
OPINION OF THE PUBLIC ACCESS COUNSELOR

ALLAN M. COGAN,
Complainant,

v.

INDIANA DEP'T OF REVENUE,
Respondent.

Formal Complaint No.
19-FC-99

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Department of Revenue (“DOR”) violated the Access to Public Records Act.¹ Assistant General Counsel Sarah E. Kamhi filed a response on behalf of the agency. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received

¹ Ind. Code § 5-14-3-1, to -10.

by the Office of the Public Access Counselor on October 2, 2019.

BACKGROUND

This case involves a dispute over access to Business Authorization and Safety applications.

On September 16, 2019, Allan Cogan (“Complainant”), a research associate for the Pacific Legal Foundation, filed a public records request with Indiana Department of Revenue seeking the following:

All Indiana Business Authorization and Safety Applications for Intrastate Carriers between January 2012 and today:

- Lists of all carriers of household goods (Sec. B, classification 25-B) applicants including business name, address, application date, whether granted a certificate and the date, certificate number, current status of the certificate, and if no longer active, when it expired or was revoked. In addition, if you have the number of vehicles and/or employees please include that information as well.

Three days later, the DOR simultaneously acknowledged and denied Cogan’s request. The DOR cited Indiana Code section 5-14-3-4(a)(1), which prohibits a public agency from disclosing records declared confidential by state statute. The agency asserted that Indiana Code section 8-2.1-22-4 and section 6-8.1-7-1 as the state statutes that declared the records requested by Cogan as confidential.

As a result, Cogan filed a formal complaint with this office on October 2, 2019. In essence, Cogan argues that the DOR’s denial is a violation of the Access to Public Records

Act because the statutes the agency relied on for the denial do not apply to the records he requested. Specifically, Cogan contends he did not request confidential taxpayer information but rather records documenting who is able to legally operate as a household goods mover in Indiana. Further, Cogan asserts that a list of legally operating businesses in Indiana is disclosable public information under APRA.

On October 18, 2019, DOR filed an answer with this office disputing Cogan's claim that the agency's denial violated APRA.

First, DOR argues that under Indiana Code section 5-14-3-3(f), a public agency is not required to create or provide copies of lists of names and addresses unless the agency is required to publish such lists and disseminate them to the public under a statute. DOR asserts that it is not required by statute to publish or disseminate a "list of all carrier of household goods applicants," as requested by Cogan. Additionally, DOR contends that it has never developed a list with the information Cogan requested.

Second, DOR maintains that Indiana Code section 5-14-3-4(a)(1), which prohibits a public agency from disclosing public records declared confidential by state statute, applies here because of another statute that declares certain tax information confidential. Specifically, DOR cites to Indiana Code section 6-8.1-7-1, which provides, in relevant part, the following:

Unless in accordance with a judicial order or as otherwise provided in this chapter, the department, its employees, former employees, counsel, agents, or any other person may not divulge the

amount of tax paid by any taxpayer, terms of a settlement agreement executed between a taxpayer and the department, investigation records, investigation reports, or any other information disclosed by the reports filed under the provisions of the law relating to any of the listed taxes, including required information derived from a federal return...

Ind. Code § 6-8.1-7-1(a). The definition of “listed taxes” is governed by statute. *See* Ind. Code § 6-8.1-1-1. DOR contends that the fee the agency fixes and collects from applicants as part of the operating authority application process meets the definition of listed tax because it constitutes “any other tax or fee that the department is required to collect or administer.” DOR maintains that carrier application information could constitute “other information disclosed by reports filed under the provisions of law relating to any listed taxes.” The agency notes that applications include social security numbers, taxpayer identification numbers, and federal employer identification numbers as well as the application fee to DOR.

Third, DOR cites Indiana Code section 8-2.1-22-4 as additional support for its denial of Cogan’s request. That statute authorizes DOR or an authorized representative to take the following actions:

- (1) upon demand, inspect the books, accounts, papers, records, memoranda, equipment, and premises of any common carrier or contract carrier;
- (2) examine, under oath, any officer, agent, or employee of the common carrier or contract carrier in relation to its business affairs; and

(3) adopt rules for inspection of motor vehicles used by common carriers or contract carriers or brokers.

Ind. Code § 8-2.1-22-4(a). DOR argues this statute does not provide for a party, such as Cogan, to inspect such records; and thus, the agency has a duty to protect records from improper disclosure.

Finally, DOR suggests Cogan contact the U.S. Department of Transportation Federal Motor Carrier Safety Administration, to search for information on approved common carriers of household goods.

ANALYSIS

1. The Access to Public Records Act (“APRA”)

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1.

