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Insights

Indy's Amazon HQ2 Records Shielded by APRA (and What it Means for Local Economic Incentive Records)

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While Amazon's "HQ2" RFP was national in scope, highly competitive, and well-publicized, an unintended consequence of that process is now apparent – can third-parties obtain records depicting incentives offered to Amazon? The Indiana Court of Appeals recently said no, finding that Indiana's HQ2 records were properly withheld at the discretion of the Indiana Economic Development Corporation or "IEDC."[1]

The facts and background in *Tax Analysts* are relatively straightforward; the IEDC and City of Indianapolis submitted responses to Amazon's original RFP and subsequent RFI. Critical to the Court's analysis, the IEDC's responses provided only "general overviews," "estimates," and "proposals to offer" certain incentives, but provided that specific terms would not be finalized until a later date. Unfortunately, Indianapolis was not selected as the host city.

Months later, Tax Analysts sought certain records from the IEDC pursuant to the Access to Public Records Act or "APRA" involving the potential Amazon deal: (1) copies of Indianapolis's HQ2 proposal, (2) all records related to the cost of the proposal, and (3) certain emails between Amazon and representatives of the IEDC.

The IEDC denied the records request pursuant Indiana Code § 5-14-3-4(b)(5) (hereinafter the "Economic Negotiations Exception"), which permits withholding certain records created during economic negotiations – though any "final offer" of public resources made to a prospect must be disclosed. The IEDC's position was that since no final binding offer was made, none of the negotiation documents constituted a "final offer" requiring disclosure. Critically, the APRA's statutory language does not define "final offer,"[2] and the Public Access Counselor and Indiana Courts have not previously analyzed this nuance.[3] Unsatisfied with IEDC's refusal to disclose, Tax Analysts filed suit.

The pertinent portions of the Economic Negotiations Exception are shown below:

> The following [may be withheld at the discretion of a public agency]:
>
> (A) Records relating to negotiations between:
>
> The Indiana economic development corporation . . . with industrial, research, or commercial prospects, if the records are created while negotiations are in progress.
>
> . . .
>
> (B) Notwithstanding clause (A), 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.
>
> (C) When disclosing a final offer under clause (B), the Indiana economic development corporation shall certify that the information being disclosed accurately and completely represents the terms of the final offer.
>
> (D) Notwithstanding clause (A), an incentive agreement with an incentive recipient shall be available for inspection and copying under section 3 of this chapter after the date the incentive recipient and the Indiana economic development corporation execute the incentive agreement regardless of whether negotiations are in progress with the recipient after that date regarding a modification or extension of the incentive agreement.

As previously noted, the Economic Negotiations Exception permits withholding records created during negotiations, but requires that "final offers" be disclosed after negotiations have terminated. Indiana Code § 5-14-3-4(b)(5)(B). However, since the APRA is not clear on what constitutes a "final offer," (*i.e.* does it mean the last offer in an imminent deal, or simply the last offer communicated in a series of offerings?), the Court had to use its rules of statutory construction to resolve the issue.

To resolve the ambiguity, the Court of Appeals started first with the plain meaning of "final offer"

> the dictionary definition of "final" is: (1) not to be altered or undone; (2) coming at the end: being the last in a series, process, or progress; (3) of or relating to the ultimate purpose or result of a process.
>
> . . .
>
> The relevant dictionary definition of "offer" as a noun is: (1) a presenting of something for acceptance; (2) an undertaking to do an act or give something on condition that the party to whom the proposal is made do some specified act or make a return promise.

Tax Analysts, 2020 WL 7776319 at *6 (internal citations and quotation marks omitted).

Next, the Court further narrowed the meaning of "final offer" by examining legislative intent, finding that the legislature intended for negotiations between public agencies and industrial, research, and commercial prospects to be confidential. Finally, the Court analyzed the evolution of the Economic Negotiations Exception's language, which, over time, more broadly protected records created during negotiations than previous statutory language.

Further, the Court found the legislature envisioned there would be "some situations in which negotiations did not result in a disclosable 'final offer' or incentive agreement, and that records of those negotiations could be withheld." Thus, using the IEDC as an example, it is able to compete for jobs and investments "without tipping off Indiana's competition or future prospects and thereby giving either an advantage." *Id.* at *7.

Applying the meaning of "final offer" to the facts before it, the Court ultimately found the conditional, tentative, and indefinite language in IEDC's offer (in response to the RFP and subsequent RFI) was not final, and each IEDC response had not developed into a "final offer of public financial resources" such that it had to be disclosed pursuant to the Economic Negotiations Exception.

What does the Court's holding mean for political subdivisions and others subject to the APRA?

Among others, the Economic Negotiations Exception applies to (1) an economic development commission, (2) a local economic development organization, and (3) a governing body of a political subdivision. Indiana Code § 5-14-3-4(b)(5)(A)(v-vii).

While an opportunity like Amazon's HQ2 may not come around for some time, political subdivisions should take notice of the Court's *Tax Analysts* opinion and the statutory guidance it provides, even for modest deals and negotiations. For political subdivisions that desire to shield negotiation records (of course, assuming the records are bonafide Economic Negotiations Exception records), such withholding appears proper, thereby avoiding "tipping off" competition or future prospects and giving either an advantage. *Tax Analysts*, 2020 WL 7776139 at *7.

If you have any questions about this alert, Indiana's APRA, or other public access laws, please contact **Christopher W. Bloomer**.

Disclaimer: The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only. You are urged to consult with legal counsel concerning your situation and specific legal questions you may have.

[1] *Tax Analysts v. Indiana Econ. Dev. Corp*., No. 20A-PL-1141, 2020 WL 7776139 (Ind. Ct. App. Dec. 31, 2020).
[2] *Tax Analysts*, 2020 WL 7776139 at *6-7.
[3] We've also previously covered the rarely interpreted "investigatory records" APRA exception. *See Investigatory Records Exception to Indiana's APRA Analyzed by Court of Appeals*, Christopher W. Bloomer and Robert S. Schein, April 30, 2019, located at https://www.kriegdevault.com/insights/investigatory-records-exception-indianas-access-public-records-act-