STATE OF INDIANA

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October 29, 2012

Deanna Case
3200 E. CR 350 N
Muncie, Indiana 47303

Re: Formal Complaint 12-FC-286; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Delaware County Commissioners

Dear Ms. Case:

This advisory opinion is in response to your formal complaint alleging the Delaware County Commissioners ("Commissioners) violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq*. and the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq*. Paul L. Jefferson, Attorney, responded on behalf of the Commissioners. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you requested copies of bids for a public works project that has been submitted to the Commissioners. You made the request in person and in writing on September 17, 2012. Both the verbal and written requests were submitted to the County Auditor and the Commissioners. You allege that both agencies stated that it did not have the records that were sought, despite the fact you believe the records had been in each agencies possession on September 14, 2012. Thereafter on September 17, 2012, you received written notification from the County Highway Department that it maintained the records that you had requested. You did not receive the records until approximately seven (7) days later. Upon receipt of the records, you believe that the Commissioners improperly redacted certain information. Specifically, the Commissioners failed to properly apply I.C. § 5-14-3-4(a)(4) & (5). You provide the information that was redacted for the low bidder's bid was provided for all other companies that submitted proposals.

In regards to the ODL, you allege that the Commissioners conducted a bid opening in its regular business meeting for the public works project. The bids were opened and read into the record. You provide that there was a question as to one of the bids that was read and the bidder was allowed to make a clarification. The Commissioners then adjourned the meeting and each individual Commissioner went into the agency's offices. The Commissioners denied access to its offices and after forty-five

minutes, the Commissioners returned to award the project to the bidder that was allowed to make the clarification. You allege that the Commissioners took the documents into its offices for review and discussion. As such, you believe that the Commissioners conducted an improper executive session, as notice was not provided and the executive session was conducted during the middle of the meeting.

In response to your formal complaint, Mr. Jefferson advised that your complaint stems from the award of a bid for a railroad spur contract in Delaware County, Indiana. A properly noticed meeting was conducted on September 14, 2012 in which the Commissioners reviewed and awarded a bid. The federal government, via the Economic Development Association ("EDA") has since approved the Commissioners selection of the winning bidder. Mr. Jefferson provided that you unsuccessfully applied for the bid.

As to the allegation that the Commissioners did not respond to the request within a reasonable period of time, the Commissioners responded to your request on the date of its receipt and you were provided with all documents that were responsive to your request within seven (7) days. As you have alleged, the initial response to your request advised that the documents that were sought were not in the Commissioners' possession. Information contained in the records had to be redacted prior to disclosure. Further, all documents were ultimately provided within five (5) business days of your request which Mr. Jefferson argues cannot be said to be unreasonable considering the nature of your request and the duties of the Commissioners in redacting the necessary information.

As to the information that was redacted as a trade secret or confidential financial information, you were informed, via your attorney that three of the four bidders instructed the Commissioners to exclude or redact certain information contained in the proposals. Your statement that the information was not redacted in any other bids that were submitted is factually inaccurate. As to the RailWorks bid, the Commissioners have enclosed an affidavit from the Vice President of RailWorks, who has confirmed that the redaction was done at RailWorks direction, that RailWorks considers the information to fall within the trade secret and confidential financial information exception, and explains the rationale of the redaction. The fact that three of the four bidders made a similar request and that RailWorks took steps to prevent the disclosure of the requested information, which would put them at a competitive disadvantage if disclosed, all supports the redactions that were made. The Commissioners produced all information that it was allowed to disclose under the law to your request.

As to the alleged ODL violation, Mr. Jefferson provided that your allegation is simply untrue. All business conducted related to the bid was done in a public meeting and a "secret" executive session did not occur. As supported by the affidavits that are provided, only two (2) of the three (3) Commissioners attended any portion of the meeting, at no time did an executive session occur, that the Commissioners went above and beyond their duty to be transparent and comply with Indiana law, and that all business was conducted in a public meeting. While the Commissioners acknowledge the requirements of I.C. § 5-14-1.5-6.1(e) which maintains that a governing body may not

conduct an executive session during a meeting, except as permitted by applicable statute, however, no such executive session occurred as alleged.

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 Commissioners are 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 Commissioners' 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).

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56*; 11-FC-172. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

Here, you provide that the Commissioners failed to comply with the requirements of I.C. § 5-14-3-3(b) in producing the records that were responsive to your request. In response, the Commissioners provided that it responded to your request on the date of its receipt and all records were produced within seven (7) days. The Commissioners noted that information was required to be redacted prior to disclosure and only five (5) business days elapsed from the time of the request and the actual production of records. It is my opinion that the Commissioners have met its burden to demonstrate that it produced all records that were responsive to your request in a reasonable period of time and that it did not violate section 3(b) or 9(b) of the APRA in responding to your request.

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 24 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 (7) 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 include 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. (emphasis added). *Opinion of the Public Access Counselor 01-FC-47.*

In response to your request, the Commissioners cited to I.C. §§ 5-14-3-4(a)(4) & (5) in denying certain information that was part of the records that were disclosed and provided the name and title of the person responsible for the denial. As such, it is my opinion that the Commissioners did not violate section 9(c) of the APRA in response to your request.

