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Indiana Department of Labor
Tony Hardman, General Counsel
402 West Washington Street, Rm. W195
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Re: Informal opinion 20-INF-2; Release of OSHA records

Dear Mr. Hardman:

This informal opinion is in response to your inquiry concerning the accessibility of certain Indiana Occupational Safety and Health (IOSHA) records. In accordance with Indiana Code section 5-14-4-10(5), I issue the following informal opinion to your inquiry.

BACKGROUND

When conducting its affairs with regard to inspecting employers for safety standards compliance, IOSHA requests certain documentation from the employer. This documentation in turn becomes part of the public record and available upon request unless an exception to disclosure applies.

Employers consider some of the documentation collected by IOSHA to be nondisclosable under both federal and state laws. Specifically, two employers argue that IOSHA has a "narrow view of exceptions to the Access to Public Records Act" and the contents of the documents are subject to both Freedom of Information Act (FOIA) exceptions to disclosure and are trade secret under both federal and state law.

Your inquiry can be divided into three parts. First, does FOIA apply at all to the documents? Second, does the trade secret exemption from disclosure apply to the documents in question? Third, with respect to compliance logs gathered by IOSHA, what information may IOSHA redact from those forms.

ANALYSIS

1. The Access to Public Records Act and the Freedom of Information Act

Central to this inquiry is whether the Access to Public Records Act (APRA) or its federal counterpart the Freedom of Information Act (FOIA) govern access to the records in contention here. We'll briefly address each in turn.

1.1 APRA

APRA governs access to public records in Indiana. The law applies to public agencies (e.g., government) at the state and local level. It does not apply to federal agencies. Under the act, public records are presumptively disclosable unless an exemption or exception to disclosure applies under the law. APRA reflects the legislature's policy intention that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." Ind. Code § 5-14-3-1.

APRA has both mandatory exemptions and discretionary exceptions to the general rule of disclosure.[1] In short, if a public record is covered by one of APRA's mandatory exemptions, the public agency is prohibited from disclosing the record unless access is specifically required by a state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a).

APRA is liberally construed in favor of transparency. *See* Ind. Code § 5-14-3-1. Notably, exceptions to public disclosure laws and their operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. *Robinson v. Indiana Univ.*, 659 N.E.2d 153 (Ind. Ct. App. 1995) *trans. denied.*

1.2 FOIA

FOIA is a federal statute that enables the public to access records from agencies of the federal government. *See generally* 5 U.S.C. § 552. FOIA does not apply to the states. Notably, courts interpret FOIA the same way as Indiana courts and agencies interpret APRA. *See Patterson v. I.R.S.*, F.3d 832 (7th Cir. 1995)(observing FOIA exemptions and exceptions construed narrowly in favor of disclosure).

Therefore, to the extent the Indiana Department of Labor construes APRA in this manner, I encourage the agency to continuing to do so. I do take exception to an employer's assertion that the access laws are to be interpreted to the contrary.

[1] Ind. Code § 5-14-3-4(a)–(b).

1.3 FOIA or APRA?

APRA applies exclusively to Indiana public agencies[2] while FOIA applies solely to federal agencies,[3] namely, those listed by the Department of Justice's Office of Information and Privacy.[4]

A notable exception to disclosure under APRA is when a record is declared confidential by federal law.[5] Differences between confidential and discretionary release notwithstanding, this provision applies only if the federal law is applicable to the agency in question. This office interprets FOIA as being a statute of agency-specific applicability.

Indeed, Indiana courts have held that state agencies are not subject to FOIA. *See Lane-El v. Spears*, 13 N.E.3d 859 (Ind. Ct. App. 2014) ("Lane–El also makes an argument under the United States Freedom of Information Act ("FOIA") that we will not address as it is well-established that the FOIA applies only to the actions of federal agencies.")(internal citations omitted).

Indiana is one of 22 "State-Plan" OSHA states, which means the Indiana Department of Labor has an OSHA-approved workplace safety and health program operated independent of the U.S. Department of Labor.[6] IDOL is a public entity established by the Indiana Legislature[7] and has regulatory authority with regard to occupational health and safety granted to it by the Indiana General Assembly.[8]

Point being is that no reasonable interpretation of IOSHA's bureaucracy would subject it to FOIA in the same manner as a federal agency. As a result, FOIA's exemptions and exceptions are not applicable to IOSHA through Indiana Code section 5-14-3-4(a)(3). In turn, any argument made under a FOIA exemption is dead on arrival.[9]

2. Trade secrets

Although there are plenty of provisions protecting proprietary information from public disclosure under Indiana law, trade secrets are expressly exempt from disclosure under APRA. Ind. Code § 5-14-3-4(a)(4). Much of the following is taken verbatim from guidance this office in conjunction with the Indiana Department of Administration in the context of requests for proposals and subsequently submitted bidding materials.[10]

When interacting with and collecting information from partners in the private sector, some public records may call for information that is considered the unique proprietary

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[2] Ind. Code § 5-14-3-2(q).
[3] 5 U.S.C. § 552(f)(1).
[4] https://www.justice.gov/oip/blog/foia-update-foia-administrative-and-legal-contacts-federal-agencies
[5] Ind. Code § 5-14-3-4(a)(3).
[6] https://www.osha.gov/stateplans/
[7] Ind. Code § 22-1-1-1.
[8] Ind. Code § 22-1-1-11.
[9] An analogous argument may be made for 29 CFR 70, which the IDOL has not incorporated by reference into its provisions found in Title 610 of the Indiana Administrative Code.
[10] Informal Opinion 18-INF-06.

information of the private third-party. If the information disclosed would place the bidder at an economic disadvantage within its marketplace and the information is not readily known, then it could be considered a trade secret.

This can apply to both a cottage industry and in large business environments. Naturally, an entity will seek to keep the trade secret strictly between the bidder and the State of Indiana. "Trade secret" is statutorily defined to mean:

> [I]nformation, 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.

Ind. Code § 24-2-3-2. Based on this statutory definition, Indiana courts have long held that a trade secret has four general characteristics: 1) it is information; 2) that derives independent economic value; 3) from not being generally known, or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and 4) that is the subject of efforts, reasonable under the circumstances, to maintain its secrecy. *See Ackerman v. Kimball Int'l, Inc.*, 634 N.E.2d 778, 783 (Ind. Ct. App. 1994), *vacated in part, adopted in part*, 652 N.E.2d 507 (Ind. 1995); *see also Bridgestone Americas Holding, Inc. v. Mayberry*, 878 N.E.2d 189, 192 (Ind. 2007) (stating that "[u]nlike other assets, the value of a trade secret hinges on its secrecy. As more people or organizations learn the secret, [its] value quickly diminishes").

Granted, this is a different standard than courts have used for the broader "commercial information" exception under FOIA.

The Indiana Supreme Court recognized trade secrets to be "one of the most elusive and difficult concepts in law to define." *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 916 (Ind. 1993). Moreover, the court recognized that 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.* In *Amoco*, the court acknowledges "[t]he 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.*

What is clear is that our courts evaluate a trade secret claim based on its individual uniqueness and proprietary exclusivity as well as the impact on the marketplace should the secret be disclosed. The bottom line is that for a trade secret to qualify, it must meet the statutory criteria. Formulas, patterns, strategy, methodology, technical specifications, techniques, and processes may be declared trade secret so long as they are exclusively proprietary to the bidder and protective measures have been taken to protect them as secret.

Commonly known or general information would not qualify as trade secret. Therefore, previously published information, generic marketing material, public relations puffery, employee bios and qualifications that are readily known, other public agency customers and the like would not satisfy the standard.

Specifically, in terms of safety and hazard mitigation programs, a private company would carry the burden of demonstrating that the record qualifies as a trade secret. This office is unware of any case law or other legal authority recognizing such a record as a trade secret. At this point, based on the information and arguments presented, I remain unconvinced.

3. Compliance logs

Finally, there is contention among IOSHA and the employers it investigates as to the disclosure of the logs of work-related injuries and illnesses. IOSHA redacts some identifying information like names, social security numbers, and driver's license numbers from the logs but discloses the remainder.

In contrast to FOIA, the IDOL has adopted and incorporated by reference a portion of the Code of Federal Regulations as it pertains to recording and reporting occupational injuries.[11] These provisions regulate record keeping and involvement of the employee or a representative in the process by the employer.[12] Notably, those regulations do not speak to disclosure or access by the public at large once it is submitted to a state-plan department of labor.

Even so, Indiana does have a Fair Information Practices Act (FIPA),[13] which guides state agencies in the safeguarding of personal information contained in public records. While not a privacy statute, per se, the FIPA instructs agencies to be mindful of sensitive information found in otherwise disclosable public records. In fact, the forms themselves offer a disclaimer that the form "*must be used in a manner that protects the confidentiality of employees.*"[14]

Toward that end, the redaction of names, social security numbers, and driver's licenses are reasonable for the purposes of maintaining an ill or injured employee's privacy expectations. The remainder of the logs, however, would not be confidential as a general proposition.

[11] 610 IAC 9-3-1
[12] 29 CFR § 1904 et. al.
[13] Ind. Code § 4-1-6 et.al.
[14] OSHA's FORM 300 (Rev. 01/2004)

CONCLUSION

Based on the foregoing, it is the opinion of this office that materials gathered by IOSHA in the course of employee investigations are disclosable. To the extent those documents contain personally identifiable information, they may be redacted in a manner consistent with this opinion.

Please do not hesitate to contact me with any questions.

Best regards,

Luke H. Britt
Public Access Counselor