



# STATE OF INDIANA

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May 10, 2013

Mr. Michael A. Howard  
694 Logan Street  
Noblesville, Indiana 46060

*Re: Informal Inquiry 13-INF-22; Trade Secrets*

Dear Mr. Howard:

This informal opinion is in response to your inquiry concerning the disclosure of information alleged to be trade secrets by Hamilton County ("County"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

## BACKGROUND

You provide that in June 2005, Hamilton County ("County") entered into a contract with New World Systems Corporation ("New World") to provide certain software services to the County. In May 2010, the County entered into a Standard Software and Maintenance Agreement with New World. On February 4, 2013, SunGard/OSSI ("SunGard"), a New World competitor, submitted a written request for records to the County for "Copies of any and all of the materials pertaining to the final award or signed contract with New World for a computer aided dispatch, records management, mobile computing, corrections, and justice system." SunGard believed the contracts were executed in 2005.

On March 19, 2013, New World provided an objection to the disclosure of said records based on the premise that the records were considered to be "trade secret." New World maintains that it has developed its pricing methodology based on years of industry experience and knowledge. In doing so, New World has taken steps to prevent the disclosure and maintain the secrecy of its pricing method. Only certain New World employees have access to the pricing information and all must sign confidentiality agreements prior to access. In addition, New World clearly marks any document containing pricing information as "confidential" due to the belief that the value associated with its pricing method is obvious to its competitors, who would derive significant value from access. Based on all of these factors, New World maintains that the pricing information contained in the agreements with the County is a trade secret and the County

may not disclose in response to a request.

On April 3, 2013, the County forwarded its response to SunGard, which provided a copy of the existing agreements between the County and New World, minus any pricing information contained in said agreements. You inquire whether the pricing information contained in the agreements is protected from disclosure as a trade secret pursuant to I.C. § 5-14-3-4(a)(4).

## 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 County 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 County’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.*

Pursuant to section 9(c) of the APRA, the County in denying the request for information deemed to be a “trade secret” would have been required to cite to the specific statute that would authorize the records withholding and the name and title of the person responsible for the denial. It should be noted that pursuant to section 9 of the APRA, the burden for nondisclosure of a record falls on the public agency who maintains the record, not the company that has submitted the information. There may well be instances where the public agency disagrees with the company’s assessment that the information submitted is considered a trade secret. In such cases, the company would be required to seek and receive an injunction from the trial court in order to prevent disclosure. Here, the County has provided all New World agreements in response to SunGard’s request, minus certain pricing information contained in said agreements. Accordingly, as long as the County cited to I.C. § 5-14-3-4(a)(4) and provided the name and title of the person responsible for the denial, it has complied with the requirements of section 9(c) of the APRA.

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*.

In *Bridgestone/Firestone, Inc. v. Lockhart*, a federal district court analyzing Indiana’s trade secret laws held that “knowledge of financial information indicating a company’s strengths and weaknesses . . . sales information . . . broken down by product . . . could be helpful to another manufacturer of competing products, especially in highly competitive, relatively fungible products.” *Bridgestone/Firestone, Inc. v. Lockhart*, 5 F. Supp. 2d 667, 681 (S.D. Ind. 1997). Such information has been considered protectable trade secrets. *Id.* The fact that competitors could gather information lawfully by investing substantial time and money did not foreclose protection of information as trade secrets. *Amoco*, 622 N.E.2d at 919-20; See also *Opinion of the Public Access Counselor 00-FC-21*. The Indiana Court of Appeals has held that a plaintiff’s customer list with pricing information that was not readily ascertainable by the defendants was considered to be a trade secret. *Hydraulic Exch. & Repair v. KM Specialty Pumps*, 690 N.E.2d 782 (Ind. Ct. App. 1998).

In support of its belief that the pricing methodology contained in the agreements with the County would be considered a trade secret, New World cites to the steps taken by the company to develop the pricing information, its efforts to prevent the disclosure of the information, and the benefit obtained by its competitors if the information was made public. New World maintains that the pricing information is unknown to its competitors, including SunGard, and only certain employees within New World have access to the information. Those employees that do have access must sign a confidentiality agreement prior to review. The information is not available in the public domain or to those outside the company, minus those entities to which New World has contracted with. If said information was disclosed, its competitors would derive significant value from access to the information and put New World at a competitive disadvantage. See also *Opinion of the Public Access Counselor 10-FC-305; 12-FC-286*. Lastly, from what has been provided, a requestor would be able to request and receive the total amounts paid to New World by the County pursuant to the contract and a description of the services rendered; however the price per service and/or unit would be redacted as a trade secret.

Based on the foregoing, it is my belief that New World made the appropriate showing to demonstrate that the pricing information is considered to be a “trade secret” and that it has taken reasonable steps to ensure the confidentiality of the information sought. Accordingly, it is my opinion that the County did not violate the APRA by

redacting certain pricing information contained in the agreements in response to SunGard's request.

Please let me know if I can be of any further assistance.

Best regards,

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

Joseph B. Hoage  
Public Access Counselor

cc: Craig Bickley, Renee Cabe