



STATE OF INDIANA

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July 11, 2014

Mr. Joseph Hoage
Indiana Department of Natural Resources

Re: Informal Inquiry 14-INF-19; Indiana Natural Heritage Data Center

Dear Joe:

This is in response to your informal inquiry regarding records compiled by the Indiana Natural Heritage Data Center. 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 § 5-14-3-1.

BACKGROUND

As part of a global network of heritage programs, The Indiana Natural Heritage Data Center, administrated by the Indiana Department of Natural Resources ("DNR"), gathers a significantly large amount of information to submit to the Natural Heritage Database ("Database") maintained by the conservation organization NatureServe. This data is compiled to aid in conservation and wildlife protection efforts. Among the data collected is the identification of Federal and State protected endangered and threatened species, including population locations.

DNR acknowledges the vast majority of records in the Data Centers database are public record. The concern is the release of records may jeopardize those populations as traffickers could potentially exploit information regarding the flora and fauna for poaching and profit. The intended use of the information is for protection and conservation efforts.

In 2002, DNR sought the informal advice of then-acting Public Access Counselor Anne Mullin-O'Connor. She advised the records could be withheld as the release of the sensitive data would compromise the integrity of the record keeping system itself. She also theorized the data would be a trade secret and therefore would be except from release. She did not publish an opinion on the matter and DNR would like a more recent analysis of the issue.

DNR is presently considering whether to initiate a program identifying the existence of caves and bat species within those caves. As with the Natural Heritage Database, DNR is concerned the release of data associated with this project may compromise the integrity of a proposed new database. These projects are similar enough to consolidate for the purposes of the arguments below and will be referenced as one.

DISCUSSION

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 Indiana Department of Natural Resources is a public agency for the purposes of the APRA. *See* Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy DNR’s non-confidential public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise non-disclosable under the APRA. *See* Ind. Code § 5-14-3-3(a).

The release of administrative or technical information that would jeopardize a record keeping system is discretionary under Ind. Code § 5-14-3-4(b)(10). The record keeping system in this case is the portion of the database containing scientific data of threatened or endangered species. Former Counselor O’Conner agreed with DNR that the release of information in the database would render the exercise of maintaining endangered species data fruitless. Poachers and traffickers would exploit this data to harm the populations in pursuit of economic profit and jeopardize the data and thusly the database.

DNR has relied on this position since 2002 and, to my knowledge, has not been challenged. Moreover, you have cited the Indiana Court of Appeals opinion in *City of Elkhart v. Agenda: Open Government*, 683 N.E. 2d 622 (Ind. Ct. App. 1997). In that case, the data in question was a log of telephone numbers in an Emergency 911 database. The asserted exception pursuant to Ind. Code § 5-14-3-4(b)(10) was not recognized by the Court as it reasoned that telephone numbers themselves are innocuous and their use by the requestor was irrelevant. The Court stated:

Section 4(b)(10) provides a discretionary exception for public records containing a "type" of information due to its nature and not because a speculated "use" of the information would jeopardize a record keeping or security system. The City [requestor] has no authority or discretion to refuse disclosure of nontechnical and nonadministrative information or to require the person making a lawful request for records to provide assurance that such information will not be misused.

There is no doubt the endangered species information is technical data. In the context of a record keeping system, however, this type of information is not germane to the infrastructure of the database. Unintended “use” of data within a record keeping system does not jeopardize the architecture of the system itself. The release of passwords,

coding, programming, design or structure of a record keeping system are technical or administrative data which I believe the legislature intended to be able to be withheld.

The Court in *City of Elkhart* stated that “speculated future misuse of information which is innocuous on its face is irrelevant”. But for the Heritage database, the endangered species information is innocuous. The system and the data are intrinsically mutually exclusive. The inclusion of the data within the system does not fundamentally change the nature of the information. While public policy considerations may strongly favor withholding the information, it is my opinion DNR cannot use Ind. Code § 5-14-3-4(b)(10) as justification to exercise discretionary release.

Interestingly, however, you have cited the trade secret exception found at Ind. Code § 5-14-3-4(a)(4). 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.

You state contributors to the database include private consultants, scientists and researchers who derive economic value from the type of information compiled and provided to DNR. They profit from books, papers, and other publications. Absent their specific scientific expertise on the subject, this information would not be readily known or ascertainable by other members of the public. You speculate the database would suffer from researchers withholding data, knowing its release would compromise their proprietary work and independent study.

I am compelled by the trade secret argument. If DNR has information from third-party scientists and researchers, it may withhold the data under the trade secret exception. This analysis applies to both the Heritage Database and the bat project. The data in both projects obtained by individuals with scientific, not-readily-known expertise and knowledge may be withheld.

Also, note my prior interpretation from *Informal Opinion 14-INF-3* which opined Ind. Code § 5-14-3-4(a)(4) obligates an agency to withhold the entire record which contains a trade secret. As to the present matter, I encourage you to consider each entry in the database to be a separate record for the purpose of release. Therefore, the trade secret

exception would not blanket the entire database, but only those entries containing trade secrets as described in this Opinion.

Please do not hesitate to contact me with any further questions.

Best regards,

A handwritten signature in black ink, appearing to be 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor