STATE OF INDIANA

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August 16, 2013

Jim J. Brugh
204 Fourth Street
Logansport, Indiana 46947

City of Logansport
c/o John R. Molitor
9465 Counselors Row, Suite 200
Indianapolis, Indiana 46240

Re: Informal Inquiry 13-INF-44; City of Logansport

Dear Sirs:

This informal opinion is in response to an issue initially raised in the City of Logansport's ("City") response to a formal complaint filed by Mr. Brugh. *See Opinion of the Public Access Counselor 13-FC-176.* Specifically, the issue concerns whether the City may properly deny or redact Mr. Brugh's request for a copy of a contract entered into by the City and a private vendor. I declined to address the issue in Mr. Brugh's formal complaint in order to allow both parties an opportunity to address the issue. *Id.* Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion.

BACKGROUND

The City is currently engaged in an effort to identify who might be able to make the best offer to the community for the construction of a new power plant. In this effort, Mayor Ted Franklin, City Utilities Superintendent Paul Hartman, and members of the City Council have been holding discussions with various private vendors pursuant to the provisions of the Public-Private Agreement Law (e.g. I.C. 5-23) in the hope that the parties may eventually be able to negotiate an agreement with one or more vendors to build and operate a new plant to serve the City's power customers. In anticipation of this process, the City and its Utilities Board entered into lengthy contracts with a private consulting firm ("Firm") to assist City officials in their efforts.

On June 5, 2013, Mr. Brugh hand-delivered a written public records request to the City, via Mayor Franklin, for a copy of any contract entered into between the City and William-Lynn-James, Inc. and/or Garry Peterson. On June 6, 2013, Mayor Franklin advised in writing that the City had received the request. After having not received any

records responsive to your request, on June 18, 2013 Mr. Brugh filed a formal complaint with the Public Access Counselor's Office alleging that the City had failed to comply with the requirements of section 3(b) of the APRA in providing all records in a reasonable period of time. In response to your formal complaint, the City raised for the first time whether it could properly deny Mr. Brugh's request pursuant to various provisions in state or federal law. On July 18, 2013, I invited the parties to submit written briefs addressing the issue of whether the City could properly deny Mr. Brugh's request for contracts entered into by the City and the Firm. I also noted that if there remained any portion of the records responsive to Mr. Brugh's request that the City believes it does not maintain the authority to redact; the City should promptly provide a redacted copy of the records pursuant to section 6 of the APRA at that time, prior to the issuance of this informal advisory opinion.

Mr. Brugh has provided that he has still yet to receive any record responsive to his request, even after the issuance of the July 18, 2013 advisory opinion. *See Opinion of the Public Access Counselor 13-FC-176.* Mr. Brugh notes that the identity of the Firm's sub-contractors and how much the Firm intends to pay the subcontractors, listed in the contract, is not an issue as the subcontractors have previously been identified by the City and/or Firm and have testified in related public hearings. Mr. Brugh maintains that the subcontractor's hourly rate of pay does not seem propriety to the Firm. The subcontractors advertise for work in their market and there is nothing proprietary what the Firm chooses to pay them. Mr. Brugh cites to case law that would support his contention. *See Weston v. Buckley*, 677 N.E.2d 1089, 1091 (Ind. Ct. App. 1997); *Hackett Life Ins. Co. v. Getche*, 701 N.E.2d 871, 876 (Ind. Ct. Ap. 1998). Information about such rate of pay has no independent economic value. "Alone it is effectively worthless." *Steenhoven v. College Life Ins. Co. of America*, 460 N.E.2d 973, 974 (Ind. Ct. App. 1984). Further, Mr. Brugh notes that there has been no articulation of the advantage gained by the Firm's competitors if their subcontractors and their scheduled rates are learned. Finally, local entities do not enjoy the Indiana Economic Development Commission's statutory shield from disclosures related to negotiations. Mr. Brugh believes that there is reason to doubt that the City Council, which alone has negotiation authority, delegated that authority to Mayor Franklin.

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 City 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 City'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 twenty-four 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 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.

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. *Opinion of the Public Access Counselor 01-FC-47*.

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:
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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). 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*.

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).

As applicable here, I do not believe that the City can deny a request for copies of contracts entered into by the agency pursuant to the trade secret exception found under I.C. § 5-14-3-4(a)(4). The Firm has entered into a contract with a public agency to provide its services. The contract calls for the expenditure of public funds in order to receive the Firm's advice and counsel. As provided by Mr. Brugh, the identity of the subcontractors has previously been disclosed in public hearings held by the City. By entering into a contract for services with a public agency, the Firm should have been aware that the requirements of the APRA would apply. In light of the requirement that the APRA be liberally construed, it is my opinion that the City has not met its burden to demonstrate that the contract would be considered a trade-secret pursuant to I.C. § 5-14-3-4(a)(4).

The General Assembly has also 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.

It is my opinion that a contract for services entered into between a public agency and a private contractor could not be withheld from disclosure pursuant to the deliberative materials exception. While it may be possible that intra- or interagency communications between City employees or officials conducted prior to executing the contract could fall with the exception, the actual contract agreed to by the parties would be comprised solely of factual materials. Contracts by their very nature are not "speculative" and encompass terms agreed to by the parties. As such, it is my opinion that the deliberative materials exception is not applicable to your request for a contract entered into between the City and Firm.

I.C. § 5-14-3-4(b)(5) provides that the following records may be disclosed at the agency's discretion:

> (a) Records relating to negotiations between the Indiana economic development corporation, the ports of Indiana, the Indiana state department of agriculture, the Indiana finance authority, an economic development commission, a local economic development organization (as defined in IC 5-28-11-2(3)), or a governing body of a political subdivision with industrial, research, or commercial prospects, if the records are created while negotiations are in progress.
> (b) Notwithstanding clause (A), the terms of the final offer of public financial resources communicated by the Indiana economic development corporation, the ports of Indiana, the Indiana finance authority, an economic development commission, or a governing body of a public subdivision 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 clause (B), the Indiana economic development corporation shall certify that the information being disclosed accurately and completely represents the terms of the final offer. I.C. § 5-14-3-5.

It is my opinion that the City may not deny your request pursuant to (b)(5) as the contract requested is not a record related to negotiations between a governing body of a political subdivision and an industrial, research, or commercial prospect. There has been no showing that the Firm is an industrial, research, or commercial prospect. As applicable here, the industrial, research, or commercial prospects are those companies that wish to construct the new power plant. The City entered into a contract with the Firm to assist with the expected negotiations; there has been no showing that the City entered into negotiations with the prospective companies prior to contracting with the Firm. Subsection (b)(5) requires that the records be created while negotiations are in progress. Further, to interpret the subsection so broadly so as to allow public agencies to withhold professional services contracts entered into to assist the agency in conducting negations with industrial, research, or commercial prospects would be contrary to the liberal interpretation for disclosure that the APRA requires.

The APRA provides that at the discretion of the agency, diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal. I.C. § 5-14-3-4(b)(7). I do not believe that a contract entered into between a public agency and a private contractor that requires the expenditure of public funds can be withheld pursuant to the diary or journal exception.

Lastly, I.C. § 5-14-3-4(b)(19) provides the following records may be withheld at the agencies discretion:

> (19) A record or a part of a record, the public disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack. A record described under this subdivision includes:
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> (A) a record assembled, prepared, or maintained to prevent, mitigate, or respond to an act of terrorism under IC 35-47-12-1 or an act of agricultural terrorism under IC 35-47-12-2;
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> (B) vulnerability assessments;
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> (C) risk planning documents;
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> (D) needs assessments;
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> (E) threat assessments;
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> (F) intelligence assessments;
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> (G) domestic preparedness strategies;
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> (H) the location of community drinking water wells and surface water intakes;
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> (I) the emergency contact information of emergency responders and volunteers;
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> (J) infrastructure records that disclose the configuration of critical systems such as communication, electrical, ventilation, water, and wastewater systems;
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> (K) detailed drawings or specifications of structural elements, floor plans, and operating, utility, or security systems, whether in paper or

electronic form, of any building or facility located on an airport (as defined in IC 8-21-1-1) that is owned, occupied, leased, or maintained by a public agency. A record described in this clause may not be released for public inspection by any public agency without the prior approval of the public agency that owns, occupies, leases, or maintains the airport. The public agency that owns, occupies, leases, or maintains the airport:

(i) is responsible for determining whether the public disclosure of a record or a part of a record has a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack; and

(ii) must identify a record described under item (i) and clearly mark the record as "confidential and not subject to public disclosure under IC 5-14-3-4(b)(19)(J) without approval of (insert name of submitting public agency)"; and

(L) the home address, home telephone number, and emergency contact information for any:

(i) emergency management worker (as defined in IC 10-14-3-3);

(ii) public safety officer (as defined in IC 35-47-4.5-3);

(iii) emergency medical responder (as defined in IC 35-42-2-6); or

(iv) advanced emergency medical technician (as defined in IC 16-18-2-6.5).

This subdivision does not apply to a record or portion of a record pertaining to a location or structure owned or protected by a public agency in the event that an act of terrorism under IC 35-47-12-1 or an act of agricultural terrorism under IC 35-47-12-2 has occurred at that location or structure, unless release of the record or portion of the record would have a reasonable likelihood of threatening public safety by exposing a vulnerability of other locations or structures to terrorist attack.

Again, I do not believe that the City has met its burden to demonstrate that disclosure of contract requested would lead to the reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack. Based on all that has been provided, it is my opinion that the records requested of the City and Utilities Board are not exempt from disclosure under the APRA and should be promptly disclosed.

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

Best regards,

Joseph B. Hoage
Public Access Counselor