



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

March 22, 2010

Mr. Aaron A. Clark
731 Lexington Ave.
New York, NY 10022

Re: Formal Complaint 10-FC-42; Alleged Violation of the Access to Public Records Act by the Indiana Department of Environmental Management

Dear Mr. Clark:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Environmental Management ("IDEM") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. I have enclosed IDEM's response to your complaint for your review.

BACKGROUND

According to your complaint, you allege that on January 15, 2010, you contacted Amy Hartsock, a public information officer at IDEM, to ask informally whether IDEM had been notified about any "planned work (also known as turnaround) during the first quarter of 2010 at BP's [British Petroleum] Whiting refinery." Ms. Hartsock responded by saying that IDEM received a turnaround notification for the first quarter of 2010, but because she refused to provide information regarding the processes and when the turnaround would occur because that information was confidential.

You then asked Ms. Hartsock to submit your request to IDEM as a formal request under the APRA, which she did. Later that same day, Melissa Farrington, the Central File Room director for IDEM, contacted you and acknowledged receipt of your request. You clarified your request by saying that you sought to learn "the start and finish dates and which units will be shut for work," and that "[a]ny additional information would be extremely useful."

On January 22, 2010, IDEM denied your request. Referring to the turnaround notification, IDEM's response stated, "The record responsive to your request is exempt from public disclosure under Indiana Code § 5-14-3-4(a)(4), § 13-14-11-3, 326 IAC 17.1 *et seq.*, and 326 IAC 8-4-2(3). This legal notification, submitted under a claim of

confidentiality, constitutes confidential business information and trade secret [sic].” You claim that IDEM provided “minimal detail on the basis for its finding that the entire document is ‘confidential business information and trade secret’” and you question whether the entire notification should be exempt from disclosure. You note that section 6 of the APRA requires agencies to “separate the material that may be disclosed and make it available for inspection and copying.”

My office forwarded a copy of your complaint to IDEM for a response. Public Records Advisor Lori Kyle Endris maintains that the information you requested is confidential because it was submitted to IDEM pursuant to 326 I.A.C. 17.1-4-1 *et seq.* Ms. Endris states that BP submitted the 2010 Process Unit Turnaround Notification in table format to IDEM on January 13, 2010. Pursuant to 326 I.A.C. 17.1-4-1(a), BP claimed the table in its entirety as Confidential Business Information and supported its claim as required by 326 I.A.C. 17.1-4-1(c). The information contained in the table is confidential per Ind. Code § 5-14-3-4(a) and § 13-14-11-3(a)(1) because it is a record containing trade secret information.

Ms. Endris argues that the record is a trade secret because it “contains dates of scheduled process unit shutdowns at the BP facility and impacts the production of its petroleum products.” She further claims that if the requested information were released prior to the scheduled shutdowns, BP’s competitors could use it to adjust their refining operations to vary their petroleum product outputs and place BP at a competitive disadvantage. Further, the changes could impact regional motor fuel supplies and the crude and gasoline markets. Consequently, Ms. Endris maintains that if IDEM were to release the information, IDEM would violate Ind. Code § 5-14-3-10 for “knowingly or intentionally disclos[ing] confidential information. . . .” I.C. § 5-14-3-10(a).

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. IDEM meets the definition of a “public agency” under the APRA. IC 5-14-3-2. Accordingly, any person has the right to inspect and copy IDEM’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).

Indiana Code requires IDEM to maintain the confidentiality of trade secret information that it receives. Specifically, Ind. Code § 13-14-11-1(b) provides,

Upon showing satisfactory to the commissioner by any person that ***all or any part*** of the records, reports, permits, permit applications, documentation, or information other than effluent or emission data, ***would, if made public, divulge methods or processes entitled to protection as***

trade secrets of the person, the commissioner shall consider, treat, and protect all or part of the trade secret records, reports, or information as confidential.

Id. (emphasis added). In accordance with this statutory language, IDEM has issued administrative rules regarding the process governing entities' claims that the information they submit to IDEM is confidential. 326 I.A.C. 17.1-4-1. IDEM maintains that BP submitted the requested information in accordance with subsection (a) of that section and supported its confidentiality claim as required by subsection (c). *Id.* Based on the information provided by Ms. Endris regarding the nature of BP's submissions and the likely effect on its business operations if that information were to be disclosed, I agree that the information appears to meet the requirements of section 4. In any event, once IDEM determined that BP's information met the requirements of section 4, under section 7 of 326 I.A.C. 17.1, the confidential information may only be released in accordance with Ind. Code § 13-14-11-6, which reads:

All records, reports, or information accorded confidential treatment under this chapter may be disclosed or transmitted to other officers, employees, or authorized representatives of the state or of the United States:

- (1) concerned with carrying out or implementing this title;
- or
- (2) when relevant in any proceeding related to enforcement.

Id. As IDEM correctly notes in its response, failure to maintain the confidentiality of information deemed confidential under 326 I.A.C. 17.1-4-1 subjects violators to criminal penalties under section 10 of the APRA. Because BP's information has been deemed confidential in their entirety in accordance with IDEM's applicable administrative rules, which are adopted pursuant to the statutory authority in Ind. Code § 13-14-11-1, it is my opinion that IDEM did not violate the APRA by denying you access to those records in their entirety.

CONCLUSION

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

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Lori Kyle Endris