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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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KRISTEN S. BROWN,  
*Complainant,*

v.

COLUMBUS REGIONAL HEALTH,  
*Respondent.*

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Formal Complaint No.  
20-FC-36

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Columbus Regional Hospital (“Hospital”) violated the Access to Public Records Act.<sup>1</sup> Sherry A. Fabina-Abney, Legal Counsel for the Hospital, filed an answer to the formal complaint with this office. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the

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<sup>1</sup> Ind. Code §§ 5-14-3-1-10.

formal complaint received by the Office of the Public Access Counselor on March 10, 2020.

### **BACKGROUND**

This case involves a dispute over the access to documents relating to contract security officers employed by the Hospital.

On January 27, 2020, Kristen Brown (Complainant) filed a public records request with the Hospital seeking the following:

Electronic copies of the invoices and/or spreadsheets prepared by Jon Rohde for contract security officers for 2017 and the first six months of 2018.

On February 28, 2020, Cynthia Boll, legal counsel for the Hospital, sent the Complainant electronic copies of the spreadsheets for 2017 and January 2018. The remainder had not yet been prepared. Furthermore, the documents that were sent to the Complainant had the names of the security officers redacted.

When asked why the officers' names had been redacted, Ms. Boll cited Indiana Code sections 16-22-2.5-2 and 16-22-3-28(e), reasoning that those statutes classify the requested information as confidential, therefore it is exempt from disclosure.

After receiving Ms. Boll's explanation for the redaction, the complaint was filed with this office. Ms. Brown argues that she was unable to reasonably interpret any section of the code that would allow the Hospital to redact contract police officers' names in the documents containing their hours

worked for payment purposes and therefore the Hospital violated the APRA.

On April 7, 2020, Sherry Fabina-Abney of Ice Miller filed an answer to Brown's complaint. Fabina-Abney denies the Complainant's claims that the Hospital wrongfully redacted and or withheld records. She provided the following explanation for the Hospital's actions.

First, Ms. Brown requested spreadsheets prepared by Jonathan Rohde, the Columbus City chief of police. According to the Hospital, there were no spreadsheets prepared by Mr. Rohde for contract security officers after January 2018, which is why the Complainant did not receive any spreadsheets for the months of February through June of 2018.

Second, Fabina-Abney asserts that Indiana Code sections 16-22-2.5-2 and 16-22-3-28(e) provide county hospitals with broad powers to protect, as confidential, information considered to be proprietary and competitive information. She argues that if the identities of the contracted security officers were to be released the Hospital would be placed at a competitive disadvantage. More specifically, there are concerns that if their identities were made public competing hospitals and companies "... may cherry pick these contracted officers away from the hospital." Therefore, the Hospital has every right to withhold the information.

In sum, the Columbus Regional Hospital does not believe that their actions constituted a violation of the Access to Public Records Act. Rather it asks that the Public Access Counselor find that they appropriately withheld information that, by law, is considered confidential.

## ANALYSIS

### 1. The Access to Public Records Act

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.” Ind. Code § 5-14-3-1. The Columbus Regional Hospital is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the Hospital’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, 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). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

### 2. Brown’s request

It appears as if a portion of the records requested simply do not exist. A public agency is not required to create records pursuant to a request. Therefore if Columbus Regional Hospital does not have the records sought, it is not required to

create and produce them. This matter should have been disposed of by an explanation on the part of the Hospital, however, they did include it in its response.

### **3. Proprietary information**

Indiana law recognizes the value of protecting proprietary information and trade secrets. The APRA allows redaction pursuant to Indiana Code section 5-14-3-4(a)(4) which exempts trade secrets from disclosure.

Similarly, proprietary and competitive information of county hospitals are not subject to disclosure based upon Indiana code section 16-22-2.5-2 and 16-22-3-28(e). These can be reasonably considered “trade secrets” in context.

While not defined in the Title 16 provisions, "trade secret" has the meaning set forth in 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, e.g., *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").

Indiana Courts have declared trade secrets to be "one of the most elusive and difficult concepts in law to define." *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (1993). Moreover, the Courts have determined information is not a trade secret if it "is not secret in the first place--if it is 'readily ascertainable' by other proper means.". The Court in *Amoco* goes on to hold: "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.* What is clear is the Courts will scrutinize a trade secret claim by its individual uniqueness and proprietary exclusivity.

The Hospital argues that if the names of the contracted offices – public employees – are revealed, it would place the Hospital at a competitive disadvantage. It posits that other entities could poach the officers for security guards and the Hospital would lose its institutional capital.

This office is unclear as to the exact nature of the agreement between the Hospital and the Columbus Police Department, but it is clear that the Hospital (at least for the purpose of this opinion) does not hire the individual officers but rather has an agreement worked out with the chief. The CPD seemingly outsources manpower. Whether this is part of the officers' official duties or whether they moonlight is equally unclear.

If the former is true, names and compensation of public employees is unequivocally disclosable pursuant to Indiana code section 5-14-3-4(b)(8). Presuming the latter, however, this office remains wholly unconvinced that hiring a group of cops – even training them up for specific security duties – is proprietary information.

Every Hospital has a security force. Some have entire police units. The names of officers do not disclose their duties and functions, methods of security enforcement, tactical maneuvers, strategic polices or patrol designs. Their function is not particularly unique to health care, much less Columbus Regional Hospital health delivery.

The bottom line is that for a trade secret to qualify, it must meet the statutory criteria. Formulas, patterns, strategy, methodology, technical specifications, techniques and processes may be declared trade secret so long as they are exclusively proprietary to the firm and protective measures have been taken to protect them as secret.

Without more, a roster of policeman security guards simply does not qualify in the eyes of this office. As such, we remain unconvinced of the lists' propriety nature as requested.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that the Columbus Regional Hospital violated the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the name and title of the signatory.

Luke H. Britt  
Public Access Counselor