May 12, 2005 Advice to Attorney General Regarding Disclosure of Records Obtained from Securities and Exchange Commission

May 12, 2005

Gregory F. Zoeller
Chief Deputy Attorney General
Indiana Government Center South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204

Re: Informal Inquiry Response

Dear Mr. Zoeller:

You have requested an informal opinion from the Office of the Public Access Counselor by letter dated March 30, 2005. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

The Office of the Indiana Attorney General ("Office") is prosecuting a civil lawsuit in the United States District Court for the Southern District of California against Fax.com and its officers for violations of federal law prohibiting unsolicited fax broadcasting. Co-plaintiffs in the lawsuit are the California Attorney General and the United States Department of Justice. The United States has obtained information relevant to the lawsuit from the U.S. Securities and Exchange Commission (SEC). The Office seeks access to this information, which includes investigative depositions of defendants in the California litigation, so that it may effectively participate and represent Indiana's interests in the California litigation.

The SEC is willing to comply with the Office's request for access to SEC information, but is seeking certain assurances prior to releasing the information. Based on several federal statutes and regulations that make information obtained by the SEC in the course of an investigation or examination "nonpublic" and confidential, the SEC is asking that the Office sign a form letter containing three assurances. Those assurances (1) require the Office to obtain SEC's prior approval before making public use of the information; (2) require the Office to notify SEC of any legally enforceable demand for the information before complying with the demand, and "assert such legal exemptions or privileges on [SEC's] behalf as [it] may request;" and (3) require the Office to notify SEC of any other demand or request for the information and grant such request only in the absence of objection from SEC.

You have asked for my opinion regarding the second requirement. In particular, you asked whether the Office may agree to assert exemptions and privileges on SEC's behalf as the SEC may request, consistent with the Indiana Access to Public Records Act. You also invited me to offer an opinion on any other issue that the SEC letter may raise with respect to the Office's obligations under the Indiana public access laws.

I know that the Office is familiar with the basic provisions of the Access to Public Records Act, so I will not repeat them here. Instead, I have reviewed the exemptions that would be available to a public agency under section 4, and have analyzed the SEC form letter in the context of the exemptions available to the Office for records that the Office receives from the SEC. As you know, a record that is maintained, received, retained, created, or filed by or with a public agency is a public record. Ind. Code 5-14-3-2. Accordingly, unless the records that the Office receives from the SEC are subject to an exemption under the APRA, the Office would be required to disclose them. Hence, the need to ensure that any assurances that the Office makes to the SEC are ones that the Office could, in good faith, enter into is no doubt a matter of great importance to the Office.

Under the APRA, records that are required to be kept confidential by federal law must be withheld from disclosure, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery. IC 5-14-3-4(a)(3). Also, records containing trade secrets are confidential under the APRA. IC 5-14-3-4(a)(4). According to the information sent to the Office by Rachel Izower, attorney for the SEC, there are several federal statutes and regulations promulgated under those statutes that make information or documents obtained by the SEC in the course of an investigation or examination confidential. 17 CFR 230.122; 17 CFR 240.0-4. In addition, 17 CFR 203.2 provides that information or documents obtained by the SEC in the course of any investigation or examination, unless made a matter of public record, shall be deemed nonpublic. There are also several other federal laws that were cited by the SEC that may apply to information that the SEC would release to the Office. These include the Federal Privacy Act (5 U.S.C. 552a), the Trade Secrets Act, and the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401-22). These laws, according to the SEC attorney, restrict the SEC from disclosing certain information that comes within the ambit of those laws.

I have not performed an exhaustive analysis of these or other federal laws that may cover the information that would be the subject of disclosure from the SEC to the Office. This is in part because the information the Office would receive from the SEC may or may not fall within the ambit of a federal confidentiality law, and I do not know the type of information that the SEC would share with the Office. However, I would note that in order for the exemption at IC 5-14-3-4(a)(3) to apply, the federal law protecting the information would have to operate directly on the Office. For example, the federal Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g applies to all schools receiving federal education funding, not just to a federal agency like the Department of Education or its employees. *See The Indianapolis Star v. The Trustees of Indiana University*, 787 N.E.2d 893, 903 (Ind. Ct. App. 2003) (discussing whether FERPA requires educational records to be kept confidential by federal law where compliance is merely a condition of funding, and holding that FERPA does require confidentiality under IC 5-14-3-4(a)(3)). Also, the Standards for Privacy of Individually Identifiable Health Information

(commonly known as "HIPAA"), 45 CFR Parts 160 and 164 requires that certain covered entities maintain the confidentiality of health information.

Hence, the Office may rely on the exemption at IC 5-14-3-4(a)(3) only where the particular federal law applies to the Office. From my review of the SEC regulations, they apply only to staff of the SEC ("officers and employees [of the Commission] are hereby prohibited from making such confidential information ...available to anyone...") 17 CFR 230.122.

Nevertheless, the Office may protect the records or information obtained directly from the SEC under IC 5-14-3-6.5, which provides that a public agency that receives a confidential public record from another public agency shall maintain the confidentiality of the public record. This provision was applied by the public access counselor in a March 2003 advisory opinion concerning another state's confidentiality laws. *Opinion of the Public Access Counselor 03-FC-17.* Consequently, if a request for SEC information is denied by the Office, the Office should cite to the federal statute or regulation making the record confidential, and to IC 5-14-3-6.5. As always, the burden of proof is on the public agency (the Office) to sustain its denial. IC 5-14-3-9(f).

I do not agree with the theory contained in footnote 2 of the March 30 letter that SEC requirement 2 would be consistent with the APRA where any exemption or privilege that SEC might ask the Office to assert would effectively make the record one "required to kept confidential by federal law." Not all federal agency actions rise to the level of "federal law," and I do not believe that the mere assertion of rights under requirement 2 of the proposed agreement by the SEC would fit the exemption at IC 5-14-3-4(a)(3). However, if the basis for an exemption or privilege is in federal law, and the applicable federal law makes the information confidential and not just nondisclosable at the agency's discretion, section 6.5 should suffice to protect the information from disclosure.

I agree with your conclusion that the other part of requirement 2, that the Office notify the SEC of any legally enforceable demand for the information before complying with the demand, is consistent with the APRA. It is analogous to IC 5-14-3-9(e), which provides that whenever an action is filed in court under subsection (e), the public agency must notify each person who supplied any part of the public record at issue: (1) that a request for release of the public record has been denied; and (2) whether the denial was in compliance with an informal inquiry response or advisory opinion of the Public Access Counselor. Such persons are entitled to intervene in any litigation that results from the denial.

Also, the requirement to notify the SEC prior to disclosure does not make the response requirements within the APRA impossible or even difficult to meet. IC 5-14-3-9(a) and (b). However, I raise one concern with respect to the language in requirement 2 that requires the Office to notify the SEC prior to "complying with the demand." If that clause can be construed to mean "respond to an APRA request" short of disclosing the records, it may be prudent to clarify that "complying with the demand" means producing the records, not merely responding to the request.

Sincerely,

Karen Davis
Public Access Counselor