
OPINION OF THE PUBLIC ACCESS COUNSELOR

DAVID W. GRENOBLE,
Complainant,

v.

CITY OF BEECH GROVE

,
Respondent.

Formal Complaint No.
19-FC-66

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the City of Beech Grove violated the Access to Public Records Act.¹ Beech Grove responded via Legal Counsel Craig Wiley. In accordance with Indiana Code § 5-14-5-10,

¹ Ind. Code § 5-14-3-1 to 10.

I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on August 13, 2019.

BACKGROUND

This case involves a dispute over access to copies of bids that were submitted to the City of Beech Grove (“City”) in response to the City’s Request for Proposal (“RFP”).

On August 9, 2019, David W. Grenoble (“Complainant”), via an email sent to Mayor Dennis Buckley, requested copies of “All 3 bids/ offers submitted in response to the RFP of the sale of the sanitary sewer system.”

On August 12, 2019, Craig Wiley responded to the Complainant’s request with a denial, stating that the proposals were “not available for inspection,” because releasing the bids to the public would cause the City to lose leverage in the negotiation process. The following day Mr. Grenoble filed the formal complaint.

In the response to the formal complaint, Mr. Wiley explains how the City published the RFP after concluding that increases in the price of waste water treatment would force the City raise utility rates, which it did not wish to do. Then, after receiving three bids, the City scheduled an executive session for August 26, 2019 where Common Council members and the interested bidders could discuss their offers. Mr. Wiley asserts that because an executive session was scheduled for the purpose of evaluating the submitted proposals, the records requested by the Complainant are except from disclosure. According to Wiley, the three bids are con-

sidered “Records specifically prepared for discussion or developed during discussion in an executive session under IC 5-14-1.5-6.1.” This is evidenced by the fact that Council members, in an email sent by Mr. Wiley, were invited to review the bids in preparation for the executive meeting.

Finally, Mr. Wiley asserts that making the bids public would place the City at a competitive disadvantage when negotiation with the three bidders. This is especially so since the City has not formally decided to sell the utility, which means that “at this stage, the privacy interests asserted by the City outweighs the public’s interest to know the particulars of the terms of the bids.”

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. 5

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.* The City of Beech Grove is a public agency for the purposes of APRA; and thus, subject to the act’s requirements. Ind. Code § 5-14-3-2(n). Unless otherwise provided by statute, any person may

inspect and copy the City's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Even still, there are notable exceptions to the presumption that public records are disclosable. Here, the records requested involve bids to sell its waste water utility, which contains a real estate element as well. The City offered a request for proposals to the public and received the bids in question.

The process for the sale of municipally owned utilities is found at Indiana Code section 8-1.5-2 *et.al.* That set of statutes does not contemplate the Request for Proposals ("RFP") in the same way public procurement does.

The negotiated bidding statutes suggest that bids are confidential until a contract is awarded², however, Indiana Code section 8-1.5-2 is silent on the matter of bidding. It largely addresses the appraisal process and approval of the disposition by the Indiana Utility Regulatory Commission ("IURC").

I did confirm with IURC that waste water utilities are often advertised to potential buyers through an RFP so it is not uncommon that Beech Grove did the same for this transfer.

Conceivably, the City solicited bids so it could target a specific buyer for negotiations. This strategy is authorized by Indiana Code section 5-14-1.5-6.1(b)(2)(D) which allows an executive session when a governing body is discussing strategy as to a real estate transfer.

² Ind. Code § 5-22-1-7.3

To be clear, the bids would not necessarily indicate a potential award. The transfer would have to satisfy the requirements of Indiana Code section 8-1.5-2 and match the appraisal value. So the bids are largely informational and an expression of interest; more akin to a request for information or qualification. The negotiation takes place after a willing buyer is identified.

That identification process presumably would have taken place in the August 26, 2019 executive session. To that extent, the bids were solicited in anticipation of that strategic session for the purposes of winnowing down potential buyers. Because the Access to Public Records Act exempts records specifically prepared for discussion of a legitimate executive session under Indiana Code section 5-14-3-4(a)(12), the bids may be withheld.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the City of Beech Grove has not violated the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor