

January 17, 2008

Gary Ricks
4701 N Keystone Avenue
Suite 222
Indianapolis, IN 46205

Re: Informal Inquiry regarding Alleged violation of the Access to Public Records Act by the Indiana Family and Social Services Administration

Dear Mr. Ricks:

This is in response to your informal inquiry dated November 2, 2007. I apologize for the delay in the response. Upon my appointment by Governor Daniels effective July 1, 2007, 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 an alleged violation of the Access to Public Records Act (“APRA”)(Ind. Code 5-14-3) by the Indiana Family and Social Services Administration (“FSSA”).

BACKGROUND

You originally filed a formal complaint on November 2, 2007. Because your complaint was untimely under I.C. §5-14-5-7, it was rejected as a formal complaint. You asked my office to convert the complaint into an informal inquiry, and your request was granted.

You requested a copy of a therapeutic intervention training manual used by the FSSA and developed by a private contractor. The manual is used to train the staff at the Logansport State Hospital, specifically regarding physical restraint techniques. On behalf of the Indiana Protection and Advocacy Services (“IPAS”), you requested this manual to determine whether certain restraint techniques were appropriate. Your request was denied by FSSA based on the trade secret exception provided in I.C. §5-14-3-4(a)(4) and based on the definition of trade secret in I.C. §24-3-4-2.

Katherine Gerber Gregory, Chief Counsel for FSSA, responded to your complaint on November 30, 2007. In her response, she indicated that Lolita Thompson from IPAS also requested the same document after your request had been denied. Ms. Gregory uses this response to address both denials.

On September 17, 2007, Ms. Gregory denied your request for the “Bridgebuilding” Therapeutic/Physical Intervention Master Trainers Manual (“Manual”) based on the trade secrets exception found in I.C. §5-14-3-4(a)(3) and defined in I.C. §24-3-4-3. This manual was produced by Bridge Building Control Techniques, Inc. (“BBCT”), a state contractor. State employees trained by BBCT were required to sign agreements with “covenant not to compete” provisions. In a memorandum dated November 27, 2007 from BBCT President Bobbie Simon to the legal counsel for Logansport State Hospital, Mr. Simon indicated that BBCT considers the manual to have information in which BBCT has a proprietary interest and disclosure of any part of the manual would be a breach of agreement. Ms. Gregory contends it would be bad public policy to disclose information that is a proprietary interest for state contractors.

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. The FSSA is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. As such, the records of the FSSA shall be disclosed upon request unless the records are excepted from disclosure under section 4 of the APRA. I.C. §5-14-3-3.

The APRA contains a list of several public records that may not be disclosed by a public agency. One of those exceptions is documents containing trade secrets. I.C. §5-14-3-4(a)(3). The term “trade secret” is defined in I.C. §24-2-3-2. It is defined as “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.

The FSSA contends the Manual contains trade secrets and as such may not be disclosed upon request. The FSSA further contends that the Manual is so infused with material the developer considers trade secret that disclosure of any part of the Manual would constitute a breach of the agreement with the contractor to not disclose the trade secret information.

Nothing in the APRA allows a public agency to enter into a confidentiality agreement to declare records confidential. Here, though, the FSSA entered into a contract which included a confidentiality clause for records the agency contends are confidential under state statute, namely I.C. §5-14-3-4(a)(3) and I.C. §24-2-3-2. Nothing in the APRA prohibits this practice.

The APRA places the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record. I.C. §5-14-3-1. In a court action challenging the denial of a record, the court determines the matter do novo, with the burden of proof on the public agency to sustain its

denial. The public agency meets its burden in the case of records exempt under section 4(a) by establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. I.C. §5-14-3-9(f).

The FSSA is required to disclose the Manual unless the FSSA can assert it is a trade secret. Both elements in the definition of a trade secret must be met in order for the FSSA to maintain the Manual's confidentiality. The FSSA has addressed the second element of a trade secret, reasonable efforts to maintain secrecy, by demonstrating that the FSSA entered into confidentiality agreements with BBCT on agency and individual employee levels. So long as the FSSA can sustain its burden of proving the first element of the trade secret definition, that independent economic value is derived from the information not being generally known to others who can derive economic value from the disclosure, the FSSA is required to withhold the Manual from disclosure.

CONCLUSION

For the foregoing reasons, it is my opinion the FSSA is required by the APRA to maintain the confidentiality of the Manual so long as it can sustain the burden of proving the Manual is a trade secret.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Katherine Gerber Gregory, Indiana Family and Social Services Administration