



STATE OF INDIANA

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December 22, 2010

Mr. Zachary P. Elliot
Citizens Action Coalition of Indiana
603 E. Washington St., Suite 502
Indianapolis, IN 46204

*Re: Formal Complaint 10-FC-295; Alleged Violation of the Access to
Public Records Act by the Indiana Utility Regulatory Commission*

Dear Mr. Elliot:

This advisory opinion is in response to your formal complaint alleging the Indiana Utility Regulatory Commission ("IURC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* IURC Assistant General Counsel DeAnna Poon's response is enclosed for your reference.

BACKGROUND

You filed this complaint on behalf of the Citizens Action Coalition of Indiana ("CAC"). You allege that on October 19, 2010, the CAC submitted a public records request to the IURC. The request sought access to reports (the "Reports") from Black and Veatch regarding the construction of the Edwardsport Integrated Gasification Combined Cycle Station (the "IGCC Project"). The IURC confirmed receipt of your request the same day you submitted it. You argue that as of November 19th (the day you filed your complaint), a reasonable period of time had passed, and that the IURC should either release the Reports or issue a "written rationale for such denial."

In response to your complaint, Ms. Poon states that the IURC sent CAC a denial letter on November 23rd. In that letter, IURC denied CAC's request based on the deliberative materials and trade secrets exceptions to the APRA found at I.C. § 5-14-3-4(b)(6) and I.C. § 5-14-3-4(a)(4), respectively. Ms. Poon argues that the Reports are deliberative material because they consist of opinionated material developed by Black and Veatch, which is IURC's contractor, concerning the IGCC Project. Black and Veatch provided the Reports to the IURC so that the IURC could decide whether or not action was needed with respect to the IGCC Project.

Ms. Poon also maintains the IURC's denial based on the trade secret exception. She enclosed with her response a November 14, 2008, docket entry in which the IURC considered a Motion for Protection of Confidential and Proprietary Information from Duke Energy Indiana, Inc. ("Duke Energy"). In its Motion, Duke Energy argued that certain information in the Reports constituted trade secrets and, therefore, should be ordered confidential by the IURC pursuant to 170 Ind. Admin. Code 1-1.1-4. Before filing the Motion, Duke Energy had already entered into a confidentiality agreement with Black and Veatch in order to "ensure that Black and Veatch has the ability to review confidential information concerning the Edwardsport IGCC Project." The purported trade secret information consisted of information released by Duke Energy to Black and Veatch: specifically, the details of the cost estimate for the IGCC Project; the details of forecasted operations and maintenance expenses of the IGCC Project; and confidential information provided to Duke Energy by the IGCC Projects two primary contractors, General Electric Company ("GE") and Bechtel Power Corporation ("Bechtel"). Duke Energy's Motion was supported by a sworn affidavit from W. Michael Womack. After considering the Motion, Chief Administrative Law Judge Scott Storms agreed that the information constituted trade secrets and ordered that it should be held as confidential by the IURC and excepted from public disclosure in accordance with the APRA.

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." I.C. § 5-14-3-1. The IURC is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the IURC's public records during regular business hours unless the records are excepted from disclosure as confidential or nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The IURC cites to the so-called deliberative materials exception to the APRA as its legal basis for refusing to disclose the Report. The deliberative materials exception is found at I.C. § 5-14-3-4(b)(6):

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

...

(6) 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.

Here, the Reports were prepared by Black and Veatch, which is "a private contractor under a contract with a public agency (i.e., the IURC)." *Id.* The deliberative materials exception also requires, however, that the records be expressions of opinion or

speculative in nature and communicated for the purpose of decision making. Ms. Poon states that the Reports were prepared in order to provide opinionated information to the IURC so that the IURC could decide on whether or not to take actions with respect to the IGCC Project. Accordingly, the Reports qualify as intra-agency and interagency deliberative material under I.C. § 5-14-3-4(b)(6). As such, the IURC did not violate the APRA by withholding it.

The IURC also claims that the Reports are excepted from disclosure pursuant to I.C. § 5-14-3-4(a)(4), which is the exception requiring public agencies to maintain as confidential “[r]ecords containing trade secrets.” I.C. § 5-14-3-4(a)(4). In I.C. § 5-14-3-2(o), the APRA defines a “trade secret” as having the meaning set forth in the Uniform Trade Secrets Act, I.C. § 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.

