

January 4, 2008

Michael Einterz
5455 West 86th Street, Suite 215
Indianapolis, Indiana 46268

Dear Mr. Einterz:

This is in response to your informal inquiry dated October 30, 2006. I apologize for the delay in the response. Upon my appointment by Governor Daniels effective July 1 of this year, I found a backlog of informal inquiries. I am currently endeavoring to address those inquiries and issue an opinion in each matter pursuant to Indiana Code §5-14-4-10(5).

BACKGROUND

In your inquiry, you ask whether certified payroll records submitted to a school corporation as a condition of a contract between a contractor and the corporation are required to be disclosed pursuant to request under the Access to Public Records Act (“APRA”)(Ind. Code 5-14-3). You indicate you represent the contractor who is opposed to disclosure and contend the APRA provides three pertinent exceptions to disclosure in I.C. §5-14-3-4(a)(3), (4), and (5). You contend that the records contain several forms of information that federal law requires to be kept confidential, the payroll and wage scale information is trade secret information, and the information is confidential financial information obtained from employees at the request of the agency.

ANALYSIS

Any person may inspect and copy the public records of a public agency, except as provided in section 4 of the APRA. I.C. §5-14-3-3(a). A public agency may not disclose certain records, unless access to the 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 these types of records, those required to be kept confidential by federal law may not be disclosed. I.C. §5-14-3-4(a)(3). Further, records containing trade secrets may not be disclosed. I.C. §5-14-3-4(a)(4). Also exempt from disclosure is confidential financial information obtained, upon request, from a person. However, this does not include information that is filed with or received by a public agency pursuant to state statute. I.C. §5-14-3-4(a)(5).

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 do 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 contend the payroll records contain several forms of information required to be kept confidential by the federal Health Insurance and Portability and Accountability Act, 42 U.S.C.S. 1320-d7 (“HIPAA”). While HIPAA requires an agency to deny access to protected health information without a valid patient authorization, agencies often make the mistake of assuming the agency is covered under HIPAA. In reality, very few agencies are covered entities. I am not aware of the HIPAA provision to which you refer requiring the contractor to keep certain information confidential, but the corporation would bear the burden in proving that HIPAA requires nondisclosure. I.C. §5-14-3-9(f).

The APRA defines “trade secret” as having the meaning set forth in I.C. §24-2-3-2. 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.

The corporation is required to disclose the information unless the corporation can assert it is a trade secret. The elements of a trade secret must be met in order for the corporation to maintain the information’s confidentiality. You indicate that payroll and wage scale information is a trade secret in the construction business and its disclosure would allow competitors a valuable bidding-war tool. While this arguably meets the first criterion in the definition of trade secret, you do not indicate whether the information is the subject of reasonable efforts to maintain its secrecy. If it is, the per hour or per person wage information may fall into the definition of trade secret.

You further assert the information is confidential financial information and was obtained from employees with an understanding that such information would only be divulged as a condition to a contract and to no entity other than the corporation. You further indicate that certified payroll records are not required to be submitted by state statute. *See Opinion of the Public Access Counselor 03-FC-56* for a discussion of the meaning of the confidential financial information exemption. Because the information contained in the records is secret financial information that would not ordinarily be released to the public, it is my opinion the financial information may be withheld under the confidential financial information exception found in I.C. §5-14-3-4(a)(5).

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(a). As such, to the extent the records contained information not covered by one of the exceptions the corporation can prove applies, the nondisclosable information should be redacted, and the disclosable information should be provided upon request.

Best regards,



Heather Willis Neal
Public Access Counselor