

July 21, 1999

Ms. Jan M. Carroll  
BARNES & THORNBURG  
11 South Meridian Street  
Indianapolis, Indiana 46204

*Re: PAC Opinion 99-8; Hoosier Lottery Retailer Sales Information and the Trade Secret exception to disclosure under the Access to Public Records Act, Indiana Code 5-14-3-4(a)(4).*

Dear Ms. Carroll:

This is in response to your June 4, 1999 request for an advisory opinion. Specifically, you have asked whether the Hoosier Lottery may claim that the records of commissions paid and revenues generated by retailers, on a retailer specific basis, are confidential under the trade secret exception to the Access to Public Records Act ("APRA"), specifically, Indiana Code section 5-14-3-4(a)(4). As a threshold matter, the Hoosier Lottery contends that, since such a report is not currently generated, there is no obligation to create the report from their database merely because a public records request has been received. For the reasons stated below, it is my opinion that a public agency must make reasonable efforts to provide information maintained in a computer database regardless of whether the public agency currently creates a report with the requested information. Further, the retailers' sales information received and maintained in the Hoosier Lottery's database is not a "trade secret" of the retailers as provided at Indiana Code section 5-14-3-4(a)(4), and therefore, should be disclosed upon request.

#### BACKGROUND

In a letter dated May 7, 1999, Mark Nichols, Computer-Assisted Reporting Coordinator for Indianapolis Newspapers, Inc., submitted a request for access to public records of the Hoosier Lottery. In that request, Mr. Nichols asked for a current list of all Hoosier Lottery ticket distributors, by name, address, city and zip code, and the revenue generated by each of these distributors during calendar year 1998. The Hoosier Lottery replied to this request in a letter dated May 11, 1999, producing a disk with the name, address, city, and zip code of all Hoosier Lottery retailers (ticket distributors). In addition, with respect to Mr. Nichols' request for the records of revenue generated by each of the retailers for calendar year 1998, the Hoosier Lottery responded that this information is confidential under the trade secret exception from disclosure under the APRA, Indiana Code section 5-14-3-4(a)(4). In that response, the Hoosier Lottery did indicate a willingness to share aggregate information about retailers, but considers specific information about retailers to be proprietary information that is confidential under the APRA.

In a letter dated May 13, 1999, you wrote to the Hoosier Lottery concerning the response that Mr.

Nichols received. In a response dated May 21, 1999, the Hoosier Lottery again stated its position that information concerning sales by individual retailers would not be released under the APRA as trade secret information, which is proprietary to the retailers who sell lottery tickets. The Hoosier Lottery did offer in the May 21, 1999 letter to provide lottery sales revenue information by zip code as an alternative to providing sales information for each retailer.

On June 4, 1999, you submitted your request for an informal opinion as to the propriety of the Hoosier Lottery's denial of access to the public records concerning commissions paid to and revenues generated by retailers from the sales of lottery tickets. As part of your opinion request, you also asked that I attempt to bring the parties together to discuss the issues. On July 9, 1999, representatives of Indianapolis Newspapers, Inc., the Hoosier Lottery and various retailer organizations and I met to discuss this matter. As no agreement was reached in that meeting, the Hoosier Lottery submitted a written response outlining their position, a copy of which was delivered to you directly. In addition to the response received from the Hoosier Lottery, various retail associations and retailers also provided written comments supporting the position of the Hoosier Lottery.

The Hoosier Lottery, through its Deputy Director and Chief Counsel, Mr. Jack Ross, stated the position of the Lottery in a letter dated July 13, 1999. The Hoosier Lottery contends that, while information is stored in a database and a report could be generated, there is no obligation under the APRA to produce a report that does not currently exist to respond to a public records request. Further, the Lottery states that it cannot release information concerning each retailer's sales, as this information is confidential as trade secrets of the retailers under Indiana Code 5-14-3-4(a) (4).<sup>1</sup>

### ANALYSIS

The General Assembly clearly stated its intent for the Hoosier Lottery and mandated the following policies:

- (1) That the lottery games be operated by the state lottery commission, which is created by IC 4-30-3 as a separate body politic and corporate from state government and should function as much as possible as an entrepreneurial business enterprise.
- (2) That the general assembly recognizes that the operation of a lottery is a unique activity for state government and that policies and procedures appropriate for the performance of other governmental functions are not necessarily appropriate for the operation of a lottery.

