



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

December 3, 2009

Ms. Carol Taylor
City Attorney
City of Fort Wayne
One Main St.
Fort Wayne, IN 46802-1804

Re: Informal Inquiry 09-INF-25; Northeast Indiana Regional Partnership

Dear Ms. Taylor:

This is in response to your informal inquiry dated July 16, 2009. I apologize for the delayed response. I took office in September of this year and found a backlog of informal inquiries at that time. I am currently endeavoring to work through the backlog and appreciate your patience in waiting for this opinion.

Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry regarding the Northeast Indiana Regional Partnership ("NEIRP"). My opinion is based on applicable provisions of the Indiana Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.*

BACKGROUND

I summarize the relevant facts in your informal inquiry as follows: the NEIRP is an investor-based organization that supports northeast Indiana economic development in ten counties. NEIRP partners with Local Economic Development Organizations ("LEDOs") to discover and develop opportunities for new business investment in northeast Indiana.

NEIRP recently contracted with ExecutivePulse to implement a Business Retention/Expansion program. The program is an economic initiative designed to assist LEDOs in connecting with wealth-generating companies in their communities and determining what the companies need to grow and be successful. As part of the program, LEDOs meet with companies and gather economic development information via a survey. The survey covers a variety of topics including Company Information, Local Workforce, Sales and Facility/Equipment.

Neither the NEIRP nor the LEDOs are subject to the APRA, but the groups hope to partner with local government agencies to reach additional companies, gather data, and connect with existing resources. Companies participate in the program with the understanding that the data collected will remain confidential, and they have expressed concern that the data gathered by a governmental entity would be subject to the APRA.

You assert that the data in the survey would fall under the APRA's exception in section 4(a)(4), which classifies as confidential records containing trade secrets. Specifically, the data collected under the headings of Company Information, Local Workforce, Sales and Facility/Equipment constitute trade secrets within the meaning of the APRA. You note that for companies to maintain a competitive advantage, they must safeguard crucial information regarding their operations. Moreover, the foregoing information has independent economic value from not being generally known or readily ascertainable and is the subject of reasonable efforts to maintain its secrecy. The companies that participate in the survey provide the LEDOs with survey data because they are assured that such information is confidential.

Once the LEDOs collect the data, it is entered into a database. LEDOs then send email communications to local government entities referring them to the database. Local governmental entities would be able to access information about the company to determine whether the governmental entities have resources that might benefit the business. The governmental entities would also have the ability to log onto the ExecutivePulse system to make a follow up journal entry regarding the referral. You argue that the email referral and journal entry fall under the exception outlined in section 4(b)(6) of the APRA, which excepts interagency or intra-agency deliberative materials from disclosure at the discretion of the public agency.

Based on that background, you ask three questions:

1. If a governmental entity subject to APRA collects data from local businesses based on the survey, would the trade secrets exception found at I.C. § 5-14-3-4(a)(4) apply? If so, would it apply to all of the data collected?
2. If a governmental entity subject to the APRA logs onto the system to review information collected by the LEDOs, would this information become public record?
3. If a governmental entity subject to the APRA creates a journal entry on the ExecutivePulse system, is that information subject to the APRA?

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. Any person has the right to inspect and copy the public records of public agencies during regular business hours unless the public records are excepted from

disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

1. Does the Trade Secrets Exception to the APRA Apply to the Survey Data?

Under the APRA, a public agency cannot disclose records that the APRA classifies as confidential unless access to those records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery. I.C. § 5-14-3-4(a). Among others, records containing trade secrets cannot be disclosed. I.C. § 5-14-3-4(a)(4). 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 *de 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).

You argue that the survey data is excepted from disclosure pursuant to I.C. § 5-14-3-4(a)(4), which is the APRA's exception for trade secrets. The APRA defines "trade secret" as having the meaning set forth in I.C. § 24-2-3-2. *See* I.C. § 5-14-3-2(o).

"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.

I.C. § 24-2-3-2.

You maintain that the survey data has independent economic value by virtue of its secret nature because the companies providing the data must safeguard such information in order to maintain a competitive advantage in their respective industries. After reviewing the blank survey form and considering the type of information that the survey seeks from companies under the headings of Company Information, Local Workforce, Sales and Facility/Equipment, I agree that such information has independent economic value by not being generally known. The second element of a trade secret is whether the information is the subject of reasonable efforts to maintain its secrecy. You have expressed that participating companies are completing the surveys with the understanding that such information will remain confidential, which indicates to me that such information is the subject of reasonable efforts to maintain its secrecy. Consequently, I agree that the information meets the second element of the definition of a trade secret.

Thus, it is my opinion that the survey data contained in the following headings of the surveys would be confidential under the trade secret exception to the APRA: Company Information, Local Workforce, Sales and Facility/Equipment. Although you do not specifically mention the information under the Business Climate and Assessment headings of the survey, it is my opinion that the same reasoning would apply to make that information confidential under the trade secrets exception as well.

