

May 13, 2008

Jennifer Jansen  
Indiana Department of Transportation  
100 North Senate Avenue; Room N730  
Indianapolis, Indiana 46204

*Re: Your informal inquiry*

Dear Ms. Jansen:

This is in response to your informal inquiry received April 22, 2008. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

You write on behalf of the Indiana Department of Transportation (“INDOT”). INDOT is a direct recipient of federal highway funds. The funds come with certain requirements and responsibilities, including a requirement that Request for Proposal (“RFP”) responses are to be evaluated based on qualifications of the respondent and not on price. As a result, INDOT has created a qualifications-based ranking system which has been approved by the Federal Highway Administration. After receiving federal funds, INDOT channels those funds to local public agencies (“LPAs”), who must then meet the same requirements as INDOT as a condition of receiving the funds. The LPAs must agree to using a qualification-based ranking system when evaluating RFP responses and selecting consultants.

To ensure the LPAs are complying with their responsibilities, INDOT’s Consultant Selection Review Committee (“Committee”) receives and reviews all documentation an LPA uses to select a consultant, including ranking sheets of individual evaluators, final rankings for a given project, and a copy of the RFP. The Committee receives the materials as evidence that a qualifications-based selection was made, and the Committee votes to approve the adequacy of the process but not to approve the firm selected.

You inquire whether INDOT would be required or permitted to disclose the information provided to the Committee by the LPA if requested to do so by a member of the public. You express concern that the records provided to INDOT might be deliberative materials excepted from disclosure pursuant to Ind. Code § 5-14-3-4(b)(6).

You ask the following questions:

- Since the records have not been created by INDOT or the Committee, does the 4(b)(6) exception still apply to copies of the records in INDOT's possession? In other words, if the LPA that created the records decided to withhold them from disclosure upon request using the 4(b)(6) exception, can or must INDOT honor the LPA's decision to withhold the records? Or can or must INDOT disclose the records upon request?
- The records contain ranking sheets, which are created based on an expression of opinion but which may not represent or express an opinion on its face. Can a document that reflects the result of deliberation instead of the deliberative process itself be withheld from disclosure using the 4(b)(6) exception?

The Access to Public Records Act ("APRA")(Ind. Code 5-14-3) provides two general categories of records which may or must be withheld from disclosure upon request for access. I.C. § 5-14-3-4(a) contains a list of the mandatory exceptions to disclosure, or the confidential records. I.C. § 5-14-3-4(b) contains a list of records which are public records but may be withheld from disclosure at the discretion of the agency. INDOT's inquiry relates to records which fall only under the 4(b) exceptions.

The APRA provides that a public agency that receives a confidential public record from another public agency shall maintain the confidentiality of the public record. I.C. § 5-14-3-6.5. Here, though, the records at issue are not confidential because they do not fall under one of the section 4(a) exceptions. While records which fall under the 4(b) exceptions may be withheld from disclosure, they are not confidential records. So I.C. § 5-14-3-6.5 does not apply to the records at issue. A similar provision for records which are excepted from disclosure at the discretion of the agency does not exist in the APRA.

Records listed in section 4(b) may be excepted from disclosure at the discretion of a public agency. I.C. § 5-14-3-4(b). This provision applies to the agency by which the record was created, received, retained, maintained, or filed by or with. I.C. § 5-14-3-2. Here, the records at issue were received by INDOT (or the Commission, which I understand is part of INDOT) pursuant to a process INDOT has established for reviewing the work of the LPAs. Because the records were received by INDOT, it is my opinion the records are public records maintained by INDOT. As such, INDOT must disclose the records upon request unless an exception to disclosure applies. I.C. § 5-14-3-3.

Because the records are not confidential and therefore not protected from disclosure pursuant to I.C. § 5-14-3-6.5, and because the copies of the records INDOT receives and maintains are public records independent of the public records maintained by the LPAs (even if they are exact copies of the records created and maintained by the LPAs), it is my opinion INDOT may exercise its discretion to determine whether to disclose all or part of the records, so long as INDOT can sustain the burden to show the records may be excepted from disclosure. See I.C. § 5-14-3-9(f). A public agency which relies on I.C. § 5-14-3-4(b)(6) to deny part of a record must, upon court review, be able to sustain its burden to show that each part of the record meets all the elements of the exemption or is "inextricably linked" to material that is not deliberative. See *An Unincorporated Operating Division of Indianapolis Newspapers, Inc. v. The Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003).

Since INDOT is not bound by an LPA's decision to withhold all or part of the records, the question is then whether INDOT may withhold from disclosure all or part of the record, pursuant to I.C. § 5-14-3-4(b)(6). To be withheld from disclosure using this exception, a record must meet all parts of the exception:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.  
I.C. § 5-14-3-4(b)(6).

The records must be intra- or interagency. The material must be expressions of opinion or speculative in nature, *and* the records must be communicated for the purposes of decision making. Further, disclosure must not be specifically required by state or federal statute. See I.C. § 5-14-3-4. So long as INDOT can sustain the burden to show the records may be excepted from disclosure, INDOT may withhold the records even though INDOT did not create the records. See I.C. § 5-14-3-9(f).

You specifically inquire whether ranking sheets may be withheld from disclosure pursuant to I.C. § 5-14-3-4(b)(6). In my opinion, the ranking sheets of individual evaluators may be withheld from disclosure based on the deliberative materials exception. You have indicated the ranking sheets are created on the basis of an opinion even though the deliberative process is not reflected in the record. In my opinion, an individual's ranking of proposals is an expression of opinion. That opinion was communicated to the selection committee as a whole for the purpose of decision making. It is my opinion this is exactly the type of record excepted from disclosure under I.C. § 5-14-3-4(b)(6), as it is an intra-agency record which is an expression of opinion communicated for the purpose of decision making (selection a consultant).

The final question, then, is whether another state statute requires disclosure of the record. Ind. Code 5-22-9 addresses requests for proposals involving an expenditure of public funds by a governmental entity. The following addresses records associated with requests for proposals:

- (a) A register of proposals must be:
  - (1) prepared; and
  - (2) open for public inspection after contract award.
- (b) The register of proposals must contain the following:
  - (1) A copy of the request for proposals.
  - (2) A list of all persons to whom copies of the request for proposals were given.
  - (3) A list of all proposals received, which must include all of the following:
    - (A) The names and addresses of all offerors.
    - (B) The dollar amount of each offer.
    - (C) The name of the successful offeror and the dollar amount of that

- offeror's offer.
- (4) The basis on which the award was made.
  - (5) The entire contents of the contract file except for proprietary information included with an offer, such as trade secrets, manufacturing processes, and financial information that was not required to be made available for public inspection by the terms of the request for proposals.
- I.C. § 5-22-9-5.

This provision requires certain information related to a request for proposals to be available for inspection and copying. As I read it, the basis on which the award was made must be disclosed. I.C. § 5-22-9-5(b)(4). In my opinion the basis on which the award was made refers to the criteria used to select the award recipient and does not refer to individual ranking sheets. It is my opinion I.C. § 5-22-9-5 does not require disclosure of the ranking sheets of individual evaluators. As such, it is my opinion INDOT may withhold those records from disclosure based on I.C. § 5-14-3-4(b)(6).

Please do not hesitate to contact us if we can provide further assistance.

Best regards,



Heather Willis Neal  
Public Access Counselor