

October 24, 2007

Lawrence J. Carcare II
Office of the Indiana Attorney General
302 West Washington Street, 5th Floor
Indianapolis, Indiana 46204

Dear Mr. Carcare:

This is in response to your informal inquiry dated February 28, 2006. I apologize for the delay in the response. I took office July 1 of this year and am currently endeavoring to address the backlog of informal inquiries. Your inquiry concerns records filed with the Office of the Attorney General ("OAG") or obtained by the OAG from another state agency relating to tobacco product manufacturers who are not participants in the Master Settlement Agreement.

BACKGROUND

Indiana Code 24-3-5.4 requires all tobacco product manufacturers to provide certain information to the state. Any tobacco manufacturer who wishes to sell cigarettes in Indiana must first certify the company's brand families. In the case of manufacturers who are not participants in the Master Settlement Agreement, they must provide the OAG and the Department of Revenue with additional information and documentation. These Non-Participating Manufacturers ("NPMs") submit information including the number of cigarettes sold in the state, proof that a qualified escrow account is established, and the dates and amounts of deposits and withdrawal activity in that escrow account. You indicate a claim has been made by an NPM that this information constitutes a trade secret.

You request an informal opinion from the public access counselor whether I.C. §24-3-5.4-18 requires information received under that chapter to be treated as confidential and thus not subject to disclosure pursuant to the Access to Public Records Act ("APRA") (Ind. Code 5-14-3).

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.

Indiana Code §5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of APRA. A “public record” means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2.

The APRA contains three exceptions to disclosure which may be applicable here. The following public records are excepted from section 3 of the APRA and may not be disclosed by a public agency 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:

- (1) Those declared confidential by state statute . . .
- (4) Records containing trade secrets
- (5) 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).

Here, the information about which you inquire is required to be filed with the OAG, the Alcohol and Tobacco Commission and the Department of Revenue by I.C. 24-3-5.4. Because this information is required by state statute to be filed with the agencies, the information specifically filed with the OAG could not be considered confidential financial information pursuant to I.C. §5-14-3-4(a)(5), because that exception to disclosure does not apply when the information is filed with the agency pursuant to state statute.

If the information is confidential financial information obtained by one agency and then provided to another agency under I.C. §24-3-5.4-18, an argument could be made that the information could now fall under this exception since it was not filed with the receiving agency pursuant to state statute; instead it was provided to the agency by another agency. It is my opinion this point is made moot, though, by I.C. §24-3-5.4-18, which provides the following:

The department and the commission shall disclose to the attorney general any information received under this chapter and requested by the attorney general for purposes of determining compliance with and enforcing this chapter. The department, the commission, and the attorney general:

- (1) shall share with each other the information received under this chapter; and
- (2) may share the information received under this chapter with other federal, state, or local agencies only for purposes of enforcing this chapter or a corresponding law in another state.

I.C. §24-3-5.4-18.

This section limits the disclosure of the information received under the chapter to either of the other agencies specifically listed or to other federal, state, or local agencies only for the purposes of enforcing the chapter or corresponding law in another state. While the language does not expressly declare the information confidential, it strictly limits disclosure of the information to other government agencies for the purposes of enforcement. It is my opinion neither the OAG, the Alcohol and Tobacco Commission, nor the Department of Revenue may

disclose the information received under this chapter for any purposes other than enforcement. Furthermore, the information may only be disclosed to other governmental agencies and not to any other entity or person. As such, it is my opinion the statute has the effect of declaring the information confidential and so this information must be withheld from disclosure under I.C. §5-14-3-4(a)(1).

If this information is provided to the OAG (or other applicable agency) along with information not required to be provided to the OAG under Ind. Code 24-3-5.4, it is my opinion any information not required to be provided must be disclosed upon request pursuant to the APRA. Ind. Code §5-14-3-6(a) provides that when 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. As such, the OAG would need to redact information required to be withheld from disclosure under I.C. §5-14-3-4(a)(1) but provide any other information submitted in conjunction with the information but not required to be submitted under Ind. Code 24-3-5.4.

Regarding the NPM's assertion the information submitted constitutes a trade secret, the agency bears the burden of proof of nondisclosure. I.C. §5-14-3-1. "Trade secret" under the APRA has the meaning set forth in I.C. §24-2-3-2, which is "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.

A trade secret is difficult to define with precision. *Amoco Production Co. v. Laird*, 622 N.E.2d 912, 916 (Ind. 1993). Moreover, whether information is a trade secret is a fact-sensitive inquiry. *Id.* Information may be a trade secret even if the holder of the information enjoys a franchise or does not compete. Indiana law does not require a trade secret to provide its holder with a competitive advantage. *Credentials Plus, LLC v. Calderone*, 230 F. Supp. 5 2d 890 (N.D. Ind. 2002). If the OAG can bear the burden of proof that the information the OAG would withhold constitutes a trade secret under this definition, the denial of access would be appropriate under I.C. §5-14-3-4(a)(4).

Best regards,



Heather Willis Neal
Public Access Counselor