The Access to Public Records Act (“APRA”) states that “(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.” *Id.* The Indiana Department of Revenue (“DOR”) is a public agency for the purposes of APRA; and thus, is subject to the act’s requirements. Ind. Code § 5-14-3-2(n). Unless otherwise provided by statute, any person may inspect and copy DOR’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Under APRA, “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 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.

Ind. Code § 5-14-3-2(r). Although public records are presumptively disclosable, APRA contains both mandatory and discretionary exceptions to disclosure.²

2. Cogan’s Request

As preliminary matter, it is important to address the public records request underlying this complaint. As set forth above, Cogan requested the following:

All Indiana Business Authorization and Safety Applications for Intrastate Carriers between January 2012 and today:

- Lists of all carriers of household goods (Sec. B, classification 25-B) applicants including business name, address, application date, whether granted a certificate and the date, certificate number, current status of the certificate, and if no longer active, when it expired or was revoked. In addition, if you have the number of vehicles and/or employees please include that information as well.

² Ind. Code § 5-14-3-4(a) and (b).

Under APRA, a request for inspection and copying must identify with reasonable particularity the record being requested. *See* Ind. Code 5-14-3-3(a)(1).

Arguably, Cogan's request starts strong because he identifies specific records (e.g., Indiana Business Authorization and Safety Applications for Intrastate Carriers) and a specific time frame. The applications are Form BAS-1.

Beyond that, the language Cogan uses torpedoes the request, at least in the context of reasonable particularity. Cogan pivots and begins requesting "lists" of carriers of household goods including certain information included on the application (e.g., business name; classification; address) and other information that is not included (e.g., whether certification was granted; certificate number, current status, expiration dates, etc.)

Notably, DOR did not challenge the particularity of Cogan's request in the initial denial or the agency's response to the complaint. Even so, when a requester asks an agency to extract and aggregate information from multiple sources and amalgamate it into a new, separate document, the request is problematic at the outset.

DOR maintains that it has never developed a list with the information requested by Cogan. As set forth above, APRA does not require an agency to create a list or a new record to satisfy a records request.

3. Declared Confidential by State Statute

The DOR correctly notes that APRA prohibits an agency from disclosing public records declared confidential by state statute. *See* Ind. Code § 5-14-3-4(a)(1).

Notably, the DOR does not cite a state statute that declares the Business Authorization and Safety Applications for Intrastate Carriers confidential. As a result, the (4)(a)(1) exception does not apply categorically to the application forms.

Granted, the applications have some confidential information embedded in them like SSN number, TID number, and (potentially) FEIN number. When a record contains both disclosable and nondisclosable information, APRA requires the agency to separate the disclosable information and make it available for inspection and copying. *See* Ind. Code 5-14-3-6(a). Redacting the nondisclosable information is probably the most common approach to separating the information.

DOR argues the fee it collects as part of the classification is a “listed tax” and therefore nondisclosable pursuant to Indiana Code section 6-8.1-7-1(a). Indeed, it may not disclose the amount of tax paid by any taxpayer.

Furthermore, Indiana Code section 6-8.1-1-1 lists “any other tax or fee that the department is required to collect or administer,” which would ostensibly render the fee confidential. Considering this justification for a denial of records, however, would lead to an absurd result because the application is published by the DOR on its website and is readily known. Anyone operating a carrier business for household

goods pays a \$180 flat fee. This is not a fee associated with the collection of taxes. The application is not part of the tax collection process – only the application to be classified for Indiana Operating Authority.

4. Authorized Inspection of Records

Next, DOR argues the denial is appropriate because Cogan is not authorized to inspect the materials of a carrier in accordance with Indiana Code section 8-2.1-22-4.

The statute allows DOR or authorized persons with certain standing to demand to review the operational business material of a carrier and to inspect them for compliance.

This office agrees with DOR's statement in general, but cannot apply that to public records held by DOR. The application materials are DOR records and not the carrier's records. While DOR has inspection authority, this does not limit or preclude a requester from inspecting DOR public records.

5. Intrastate Records

Lastly, DOR suggests the better target for a public records request is the Federal Government. It is unclear why this argument defers to the U.S. Department of Transportation, however, the applications forms are state held records. While the Federal Motor Carrier Safety Administration may have the state applications as well, DOR almost certainly would have them for Indiana applicants seeking certification to operate intrastate.

CONCLUSION

In sum, the request itself is deficient and seeks a record that the DOR contends does not exist. Even so, this office is not convinced that the records would be confidential if they did exist—at least not entirely.

Individual applications would be disclosable after redacting any sensitive or confidential information included therein.

DOR is not in violation of the law by denying a request for a record that does not exist – namely a list or information extracted from other individual records. Otherwise the request does indeed have a particularity problem. But if the requester were to seek an application form concerning a specific carrier or set of named carriers, it is unlikely the request could be refused in a wholesale manner.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor