



STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

September 24, 2014

Ms. Kathleen McLaughlin
41 E. Washington St.
Indianapolis, IN 46219

*Re: Formal Complaint 14-FC-184; Alleged Violation of the Access to Public Records Act
by the Indianapolis Office of Corporation Counsel*

Dear Ms. McLaughlin,

Please allow this letter to serve as acknowledgement of your formal complaint against the Indianapolis Office of Corporation Counsel ("OCC"). The OCC has not yet denied you access to the records (but rather has delayed them), yet they have indicated in the response to your complaint that a denial is forthcoming. Rather than publishing an Opinion regarding the issue, I wanted to first write to you addressing the situation and copying the OCC. This is especially so given this Office and my advice was a source of some of the confusion.

Your complaint dated August 19, 2014, alleges the Office of Corporation Counsel violated the Access to Public Records Act (IC 5-14-3) by improperly denying you access to OCC files. On or about July 22, 2014, you submitted a public records request to the OCC seeking the request for proposals ("RFP") issued by Indianapolis for a new criminal justice center. The OCC acknowledged your request on July 23, 2014, however, has not stated a reason for denying the records nor have they produced them.

The OCC, in response to your formal complaint, argues they have not yet denied your request; however, they will be doing so with a formal denial including a citation to why they feel it can be withheld. Based on their response, they will be asserting a discretionary privilege due to the RFP still being in negotiation, and a confidentiality provision as the RFP contains trade secrets.

As this matter was pending – prior to your complaint – you contacted this Office seeking advice as to how to proceed. The OCC was not providing you the records and you sought my informal opinion on whether the OCC may withhold. I indicated I was not aware of any legal justification to do so. In a subsequent conversation, the OCC solicited my advice as well. They indicated the RFP may contain trade secrets. This will be discussed below, however, my first impression of the issue – with the limited amount of information available to me at the time – I agreed the inclusion of trade secrets in a document is justification for withholding public records.

The OCC asserts negotiations are ongoing and a contract is not final. They are correct Ind. Code § 5-14-3-4(b)(5)(A) gives an agency discretion to decide whether to release negotiation material. RFPs are generally non-negotiated instruments. I'm not familiar with the City of Indianapolis' procurement process; however, an RFP is usually inviting a bid for services or goods to meet a need. The RFP does not change, although the terms of a final contract may. I am not necessarily compelled by the argument an RFP itself is under negotiation. After the bidding process is over, terms and conditions may change, but the public request for proposal would not be changed by the negotiation of a final contract.

The other argument the City puts forward is the RFP contains trade secrets. Upon further reflection, it is difficult for me to be compelled by this argument as well. Again, the OCC is correct records containing trade secrets would need to remain confidential under Ind. Code § 5-14-3-4(a)(4). Part of that exception is the assumption the agency would need to prove the information is indeed trade secrets. Conversations with the City have indicated the RFP contains information from architects which are considered trade secrets. Blueprints, plans and drawings can certainly fall under the definition in Ind. Code § 24-2-3-2(c):

“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.

If an RFP sent out into the marketplace does indeed contain trade secrets, it stands to reason the secret is out once it goes out to potential contractors. The second prong of the test fails as secrecy is inherently compromised in an RFP. Industry has now been made aware of the trade secret, therefore it is no longer secret. The proposals themselves may be withheld as they may contain trade secrets and are part of the negotiation process; however, the RFP should be disclosed.

Instead of finding a violation on the part of the City - which may be counter-productive - I encourage the OCC to evaluate the denial in light of the above thoughts. The burden is on the public agency to justify the denial. I do not believe the OCC has done so to this point.

Please do not hesitate to contact me with any other questions.

Regards,

A handwritten signature in black ink, appearing to be 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor

cc: Ms. Samantha DeWester, Esq.



Office of the City Prosecutor

Indianapolis

Gregory A. Ballard, Mayor

September 23, 2014

Luke Britt
Public Access Counselor
State of Indiana
Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, IN 46204

VIA ELECTRONIC MAIL

Re: Formal Complaint #14-FC-184

Dear Mr. Britt,

Please accept this correspondence as the official response on behalf of the City of Indianapolis Office of Corporation Counsel ("OCC") to the above-referenced Complaint ("Complaint") filed with your office by Kathleen McLaughlin. The Complaint alleges that OCC has denied access to public records and provided no response to her Request.

Formal Complaint #14-FC-184 is the result of a public records request ("Request") directed to the OCC received July 22, 2014 requesting "the request for proposals ("RFP") pertaining to the consolidated criminal justice complex". This Request was acknowledged on July 23, 2014. A search for any responsive records was initiated at that time. This Complaint was filed August 19, 2014.

Under the Indiana Access to Public Records Act, an agency has a reasonable amount of time to produce the record or allow the requestor to make copies. This Complaint was filed less than thirty (30) days after the initial Request had been made.

After a search for responsive records, it was discovered that other records, including the original RFQ, was previously released to the public/media. However, the RFP is still under negotiation. Currently, the RFP has been amended and will continue to be amended while still in negotiation. Under the APRA § 5-14-3-4(b)(5)(A) a public agency can withhold records relating to negotiations...if the records are created while negotiations are still in progress. Additionally, the RFP contains sensitive information regarding the trade secrets of the entities involved, which is co-mingled throughout the document. Under the APRA § 5-14-3-4(a)(4) records are exempt from disclosure.

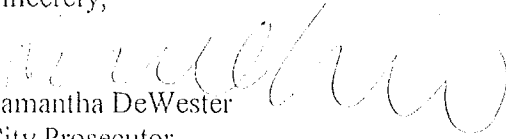
Office of the City Prosecutor

1601 City- County Building
200 East Washington Street
Indianapolis, Indiana 46204
317.327.4055 (O)
317.327.4958 (F)
<http://www.indy.gov>

The OCC does not believe it has been non-responsive or has taken an unreasonable amount of time to search for, locate, and review the responsive records involved with this Request nor has it violated the APRA. Therefore, the OCC will be issuing a letter responsive to Ms. McLaughlin's Request denying her Request for the RFP(s) involving the criminal justice complex based upon the above rationale. The OCC requests this Complaint be dismissed and its actions deemed appropriate.

Should you need anything further from me, please don't hesitate to ask. Thanks!

Sincerely,



Samantha DeWester
City Prosecutor
Public Access Counselor
317-327-5439
Samantha.DeWester@indy.gov