\* \* \*

- (4) That the commission be accountable to the general assembly and the people of Indiana through a system of audits and reports and by complying with financial disclosure, open meetings, and public record laws.

Indiana Code  $\alpha$  4-30-1-2.

The Hoosier Lottery, therefore, is subject to the provisions of the APRA "It is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government." Ind. Code  $\text{rc}$  5-14-3-1. Further, the Indiana General Assembly has provided that the APRA is to be liberally construed in favor of this policy and the burden of proof for nondisclosure of a public record lies with the public agency, not the person seeking access to the public record. *Id.* Public records are to be available for copying and inspection unless the public record is confidential under Indiana Code subsection 5-14-3-4(a) or nondisclosable at the agency's discretion under Indiana Code subsection 5-14-3-4(b).

Under Indiana Code section 4-30-3-4, the Lottery Commission is required to maintain records of lottery transactions, including revenue received and other financial transactions. The Hoosier Lottery contracts with various retailers to sell lottery tickets throughout the state. 65 IAC 3-1-13. The rules of the Commission further provide that the retailers must file reports of their receipts and transactions of sales of lottery tickets. 65 IAC 3-4-1(k). Records of the commissions paid to retailers are also maintained; five percent (5%) of the lottery ticket price of instant and on-line tickets and seven percent (7%) of the pull-tab ticket price. 65 IAC 3-4-5(a).

*A. Duty to disclose information stored in a database.*

The first basis raised for nondisclosure of the information requested by Indianapolis Newspapers, Inc. is that the Hoosier Lottery does not currently produce a public record that contains the information. The Hoosier Lottery does receive and maintain sales information from its retailers in a comprehensive database. There is no question that the sales information received by the Hoosier Lottery is a public record.

A "public record" is defined, for the purposes of the APRA as:

Any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, maintained, used or filed by or with a public agency<sup>2</sup> and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Indiana Code  $\text{rc}$  5-14-3-2. The Hoosier Lottery contends that there is no obligation to create a new public record, such as the report requested by Indianapolis Newspapers, Inc.; only to provide access to public records that have been created by the public agency and which are not otherwise confidential.

While it is generally true that a public agency need not create a new public record in order to respond to a public records request, there is some obligation under the APRA for those agencies to attempt to provide information if it is stored in a database. Indiana Code section 5-14-3-3(d) provides, in pertinent part, that

a public agency that maintains . . . public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency's data storage system.

The Hoosier Lottery has produced some of the information requested by Indianapolis Newspapers, Inc. concerning its retailers from the very database in which the retailers' sales information is maintained. In fact, the Hoosier Lottery admits that it can produce the very report that Indianapolis Newspapers, Inc. requests. Given these facts, Indiana Code section 5-14-3-3(d) requires the Hoosier Lottery to make reasonable efforts to produce the information requested. The only basis upon which the Hoosier Lottery may validly withhold part of this information is to meet the burden of proof that the retailers' sales information is either confidential under Indiana Code section 5-14-3-4(a) or otherwise nondisclosable at the public agency's discretion .<sup>3</sup>

### *B. The Trade Secret Exception and Hoosier Lottery Retailers' Sales Information.*

The Hoosier Lottery contends that information concerning sales of lottery tickets by each retailer is information that is confidential as a "trade secret" of its retailers under Indiana Code section 5-14-3-4(a)(4). The knowing or intentional disclosure of confidential information by a public agency through its officials or employees is a Class A misdemeanor under the APRA. Ind. Code  $\S$  5-14-3-10. For this reason, public agencies are necessarily cautious when presented with a request for information that may be considered confidential under Indiana Code section 5-14-3-4 (a).

The question is whether lottery sales information of each retailer that sells lottery tickets constitutes a trade secret under Indiana law. A "trade secret" for the purposes of the APRA has "the meaning set forth in IC 24-2-3-2," the Indiana Uniform Trade Secrets Act (IUTSA. Ind. Code  $\S$  5-14-3-2.

"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.

A trade secret that may be protected under the IUTSA has four key characteristics:

- (1) it is information
- (2) which derives independent economic value

(3) that is not generally known, or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and

(4) it is the subject of efforts reasonable under the circumstances to maintain its secrecy.

*Ackerman v. Kimball International, Inc.*, 634 N.E.2d 778, 783 (Ind. App. 1994), *vacated in part, adopted in part*, 652 N.E.2d 507 (Ind. 1995).

The public records that Indianapolis Newspapers, Inc. has requested certainly qualify as information. According to the Hoosier Lottery, the retailers' sales information does derive independent economic value in that it can be used to extrapolate market information that competitors would otherwise have to conduct extensive market research to obtain. Further, the Hoosier Lottery contends that retailers' sales information is not generally known or readily ascertainable by Hoosier Lottery retailers' competitors as only the Hoosier Lottery and the specific retailer keep it. Finally, the Hoosier Lottery contends that the information requested has been the subject of reasonable effort to maintain its secrecy in that there is no instance in which this information has ever been requested or provided as the result of a public records request or otherwise.

Indiana courts have noted that defining what may constitute a trade secret can be difficult, but there is some support for the notion that financial information may qualify as trade secrets. *Amoco Production Co. v. Laird*, 622 N.E.2d 912, 916 (Ind. 1993). In *Bridgestone/Firestone, Inc. v. Lockhart, et al.*, 5 F. Supp. 2d 667, 680-81 (S.D. Ind. 1997), a federal district court, interpreting the IUTSA, found that "knowledge of financial information indicating a company's strengths and weaknesses . . . sales information . . . broken down by product . . . could be helpful to another manufacturer of competing products, especially in highly competitive, relatively fungible products" have been considered protectable trade secrets by the Indiana courts. Also, the Indiana Supreme Court has held that "where duplication or acquisition of alleged trade secret information requires a substantial investment of time, expense, or effort, such information may be found 'not being readily ascertainable' so as to qualify for protection under the" *IUTSA*. *Amoco Production Co.*, at 919.

There is no doubt that there may be some value to competitors of lottery retailers in knowing how many lottery tickets are sold at a particular location and that this information has not been made available to anyone in the ten years that the Hoosier Lottery has been in existence. But, there are distinctions between the trade secret cases mentioned above and the present fact situation. First, the products in question are lottery tickets and the retailers are merely contractual agents for the Hoosier Lottery, which has no competitors in this state. The Lottery Commission is supposed to function as much as possible as an entrepreneurial business enterprise, but the Hoosier Lottery is also accountable to the General Assembly and the citizens of Indiana. This accountability is achieved through a system of audits and reports, and the fact that the Hoosier Lottery is required to comply with financial disclosure, open meetings, and public record laws in our state. Ind. Code  $\alpha$  4-30-1-2. The financial information at issue, information about lottery ticket sales, does not appear to be a product of the retailers who sell them, but the Hoosier Lottery as the exclusive "entrepreneurial business enterprise" that operates a statewide lottery.

The Lottery Commission is also required by statute to maintain records of lottery transactions, including revenue received and other financial transactions under Indiana Code section 4-30-3-4. There is nothing in the Hoosier Lottery's enabling act that places any restriction upon these public records. Under its own rules, the Commission has required retailers to provide sales information on a regular basis. 65 IAC 3-4-1(k). The General Assembly could have specifically excepted lottery sales information from disclosure as it has done numerous times throughout the Indiana Code, but that was not done.<sup>4</sup>

