
OPINION OF THE PUBLIC ACCESS COUNSELOR

LAUREN LORICCHIO,
Complainant,

v.

INDIANA ECONOMIC DEVELOPMENT CORP.,
Respondent.

Formal Complaint No.
19-FC-14

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Economic Development Corporation violated the Access to Public Records Act.¹ Chief Operating Officer Chris W. Cotterill filed an answer to the complaint on behalf of the IEDC. In accordance with Indiana Code

¹ Ind. Code §§ 5-14-3-1 to -10

§ 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on February 6, 2019.

BACKGROUND

This complaint involves a dispute over access to certain records associated with Indianapolis's proposal for Amazon's HQ2 project.

Amazon announced plans to build a new headquarters, known as HQ2, in September 2017. The company invited states, counties, cities, and other localities to submit a response to the corporation's request for proposals ("RFP").

Amazon's RFP called for specifics:

"Identify incentive programs available for the Project at the state /province and local levels. Outline the type of incentive (i.e. land, site preparation, tax credits/exemptions, relocation grants, workforce grants, utility incentives/grants, permitting, and fee reductions) and the amount. The initial cost and ongoing cost of doing business are critical decision drivers."

Amazon received more than 200 proposals in response to the HQ2 RFP, including one from Indianapolis. The Indiana Economic Development Corporation ("IEDC") submitted the proposal to Amazon on behalf of Indianapolis. Amazon included Indy on its shortlist of 20 finalists for the HQ2 project. The company announced the finalists in January 2018.

On November 13, 2018, Amazon announced its decision to split the HQ2 project between two locations: Queens, New

York;² and Arlington, Virginia. Amazon also selected Nashville, Tennessee as its new distribution management hub.

On January 16, 2019, Lauren Loricchio (“Loricchio”), a reporter for *Tax Analysts*³, submitted a written public records request to the IEDC seeking the following:

- (1) access to and copies of Indianapolis’ proposal for Amazon’s HQ2 project;
- (2) all records related to the cost of the proposal including receipts and memos; and
- (3) emails between Holly Sullivan of Amazon and representatives of the IEDC between the dates of October 19, 2017 and November 13, 2018.

On January 23, 2019, the IEDC denied Loricchio’s request. The IEDC cited Indiana Code section 5-14-3-4(b)(5)(A)(i) as the statutory authority for the denial.

As a result, Loricchio, on behalf of *Tax Analysts*, filed a formal complaint with this office disputing the IEDC’s denial as improper under the Access to Public Records Act (“APRA”). Specifically, Loricchio asserts that Indiana Code section 5-14-3-4(b)(5)(B) requires IEDC to release the records she requested because Amazon did not select Indianapolis for the HQ2 project and there is significant national interest in the disclosure of the proposal.

On March 4, 2019, the IEDC filed an answer to Loricchio’s complaint denying the agency violated APRA.

² In February 2019 Amazon rescinded its decision to locate in Queens.

³ Tax Analysts is a Virginia-based nonprofit publisher of weekly magazines and daily online journals on tax policy and administration.

First, IEDC maintains that it has discretion under Indiana Code section 5-14-3-4(b)(5)(A)(i) to exempt the records—including the Indy Amazon proposal—requested by Loricchio because the records relate to negotiations between IEDC and a commercial prospect.

Next, IEDC disputes Loricchio’s claim that Indiana Code section 5-14-3-4(b)(5)(B), which mandates disclosure of the terms of the final offer of public resources communicated by the IEDC to a commercial prospect, requires it to disclose the records she seeks. IEDC maintains that the statute does not apply because there has never been a final offer.

Lastly, IEDC claims the release of the records requested by Loricchio would put Indiana at a competitive disadvantage because other states, prospects, and their advisors would know critical aspects of the state’s negotiating strategies and then use that information against Indiana in the future.

ANALYSIS

The primary issue in this case is whether the Indiana Economic Development Corporation has discretion in accordance with Indiana Code section 5-14-3-4(b)(5)(A)(i) to exempt from disclosure the records requested by Loricchio.

1. The Access to Public Records Act

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1.

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.” *Id.*

To implement this public policy our legislature expressly states that APRA must be “liberally construed...and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.” *Id.*

The Indiana Economic Development Corporation (“IEDC”) is a public agency for the purposes of APRA; and thus, subject to the Act’s requirements. Ind. Code § 5-14-3-2(n); *see also* Ind. Code § 5-28-5-9.

Unless otherwise provided by statute, any person may inspect and copy IEDC’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Under APRA, *public record* means:

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 and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r) Here, there is no dispute that the records requested by Loricchio are public records under

APRA. Instead, the issue is whether the records must be disclosed or if IEDC has discretion to withhold the records from disclosure.

