



STATE OF INDIANA

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Mr. Joe Hoage, Esq.
General Counsel
Indiana Department of Natural Resources

Re: Informal Inquiry 14-INF-03; Forestry Pricing Information

Dear Counselor Hoage:

This is in response to your informal inquiry regarding public records of the Indiana Department of Natural Resources' Division of Forestry ("DNR"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-1.5-1 *et seq.* and Ind. Code § 6-1.1-35 *et seq.*

BACKGROUND

The Indiana Department of Natural Resources' Division of Forestry compiles pricing information from private entities associated with the hardwood industry in order to publish a Price Report and Trend Analysis ("Report"). The purpose of this report is to educate the industry on pricing trends of timber. The pricing information in the Report is published in the aggregate and individual pricing data for companies is not disseminated.

The information submitted to the Division is voluntary and the Division is not statutorily mandated to collect pricing data. Your inquiry is whether the individual pricing would be considered a trade secret and/or financial information which would be considered 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 Ind. Code § 5-14-3-1. The Department of Natural Resources' Division of Forestry is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Division's public records during regular

business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

Your inquiry in the present case is whether the individual pricing data published in the aggregate in the Division's Report is subject to disclosure as a public record or if the information would fall into one of the ARPA's statutory exceptions as a confidential record. Specifically, you argue the information is a trade secret of the private operators. Additionally, the pricing data obtained is confidential financial information. If the records fall into either of these two categories, the pricing information would be considered confidential in the case of a public records request.

Trade Secrets

Ind. Code § 5-14-3-4(a)(4) prohibits the disclosure of trade secrets by a public agency pursuant to a public records request unless compelled to do so by a court of law. Under Ind. Code § 5-14-3-2(o), the APRA defines a "trade secret" as having the meaning set forth in the Uniform Trade Secrets Act, Ind. Code § 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.

Presumably, the pricing data submitted to the Division by private operators is a proprietary formula extrapolated from the business model and strategy of the individual entity. Indiana Courts have declared trade secrets to be "one of the most elusive and difficult concepts in law to define." See *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (1993). Moreover, the Courts have determined information is not a trade secret if it "is not secret in the first place--if it is 'readily ascertainable' by other proper means." *Id.* The Court in *Amoco* goes on to hold: "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."

In your inquiry, you allege the pricing information of individual entities is not published in any other forum. You argue that if the information were to be disclosed, it would compromise industry competition and place an individual operator at a disadvantage in the market. In all probability, individual pricing factors are seemingly unique to each individual operator. There would be no economically feasible way to reproduce the formula by another industry competitor.

If the above is held as true and the release of said data would be an impediment to competition and would place an individual operator at risk of economic disadvantage, then the pricing information could be considered a trade secret. As such, the Division may not disclose the information unless ordered to do so by court order under Ind. Code § 5-14-3-4(a)(4).

You next raise an interesting issue of the interpretation of Ind. Code § 5-14-3-6 as it relates to the trade secret exception in Ind. Code § 5-14-3-4(a)(4). Section 4(a)(4) exempts records containing trade secrets implying the *entire* record would be exempt and not merely the trade secret itself. Conversely, Ind. Code § 5-14-3-6 requires an agency to separate confidential material from disclosable records and release the partial record which may be produced.

Former Public Access Counselor Andrew Kossack opined in 11-INF-06 the plain meaning of Ind. Code § 5-14-3-4(a)(4) obligates an agency to withhold the entire record which contains a trade secret. After review of Counselor Kossack's opinion and the statutes in question, it is also my opinion Ind. Code § 5-14-3-6 would not apply to records containing trade secrets. Therefore, if the pricing information contained in records submitted to the Division contains trade secrets, then the entirety of that record is to be considered confidential.

Confidential Financial Information

You also inquire if the pricing information submitted to the Division is considered confidential financial information. Ind. Code 5-14-3-4(a)(5) prohibits the disclosure of confidential financial information obtained by a public agency unless the information is filed with the agency pursuant to statute. As you indicate in your inquiry, the term *confidential financial information* is not defined in the APRA.

In the *Opinion of the Public Access Counselor 03-FC-56*, Acting Counselor Susan K. Barger opined, "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.* at 364. Therefore, 'confidential financial information' means information that is secret relating to finance." This analysis has been used by subsequent Public Access Counselors and I see no reason to deviate from that conclusion.

In the present case, and as discussed above, the private operators reporting pricing information clearly intended the information to be conveyed in confidence. You claim the information is reported voluntarily and dissemination of the data would potentially harm industry competition. Pricing is clearly financial and you state it is intended to be a trade secret. Therefore, a trade secret relating to finance would be considered confidential financial information and also not disclosable by a public agency.

CONCLUSION

Based on the foregoing reasons, it is the Opinion of the Public Access Counselor the pricing information obtained by the Indiana Department of Natural Resources' Division of Forestry is a trade secret and confidential financial information. Additionally, as the information is a trade secret, the record containing those secrets is not to be disclosed by the Division.

Best regards,

A handwritten signature in black ink, appearing to read 'L. Britt', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor