEDC General Counsel Shawn Peterson released the names of 66 cancelled and amended projects at the request of WTHR. In 2010, Mickey Maurer, former IEDC President, told WTHR:

> "If you're running [a] company and I'm saying you failed to meet your commitments, headlines being what they are, folks who deal with that company may come up with an adverse opinion of that company, and that's not what we're trying to do here in Indiana. So if a company says it's going to hire 100 folks and it only hires 80, that's not something we want splashed across the headlines. At the same time, everything should be made available to the public that does not jeopardize the ability of the IEDC to do its job and do it right, and letting the public know what projects are dead and which ones failed, that information should be made available."

Further, WTHR does not believe that IEDC's contention that "cancelled projects do not represent situation where there are terms of a final offer with a company" is accurate. Many of the competitive projects cited in IEDC's annual report that are now considered inactive (cancelled) include signed final agreements between the companies and IEDC. WTHR has already reviewed many of those agreements during previous records inspections. The existence of a final agreement and the amount of state resources committed to a project is irrelevant to WTHR's request and as a justification for denial.

Mr. Akard responded to Mr. Segall's March 19, 2012 correspondence on March 23, 2012. Mr. Segall's contention that the names of 145 cancelled projects "was prepared in early 2011 long after IEDC's negotiations had ended," is factually incorrect and reflects a serious misunderstanding of the incentive processes implemented by the IEDC. IEDC negotiates with prospects the general framework of an initial offer of incentives, commonly called a "precommit." The precommit is an initial offer, not a final offer, and when a prospect accepts the preliminary terms, the precommit forms the basis of an accepted project, as disclosed in IEDC's annual report. These projects are sometimes made public, at the discretion of the IEDC, although negotiations remain ongoing. Next, the IEDC negotiates with prospects the contractual, binding terms of an offer of public financial resources. Only upon a fully-executed agreement between the IEDC, the State Budget Agency, and a prospect do those terms reach the state of a "final offer of public financial resources." On occasion, these terms may be revisited and upon mutual agreement renegotiated. The renegotiated terms would serve as the final offer of public

financial resources. Cancelled projects are those for which there is by definition no final offer of public financial resources. They may include projects that accepted a preliminary offer at the precommit stage, but never reached the terms of a final offer of public financial resources. That is the case here as among the 145 cancelled projects that have been sought are many projects that did not reach the stage of a final offer.

In a practical sense, negotiations may reach an impasse or become inactive, but they are philosophically – or legally under the Act – terminate until they result in a final offer of public financial resources. In other words, either there is a negotiation or an agreement. To find otherwise would mean that negotiations are confidential only if they are successful and result in a final offer, after some unspecified period of time. The compilation of a list of cancelled projects was made after the cancellations. However, the contents of the list derive from records made in the course of negotiations and the list constitutes a trade secret of the IEDC and the respective companies. Further, as provided by the APRA, IEDC has discretion to determine when to disclose records reflecting negotiations with a prospect.

As to your quote from former IEDC president, Mickey Maurer, Mr. Maurer qualified his comments with the important admonishment that "[information] should be available to the public that does not jeopardize the ability of the IEDC to do its job and do it right." Releasing details about cancelled projects with resumed or potentially resumed negotiations would certainly jeopardize IEDC's ability to do its job.

Further, the IEDC stands by the statement that "cancelled projects do not represent situations where there are terms of a final offer with a company" despite your disagreement. As previously cited, the term cancelled project includes projects that have never reached a final offer of public resources. Second, those that reached the latter stage have subsequently been declined or terminated offered incentives. In such cases, the terms of a final offer simply do not legally exist. A final agreement is the sole basis for access to records related to negotiations by the IEDC as provided by I.C. § 5-14-3-4.5. In addition, the statute expressly incorporates the primary policy reason behind it: the utilization of "public financial resources." *See* I.C. § 5-14-3-4.5(b). Any other interpretation would jeopardize the confidentiality of negotiations and defeat the policies under the Act, which are designed to protect the State's ability to attract top-notch companies.

Subsequent to Mr. Akard's March 23, 2012 correspondence to WTHR, he submitted a request for an Informal Opinion from the Public Access Counselor's Office. Mr. Akard provided the IEDC would be happy to provide the list in question for an in-camera review and reiterated IEDC's position regarding the denial.

On March 23, 2012, Mr. Segall responded to IEDC, reiterated WTHR's contentions regarding IEDC's denial. In addition, Mr. Segall noted that IEDC conceded that the list of cancelled projects and associated project job-numbers was made after the cancellations. Therefore, the record was not created while the negotiations were in progress, which is a prerequisite for claiming exemption under I.C. § 5-14-3-4(b)(5).

IEDC cannot claim the names of the companies and their projected job numbers are a trade secret when that very same and specific information was published in its annual reports from 2005 – 2010. The statute does not provide that records may be denied if they were "derived" from other records made during negotiations. Mr. Segall acknowledges that the IEDC is not required to create a list pursuant to the APRA, but here a list has already been created. IEDC cannot set a double standard by claiming the names of companies and their projected totals are public information at one point, and then claiming that the same information is a trade-secret several months or years later.

WTHR is not seeking the names of cancelled projects related to companies that were never publically released by the IEDC due to incomplete or failed negotiations. WTHR is seeking the names of the companies/projects that have already been released publically by the IEDC in its annual reports. The request does not seek trade secret or privileged information, or anything that is allowed to be exempted under the law.

On March 30, 2012, Mr. Akard provided further information regarding WTHR's request and IEDC's denial. Since its inception, IEDC has published an Annual Report. The report is public at IEDC's discretion, and not mandated by law. In the report, it lists protected job commitments from companies that have selected Indiana as a place to grow their business. Specifically, the list includes companies that have either entered a final agreement with the IEDC for incentives to choose Indiana or have entered a preliminary agreement with the IEDC, in a given calendar year. Updated information about projected job commitments is voluntarily provided in the aggregate in the Annual Report in the form of a graphic display of adjusted projected job commitments to reflect deductions made for cancelled projects. WTHR request seeks a list of the cancelled projects referenced in the Annual Report.

IEDC's denied IEDC's request citing I.C. § 5-14-3-4(b)(5) and I.C. § 5-14-3-4.5. IEDC position is that negotiations remain ongoing for cancelled projects and public policy supports the protection of such information when the loss of prospective jobs in Indiana is at stake and no public financial resources are at issue. WTHR has assumed that cancellation means negotiations have ended and that a list of cancellation could not have been made while negotiations are in progress. The assumption is incorrect. Cancellation may in fact be the start of a renewed round of negotiations. WTHR has offered no information to the contrary. Instead, WTHR seems to suggest that once the IEDC identified companies in its Annual Report, the IEDC is obligated to provide additional information specific to those companies in the future. This assumption ignores the fact that the Annual Report itself is discretionary and the Act provides for such discretion and only compels release "of the terms of the final offer of public financial resources." *See* I.C. 5-14-3-4.5.

As to WTHR's contentions regarding trade secrets; the trade secret is not the name of the companies but the compilation of information by the IEDC, which the IEDC can then analyze. It would not be in the public interest for the analytical procedures of the IEDC to be made known to competitors. Nor would it be in the public interest for information about specific cancellations to be made known if the disclosure of the

information could result in companies deciding not to continue to negotiate with the IEDC and locate jobs in Indiana. Further, WTHR offers no dispute that cancellation information could be a trade secret of a company involved, in addition to the IEDC.

In response to Mr. Akard's March 23, 2012 correspondence, WTHR maintains that the IEDC repeatedly stated that negotiations remain ongoing for cancelled projects without providing an ounce of evidence to support this statement. While it is possible that cancellation may mean any number of things, suggesting situations under which the information may qualify for exemption under I.C. §§ 5-14-3-4(b)(5) and 5-14-3-4.5 does not show substantial proof that these situations exists. IEDC's argument appear to be that any cancelled project may be removed, and thus negotiations never end which has the affect of going beyond the exception allowed by the APRA.

IEDC's contention that the Annual Report is discretionary, conflicts with the requirements of I.C. §§ 5-28-28 and 5-28-28-6. Further, IEDC provides no evidence to back the position that a company not receiving financial resources is not subject to disclosure and that the compilation of company names for cancelled projects constitutes a trade secret. Lastly, even in situation in which a company eventually does not receive any financial resources form the state, the IEDC does expend public financial resources through staff time and resources spent in negotiating with such companies, time and resources which are paid for by Indiana taxpayers.

ANALYSIS

The public policy of the 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." *See* I.C. § 5-14-3-1. The IEDC is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the IEDC's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the IEDC responded to your initial request for records within seven (7) days of its receipt.

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible

for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

> Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. (emphasis added). *Opinion of the Public Access Counselor 01-FC-47.*

There is no dispute that the records that have been requested are "public records" pursuant to the APRA. *See* I.C. § 5-14-3-2(n). The IEDC has cited to two exceptions found in the APRA that allow the Department discretion to produce the records in response to a public records request. The Department would satisfy its obligation in responding to a formal complaint filed with the Public Access Counselor's Office by complying with section 9(c) of the APRA. If, however, the matter proceeded to litigation before a court, who would be allowed to conduct an in-camera review, the burden of proof would be on the Department to sustain the denial of access to the records that were requested. *See* I.C. § 5-14-3-4(f); *Opinion of the Public Access Counselor 09-FC-285.*

At the outset, it is apparent that the IEDC and WTHR significantly disagree on a number of factual issues related to WTHR's request and IEDC's denial. Further, both parties have alleged that the other has failed to provide the necessary factual or evidentiary support. It is important to note that the public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.*

I.C. § 5-14-3-4.5 provides the following:

> (a) Records relating to negotiations between the Indiana economic development corporation and industrial, research, or commercial prospects

> are excepted from section 3 [IC 5-14-3-3] of this chapter at the discretion of the corporation if the records are created while negotiations are in progress.
> (b) Notwithstanding subsection (a), the terms of the final offer of public financial resources communicated by the corporation to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.
> (c) When disclosing a final offer under subsection (b), the corporation shall certify that the information being disclosed accurately and completely represents the terms of the final offer. I.C. § 5-14-3-4.5

The IEDC also cited to I.C. § 5-14-3-4(b)(5) in denying your request. I.C. § 5-14-3-4(b)(5) provides that records created while negotiations are in progress between the IEDC and industrial, research, or commercial prospects, are exempt at IEDC's discretion. I.C. § 5-14-3-4(b)(5). Further, I.C. 5-14-3-4(b)(5)(b) requires that, notwithstanding clause (A), the terms of the final offer of public financial resources communicated by the IEDC shall be available for inspection and copying under section 3 of the APRA after negotiations with that prospect have terminated. *Id.*

I am not aware of any decision rendered by either the Indiana Supreme Court or the Indiana Court of Appeals that has addressed I.C. § 5-14-3-4.5 or I.C. § 5-14-3-4(b)(5). In my review of previous advisory opinions issued by this office, 09-FC-102 is the only opinion that has discussed the application of I.C. § 5-14-3-4.5 and I.C. § 5-14-3-4(b)(5) as it pertains to the IEDC. *See Opinion of the Public Access Counselor 09-FC-102.* In that opinion, a request was made of the IEDC for records relating to its work with Nestle USA, Inc. *Id.* In response to the request, IEDC provided copies of several records, but denied others citing I.C. § 5-14-3-4.5(a) and I.C. 5-14-3-4(b)(5)(A). *Id.* IEDC's maintained that it was entitled to withhold from disclosure records created during negotiations with a prospect until negotiations have ceased. *Id.* Further, even after negotiations are completed, the IEDC is only required to disclose terms of its final offer. *Id.* Counselor Neal provided the following analysis:

> As the IEDC explains, it is currently still involved in negotiations with Nestle regarding the projects for which you have requested records. Subsection (a) of I.C. § 5-14-3-4.5 affords the IEDC the discretion to withhold from disclosure all records related to ongoing negotiations. When negotiations have terminated, the IEDC is required to make available for inspection and copying *the terms of the final offer of public financial resources communicated by the corporation.* See I.C. § 5-14-3-4.5(b), emphasis added. Here, the IEDC is still involved in negotiations with Nestle, so subsection (a) allows the IEDC to withhold from disclosure all records relating to the negotiations. When the discussions have terminated, the IEDC will be required

> by subsection (b) to make available for inspection and copying only the terms of the final offer of public resources; the IEDC is not required to make available any other records related to the negotiations if those records were created while the negotiations were in progress. To the extent any records related to negotiations were made outside of the time the negotiations were in progress, those records would be disclosable after the negotiations have terminated, unless another exception to disclosure applies.
>
> For the foregoing reasons, it is my opinion the IEDC has been granted by the Indiana General Assembly broad discretion to withhold from disclosure records relating to negotiations so long as those records were created while the negotiations were in progress. Because the negotiations related to this project are currently in progress, I do not here provide a detailed analysis regarding the several other exceptions to disclosure asserted by the IEDC. I would note, though, that in my opinion the IEDC has demonstrated in its thorough response to the complaint that it would be able to bear the burden of proof to sustain the denial of access to the records even after the negotiations have terminated. *Opinion of the Public Access Counselor 09-FC-102.*

