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August 16, 2013

Mr. Jacob C. Elder
Clark County Attorney
501 East Court Avenue, Room 406
Jeffersonville, Indiana 47130

Re: Informal Inquiry 13-INF-41(a); Clark County Commissioners

Dear Mr. Elder:

This amended informal opinion is in response to your inquiry regarding records maintained by the Clark County Board of Commissioners ("Board") and its compliance with the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. Elijah D. Baccus, Attorney, and Bryan Wickens, General Counsel, issued a response to your informal inquiry. Informal Opinion 13-INF-41 was issued on July 16, 2013. Due to a clerical error on my part, notification of your request for an informal opinion was never provided to MAC Construction ("MAC"). To rectify the error, I allowed MAC the opportunity to submit a response and now issue an amended informal opinion.

BACKGROUND

The Board has contracted with an engineering firm to design Star Hill Road. Once the design was completed, the Board received bids for construction. The contract was awarded to MAC. This is a joint project between Clark County and the Indiana Department of Transportation ("INDOT") using federal matching dollars. INDOT maintains a provision that allows the construction bid winner to submit a Cost Reduction Incentive ("CRI"), provided the bid winner follows the procedures established by INDOT. The CRI is made up of engineering designs and pecuniary estimates and is utilized as a mechanism to allow all parties to save money. MAC has prepared and submitted a CRI to the Board for review. As an attorney for the county, you inquire what portion of the CRI is subject to disclosure under the APRA since the CRI has not been accepted by the Board and is merely a proposal at this juncture.

Mr. Baccus represents the Laborers International Union of North America ("LINUA"), who submitted a request for records to the Board for a copy of the CRI submitted by MAC. On or about February 14, 2013, MAC submitted an informal CRI to the Board. At the Board's February 14, 2013 public meeting, a representative from MAC

estimated it would cost $175,000 to develop the formal CRI required by INDOT. The cost of developing the CRI would be split between the Board and MAC, again in compliance with INDOT standards. The Board thereafter approved a proposal to allow MAC to develop the formal CRI.

On March 13, 2013, a representative from LINUA submitted a public records request to the Board for all documents related to MAC's CRI. The Board acknowledged the receipt of the request, in writing, on March 18, 2013. According to Mr. Elder, MAC was instructed to provide an additional copy of the formal CRI in order to allow the Board to satisfy the records request that was submitted. Sometime before June 27, 2013, MAC submitted the formal CRI to the Board and has refused to provide a copy to LINUA, based in part on its belief that the record is not a public record until it is "accepted" by the Board.

Mr. Baccus advised that there is no dispute that MAC has submitted the CRI to the Board; thus there is no question that the CRI qualifies as a public record under the APRA. MAC's argument that a record submitted to a governing body for consideration is not a public record until the record is "accepted" is contrary to the APRA. Nowhere in the definition of "public record" is the word "accepted" referenced. Regardless, the CRI has already been accepted because formal CRI proposals are only required when the concept underlying the informal CRI has been accepted. The Board has already accepted the concepts proposed by MAC in the informal CRI and has agreed to pay $87,500 to allow MAC to develop the formal CRI.

Mr. Wickens advised that MAC does not dispute that the CRI is a public record under the APRA, as the Board maintains a copy of the record. However, MAC would argue that the CRI is a confidential trade secret, which prohibits the Board from disclosing the public record. Further, the Board would retain discretion to disclose the CRI as it would be considered deliberative material under the APRA.

I.C. § 5-14-3-4(a)(4) provides that records containing trade secrets are confidential and may not be disclosed by a public agency. In support of its argument that the CRI would be deemed a trade secret, MAC maintains that disclosure of the record would substantially harm MAC's competitive position and provide an unfair advantage to its competitors. The CRI provides the method and manner by which MAC proposes to perform the work on the Star Hill Project. There are an untold number of ways in which a contractor could perform the work and MAC has set itself apart from other competitors by its creativity and engineering capabilities to design alternative innovative methods for performing work that can often save the state and taxpayers money. The methods, plans, techniques, processes, scheduling, designs, utilization of various resources, equipment, supplies, vendors and proposed changes/modification constitute confidential and proprietary trade secret information that may not be disclosed by the Board. MAC's competitors would relish the opportunity to gain access to such information, knowing they would harm MAC's competitive position. The methods and techniques utilized by MAC are not readily known by others and MAC jealously guards the information maintained in the CRI. If MAC's competitors gained access to the information, they

could utilize aspects of MAC's design to their advantage; they could also derive pricing, methodology, scheduling efficiencies, and various techniques and use it against MAC in future bidding projects. Such information was not required to be provided by MAC to INDOT or the Board. Mr. Wickens further notes that MAC is an open shop/merit shop employer. This is not the first time MAC has had to defend its confidential information from being disclosed as the result of the union attempting to obtain the information via an open records request.

Further, the record would qualify as deliberative material pursuant to I.C. § 5-14-3-4(b)(6). MAC has provided its ideas, recommendations, and proposal for consideration as part of a state sanctioned decision making process. If the materials fall within the exception, the Board has the authority and discretion to withhold the records from disclosure, regardless of whether a decision has been made. The exemption allows private contractors and public agencies the ability to conduct open, accurate, and honest exchanges regarding a proposal or idea and allows the agency to make an objective determination; the exception protects the integrity of the decision making process.

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 Board 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 Board'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 public record is defined as 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. *See* I.C. §5-14-3-2(o). There is no dispute that the Board has received and maintains a copy of the CRI. Accordingly, it is my opinion that upon receipt, the CRI became a public record of the Board. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). MAC maintains that the CRI is prohibited from being disclosed by the Board as it is a trade secret deemed confidential under state law and further, the record would be considered deliberative, which would allow the Board discretion to disclose the record in response to a request.

I.C. § 5-14-3-4(a)(4) provides that "[r]ecords containing trade secrets" are confidential. I.C. § 5-14-3-2(q) 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:
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> (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). 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).

In *Bridgestone/Firestone, Inc. v. Lockhart*, a federal district court analyzing Indiana's trade secret laws held that "knowledge of financial information indicating a company's strengths and weaknesses . . . sales information . . . broken down by product . . . could be helpful to another manufacturer of competing products, especially in highly competitive, relatively fungible products." *Bridgestone/Firestone, Inc. v. Lockhart*, 5 F. Supp. 2d 667, 681 (S.D. Ind. 1997). Such information has been considered protectable trade secrets. *Id.* The fact that competitors could gather information lawfully by investing substantial time and money did not foreclose protection of information as trade secrets. *Amoco*, 622 N.E.2d at 919-20; *See also Opinion of the Public Access Counselor 00-FC-21*. The Indiana Court of Appeals has held that a plaintiff's customer list with pricing information that was not readily ascertainable by the defendants was considered to be a trade secret. *Hydraulic Exch. & Repair v. KM Specialty Pumps*, 690 N.E.2d 782 (Ind. Ct. App. 1998).

In support of its belief that the CRI would be considered a trade secret, MAC cites to the steps taken to develop the information maintained in the record, its efforts to prevent the disclosure, and the benefit obtained by its competitors if the information was made public. MAC maintains that the information is unknown to its competitors, and if disclosed, its competitors would derive significant value from access to the information

and place MAC at a competitive disadvantage. *See also Opinions of the Public Access Counselor 10-FC-305; 12-FC-286; 13-INF-22.* As noted *supra*, Indiana Courts have held that manufacturing costs, blueprints and price summaries have been considered trade secret and granted protection under the law. Based on the foregoing, it is my belief that MAC has made the appropriate showing to demonstrate that information contained in the CRI is considered to be a "trade secret", that it derives economic value from the information, and the company has taken reasonable steps to ensure the confidentiality of the information sought. Accordingly, it is my opinion that the County may not disclose the CRI, as records containing trade secrets are deemed confidential pursuant to I.C. § 5-14-3-4 (a)(4).

Although moot as applicable here, the General Assembly has provided that records that qualify as deliberative materials may be disclosed at the discretion of the public agency. *See* I.C. § 5-14-3-4(b)(6). The subdivision provides that:

> Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a 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. I.C. § 5-14-3-4(b)(6).

Deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1.* Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64.* The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must also be interagency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17.* However, the deliberative materials exception does not provide a pre- and post-decision distinction, so that the records may be withheld even after a decision has been made. *See Opinion of the Public Access Counselor 09-INF-25.*

When a record contains both discloseable and nondiscloseable information and an agency receives a request for access, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1. The Indiana Court of Appeals provided the following guidance on a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.,* 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate dislcoseable from non-dislcoseable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-dislcoseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
>
> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id*. at 913-14.

If the CRI meets the statutory requirements of a deliberative material, the Board would have discretion to disclose the record in response to LINUA's request. The deliberative materials exception does not deem that the public record is confidential; rather, discretion to provide the public record is left to the agency. The decision to disclose discretionary material is left to the public agency, not the Public Access Counselor. Further, if the Board were to deny the request based solely on the deliberative materials exception, it would be required to comply with the requirements of section 6 of the APRA in providing all factual, non-deliberative material maintained in the record.

Please let me know if I can be of any further assistance.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Elijah D. Baccus, Bryan Wichens