Although you did not cite this exception, I also note that some of the information in the surveys appears to be confidential financial information obtained upon request from a person, which is excepted from disclosure under section 4(a)(5) of the APRA. A “person” means an individual, a corporation, a limited liability company, a partnership, an unincorporated association, or a governmental entity. I.C. § 5-14-3-2(j). *Opinion of the Public Access Counselor 03-FC-56* includes an analysis of the meaning of the confidential financial information exception. “The word ‘confidential’ is defined as ‘imparted in confidence, secret.’ *New Illustrated Webster's Dictionary* 211(1992). ‘Financial’ is defined as ‘of or relating to finance.’ *Id.* at 364. Therefore, ‘confidential financial information’ means information that is secret relating to finance.” One element of this exception that I am unsure about is whether or not the surveys would be obtained “upon request” of the governmental entity. I understand the email referral provides the governmental entity with the ability to access the survey data. In that case, it would likely not be provided at the request of the public agency because the governmental entity is given the ability to access the survey before having requested access to the information. However, if the email referral to the agency merely informs the public agency of the availability of the surveys upon receipt of a request from that agency for access, the exception appears to apply. Under those latter circumstances, it would be my opinion that at least some of the information contained in the surveys (i.e., wages, sales, etc.) is confidential financial information under section 4(a)(6) of the APRA.

If a public record contains disclosable and nondisclosable information, the APRA requires the agency to separate the material that may be disclosed and make it available for inspection and copying in response to a request for access. I.C. § 5-14-3-6(a). Thus, to the extent the surveys contain information not covered by one of the exceptions, the APRA requires that the governmental entity that possesses the surveys redact nondisclosable information and provide the remaining disclosable information upon request. In this case, as the only information that would be disclosable from the surveys is that which the participating companies make no efforts to keep confidential, I trust this will not be problematic for the NEIRP’s program.

2. If a Governmental Entity Accesses the Information Provided by the LEDOs Electronically, Does the Record Become a Public Record?

The APRA’s definition of a “public record” applies to any record which has already been created, received, retained, maintained, or filed by or with a public agency. *See* I.C. § 5-14-3-2(m). If the governmental entities are merely *accessing* the survey information online, that does not make them public records under the APRA. However,

if a governmental entity should print a copy of the survey, it would then become a public record as it would be “maintained” by the agency under section 2(m).

However, even if the survey became a public record by virtue of a governmental entity maintaining it, the survey would nevertheless maintain its trade secret status pursuant to the analysis above. Thus, although a survey might be a public record under the APRA, it would be a nondisclosable public record under section 4(a)(4) and/or 4(a)(5). I also note that under the APRA, if a public agency subject to its provisions receives a confidential public record from another public agency, the receiving public agency must maintain that record as confidential. I.C. § 5-14-3-6.5.

3. If a Governmental Entity Creates a Journal Entry on the ExecutivePulse System, Is Such Information Subject to the APRA?

You contend that the journal entry fall under the exception in section 4(b)(6) as interagency or intra-agency deliberative materials. That exception gives the agency the discretion to withhold “[r]ecords that are intra-agency or interagency advisory or deliberative material, . . . that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.” I.C. § 5-14-3-4(b)(6). The deliberative materials exception is a broad exception which can be relied upon so long as the records are either speculative or are expressions of opinion *and* are communicated for the purpose of decision making. Indiana law does not provide a pre- and post-decision distinction, so the records may be withheld even after a decision has been made.

There are three elements to the so-called deliberative materials exception that must be satisfied for an agency to meet its burden to show that the exception applies. The first element is whether or not the communication was interagency and/or intra-agency. It is unclear to whom the journal entries are communicated. If the journal entry is a communication between a governmental entity and a company or other non-public entity, section 4(b)(6) would not apply. If, however, the journal entry is a communication from one public agency to the same or other public agencies, the exception would apply.

I do not have enough information about the content of the journal entries to determine whether or not the entries are “expressions of opinion or are of a speculative nature.” If the entries consist of opinionated observations and speculation regarding business prospects related to the program, the exception would apply. If, however, the entries are factual or otherwise non-opinionated in nature, the exception would not apply.

Finally, the journal entries must be communicated for the purpose of decision making. Again, I do not have enough information to make this determination. If employees of a governmental entity create journal entries for the purpose of deciding, for example, whether or not to engage in a business development effort with a company that participated in the survey, the exception would apply. The burden will be on the governmental entities to show that the deliberative materials exception applies. If any of

these foregoing elements is not present, the deliberative materials exception does not apply.

I also note that the APRA also provides a discretionary exception to disclosure for “[d]iaries, *journals*, or other personal notes serving as the functional equivalent of a diary or journal.” I.C. § 5-14-3-4(b)(7) (emphasis added). The Indiana Court of Appeals addressed this exception to disclosure in *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826 (Ind. Ct. App. 1998). The issue centered on an NCAA compliance log maintained by a University employee. The log was described as “notes that [the employee] has made concerning information provided to him on activities related to NCAA or Big Ten rules and regulations.” *Id.* at 829. The log was ongoing, it was a place for his personal notes, and no one else made entries in the log. The employee specifically referred to it as his notebook or diary and shared it with select others only on occasion. The court held that the log “clearly falls under the diary, journal, or personal notes exception to the Act. *Id.* I do not have enough information to determine whether or not section 4(b)(7) would apply to the journal entries at issue, but I raise it for your consideration. Again, the burden is on the public agency to show that an exception to the APRA applies. I.C. § 5-14-3-1.

CONCLUSION

For the foregoing reasons, it is my opinion that the trade secrets exception to the APRA applies to the survey information that the survey participants regularly maintain as secret, such as the information contained within the following headings: Company Information, Local Workforce, Sales and Facility/Equipment, Business Climate, and Assessment. If the journal entries meet the foregoing elements of the APRA’s deliberative materials exception (or the exception for journals in section 4(b)(7)), it is my opinion that the journal entries may be withheld at the discretion of the public agency to which a request is directed.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,



Andrew J. Kossack
Public Access Counselor