



STATE OF INDIANA

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January 3, 2011

Mr. Jeffrey W. Hagedorn
727 Main St.
Tell City, IN 47586

Re: Formal Complaint 10-FC-305; Alleged Violation of the Access to Public Records Act by the Town of Ferdinand

Dear Mr. Hagedorn:

This is in response to your formal complaint alleging the Town of Ferdinand ("Town") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* A copy of the Town's response to the complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that you requested a copy of the Town's Wholesale Electric Power Supply Contract (the "Contract") on November 17, 2010. On November 29th, you received a redacted copy of the Contract with a cover letter explaining that the redacted portions of the contract were withheld under the trade secrets exception to the APRA. You argue that the redacted information contains financial information that would provide citizens with valuable information to assist them in determining whether the Town's electric utility is paying a reasonable amount for wholesale electric power that is later re-sold to consumers. You dispute that the redacted information constitutes trade secrets.

In response to your complaint, the Town denies that it violated the APRA. The redacted information in the Contract is owned by Southern Indiana Gas and Electric Company d/b/a Vectren Power Supply, Inc. ("Vectren South") and constitutes both confidential financial information and trade secrets under the APRA. Upon receipt of your request, the Town's counsel contacted Vectren South and requested that Vectren South provide a copy of the Contract that redacted information Vectren South believed to be either confidential financial information or trade secrets. Vectren South redacted only that confidential information.

Vectren South redacted confidential financial information including its bank account routing number and account number. Vectren South argues that disclosure of

such information would expose it to financial fraud. The information is not required to be filed with the Town by any state or federal statute. As such, it constitutes confidential financial information that is excepted from disclosure under the APRA.

Vectren South redacted two types of trade secrets: (1) criteria used to evaluate the level of credit exposure among the parties without requiring collateral to be posted; and (2) pricing information, including the energy price and fees that Vectren South assesses to the Town for coordinating the ancillary services for the Town and acting as its transmission system agent. Vectren South avers that it derives independent economic value from both categories of information not being generally known and not readily ascertainable by those who can obtain economic value from their disclosure.

With regard to the evaluation information, Vectren South argues that it is a trade secret because it is information that derives independent economic value from not being generally known because other contracting parties could use the information to evaluate what level of exposure Vectren South has agreed to in the past and use such information against the company in future contract negotiations. Competitors could use the information to make offers to customers that are slightly more attractive than Vectren South's offer. Additionally, the evaluation information is not generally known or readily ascertainable by proper means by persons who could obtain economic value from it. The information is not publicly available, and Vectren South makes reasonable efforts to maintain its secrecy by contracting with parties to protect such information from disclosure.

As to the pricing information, Vectren South states that it derives independent economic value by not being generally known because other contracting parties (e.g., neighboring municipalities) could use the information in negotiations with Vectren South as a target for their own negotiations with Vectren South. Competitors could also use the information to obtain a competitive advantage over Vectren South by offering slightly lower rates than Vectren South. The pricing information is not publicly known and Vectren South takes reasonable steps to maintain its confidentiality by contractually obligating parties to protect it from disclosure.

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 Town does not contest that it is a “public agency” under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Town's public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Certain categories of information is confidential under the APRA and may not be disclosed unless a court, state statute, or federal statute requires otherwise. *See* I.C. § 5-

14-3-4(a). Two such categories are “[r]ecords containing trade secrets” and “[c]onfidential 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)(4), 5-14-3-4(a)(5). The APRA prescribes criminal penalties for public employees and officials who knowingly or intentionally disclose confidential information. I.C. § 5-14-3-10(a).

The Town claims that it redacted trade secrets from the Contract pursuant to I.C. § 5-14-3-4(a)(4), which is the exception requiring public agencies to maintain as confidential “[r]ecords containing trade secrets.” I.C. § 5-14-3-4(a)(4). In Ind. Code § 5-14-3-2(o), the APRA defines a “trade secret” as having the meaning set forth in the Uniform Trade Secrets Act, I.C. § 24-2-3-2(c):

“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.

Even after the 1982 enactment of the Indiana Uniform Trade Secrets Act, courts have noted that what constitutes trade secret information is not always clear. *See, e.g., Franke v. Honeywell, Inc.*, 516 N.E.2d 1090, 1093 (Ind. Ct. App. 1987), *trans. denied*. Courts determine whether or not something is a trade secret as a matter of law. *Id.* “The threshold factors to be considered are the extent to which the information is known by others and the ease by which the information could be duplicated by legitimate means.” *Id.* “Information alleged to be a trade secret that cannot be duplicated or acquired absent a substantial investment of time, expense or effort may meet the ‘not readily ascertainable’ component of a trade secret under the Act.” *Id.*, citing *Amoco Product. Co. v. Laird*, 622 N.E.2d 912, 919 (Ind. 1993). For example, Indiana courts have afforded trade secret status to a compilation of documents that included customer contact information, manufacturing costs, blueprints and price summaries, as well as a customer list of names not able to be created by means outside the business operations of the list owner. *See Infinity Products, Inc. v. Quandt*, 810 N.E.2d 1028, 1032 (Ind. 2004), *trans. denied*; *Kozuch v. CRA-MAR Video Center, Inc.*, 478 N.E.2d 110, 113-14 (Ind. Ct. App. 1985), *trans. denied*.

Here, both the evaluation and pricing information redacted by the Town (via Vectren South) appears to be “information [that] derives independent economic value, actual or potential, from not being generally known” to Vectren South’s competitors and other entities in the industry that could obtain economic value from its disclosure. I.C. § 24-2-3-2(c)(1). Moreover, such information is similar to that which has been ruled a trade secret by Indiana courts. *See Infinity Products, Inc. v. Quandt*, 810 N.E.2d 1028, 1032 (Ind. 2004), *trans. denied* (manufacturing costs, blueprints and price summaries); *Kozuch v. CRA-MAR Video Center, Inc.*, 478 N.E.2d 110, 113-14 (Ind. Ct. App. 1985), *trans. denied* (customer list of names not able to be created by means outside the business

operations of the list owner). Further, Vectren South notes that it enters into confidentiality agreements with parties possessing such information to ensure its nondisclosure, which indicates that the information was and is “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” I.C. § 24-2-3-2(c)(2). Based on this information, the redacted information in the Contract appears to fall within the definition of a trade secret under I.C. § 24-2-3-2(c). Because the APRA classifies as confidential “[r]ecords containing trade secrets,” I.C. § 5-14-3-4(a)(4), the Town did not violate the APRA by refusing to disclose it.

Vectren South’s bank account numbers and routing numbers were redacted pursuant to the APRA’s exception for confidential financial information. Under the APRA, a public agency must withhold “[c]onfidential 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). 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 contemplates 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.* Therefore, ‘confidential financial information’ means information that is secret relating to finance.” Using this definition, it is my opinion that Vectren South’s bank account numbers and routing numbers are confidential financial information under subsection 4(a)(5). As such, the Town did not violate the APRA by redacting them from the Contract.

CONCLUSION

For the foregoing reasons, it is my opinion that the Town did not violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: William L. Shaneyfelt
P. Jason Stephenson