
OPINION OF THE PUBLIC ACCESS COUNSELOR

DAVID WILLIAMS,
Complainant,

v.

INDIANA DEPARTMENT OF ADMINISTRATION,
Respondent.

Formal Complaint No.
22-FC-11

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Department of Administration violated the Access to Public Records Act.¹ IDOA General Counsel John Snethen filed an answer on behalf of the agency. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on January 25, 2022.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over access to records collected by the Indiana Department of Administration's (IDOA) Division of Supplier Diversity voluntarily submitted by businesses applying for certification as a Women-Owned Business (WBE) or a Minority-Owned Business (MBE).

On November 18, 2021, a representative of the Laborers International Union of North America filed a public records request with the IDOA seeking records on two business that applied for certification as MBEs and WBEs. After IDOA invited LIUNA to narrow down the scope of the request, David Williams (Complainant), LIUNA Partnership Development Coordinator, submitted an updated request on November 29, 2021, seeking the following:

1. Copies of the entire initial Application for Certification packets completed by the owner(s) of the two (2) companies captioned above in accordance with 25 IAC 5-3-2(f). Of course, this would exclude all non-disclosable documents in accordance with Indiana Code such as tax returns, financial information, and trade secret information.
2. Our examination of a previous hard copy version of the ACE form does not appear to contain any information which would prohibit its disclosure under Indiana Code. If, in fact, there is any information which is prohibited from disclosure under Indiana Code, please exclude or redact such information and forward all other documents pursuant to our request.

3. Copies of any documents created by or retained by the IDOA for “on-site” inspections/interviews during the initial certification process for the two (2) companies listed below in accordance with 25 IAC 5-3-2(f). Of course, this would exclude all non-disclosable documents in accordance with Indiana Code such as tax returns, financial information, and trade secret information.
4. Copies of WBE decertification letters sent to all companies whose WBE certifications have been decertified or revoked by IDOA within the past five (5) years.

On January 24, 2022, IDOA partially denied Williams’ revised request. The following day, Williams filed a formal complaint alleging IDOA’s denial violated APRA. Specifically, Williams argues IDOA misapplied the cited Indiana Code provisions.

On February 11, 2022, IDOA filed an answer to the William’s complaint. First, IDOA argues the public access counselor lacks jurisdiction over this dispute because the Governor’s Commission on Supplier Diversity has exclusive jurisdiction to determine the confidentiality of the records at issue. Second, IDOA argues that even if this office has jurisdiction over this dispute, it is proper to treat the records as confidential under APRA, and other statutes and regulations.

Specifically, IDOA asserts that the records related to the applications for certification are declared confidential by statute², which makes them exempt from disclosure under

² Ind. Code § 4-13-16.5-7

APRA³. It argues that the requested material qualifies under these statutes and public policy supports that conclusion.

Regarding the on-site inspection and interview records, IDOA contends those materials are deliberative by nature and the agency has discretion to withhold them in accordance with APRA's deliberative materials exception.⁴ Those materials may also contain confidential financial information as well.

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 Indiana Department of Administration (IDOA) 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 IDOA's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

³ Ind. Code § 5-14-3-4(a)(3)

⁴ Ind. Code § 5-14-3-4(b)(6)

2. PAC jurisdiction

As an initial matter, IDOA challenges this office's jurisdiction to address this matter. The public access counselor has a statutory duty to field complaints concerning:

any other right conferred by IC 5-14-3 or IC 5-14-1.5 or any other state statute or rule governing access to public meetings or public records;

Ind. Code § 5-14-5-6. The operative statute in question—Indiana Code section 4-13-16.5-7—qualifies this matter for PAC review:

For purposes of IC 5-14-3, materials containing:

- (1) personal financial information; or
- (2) confidential business information;

submitted by an applicant for certification as a minority business enterprise or a women's business enterprise are confidential.

Notably, IDOA's relevant administrative rules also reference the Access to Public Records Act.⁵ The question is not whether the Governor's Commission on Minority and Women's Business Enterprises has authority to designate certain items as confidential. The issue is whether the application of confidentiality is proper. As a result, this office will assume jurisdiction over this matter for the purposes of this complaint.

⁵ 25 IAC 5-3-2(f): All documents submitted in connection with an application for certification as an MBE or a WBE are subject to the Indiana Access to Public Records Act, IC 5-14-3. The department will maintain as confidential any: (1) tax returns; (2) financial information; and (3) trade secret information;

3. Personal financial and confidential business information

IDOA argues the denial was appropriate as the applications, on-site inspection, and interview records contain personal financial and confidential business information. As noted above, confidential financial material obtained by a public agency is confidential under APRA. *See* Ind. Code § 5-14-3-4(a)(5). More specifically, however, both personal financial and confidential business material submitted as part of the certification process are declared confidential by statute. *See* Ind. Code § 4-13-16.5-7.

APRA includes disclosure exemptions for records declared confidential by state statute and those declared confidential by rule adopted by a public agency if they have the authority to do so.⁶ *See* Ind. Code §§ 5-14-3-4(a)(1), -(2).

While this office has not been made privy to the records in question, IDOA's response sufficiently describes the type of information germane to the application process and why they qualify as sensitive material. Those arguments carry IDOA's burden to demonstrate the invocation of the exemptions to disclosure was appropriate.

By its nature, the application process invites the submission of sensitive business documents. Inferentially, it stands to reason that the materials adjacent to the process are personal financial and confidential business records.

⁶ IDOA has rulemaking authority to administer the provisions of Indiana Code section 4-13-16.5-7.

Insofar as the on-site visits are concerned, by administrative rule, IDOA shall:

Make on-site visits during normal business hours to company headquarters with little or no advance notice in its efforts to make an accurate determination of the ownership and control of an enterprise. The department may interview the principal officers of the enterprise and review their resumes and work histories. The department may also perform an on-site visit to job sites if there are such sites on which the enterprise is working at the time of the eligibility investigation in its jurisdiction or local area.

25 IAC 5-3-7(1)(A). As with the application process, these inspections would also likely involve personal financial or confidential business information.

4. Deliberative materials

IDOA also argues that it has discretion under APRA's deliberative materials exception to withhold materials regarding on-site inspections and interviews of the businesses. Under APRA, deliberative materials include records that are:

intra-agency or interagency advisory...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.

Ind. Code § 5-14-3-4(b)(6). Deliberative materials include information that reflects, for example, one's ideas, considerations, and recommendations on a subject or issue for use in a decision-making process. The purpose of protecting such

communications is to “prevent injury to the quality of agency decisions.” *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. 766 N.E.2d at 12.

To withhold a public record from disclosure under APRA’s deliberative materials exception, the record must be inter-agency or intra-agency records of advisory or deliberative material and expressions of opinion or speculative in nature. Academically speaking, there is little to argue insofar as IDOA’s arguments are concerned. The agency demonstrates an understanding of the exception.

Appropriate application of the exception is another matter altogether. Here, there appears to be little, if any, questions as to propriety. Williams does not present any argument to raise a presumption otherwise.

If documented, the notes and assessments of IDOA staff concerning on site visits would qualify as deliberative materials if the records were speculative or opinion-based and used in the decision-making process of IDOA’s Division of Supplier Diversity.

Without more, there exists little reason to conclude IDOA invoked this exception contrary to the letter or spirit of the law.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Indiana Department of Administration has not violated the Access to Public Records Act or any other applicable access law.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

Luke H. Britt
Public Access Counselor

Issued: March 9, 2022