



STATE OF INDIANA

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May 20, 2009

Kevin Blair
51 Cavalier Blvd, Suite 240
Florence, Kentucky 41042

Re: Formal Complaint 09-FC-102; Alleged Violation of the Access to Public Records Act by the Indiana Economic Development Corporation

Dear Mr. Blair:

This advisory opinion is in response to your formal complaint alleging the Indiana Economic Development Corporation ("IEDC") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. A copy of the IEDC's response to the complaint is enclosed for your reference. It is my opinion the IEDC did not violate the APRA by denying you access to confidential or discretionary information contained in the IEDC's records.

BACKGROUND

You allege that more on April 8, 2009 you requested copies of several records maintained by the IEDC. Specifically, you requested access to a number of records related to IEDC's work with Nestle USA, Inc. ("Nestle"). On April 16 the IEDC provided you copies of several records but redacted certain information and omitted certain attachments. You allege that the APRA requires the IEDC to disclose the records.

The IEDC responded to the complaint by letter dated May 7 from attorneys Bryan Babb and Stephen Unger. The IEDC contends the legislature has recognized the need for the IEDC to maintain as private the content and context of negotiations conducted in its efforts to carry out economic development functions. The IEDC provides a detailed explanation of the Nestle projects and the associated records. The IEDC asserts that, pursuant to I.C. § 5-14-3-4.5(a) and I.C. § 5-14-3-4(b)(5)(A), it is entitled to withhold from disclosure records created during negotiations with a prospect until negotiations have ceased. The IEDC further asserts that even after negotiations have terminated, the IEDC is only required to disclose terms of its final offer. The IEDC further cites provisions in I.C. § 5-14-3-4(a), namely subsections (3), (4), (5), and (12), which it contends prohibit disclosure of certain records. The IEDC contends most of the records you have requested fall into one of the asserted exceptions to disclosure. The IEDC explains that it has

exercised its discretion by choosing to disclose some of the records to you even though it was not required to do so.

ANALYSIS

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

The IEDC has denied you access to certain records and information contained in certain other records on the basis of a number of exceptions to disclosure found in the APRA. First among those is I.C. § 5-14-3-4.5, which 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

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.

CONCLUSION

For the foregoing reasons, it is my opinion the IEDC has not violated the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Shawn Peterson, Indiana Economic Development Corporation
Bryan Babb and Stephen Unger, Bose McKinney & Evans LLP