

August 6, 2003

Mr. R. Jay Taylor, Jr.
10 W. Market St.
Suite 1500
Indianapolis, IN 46204

Re: Advisory Opinion 03-FC-54; Alleged Denial of Access to Public Records by the Indiana Department of Administration

Dear Mr. Taylor:

This is in response to your formal complaint, which was received on July 8, 2003. You have alleged that the Indiana Department of Administration ("Department") violated the Indiana Access to Public Records Act ("APRA"), Indiana Code chapter 5-14-3. Specifically, you allege that you were wrongfully denied access to copies of all public records possessed by the Department relating Baja Concrete & Materials. Ms. Shari E. Kinnaird, Director of Contracting for the Department, responded in writing to your complaint. A copy of her response is enclosed for your reference. It is my opinion that 49 C.F.R. 26.109 is inapplicable to your public records request. However, it is my opinion that to the extent the Department withheld confidential financial information as set forth in Indiana Code section 5-14-3-4 (a)(5) the Department did not violate the APRA. Finally, it is my opinion that information, if any, that is not confidential financial information should have been disclosed by the Department.

BACKGROUND

According to your complaint, on June 25, 2003 you wrote a letter to Ms. Kinnaird and requested copies of all public records possessed by the Department relating to a firm by the name Baja Concrete & Materials. In a letter dated July 2, 2003, Ms. Kinnaird denied your request stating that 49 C.F.R. 26.109 is dispositive of your request. In her letter, Ms. Kinnaird advised you that "the materials you requested cannot be released without the consent of the firm that submitted the information." You then filed your complaint with this Office.

In her written response to this Office Ms. Kinnaird advised that it is the position of the Department that the release of the records you requested is governed by 49 C.F.R. 26.109. Further, she advised that because this regulation is specific to the Department's Disadvantaged Business Enterprises ("DBE"), the Department believes that the regulation provides more protection than 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." Ind. Code § 5-14-3-1. The Department is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, anyone has the right to inspect and copy the public records of the Department during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

One exception to disclosure, Indiana Code section 5-14-3-4(a)(3) provides that a public agency may not disclose records required to be kept confidential by federal law. Ms. Kinnaird asserts that 49 C.F.R. 26.109, which provides in relevant part that:

[n]otwithstanding any provision of Federal or state law, you must not release information that may be reasonably [sic] be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting documentation

applies to your request. The question here is whether this regulation applies to your public records request. According to Mr. Bob Ashby, Office of the General Counsel for the United States Department of Transportation, the regulation would not apply to public records requests submitted prior to the effective date of the regulation, July 16, 2003. It should be noted that on July 2, 2003 I discussed this matter with Ms. Kinnaird. At that time, Ms. Kinnaird advised me that there were new federal rules that governed the release of minority business information. I advised her to follow the federal rules and withhold the confidential business information. Additionally, I advised Ms. Kinnaird that the regulation applied to all records possessed by the agency regardless of when they were submitted, before or after the effective date of the regulation. However, based upon the information I received from Mr. Ashby it is my opinion that the regulation is inapplicable to your public records request dated June 25, 2003 and should not have been relied upon to withhold the records you requested.

It is my opinion, however, that Indiana Code section 5-14-3-4(a)(5) is applicable. Indiana Code section 5-14-3-4(a)(5) provides that a public agency may not release "[c]onfidential financial information obtained, upon request, from a person. However, this does not include information that is filed with or received by a public agency pursuant to state statute." Since there is no Indiana case law interpreting Indiana code section 5-14-3-4(a)(5), we must rely upon the rules of statutory construction in order to ascertain the General Assembly's intent in adopting this provision.

When construing a statute, we seek to ascertain and give effect to the intention of the legislature as expressed in the statute. In so doing, the objects and purpose of the statute in question must be considered as well as the effect and consequences of such interpretation. We presume words appearing in the statute were intended to have meaning, and we endeavor to give those words their plain and ordinary meaning absent a clearly manifested

purpose to do otherwise.

Johnson v. State, 721 N.E.2d 327, 332 (Ind. App. 1999). [Citations omitted.]

The APRA provides that "confidential financial information" obtained by a public agency upon request may not be disclosed by the public agency. Ind. Code § 5-14-3-4(a). The word "confidential" is defined as "imparted in confidence; secret." *New Illustrated Webster's Dictionary* 211(1992). "Financial" is defined as "of or relating to finance." *Id.* at364. Therefore, "confidential financial information" means information that is secret relating to finance.

Along with the rules of statutory interpretation Indiana courts have also relied upon case law from other jurisdictions interpreting similar provisions to assist them in interpreting Indiana statutes. Here, federal case law is particularly important because a similar provision to the Indiana provision is found in the federal Freedom of Information Act ("FOIA"). FOIA provides that generally information is disclosable, however, certain information is exempt from disclosure. Of particular importance in this case is the provision exempting from disclosure "trade secrets and commercial or *financial information obtained from a person and privileged or confidential.*" 5 U.S.C. § 552(b)(4). In interpreting the FOIA provision numerous federal courts have stated that in order to bring a matter within the financial information exemption under that statute it must be shown that the information is (1) financial, (2) obtained from a person, and (3) privileged or confidential. *See generally, National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (C.A.D.C. 1974).¹ Furthermore, in *McDonnell Douglas Corp. v. National Aeronautics & Space Admin.*, the District Court for the District of Columbia stated that financial information provided to the government voluntarily is exempt from disclosure if it is the kind of information that would not customarily be released to the public by the person from whom it was obtained. 895 F. Supp. 316 (D.D.C. 1995). Finally, the Florida District Court provided that whether the disclosure of the information would significantly aid the public agency in performing its function, whether there would be harm to the public generally, and whether there are other alternatives to releasing all of the information should be considered in determining whether to release the information. *Doctors Hospital of Sarasota, Inc. v. Califano*, 455 F. Supp. 476 (M.D. Fla. 1978). It is my opinion, therefore, that financial information that the submitting entity would not customarily release to the public may be withheld from disclosure pursuant to Indiana Code section 5-14-3-4(a)(5). However, any information that is generally released to the public or readily available to the public should have been released upon request.

Additionally, any record submitted to the Department pursuant to state statute must be released. However, it is my opinion that confidential records submitted to the Department based upon administrative rules may be withheld from disclosure. It is my opinion that if the general assembly had intended for confidential information submitted pursuant to administrative rules to be released then the general assembly would have stated that confidential financial information submitted by a person must be withheld except for information filed pursuant to state law. (Emphasis added.) Since the general assembly did not do so it is my opinion that only information required to be submitted by state statute, and not administrative rules, must be provide upon request.

Finally, Indiana Code section 5-14-3-6 provides that "[i]f a public record contains disclosable and

nondisclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed and make it available for inspection and copying." Therefore, if a document contains both confidential financial information and information that is not confidential financial information (or exempt under any other provision) the Department must redact the nondisclosable information and release the disclosable information.

CONCLUSION

In conclusion, it is my opinion that 49 C.F.R. 26.109 according to the United States Department of Transportation is inapplicable to your June 25, 2003 public records request. Therefore, it was improper to withhold the records you requested based upon 49 C.F.R. 26.109. However, it is my opinion that Indiana Code section 5-14-3-4(a)(5) is applicable to your request. Therefore any confidential records obtained upon request from person, except those required to be submitted by state statute and not by administrative rule, was properly withheld from disclosure. Finally, the Indiana Department of Administration has an obligation to separate disclosable and nondisclosable information and provide you with access to the disclosable information and failure on the part of the Department to do so violated the Access to Public Records Act.

Sincerely,

Sandra K. Barger
Acting Public Access Counselor

Cc: Ms. Shari Kinnaird, Director of Contracting
Indiana Department of Administration

¹ See also, *Continental Oil Co. v. Federal Power Commission*, 519 F.2d 31 (C.A. TX 1975), certiorar denied 425 U.S. 971; *Burroughs Corp. v. Schlesinger*, 403 F. Supp 633 (D.C.Va. 1975); *Petkas v. Staats*, 364 F. Supp. 680 (D.C.D.C 1973), reversed on other grounds 501 F.2d 887.