WTHR has sought a list of the 145 cancelled projects referenced in the aggregate in the IEDC's 2010 Annual Report. The IEDC maintains that negotiations remain ongoing for the cancelled projects. The IEDC provides that WTHR has incorrectly assumed that cancellation means negotiations have ended and that a list of cancellations could not have been made while negotiations are in progress. Further, cancellation may in fact be the start of a renewed round of negotiations. In response, WTHR maintains that the IEDC has failed to provide any evidence to support the contention that negotiations remain ongoing for cancelled projects. While it may be possible that in some cases, negotiations are ongoing, WTHR has cited to previous cancelled projects where there are not renewed negotiations or considering new terms of offer. It is my opinion that a list of cancelled projects maintained by the IEDC would be considered "a record relating to negotiations" as provided under I.C. § 5-14-3-4.5(a). As such, if the cancelled project list was created while negotiations were in progress, as the IEDC has maintained that it was, the IEDC could properly exercise its discretion pursuant to I.C. § 5-14-3-4.5(a) and I.C. § 5-14-3-4(b)(5) in denying WTHR's request. However, if the list was not created while negotiations were still in progress, then the IEDC could not properly cite to subsection (a) in denying WTHR's request.

Both parties argue the facts and importance of a previous disclosure made by the IEDC of a similar cancelled projects list in 2011. WTHR maintained its previous request sought the names of "66 cancelled and amended projects." IEDC advised that the

previous request sought, "the names of the 66 projects IEDC announced between 2005 and 2008 that IEDC determined were not moving forward . . ." Regardless, neither I.C. § 5-14-3-4.5 or I.C. § 5-14-3-4(b)(5) would make a cancelled projects list confidential. The IEDC would have discretion to provide the records in response to a request pursuant to section 4.5 or subsection 4(b)(5) of the APRA. The Indiana Court of Appeals has recognized that a public agency may waive an applicable APRA exception if the agency allowed access to its material to one party and denied access to another based on an APRA exception. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003). However, that decision would be applicable to an agency that released certain records and then subsequently refused another individual's request for access to the exact same records; which does not describe IEDC's denial of WTHR's request here.

I.C. § 5-14-3-4(a)(4) provides that "[r]ecords containing trade secrets" are confidential. I.C. § 5-14-3-2(p) defines a "trade secret" as having the meaning set forth in I.C. § 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.

Even after the 1982 enactment of the Indiana Uniform Trade Secrets Act, courts have noted that what constitutes trade secret information is not always clear. *See, e.g., Franke v. Honeywell, Inc.*, 516 N.E.2d 1090, 1093 (Ind. Ct. App. 1987), *trans. denied*. Courts determine whether or not something is a trade secret as a matter of law. *Id.* "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.* "Information alleged to be a trade secret that cannot be duplicated or acquired absent a substantial investment of time, expense or effort may meet the 'not readily ascertainable' component of a trade secret under the Act." *Id.*, citing *Amoco Product. Co. v. Laird*, 622 N.E.2d 912, 919 (Ind. 1993). For example, Indiana courts have afforded trade secret status to a compilation of documents that included customer contact information, manufacturing costs, blueprints and price summaries, as well as a customer list of names not able to be created by means outside the business operations of the list owner. *See Infinity Products, Inc. v. Quandt*, 810 N.E.2d 1028, 1032 (Ind. 2004), *trans. denied*; *Kozuch v. CRA-MAR Video Center, Inc.*, 478 N.E.2d 110, 113-14 (Ind. Ct. App. 1985), *trans. denied*.

Here, the IEDC has provided that as applicable to WTHR's request, the trade secret is not the names of the companies but the compilation of information by the IEDC. IEDC further maintains that it would not be in the public's interest for the analytical procedures of the IEDC to be made known to competitors, nor would information about specific cancellations, if the disclosure of information would result in companies deciding not to negotiate with the IEDC or locate jobs in Indiana. Further, WTHR does not dispute that cancellation information could be a trade secret for the company involved, as well as the IEDC. In response, WTHR provides that IEDC has made a statement for which it offers no proof. Why the IEDC believes that publishing the names of companies that cancelled their preliminary or final agreements (already published by the IEDC) is a trade secret with dire consequences for the state is still a mystery for which the IEDC has yet to explain.

As noted *supra*, the IEDC would satisfy its obligation in responding to a formal complaint filed with the Public Access Counselor's Office by complying with section 9(c) of the APRA; which it has done here by citing to I.C. § 5-14-3-4(a)(4) and providing the name and title of the person responsible for the denial. Before a Court however, who would be allowed to make an in-camera inspection, the burden would be on the IEDC to demonstrate that the records qualified under I.C. § 5-14-3-4(a)(4). *See* I.C. § 5-14-3-9(f); *Opinion of the Public Access Counselor* 01-FC-47. As such, it is my opinion that the IEDC has complied with the requirements of the APRA by issuing a denial that complies with the requirements of section 9(c) of the APRA.

If I can be of any further assistance to either party, please do not hesitate to contact our office.

Best regards,

Joseph B. Hoage
Public Access Counselor