

May 29, 2008

DeAnna Bruner  
Chief Counsel and Administrative Officer  
Indiana State Department of Agriculture  
101 West Ohio Street; Suite 1200  
Indianapolis, Indiana 46204

*Re: Your informal inquiry*

Dear Ms. Brunner:

This is in response to your informal inquiry dated May 21, 2008. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

#### BACKGROUND

You write on behalf of the Indiana State Department of Agriculture (“ISDA”) to inquire about certain records the ISDA may keep confidential, pursuant to new statutory authority effective July 1, 2008. The new law provides the following:

The department may keep records submitted to the department by a livestock producer under a voluntary certification program confidential.  
I.C. § 15-11-2-7.

You indicate that “department” refers to the ISDA. The “voluntary certification program” refers to the ISDA’s new Certified Livestock Producer Program (“CLPP”). The CLPP’s purpose, as identified by the CLLP Executive Summary, is the following:

The Indiana State Department of Agriculture (ISDA) is currently developing a Certified Livestock Producer Program (CLPP) as a way to recognize livestock producers that go above and beyond in their farm practices and procedures. This voluntary program will recognize producers that are willing to demonstrate publicly their commitment to the environment, animal well-being, food safety, emergency planning, biosecurity and being a good neighbor in their community. ISDA believes this tool will help improve understanding of modern livestock

production in today's communities. Indiana State Department of Agriculture Certified Livestock Producer Program Executive Summary, [http://www.in.gov/isda/files/CLPP\\_Exec\\_Summary\\_2.pdf](http://www.in.gov/isda/files/CLPP_Exec_Summary_2.pdf), accessed May 29, 2008.

You present two questions related to the CLLP:

1. If an ISDA employee takes information from the record submitted and re-enters the information into a database (e.g. uses application information to create an address database), is this still considered confidential under IC 15-11-2-7?
2. If the producers or ISDA disclose the producer is certified (i.e. signs, recognition event, etc.), does that break the confidentiality such that ISDA would then be required to disclose all records submitted by the producer?

#### ANALYSIS

The public policy of the Indiana Access to Public Records Act ("APRA")(Ind. Code 5-14-3) 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 ISDA is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the ISDA 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).

An agency may not disclose any records declared confidential by state statute. I.C. § 5-14-3-4(a)(1). A public employee or official who knowingly or intentionally discloses information classified as confidential by state statute commits a Class A misdemeanor. I.C. § 5-14-3-10(a). A public employee or official who unintentionally or unknowingly discloses confidential or erroneous information in response to a request under the APRA is immune from liability for such disclosure. I.C. § 5-14-3-10(c).

Generally, the records of a public agency must be made available for inspection and copying. I.C. § 5-14-3-3. When records are declared confidential by state statute, those records may not be disclosed unless access to the records is specifically required by a state or federal statute or ordered by a court under the rules of discovery. I.C. § 5-14-3-4(a). In general, state statutes declaring records confidential include terms like "shall be confidential" or "are confidential." Here, though, the applicable statute indicates that the "may" keep the records confidential:

The department may keep records submitted to the department by a livestock producer under a voluntary certification program confidential.  
I.C. § 15-11-2-7.

In my opinion, the word “may” affords the agency the discretion to withhold the records from disclosure or to release the records upon request. Certainly the ISDA may rely on I.C. § 15-11-2-7 to deny access to all records submitted under the program. It is my opinion, though, that because this is a discretionary clause, the ISDA may exercise its discretion to produce part or all of the records.

To the extent the agency uses the information contained in the records obtained under I.C. § 15-11-2-7 to create a new record, it is my opinion the ISDA would not be required to disclose the new record so long as it contains only the information contained in the records identified in I.C. § 15-11-2-7, which may be kept confidential. In my opinion, this is a practical application of the statute because it is often necessary or efficient for an agency to maintain a database or other such record to manage information associated with such a program.

To the extent a new record is created which derives part of its information from other sources, that information would be required to be disclosed (unless another statute excepts it from disclosure). If a public record contains disclosable and nondisclosable information, the agency shall, upon receipt of a request under the APRA, separate the material that may be disclosed and make it available for inspection and copying. I.C. § 5-14-3-6. So in the example presented, a database of addresses submitted in the records, if the agency added other information derived from sources other than information submitted under the program, that information must be disclosed and the information contemplated under I.C. § 15-11-2-7 redacted.

Regarding your second question, whether confidentiality may be waived by disclosure of certain information like certification status, it is my opinion it may not. The statute does not provide a circumstance for waiver of confidentiality. Similarly, the APRA does not provide that disclosure of certain information waives confidentiality. Further, it is my opinion I.C. § 15-11-2-7 provides the ISDA with the discretion to withhold or disclose the records or parts of the records. Certainly the discretion afforded by the General Assembly allows the ISDA to disclose some information contained in the records, so long as denial of the records is not arbitrary and capricious. *See I.C. § 5-14-3-9(g)(2) regarding discretionary records.*

#### CONCLUSION

It is my opinion that information the ISDA receives under I.C. § 15-11-2-7 but uses to create another record may be withheld from disclosure, to the extent the only information used to create the record is submitted to the ISDA under I.C. § 15-11-2-7. Further, it is my opinion the ISDA does not waive confidentiality of the records contemplated by I.C. § 15-11-2-7 by disclosing some information about the entities which submit information to the ISDA pursuant to I.C. § 15-11-2-7.

Best regards,



Heather Willis Neal  
Public Access Counselor