It is true that there are no Indiana cases directly on point determining that lottery retailers' sales information qualify as trade secrets. The retailers argue that disclosing each retailer's sales information will be harmful to the retailers who operate in highly competitive convenient store, gasoline station and grocery operations. Many of the same arguments raised by the retailers were also raised before and rejected by an Illinois appellate court in a case that dealt squarely with whether that state's lottery retailers' sales information constituted trade secrets of the retailers. *In Cooper v. The Department of the Lottery*, 640 N.E.2d 1299 (Ill. App. 1994), the Illinois Department of the Lottery contended that sales information of each of its retailers in Chicago need not be disclosed under the Illinois Freedom of Information Act, which excepts from disclosure

(t)rade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged or confidential, or where disclosure of the trade secrets or information may cause competitive harm.

5 ILCS 140/7(1)(g).

The Illinois Department of the Lottery claimed that the release of sales information by retailer would result in competitive harm to its retailers because retailers must be engaged in a business enterprise other than lottery sales to apply to become a lottery ticket agent. Competitive harm, it was argued, could arise in the disclosure of high-ticket volume sellers as against low volume ticket sellers with respect to the negotiation of contracts with common suppliers or in making financial decisions to the disadvantage of less successful selling retailers.<sup>5</sup> The Illinois court rejected the arguments that disclosure of this information would lead to competitive harm for the retailers as there maybe other ways that competitors might derive information about existing operations of lottery retailers, all of whom are engaged in the business of selling other items. The Illinois court ultimately held that the retailers' sales information must be released in response to the public records request.

In conclusion, there is no question that the Hoosier Lottery is subject to the APRA and that the APRA is to be construed liberally in favor of disclosure. Access to the financial information concerning lottery sales is not subject to any restrictions on disclosure and does not appear to be a trade secret of lottery retailers or meet any other exception to disclosure under the APRA. It is my opinion that the Hoosier Lottery must make reasonable efforts to disclose this information

from its database under Indiana Code section 5-14-3-3(d).

## CONCLUSION

It is my opinion that a public agency must make reasonable efforts to provide any disclosable information maintained in a computer database regardless of whether the public agency currently prepares a similar report. In addition, the sales information received and maintained in the Hoosier Lottery's database is not a "trade secret" of its retailers under Indiana Code section 5-14-3-4(a)(4), and therefore, must be disclosed upon request under the APRA.

Sincerely,

Anne Mullin O'Connor

cc: Jack Ross, Hoosier Lottery  
Joseph Lackey, Indiana Grocery and Convenient Store Association  
Michael Pitts, Indiana Petroleum Marketers and Convenience Store Association  
Stan Pinegar, Indiana Petroleum Council  
Grant Monahan, Indiana Retail Council  
Joseph Heeren, Marsh Supermarkets

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<sup>1</sup>In addition to the Hoosier Lottery's written response, letters supporting the denial of access to retailer information as trade secrets were submitted by the Indiana Petroleum Marketers & Convenience Store Association and the following retailers: Dinner Bell Markets, Inc., Schnuck Markets, Inc., Babbs Supermarket, Inc. and Scott's Food Stores.

<sup>2</sup>There is no dispute between the parties that the Hoosier Lottery is a public agency for the purposes of the Access to Public Records Act. Ind. Code §§ 4-30-1-2(4) and 5-14-3-2.

<sup>3</sup>Indiana Code section 5-14-3-4(b) outlines the categories of records that may be withheld in the discretion of public agencies. The Hoosier Lottery references only the trade secret exception under Indiana Code section 5-14-3-4(a); therefore, this opinion does not include the analysis of the other possible bases for nondisclosure.

<sup>4</sup>The retailers note that they collect sales taxes and cigarette taxes for the state but those figures are kept confidential. This information is distinguishable because it is confidential under the statutes governing the Indiana Department of Revenue. See, Ind. Code §§ 6-2.5-10-2 and 6-8.1-7-1.

<sup>5</sup>In Cooper, the Illinois Department of the Lottery also raised privacy concerns based upon the

provisions of their Freedom of Information Act exemptions for privacy interests. The APRA has no similar provision.