



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

July 9, 2015

Mr. Jacob German, Esq.
11 South Meridian Street
Indianapolis, Indiana 46204

Re: Formal Complaint 15-FC-168; Alleged Violation of the Access to Public Records Act by the Ports of Indiana

Dear Mr. German:

This advisory opinion is in response to your formal complaint, which alleges the Ports of Indiana (“Ports”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et. seq.* Ports has responded via Ms. Andrea Hermer, Esq., General Counsel. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on May 22, 2015.

BACKGROUND

Your complaint dated May 22, 2015, alleges the Ports of Indiana violated the Access to Public Records Act by failing to provide the records you requested.

You submitted a records request to the Ports, seeking “any and all” contracts or agreements between the Ports and MG Rail, Norfolk Southern Railroad, and Harbor Belt Railroad. You received redacted copies of the contracts requested. You contend portions of these redactions are improper.

The redactions were relating to economic and pricing terms. You contend the full contract price should not be redacted. These redactions were defended to you as otherwise unavailable to the public and the release of pricing information would disadvantage the companies in future negotiations.

On June 8, 2015, the Ports responded to your formal complaint. The Ports dispute the argument that economic and pricing terms could be redacted, because disclosing the total amounts paid under a requested contract still implicates trade secret information. The Ports see no material difference in disclosing pricing methodology versus disclosing the price. Either method implicates confidential information.



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

ANALYSIS

The public policy of the 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.” See Ind. Code § 5-14-3-1. The Ports of Indiana is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Ports’ disclosable, public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

Here, the Ports have raised a trade secret exemption under Ind. Code § 5-14-3-4(a). Ind. Code § 5-14-3-2(q) defines trade secret as having the meaning set under Ind. Code § 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.

Indiana Courts have held that “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.” See *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (1993).

As stated in a prior opinion, when there has been no opportunity to “review the redacted information *in camera*” it is not possible for the Office of the Public Access Counselor to state conclusively whether or not the redacted information is or is not actually a trade secret. See 14-FC-255. In its disclosure, the Ports contend the redacted information includes economic and pricing information which if revealed would be to the competitive disadvantage and economic detriment of MG Rail, Harbor Belt Railroad, and Norfolk Southern Railroad (*formerly Consolidated Rail Corporation*).



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

In this case, Ports of Indiana has not withheld nor redacted the entirety of the requested documents. Without, further information or detail, this office is not unable to, nor tasked with deciding if the information is or is not actually trade secret. Furthermore, there is no provision in Indiana statute or case law that requires further specificity as to the reason for a party's denial to disclose. *See* 14-FC-255. Without disclosure of more information on the issue, whether or not the redactions are proper is best left for a trier of fact to decide.

Balanced against those considerations, however, is the following provision from Ind. Code § 5-14-3-4(b)(5)(B):

the terms of the final offer of public financial resources communicated by the Indiana economic development corporation, **the ports of Indiana**, the Indiana finance authority, an economic development commission, or a governing body of a political subdivision to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

Emphasis added.

While specific pricing per unit information is potentially trade secret, the contract price paid per year would appear to be terms of the final offer of public financial resources expended. However, again, without the benefit of seeing the un-redacted documentation, that is impossible to ascertain.

RECOMMENDATION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Ports of Indiana reexamine the redactions in light of Ind. Code § 5-14-3-4(b)(5)(B).



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

Regards,

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

Luke H. Britt
Public Access Counselor

Cc: Ms. Andrea Hermer, Esq.