



# STATE OF INDIANA

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August 12, 2009

Kenneth Collier-Magar  
151 North Delaware, Suite 1460  
Indianapolis, Indiana 46204

*Re: Formal Complaint 09-FC-160; Alleged Violation of the Access to Public Records Act by the Indiana Department of Revenue*

Dear Mr. Collier-Magar:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Revenue ("Department") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the Department's response to the complaint for your reference. In my opinion the Department can likely bear the burden of proof to sustain the denial of access on the grounds the requested records are confidential.

## BACKGROUND

You allege that on June 23, 2009 you requested from the Department access to records maintained by the Department. Specifically, you requested Federal Aviation Administration ("FAA") N-Numbers, unique alpha-numeric numbers that identify each aircraft registered in Indiana. On June 30, 2009, the Department denied you access to the records on the basis of I.C. § 6-8.1-7-1. You contend that the Department may not withhold the information from disclosure on the basis of I.C. § 6-8.1-7-1 because the Department obtains the numbers from sources other than the Application for Aircraft Registration. You further contend that federal law makes the aircraft registration information public record.

The Department responded to the complaint by memorandum dated July 21 from Collin Davis. The Department contends the records may not be disclosed, pursuant to I.C. § 5-14-3-4(a)(1), which prohibits the Department from disclosing records declared confidential by state statute. The Department cites I.C. § 6-8.1-7-1, which applies to the disclosure of certain records it maintains. The Department explains that it interprets the Aircraft License Excise Tax to be a "listed tax" pursuant to I.C. § 6-8.1-1-1 and therefore contends it is precluded by statute from disclosing the information except pursuant to a judicial order.

The Department further contends that the N-Numbers obtained from the FAA are confidential pursuant to I.C. § 6-8.1-7-1(a) because the records constitute “investigation records” or “investigation reports.” The Department indicates it requests the numbers to investigate whether the N-Numbers supplied on the Department’s reports are correct. Finally, the Department asserts that Indiana law sets out severe consequences for disclosure of confidential information.

## 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 Department is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m)(1). Accordingly, any person has the right to inspect and copy the public records of the Department 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).

The APRA provides that an agency may not disclose any record declared confidential by state statute unless disclosure is required by state or federal statute or an order of a court under the rules of discovery. I.C. § 5-14-3-4(a)(1). The Department contends I.C. § 6-8.1-7-1 is a state statute which requires the requested records be kept confidential. I.C. § 6-8.1-7-1 provides the following:

(a) This subsection does not apply to the disclosure of information concerning a conviction on a tax evasion charge. 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, except to:

(1) members and employees of the department;

(2) the governor;

(3) the attorney general or any other legal representative of the state in any action in respect to the amount of tax due under the provisions of the law relating to any of the listed taxes; or

(4) any authorized officers of the United States;

when it is agreed that the information is to be confidential and to be used solely for official purposes.  
I.C. § 6-8.1-7-1(a).

The Department relies upon the language “any other information disclosed by the reports” as well as “investigation records” and “investigation reports” in denying access to the information. For the purposes of I.C. § 6-8.1-7-1(a), “listed taxes” is defined in I.C. § 6-8.1-1-1. The Aircraft License Excise Tax is not specifically identified in I.C. § 6-8.1-1-1, but the last line in the definition of “listed taxes” is “any other tax or fee that the department is required to collect or administer.” The Department interprets the statute to include this as a listed tax, and you do not dispute that claim. I would agree that the Aircraft License Excise Tax is a “listed tax” as contemplated by I.C. § 6-8.1-7-1(a) because it is certainly a “tax or fee that the department is required to collect or administer.” Because the Aircraft License Excise Tax is a listed tax, the Department is required to keep confidential “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.” *Id.*

I.C. § 6-8.1-7-1(a) requires the Department to keep confidential not just the tax or fee information but also “any other information disclosed by the reports.” It is my opinion the information you request, the N-Number listed on the application, is “any other information disclosed by the reports.” As such, the Department may not disclose the N-Number as provided by the applicant.

You argue, though, that because the Department receives N-Number information from the FAA and because federal law makes the N-Number a matter of public record, the Department should disclose the N-Numbers received from the FAA. I do not agree. The Department contends that it receives the N-Numbers as part of its investigation into whether the N-Numbers supplied on the Department’s reports are correct. I would agree this seems to fall under the confidentiality provisions of I.C. § 6-8.1-7-1(a), as the information is an investigation record or report.

You contend that federal law requires the disclosure of N-Numbers. I would note that the federal Freedom of Information Act (“FOIA”) does not apply to records maintained by the Indiana Department of Revenue. *See McClain v. United States Dep't of Justice*, No. 97-C-0385, 1999 WL 759505, at \*2 (N.D. Ill. Sept. 1, 1999) (dismissing FOIA claims against state attorney general because “[p]laintiff may assert Privacy Act and Freedom of Information Act claims against . . . federal defendants only”), *aff'd*, 17 Fed. Appx. 471 (7th Cir. 2001).

The APRA places on the public agency who would deny access the burden of proof to sustain the denial. I.C. § 5-14-3-1. For the foregoing reasons, it is my opinion the Department can bear that burden in this instance.

## CONCLUSION

For the foregoing reasons, it is my opinion the Department can likely bear the burden of proof to sustain the denial of access on the grounds the requested records are confidential.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Collin Davis, Indiana Department of Revenue