



STATE OF INDIANA

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February 28, 2013

Mr. Louie Batides

Re: *Formal Complaint 13-FC-49; Alleged Violation of the Access to Public Records Act by the Town of Winfield*

Dear Mr. Batides:

This advisory opinion is in response to your formal complaint alleging the Town of Winfield ("Town") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* David M. Augsten, Attorney, responded in writing on behalf of the Town to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on February 13, 2013, you requested a copy of the House Plans for Lot 21 in the Wynbrook Subdivision ("Plans"). Dawn Tokody, Building and Planning Coordinator, denied your request as a trade secret under the APRA. You do not believe that the Plans qualify as a trade secret under the APRA.

In response to your formal complaint, Mr. Augsten advised that it is the Town's position that the information requested would qualify as a trade secret pursuant to *Frank v. Honeywell Inc.*, 516 N.E.2d 1090, 1093 (Ind. Ct. App. 1987) and Informal Opinion of the Public Access Counselor 11-INF-48. House plans or other documents containing trade secret or proprietary information of any vendor in which the requesting party has not paid or been granted a license by the vendor for access are confidential under 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." *See* I.C. § 5-14-3-1. The Town is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Town's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either “establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit” *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47*.

Here, your request was denied as a trade secret. Pursuant to section 9(c) of the APRA, the Town in denying your request was required to cite to the specific statute that would authorize it to withhold the records in response to the request. Thus, the Town acted contrary to the requirements of 9(c) by failing to cite to I.C. § 5-14-3-4(a)(4) in denying your request.

As to the substance of your denial, I.C. § 5-14-3-4(a)(4) provides that “[r]ecords containing trade secrets” are confidential. I.C. § 5-14-3-2(p) defines a “trade secret” as having the meaning set forth in I.C. § 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.

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*. 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 afforded trade secret status to a compilation of documents that included 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, Mr. Augsten advised that the Town will continue to deny access to the Plans or any other documents containing trade secret or propriety information of any vendor in which the requesting party has not paid for or been granted a license by the vendor for access to such information. The Plans contain information that is not accessible to the general public, are not readily available from other sources, the vendor derives independent economic value from the nondisclosure of plan information, and the information contained in the Plans is only known by the vendor, the individual who contracts with the vendor for the creation of the Plans, and the requisite local authority to which the plans must be submitted. Further, as noted *supra*, Indiana courts have afforded trade secret status to a compilation of documents that include blueprints. Based on what has been provided by the Town and previous case law, it is my opinion that it did not violate the APRA in denying your request pursuant to I.C. § 5-14-3-4(a)(4).

CONCLUSION

Based on the foregoing reasons, it is my opinion that the Town acted contrary to the requirements of section 9(c) of the APRA by failing to cite to I.C. § 5-14-3-4(a)(4) in denying your request. As to all other issues, it is my opinion that the Town did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: David M. Augsten