Indeed, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. For instance, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a).

APRA also lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code §§ 5-14-3-4(b)(1), to -(28).

At issue in this complaint is the applicability of one of APRA's discretionary disclosure exceptions.

2. Economic Development Records

At the heart of this complaint are two clauses of the APRA disclosure exception codified under section 4(b)(5). Specifically, the statutes at issue here are Indiana Code section 5-14-3-4(b)(5)(A)(i), and section 4(b)(5)(B).

2.1. Section 5-14-3-4(b)(5)(A)(i)

Under APRA, records relating to negotiations between: the Indiana economic development corporation and an industrial, research, or commercial prospect may be excepted from disclosure at the discretion of the agency, if the records are created while negotiations are in progress. Ind. Code § 5-14-3-4(b)(5)(A).

In other words, APRA expressly bestows the IEDC with the latitude to choose what records, if any, it will release publicly so long as the records satisfy the requirement of “relating to its negotiations with industrial, research, or commercial prospects” and the records are created while negotiations are in progress. Ind. Code § 5-14-3-4(b)(5)(A)(i).

As set forth above, in this case Lorichhio requested various public records from the IEDC relating to the Indianapolis’s Amazon HQ2 proposal:

- (1) access to and copies of Indianapolis’ proposal for Amazon’s HQ2 project; (2) all records related to the cost of the proposal including receipts and memos; and (3) emails between Holly Sullivan of Amazon and representatives of the IEDC between the dates of October 19, 2017 and November 13, 2018.

IEDC relied on section 4(b)(5)(A)(i) in denying Lorichhio’s request. Notably, Lorichhio does not argue that the requested records are not related to IEDC’s negotiations with a commercial prospect or that the records were not created during the negotiations.

From that statute alone, it appears as if ancillary records relating to negotiation—emails, memos, notes, etc.—may be withheld at the discretion of IEDC, if created while the negotiations were in progress.

2.2. Section 4(b)(5)(B).

Another important issue in this case is the applicability of Indiana Code section 5-14-3-4(b)(5)(B), which provides, in relevant part, the following:

Notwithstanding clause (A), the terms of the final offer of public financial resources communicated by the Indiana economic development corporation...to an industrial, a research, or a commercial prospect shall be available for inspection and copying...after negotiations with that prospect have terminated.

Put differently, despite the IEDC's discretion to deny disclosure of the public records created during, and relating to its negotiations with a commercial prospect, the IEDC does not have discretion to withhold from disclosure the terms of the final offer of public financial resources communicated to a commercial prospect after the negotiations have terminated.

Additionally, when disclosing a final offer, the IEDC must certify that the information disclosed accurately and completely represents the terms of the final offer. Ind. Code § 5-14-3-4(b)(5)(C).

Essentially, the gist of the dispute is that Loricchio contends the records she requested must be disclosed by the IEDC under this provision because Amazon did not select Indianapolis for the HQ2 project and there is significant national interest in the proposal. The IEDC, however, asserts that this language does not require disclosure of the records Loricchio requested because it never made a final offer to Amazon.

First, the IEDC relies, in part, on a 2012 Public Access Counselor opinion⁴ to support its claim. There, Counselor Hoage inferred that cancelled projects, i.e. those in which negotiations have concluded, never really involve a final offer because talks could always resume and negotiations resurrected. Hoage reasoned, therefore, an executed agreement must exist in order for a final offer to exist. Even still, the opinion seems to stand for a proposition that even executed contracts are never quite final because the terms, as it relates to the economic development world, are always fungible to a certain degree.

In 2014, I partially disagreed with that position because section (b)(4)(5)(B) does not contemplate an agreement at all. It follows that defining “final offer” as requiring an agreement—with terms that may be perpetually shifting; and thus, not final—would defeat the purpose of section (b)(4)(5)(B) entirely. Granted, I concluded that an executed agreement would be proof positive that a final offer exists in terms of the agreement. Moreover, I found that cancelled projects could also, but not always, entail a final offer of public financial resources to a commercial prospect.

The 2012 opinion also cites policy considerations that “utilization of public financial resources” is the predicate to the public’s right to know the terms of a final offer, however, the statute expressly makes public the terms of the final offer of public financial resources *communicated* to a commercial prospect. The resources offered need not be *utilized*.

⁴ *Informal Opinion of the Public Access Counselor*, 12-INF-12 (2012).

The current situation, while significantly unique, is informed exclusively by the Request for Proposals (“RFP”) set forth by Amazon.

In the HQ2 RFP, Amazon specifically requested a “summary of total incentives offered for the project by the state and local community.” Specifically the RFP included the following:

In this summary, please provide a brief description of the incentive item, the timing of incentive payment/realization, and a calculation of the incentive amount.

Please describe any specific or unique eligibility requirements mandated by each incentive item. With respect to tax credits, please indicate whether credits are refundable, transferable, or may be carried forward for a specific period of time. If the incentive includes free or reduced land costs, include the mechanism and approvals that will be required. Please also include all timelines associated with the approvals of each incentive.

We acknowledge a Project of this magnitude may require special incentive legislation in order for the state/province to achieve a competitive incentive proposal. As such, please indicate if any incentives or programs will require legislation or other approval methods.

Ideally, your submittal includes a *total value of incentives*, including the specified benefit time period.

2.21 Final Offer

The phrase “final offer” is not defined under APRA or in the article of the Indiana Code that governs the IEDC. What is more, there is no appellate case law interpreting this section of APRA.

Still, based on the terms of the RFP, one can comfortably conclude that a bid or proposal submitted to Amazon in response to the HQ2 RFP constitutes an “offer.”

For instance, Indiana Code section 5-22-2-17(a) defines “offer” as a “response to a solicitation,” and a solicitation includes a “bid, proposal, or quote.” Ind. Code 5-22-2-17(b). Moreover, *Black’s Law Dictionary* has defined “offer” to mean:

The act or an instance of presenting something for acceptance.⁵

Here, the more important question is one of finality. The word “final,” in the context of describing the type of offer where the terms must be disclosed under APRA, is not defined.

Presumably, IEDC put forth the best initial proposal possible with the input and assistance of various other groups and municipalities. That proposal was not selected by Amazon to go forward, but it was extended nonetheless.

To be sure, had IEDC’s bid been chosen, negotiations would have continued and the initial (and only) offer would have

⁵ *Black’s Law Dictionary*, 535 (4th pocket ed. 2011).

been further negotiated, terms added, and conditions subsequently attached.

As it stands, however, the initial offer was the only one on the table when the selection of another locality occurred. That makes the initial offer, in no uncertain terms, the last offer.

As noted above, the Amazon RFP called for a preliminary commitment of an incentive package. IEDC does not argue that the bid was mutually exclusive from an extension of public financial resources. Moreover, IEDC does not argue that negotiations could be revived in the future as far as Indianapolis is concerned.

By the plain letter of the law, liberally construing the access statutes as is required by Indiana Code,⁶ the proposal was—or at least contains—a final offer of public financial resources, negotiations had terminated, and there is little question as to whether talks could resume.

But as is almost always the case in matters such as this, the answer is much more nuanced. The Amazon RFP and the bids it invited are presumably an extreme outlier in the economic development world. Although this office is not an expert in matters of economic development and its colloquial terminology, it knows enough that it is usually the government soliciting private business and not the other way around.

In that sense, IEDC is typically the aggressor, tempting private sector business with attractive incentives to invest in

⁶ Ind. Code § 5-14-3-1

Indiana. It decides whether to fish, then baits the hook accordingly. In this case, Amazon provided the pond, the boat, the rod, and the reel; and IEDC—and hundreds others—merely chose the lure.

It stands to reason that when the Indiana General Assembly enacted legislation to add subsection (b)(5) to APRA nearly thirty years ago,⁷ it would not have anticipated Indiana being courted by the largest online retailer on earth. Nor would it have foreseen a “final offer of public financial resources” communicated in this context.

Therefore construing (b)(5) broadly in this particular situation versus traditional IEDC activities might be using a blunt instrument in a situation that requires a little more analytical finesse.

Furthermore, the unsuccessful bid could be a glass slipper that fits another large economic development prospect. It is possible that disclosure of that bid could compromise future projects of a similar magnitude.

Therefore in regard to finality, it is unclear whether the General Assembly intended the bid/proposal/offer in subsection (b)(5) to be an offer in an imminent deal – something closer to a best and final offer, inferring an element of relative permanence – or if “final offer” was intended to include any and all “last” offers as in a sequential order. As there is no case law on the matter, it is equally unclear how a court would define the term.

This Office universally encourages as much government transparency is possible, but acknowledges that concept is

⁷ Public Law 50-1991

not absolute. The uniqueness of this rare kind of offer renders the application of the (b)(5) statute vague. Without judicial precedent or interpretation, enough contextual ambiguity in the statute exists to defer on this Office's drawing of a definitive conclusion or even making a recommendation in this instance.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Indiana Economic Development Corporation did not violate the Access to Public Records Act by denying Loricchio's request for records and emails related to the agency's negotiations with Amazon as a commercial prospect.

Although the proposal that IEDC submitted on behalf of the City of Indianapolis arguably communicates the terms of an offer of public financial resources, this office is not privy to the contents of the proposal and there is no authority defining finality; and thus, declines to conclude, without more, that a violation occurred.

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor