



# STATE OF INDIANA

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## OPINION OF THE PUBLIC ACCESS COUNSELOR

<b>ERIC P. KRIEG,</b>	)	
	)	
<b>Complainant</b>	)	
	)	
<b>v.</b>	)	<b>17-FC-34</b>
	)	
<b>SCHOOL TOWN OF MUNSTER</b>	)	
	)	
<b>Respondent</b>	)	

### **ADVISORY OPINION March 22, 2017**

This advisory opinion is in response to the formal complaint alleging the School Town of Munster (“STM”) violated the Access to Public Records Act (“APRA”), Indiana Code § 5-14-1.5-1 et. seq. The STM responded on February 23, 2017 via Ms. Kathleen M. Maicher, Legal Counsel. Her response is included for review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on February 14, 2017.

### **BACKGROUND**

The formal complaint dated February 14, 2017 alleges the School Town of Munster violated the APRA by denying access to an alleged public record.

On or about January 30, 2017, the Complainant submitted a public records request to the STM for an electronic copy of spreadsheets used to calculate costs of a capital referendum. This document was prepared by the STM’s vendor in anticipation of the decision-making process. The records request was denied on February 14, 2017, as the STM does not consider the spreadsheet a public record, because it was not received by the agency and remained in the custody of the third-party vendor.



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The STM responded by claiming the response is internal work product of the vendor and was not disclosed to STM at any point. It also argues the request was not reasonably particular, as it did not identify a specific document to be disclosed.

## ANALYSIS

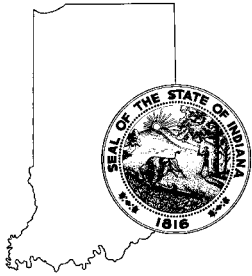
The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." *See Indiana Code § 5-14-3-1*. The School Town of Munster is a public agency for the purposes of the APRA. *See Indiana Code § 5-14-3-2(n)*. Accordingly, any person has the right to inspect and copy the STM's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14-3-3(a)*.

The operative question in this discussion is whether the underlying financial model of a finished product, created by a vendor, is proprietary to the vendor or whether it becomes a public record since it was created at the behest of a public agency. Consistent with prior Public Access Counselor opinions, the latter is true. When a public agency contracts with a third party to perform work on its behalf, the final product is almost universally public record which is subject to disclosure. The methodology behind the finished product, including financial modeling, formulas, calculations and procedures are generally considered proprietary information or trade secrets belonging to the third party.

Indiana Code § 5-14-3-4(a)(4) provides that "[r]ecords containing trade secrets" are confidential. Indiana Code § 5-14-3-2(p) defines a "trade secret" as having the meaning set forth in Indiana Code § 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.



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When the government outsources a task to an outside party, it is often because the public agency lacks the institutional knowledge or skill to perform the task on its own. It would be too costly to develop the knowledge in-house; therefore, it contracts with an outside vendor to do the work on its behalf. When work product is provided to the public agency as a finished product, taxpayers may request those documents to verify that money spent hiring an outside vendor was appropriate and cost-effective. However, the same is not the case for the underlying work product which led to the ultimate finished product. The reason why vendors are selected is because they possess a unique intellectual skill or property making them attractive in the marketplace to public and private entities alike. If these skills and proprietary know-how were made known publicly, it would lose its uniqueness and be stripped of its economic value. Therefore, the law protects this knowledge and information from being public -even if it is used to develop a document which eventually becomes a public record.

The spreadsheets may be kept secret by the vendor and therefore the reasonable particularity argument postulated by the agency need not be addressed.

## CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the School Town of Munster Department did not violate the Access to Public Records Act.

Luke H. Britt

A handwritten signature in black ink, appearing to read "L. H. Britt", written in a cursive style.

Public Access Counselor

Cc: Ms. Kathleen M. Maicher, Esq.