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:

(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 support of Commissioners citation to the trade secret exception, it submitted an affidavit of Bill Doris, Vice President and Regional Manager of RailWorks. Mr. Doris provides that the RailWorks provided certain information to the Commissioners under the belief that it would not be made public as said information was a trade secret and confidential financial information. Disclosure of the information would put RailWorks at a competitive disadvantage in that it would allow its competitors to use the information in negotiation with its subcontractors, with other bidding projects, and would reveal certain portions of the company's business and risk management plans. The information that has been redacted has not been disclosed to the public domain and necessary steps have been taken to keep the information confidential.

It should be noted that each company that submitted a bid, the overall base bid and alternate bid were read aloud at the September 14, 2012 meeting and has been made available. From my review of the record, what appears to have been redacted in response to your request is the cost/pricing that RailWorks used to come up with its overall base and alternate bid. This information is not readily available from any other source. You are correct in noting that pursuant to section 9 of the APRA, the burden for nondisclosure of a record falls on the public agency who maintains the record, not the company that has submitted the information. There may well be instances where the public agency disagrees with the company's assessment that the information submitted is considered to be a trade secret. There, the company would be required to receive an injunction from

the trial court in order to prevent the disclosure of the information under the APRA by the agency that maintains it. Here, the Commissioners agreed with the assessment provided by RailWorks. As provided *supra*, the Commissioners cited to the appropriate exception regarding trade secret information in denying your request. It is my opinion that the Commissioners have satisfied the requirements of section 9(c) of the APRA in denying your request and met its burden to show that the information that was redacted would be considered a trade secret pursuant to I.C. § 24-2-3-2.

In addition to the trade secret exception found under (a)(4), I.C. § 5-14-3-4(a)(5) provides that "confidential financial information obtained, upon request, from a person," is considered to be confidential and may not be disclosed. Confidential financial information would *not* include information that is filed with or received by a public agency pursuant to state statute (emphasis added). *See* I.C. § 5-14-3-4(a)(5). The APRA defines a "person" as an individual, corporation, limited liability company, partnership, unincorporated association, or a governmental entity. *See* I.C. § 5-14-3-2(j). However, the phrase "confidential financial information" has not been defined in the APRA. In previous opinions of the counselor, the phrase has been analyzed using the plain meaning of the words used in the statute. *See Opinions of the Public Access Counselor 03-FC-56 and 10-INF-44.* These opinions provide that:

> "The word 'confidential' is defined as "imparted in confidence, secret." *New Illustrated Webster's Dictionary* 211 (1992). 'Financial' is defined as "of or relating to finance." Therefore, 'confidential financial information' means information that is secret relating to finance." *See Opinions of the Public Access Counselor 03-FC-56 and 10-INF-44*.

From my review of the record, the financial information that was redacted consisted of the cost/pricing that RailWorks used to determine its base bid and alternate bid. Neither party has cited to any section of the Indiana Code that would require the company to submit the information pursuant to state law. RailWorks has provided that it has actively taken steps to prevent the disclosure of the information that was redacted. As such, based on the description of the information that was redacted and that said information is not readily available in the public domain, it is my opinion that the Commissioners complied with section 9(c) of the APRA in denying your request pursuant to I.C. § 5-14-3-4(a)(5).

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a).

A "meeting" is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. *See* I.C. § 5-14-1.5-2(c). "Official action" means to receive information, deliberate, make recommendations,

establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). "Public business" means any function upon which the public agency is empowered or authorized to take official action.

The ODL requires that public notice of the date, time, and place of any meeting, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. *See* I.C. § 5-14-1.5-5(a). The notice must be posted at the principal office of the agency, or if no such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices, nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2).

Notice of an executive session must also include a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and the citation to the specific instance; hence, "To discuss a job performance evaluation of an individual employee pursuant to I.C. § 5-14-1.5-6.1(b)(9)" would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39*. Further, a governing body may not conduct an executive session during a meeting, except as otherwise permitted by applicable statute. *See* I.C. § 5-14-1.5-6.1(e). An executive session may not be recessed and reconvened with the intent of circumventing this subsection.

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* You allege that the Commissioners conducted an executive session on September 17, 2012 without providing proper notice and that the executive session occurred during a meeting. You allege that the Commissioners took the bid information into its offices in order to discuss certain issues regarding the bidding process while one of the bidders was seeking clarification regarding its bid. In response, the Commissioners have provided that no executive session or meeting took place, which is supported by affidavits that have been submitted by the Commissioners, legal counsel, and certain employees of Delaware County. As such, it is my opinion that *if* an executive session of the Commissioners was not convened on September 17, 2012, then the Commissioners did not violate the ODL (emphasis added).

CONCLUSION

Based on the foregoing, it is my opinion that the Commissioners did not violate the APRA. Further, it is my opinion that *if* the Commissioners did not convene an executive session on September 17, 2012, then it did not violate the ODL (emphasis added).

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Paul L. Jefferson, Todd Donati