However, even after the 1982 enactment of the Indiana Uniform Trade Secrets Act, courts have noted that what constitutes trade secret information is not always clear. *See, e.g., Franke v. Honeywell, Inc.*, 516 N.E.2d 1090, 1093 (Ind. Ct. App. 1987), *trans. denied*. In litigation, courts determine whether or not something is a trade secret as a matter of law. *Id.* “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.” *Id.* “Information alleged to be a trade secret that cannot be duplicated or acquired absent a substantial investment of time, expense or effort may meet the ‘not readily ascertainable’ component of a trade secret under the Act.” *Id.*, citing *Amoco Product. Co. v. Laird*, 622 N.E.2d 912, 919 (Ind. 1993). For example, Indiana courts have determined that trade secret protection should be afforded to a compilation of documents including customer contact information, manufacturing costs, blueprints and price summaries, as well as a customer list of names not able to be created by means outside the business operations of the list owner. *See Infinity Products, Inc. v. Quandt*, 810 N.E.2d 1028, 1032 (Ind. 2004), *trans. denied*; *Kozuch v. CRA-MAR Video Center, Inc.*, 478 N.E.2d 110, 113-14 (Ind. Ct. App. 1985), *trans. denied*.

Here, the IURC determined that the information in the Reports consisted of trade secrets. The IURC’s administrative rules govern the submission of confidential or privileged information to the IURC. *See* 170 I.A.C. 1-1.1-4. Parties seeking an IURC determination that information is confidential are required to apply for such a finding and include in such application a sworn statement that describes (1) the nature of the confidential information; (2) the reasons why the information should be treated as confidential pursuant to I.C. § 8-1-2-29 and I.C. § 5-14-3; and (3) the efforts the party has made to maintain the confidentiality of the information.

Indiana courts have recognized that “the broad grant of regulatory authority given the IURC by the legislature includes implicit powers necessary to effectuate the statutory regulatory scheme.” *Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm’n*, 810 N.E.2d 1179, 1184 (Ind. Ct. App. 2004); *Office of Utility Consumer Counselor v. Public Serv. Co. of Indiana, Inc.*, 608 N.E.2d 1362, 1363 (Ind. 1993). The Indiana Court of Appeals has upheld IURC’s administrative orders concerning the confidentiality of alleged trade secret information. *See, e.g., Ind. Bell Tel. Co.*, 810 N.E.2d at 1184; *Cellco P’ship. v. Ind. Util. Regulatory Comm’n*, 810 N.E.2d 1137 (Ind. Ct. App. 2004). An IURC administrative order is subject to appellate court review to determine whether it is supported by specific findings of fact and by sufficient evidence, as well as to determine whether the order is contrary to law. *Cellco P’ship.*, 810 N.E.2d at 1142. Upon judicial review, courts afford the IURC “wide discretion” on matters within IURC’s discretion. *Id.* The Indiana Court of Appeals has noted that IURC’s “findings and decision will not be lightly overridden just because this Court might reach a contrary opinion on the same evidence.” *Id.* Before a court will vacate an IURC order, the petitioner must demonstrate that the order either lacks a factual basis or is contrary to law. *Id.*

The IURC determined pursuant to 170 I.A.C. 1-1.1-4 that the Reports include confidential trade secrets. Nothing before me indicates that the IURC’s decision lacked a factual basis or was contrary to law. *Cellco P’ship.*, 810 N.E.2d at 1142. In fact, the type of information subject to the IURC order (e.g., details of the cost estimate for the IGCC Project and the details of forecasted operations and maintenance expenses of the IGCC Project) appears to be “information [that] derives independent economic value, actual or potential, from not being generally known” to Duke Energy’s competitors and other entities in the industry that could obtain economic value from its disclosure. I.C. § 24-2-3-2(c)(1). Moreover, such information is similar to that which has been ruled a trade secret by Indiana courts. *See Infinity Products, Inc. v. Quandt*, 810 N.E.2d 1028, 1032 (Ind. 2004), *trans. denied* (manufacturing costs, blueprints and price summaries); *Kozuch v. CRA-MAR Video Center, Inc.*, 478 N.E.2d 110, 113-14 (Ind. Ct. App. 1985), *trans. denied* (customer list of names not able to be created by means outside the business operations of the list owner). Further, the IURC order noted that Duke Energy entered into a confidentiality agreement with Black and Veatch to ensure the nondisclosure of the IGCC Project information, which indicates that the information was “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” I.C. § 24-2-3-2(c)(2). In my opinion, the Reports appear to contain information that falls within the definition of a trade secret under I.C. § 24-2-3-2(c). Because the APRA classifies as confidential “[r]ecords containing trade secrets,” I.C. § 5-14-3-4(a)(4), the IURC did not violate the APRA by denying your request.

CONCLUSION

For the foregoing reasons, it is my opinion that the IURC did not violate the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

cc: DeAnna L. Poon