



STATE OF INDIANA

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September 26, 2014

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

Re: Informal Inquiry 14-INF-25; DNR Audits of Timber Buyers

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.*

BACKGROUND

As the regulatory authority over timber buyers, the Indiana Department of Natural Resources' Division of Forestry has the statutory authority to audit those buyers pursuant to Ind. Code § 25-36.5-1-8. Documentation generated by the audit contains pricing information of timber and other financial information. Your inquiry asks this Office to determine whether such information is confidential.

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).

A substantially similar issue was addressed to the DNR in *Informal Opinion of the Public Access Counselor 14-INF-03*. To maintain consistency, much of this analysis will be derived from that particular Opinion.

Your inquiry in the present case is whether the information gathered by DNR's Division of Forestry's auditors is disclosable public record. You postulate that much of the information reflects pricing information which may be considered to be a trade secret. The release of trade secrets by a public agency could result in potential liability.

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.

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."

The audit information is not published by the Division. It is purely a regulatory oversight mechanism for ensuring compliance. You argue the information is held secret by the timber buyer - it is not readily ascertainable; the data underlying the audit is generally held secret by the buyer; and the release of the information would place the regulated entity at an economic disadvantage.

Similar to pricing information discussed in *Informal Opinion of the Public Access Counselor 14-INF-03*, the accounting records are seemingly unique to each individual operator. 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).

Please also note Ind. Code § 5-14-3-4(a)(4), which exempts records containing trade secrets implying the *entire* record would be exempt and not merely the trade secret itself. I, as well as previous Public Access Counselors, have interpreted this statute to hold that a public agency must withhold the entirety of the record containing a trade secret.

The information collected by the Division could also be 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 timber buyers subjecting their financial information to DNR regulators is pursuant to statute. In order to encourage buyers to be completely forthcoming with the data, it would stand to reason the audit is intended to be confidential.

CONCLUSION

Based on the foregoing reasons, it is the Opinion of the Public Access Counselor the audit information obtained by the Indiana Department of Natural Resources’ Division of Forestry is a trade secret and confidential financial information.

Best regards,

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

Luke H. Britt
Public Access Counselor