

October 27, 2007

Mara Snyder  
Indiana Department of Homeland Security  
302 West Washington Street  
Indianapolis, Indiana 46204

Dear Ms. Snyder:

This is in response to your informal inquiry dated June 27, 2006. I apologize for the delay in the response. Upon my appointment by Governor Daniels effective July 1 of this year, I found a backlog of informal inquiries. I am currently endeavoring to address those inquiries and issue an opinion in each matter pursuant to Indiana Code §5-14-4-10(5). Your inquiry concerns records filed with the Indiana Department of Homeland Security, Division of Fire and Building Safety (hereinafter "DFBS").

#### BACKGROUND

On February 21, 2006, DFBS received a request from the law firm of Barnes & Thornburg LLP for a large number of public records. After some clarification, you produced the requested records. On June 21, 2006, DFBS received a letter from the law firm of Ice Miller requesting DFBS to require the immediate return of the records provided to Barnes & Thornburg LLP with respect to Patriot Homes, Inc. and Patriot Manufacturing, Inc. (hereinafter "Patriot"). On June 22, 2006 DFBS received a letter from Barnes & Thornburg LLP indicating DFBS had no authority and no obligation to comply with Ice Miller's request for the return of the records. Also on June 22 you sent a letter to Ice Miller indicating you were seeking advice from the public access counselor to determine whether the records were to be maintained as trade secrets and withheld from disclosure pursuant to the Access to Public Records Act ("APRA") (Ind. Code 5-14-3).

The records at issue here are records submitted to DFBS in connection with selling of modular or manufactured homes in Indiana. Specifically, the records at issue are Patriot's Systems Manuals and Quality Control Manuals as well as other documents the entity was required to file with DFBS. Ice Miller has indicated to you that the manuals contain "confidential, proprietary and trade secret information" which may not be disclosed by the agency under the exception to disclosure found in I.C. §5-14-3-4(a)(4). The manuals are required to be filed with the DFBS under 675 IAC 15-1.2-5(e)(17).

## ANALYSIS

The public policy of the APRA states, "(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." I.C. §5-14-3-1.

Indiana Code §5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of APRA. A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2(m). The DFBS of the Department of Homeland Security is clearly a public agency under I.C. §5-14-3-2(l).

The following public records are excepted from section 3 of the APRA and may not be disclosed by a public agency 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:

- (4) Records containing trade secrets

I.C. §5-14-3-4(a).

Regarding Ice Miller's assertion the information contained in the manuals constitutes a trade secret, the DFBS would bear the burden of proof of nondisclosure. I.C. §5-14-3-1. "Trade secret" under the APRA has the meaning set forth in I.C. §24-2-3-2, which is "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."

I.C. §24-2-3-2.

A trade secret is difficult to define with precision. *Amoco Production Co. v. Laird*, 622 N.E.2d 912, 916 (Ind. 1993). Moreover, whether information is a trade secret is a fact-sensitive inquiry. *Id.* I do not understand the issue here to involve the first part of the two-part definition for trade secret. The issue here is whether Patriot has fulfilled the second part of the definition, having made reasonable efforts to maintain the secrecy of the information when it did not label the information it provided to DFBS as containing trade secrets. Further you inquire whether the DFBS was under an obligation to withhold the information from disclosure when the information was not so labeled.

Indiana courts have addressed the issue of reasonable efforts to maintain secrecy. "The owner of the trade secret must make reasonable, though not overly extravagant, measures to protect its secrecy. Absolute secrecy is not required. What is 'reasonable' under the facts of one case may be considered inadequate under the facts of another." *Zemco Manufacturing, Inc. v. Navistar International Transportation Corp.*, 759 N.E.2d 239, 246 (Ind. Ct. App. 2001). But

Indiana courts have not addressed the issue as it relates to the Access to Public Records Act (I.C. 5-14-3).

The Supreme Court of Georgia addressed this issue in *Georgia Department of Natural Resources et al v. Theragenics Corporation*, 273 Ga. 724 (Georgia 2001). There, a competitor of Theragenics sought to obtain information filed with the Georgia Environmental Protection Division (EPD). The EPD indicated it would disclose all filing information not designated by Theragenics as a trade secret. The court said that the EPD is not an insurer against disclosure of trade secrets and under Georgia law is not liable for disclosure when relying in good faith on the requirements of the Open Records Act. The court indicated it would be prudent for a regulated party to designate at the outset which materials contain trade secrets. *Id.* at 726. But because the Open Records Act places the ultimate responsibility for non-disclosure on EPD, the agency cannot simply rely on the company's failure to identify trade secrets as a waiver of confidentiality of its proprietary material. The court suggested EPD could undertake its own review of the records or inform the regulated party of the request and solicit a designation from the party of records deemed confidential. *Id.*

In Florida, the Court of Appeals has addressed a similar issue when a competitor of a contractor of the Florida Department of Environmental Protection (DEP) sought disclosure of records filed with the agency.

“The trade secret owner who fails to label a trade secret as such, or otherwise to specify in writing upon delivery to a state agency that information which it contends is confidential and exempt under the public records law is not to be disclosed, has not taken measures or made efforts that are reasonable under the circumstances to maintain the information's secrecy. *Sepero Corporation v. Florida Department of Environmental Protection*, 839 So.2d 781, 784 (Fla. Ct. App. 2003).

The court further admonishes, “it is clear a private party cannot render public records exempt from disclosure merely by designating information it furnishes a government agency confidential.” *Id.*

In Indiana, there do exist statutes and administrative rules placing the burden on the regulated entity to identify to the agency which records contain information excepted from disclosure under the APRA. Ind. Code §13-14-11-3 places the duty to ask for the exemption to disclosure on a person who is required to submit a record to the Department of Environmental Management. Similarly, 326 IAC 17.1-4-1 places the duty on the person submitting information to the Air Pollution Control Board to request the records to be kept confidential for reasons allowed in I.C. §5-14-3-4. No such provision exists relating to records submitted to the DFBS.

It is my opinion that as a practical matter an agency cannot always know what records contain trade secrets. Most agencies do not have the resources to contact the submitting party every time a request for access to records is submitted to the agency regarding records submitted by that party. A party claiming a trade secret must show efforts that are reasonable under the circumstances to maintain its secrecy. I.C. §24-2-3-2. It is my opinion that under this definition a party should label or otherwise designate the records as containing trade secrets when submitting information to a regulating agency. While a party cannot render records confidential

merely by indicating they are confidential, the entity should designate those records which contain trade secrets or are otherwise confidential. The agency should then verify the designation is accurate and withhold the records from disclosure pursuant to I.C. §5-14-3-4.

#### CONCLUSION

It is my opinion the DFBS did not err in providing copies of the records to the requester when the records had no designation indicating trade secrets were contained therein.

Best regards,



Heather Willis Neal  
Public Access Counselor