
OPINION OF THE PUBLIC ACCESS COUNSELOR

MICKEY SHUEY,
Complainant,

v.

CAPITAL IMPROVEMENT BD. OF MANAGERS OF
MARION COUNTY,
Respondent.

Formal Complaint No.
19-FC-33

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Capital Improvement Board of Managers of Marion County violated the Access to Public Records Act.¹ Counsel Philip Sicuso responded on behalf of the agency. In accordance with 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 April 1, 2019.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

This case involves a dispute about whether turnstile counts for Indy Eleven home games are subject to disclosure under the Access to Public Records Act or exempt as trade secrets.

In early March, 2019, Mickey Shuey (“Complainant”), a reporter with the *Indianapolis Business Journal*, delivered a public records request to the Capital Improvement Board of Marion County (“CIB”) seeking “exact turnstile counts for all Indy Eleven home games played at Lucas Oil Stadium during the 2018 soccer season.”

On March 27, 2019, the CIB denied Shuey’s request. The CIB asserted that the requested information constitutes a trade secret of the Indy Eleven, which prohibits the agency from disclosing the records under Indiana Code section 5-14-3-4(a)(4). Shuey filed a formal complaint the same day.

Shuey disagrees that the turnstile data qualifies as a trade secret under the law. He also asserts that releasing the turnstile records would serve the public’s interest.

In response, the CIB renewed its argument that the turnstile data constitutes a trade secret. The CIB relies, in part, upon a statement by the Indy Eleven claiming trade secret as justification to withhold the turnstile data. It also makes allusions to the fact that although CIB may have access to the data, it does not necessary receive the data.

ANALYSIS

1. The Access to Public Records Act (“APRA”)

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. Further, 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.* There is no dispute that the Capital Improvement Board of Marion County (“CIB”) is a public agency for the purposes of the APRA; and thus, subject to the Act’s disclosure requirements. Ind. Code § 5-14-3-2(q)(6).

Thus, unless otherwise provided by statute, any person may inspect and copy the CIB’s public records during regular business hours. *See* Ind. Code § 5-14-3-3(a). Even so, the Act contains both mandatory and discretionary exceptions to the general rule of disclosure. Specifically, 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).

2. Trade Secrets

Some uniquely situated public agencies will be in the custody of public records that contain proprietary information of a third party. If the information disclosed would place the third party at an economic disadvantage within its marketplace and the information is not readily known, then it could be considered a trade secret.

Naturally, the third party will seek to keep the trade secret strictly between the bidder and the State of Indiana. The Ac-

cess to Public Records allows this under Indiana Code section 5-14-3-4(a)(4), which exempts trade secrets from disclosure.

Under Indiana Code section 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.

Based on this statutory definition, Indiana courts have long held that a trade secret has four general characteristics: (1) it is information; (2) that derives independent economic value; (3) from not being generally known, or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and (4) that is the subject of efforts, reasonable under the circumstances, to maintain its secrecy. *See Ackerman v. Kimball Int’l, Inc.*, 634 N.E.2d 778, 783 (Ind. Ct. App. 1994), vacated in part, adopted in part, 652 N.E.2d 507 (Ind. 1995). *See Bridgestone Americas Holding, Inc. v. Mayberry*, 878 N.E.2d 189, 192 (Ind. 2007) (stating that “[u]nlike other assets, the value of a trade secret hinges on its secrecy. As more people or organizations learn the secret, [its] value quickly diminishes”).

What is clear is our courts will scrutinize a trade secret claim by its individual uniqueness and proprietary exclusivity. The Indy Eleven do indeed describe factors that qualify

turnstile data as information and holding economic value. The trade secret argument loses some steam, however, when describing elements that make it not readily ascertainable by others; and be subject to reasonable efforts to protect confidentiality.

The Indiana Supreme Court observed “trade secret” to be “one of the most elusive and difficult concepts in law to define.” *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 916 (Ind. 1993). Moreover, some courts have concluded that information is not a trade secret if it “is not secret in the first place—if it is readily ascertainable by other proper means.” *Fleming Sales Co. v. Bailey*, 611 F.Supp. 507, 513 (N.D.Ill.1985) (interpreting the Indiana Uniform Trade Secrets Act).

In *Franke v. Honeywell*, the our court of appeals noted “the threshold factors for the court to consider are the extent to which the information is known by others and the ease by which the information could be duplicated by legitimate means.” 516 N.E.2d 1090, 1093 (Ind. Ct. App. 1987).

Turnstile data is not intellectual property insofar as it is not a methodology, strategy, mechanism, or formula. It is a compilation of hard data without any propriety technique or process applied. If it is considered secret, then it is a secret in plain sight.

Anyone can buy a ticket to an Indy Eleven game. And if one were so inclined, one could conduct a rough estimate head count during the game. It is not difficult to approximate attendance at a sporting event. Attendance figures (based upon tickets distributed) are already released. Additionally, this office has confirmed through a telephone conversation

that Major League Baseball releases turnstile data to the press.²

Based on the information provided, Indy Eleven's attempt to marry existing trade secret case law and fact patterns to turnstile data rings false. Those cases are factually distinguishable because they involve customer lists, blueprints, patented information, subjective intellectual property, and other highly technical methodologies and practices.

To be sure, were the CIB in the custody of Indy Eleven's marketing strategy, training methodology, revenue forecasts, ticket pricing plans, confidential financial information, deliberative materials, identified suite or season ticket holders, internal controls, procedures, or the like, those could most certainly qualify as a trade secrets. Turnstile data, however, does not pass muster under a typical trade secret analysis.

Ultimately, however, it is not certain whether the CIB even has custody of Indy Eleven turnstile data. While the CIB may have access to it, it would not become a public record unless it is created, received, retained, maintained, or filed by or with a public agency. *See* Ind. Code 5-14-3-2(q). A public agency is not required disclose records it does not have. Therefore, while this office is not persuaded that turnstile data constitutes a trade secret, the CIB would not be required to release it if the CIB has not received it from Indy Eleven.

² Other sports leagues were unavailable for comment.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Capital Improvement Board of Managers of Marion County has not violated the Access to Public Records Act.

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

Luke H. Britt
Public Access Counselor