



STATE OF INDIANA

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State of Indiana
Indiana Department of Revenue
Mr. Larry Molnar, Esq.
Director of Legal Affairs
100 N. Senate Ave., N. 248
Indianapolis, IN 46204

Re: Informal Inquiry 15-INF-32; Taxpayer Information and Trade Secrets

Dear Mr. Molnar:

This is in response to your informal inquiry regarding disclosure of taxpayer information and vendor's trade secrets. 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 *et seq.*

BACKGROUND

Your inquiry is regarding the propriety of the Department of Revenue ("DOR") withholding taxpayer information and the designation of DOR vendor's proprietary software as trade secrets.

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 § 5-14-3-2. Accordingly, any individual has the right to inspect and copy a public agency's 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).

Under Ind. Code § 6-8.1-7-1, the Department of Revenue:

“may not divulge the amount of tax paid by any taxpayer, terms of a settlement agreement executed between a taxpayer and the department, investigation records, investigation reports, or any other information disclosed by the reports filed under the provisions of the law relating to any of the listed taxes.”

You request an opinion from this office as to the exemptions under the APRA. Ind. Code § 5-14-3-4(a)(1) exempts from the APRA records “declared confidential by state statute.” Therefore, the Department of Revenue should invoke Ind. Code § 5-14-3-4(a)(1) to the extent the requested records are declared confidential under Ind. Code § 6-8.1-7-1. This confidentiality similarly extends to any state vendor holding this information in its official capacity as a state contractor.

Moreover, you also request a statement regarding propriety software materials used by the DOR. 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.”

So long as the propriety code or software meets the criteria set forth in Ind. Code § 24-2-3-2(c), any documentation containing proprietary information should be withheld from public release by the DOR. Courts determine whether or not something is a trade secret as a matter of law, however, from a public access standpoint, if proprietary information has economic value, is not readily ascertainable and is kept secret, it would be exempt from a public access request.

Furthermore, even if it is not trade secret, computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it would be exempted from disclosure as discretionary release under Ind. Code § 5-14-3-4(b)(11). Therefore, the DOR may exercise its discretion to withhold a public record containing information such as computer code or proprietary information technology materials. It is also my opinion, based upon the information provided, that any security reports required to be filed to the DOR by these software vendors would also be discretionary or considered to be deliberative material under Ind. Code § 5-14-3-4(b)(6).

Please do not hesitate to contact me with any questions.

Best regards,

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

Luke H. Britt
Public Access Counselor