



STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

November 24, 2014

Mr. Brian D. Schneider, Esq. .
1717 K. St. NW
Washington DC 2006

Re: Formal Complaint 14-FC-255; Alleged Violation of the Access to Public Records Act by Purdue University

Dear Mr. Schneider,

This advisory opinion is in response to your formal complaint alleging Purdue University ("University"), violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The University has responded to your request via Ms. Deborah B. Trice, Esq. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor October 24, 2014.

BACKGROUND

Your complaint dated October 24, 2014, alleges Purdue University violated the Access to Public Records Act (Ind. Code § 5-14-3) by inappropriately redacting portions of a public records response.

On August 9, 2014, Purdue University entered into a service contract with Amazon Pickup Points, Inc. ("Amazon"). On August 29, 2014, you requested a copy of all contracts and agreements entered into between Purdue University and Amazon. On October 6, 2014 the University released a copy of the agreement with significant portions of the document redacted. The University did not expound upon why the portions were redacted other than the parties considered them to be trade secrets.

The University responded by claiming it has no obligation to provide detailed information as to what was redacted and why with regard to the issue of trade secrets – only that the parties considered the material to be confidential.

ANALYSIS

The public policy of the APRA states that “a (p)roviding person 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 Ind. Code § 5-14-3-1. Purdue University is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Any person has the right to inspect and copy the University’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

Ind. Code § 5-14-3-4(a)(4) prohibits the disclosure of trade secrets by a public agency pursuant to a public records request unless compelled to do so by a court of law. Under Ind. Code § 5-14-3-2(o), the APRA defines a "trade secret" as having the meaning set forth in the Uniform Trade Secrets Act, Ind. Code § 24-2-3-2(c):

“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.

Indiana Courts have declared trade secrets to be "one of the most elusive and difficult concepts in law to define." See *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (1993). Moreover, the Courts have determined information is not a trade secret if it “is not secret in the first place--if it is 'readily ascertainable' by other proper means." *Id.* The Court in *Amoco* goes on to hold: “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.”

If the University’s assessment of the information is correct, release of the entire un-redacted document would be an impediment to competition and would place Amazon at risk of economic disadvantage. As such, Purdue University may not disclose the information unless ordered to do so by court order under Ind. Code § 5-14-3-4(a)(4).

You are correct the University may not derive independent economic value from the information – public agencies very rarely can claim a trade secret – however, Amazon as a private actor is likely to have sensitive information it would prefer to keep secret from its competitors in the online marketplace and shipping industry. The trade secret exception applies to either party in a public-private agreement.

I have not been afforded the opportunity to review the information *in camera*, nor is the Public Access Counselor a finder of fact. Therefore, I cannot state conclusively if the redacted information is actually a trade secret. This determination would be made by a trier of fact.

As to disclosure, you are likewise correct the requester has no way of knowing whether the information is truly a secret without a more detailed explanation of what is being redacted. Simply put, there is no provision in Indiana statute or guidance in case law to obligate a party to be more specific in their denial.

In fact, the APRA allows public agencies to withhold the entire document if it contains trade secrets. A plain reading of Ind. Code § 5-14-3-4(a)(4) exempts from disclosure *records* containing trade secrets implying the *entire record* would be exempt and not merely the trade secret itself. Conversely, Ind. Code § 5-14-3-6 requires an agency to separate other kinds of confidential material from disclosable records and release the partial record which may be produced.

Purdue has not withheld the entire document in this case and rightfully so. Public-private contracts should be scrutinized in the light of day. However, given that contracts may contain confidential information, Indiana law allows for redaction. It may possibly be the University's determination the information they deem as a trade secret is erroneous, but this Office cannot decide that particular issue based on the information provided.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor that Purdue University has not violated the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'L. H. Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor

Cc: Mr. Deborah B. Trice, Esq.