

August 17, 2000

Ms. Meghan Hoyer
The Journal Gazette
600 W. Main Street
Fort Wayne, IN 46802

Re: Advisory Opinion 00-FC-21 *Denial of Access to Information from Database of Pawnbrokers' Receipts by the Fort Wayne Police Department.*

Dear Ms. Hoyer:

This is in response to your formal complaint, which was received on July 18, 2000. You have alleged that the City of Fort Wayne, on behalf of its Police Department ("Police Department" or "City") has violated the Access to Public Records Act ("APRA"), Indiana Code chapter 5-14-3. Specifically, on July 5, 2000, you made a request for copies of information from a database of pawnbrokers' receipts collected and maintained by the Police Department. On July 6th, your request was denied on the basis of Indiana Code sections 5-14-3-4(a)(4), the trade secret exception, 5-14-3-4(b)(1) for investigatory records of a law enforcement agency and 5-14-3-4(c)(1), concerning the release of lists of names and addresses.

Mr. Timothy Manges, attorney for the City, responded to your complaint in a letter dated July 28, 2000. A copy of his response is attached for your reference. In addition to the original bases for denial, Mr. Manges raised two additional justifications for withholding the pawnbrokers' receipts. He claims the information is confidential under a state statute, which is another exception under the APRA, Indiana Code section 5-14-3-4(a)(1). Specifically, Mr. Manges cites to the state financial institutions statutes located at Indiana Code chapter 28-7-5 and Indiana Code sections 28-1-2-30, as authority for this additional basis for denial. The second additional justification raised was that the information requested is confidential financial information obtained upon request from a person and nondisclosable under Indiana Code section 5-14-3-4(a)(5).

For the following reasons, it is my opinion that only two of the exceptions cited by the City justify nondisclosure, but only in a limited manner. The transaction-specific information relating to customers and pricing by pawnbrokers may be subject to trade secret protection under Indiana Code section 5-14-3-4(a)(4). It is the duty of the City, however, to make reasonable efforts to provide information from the database that would not infringe upon this trade secret information under Indiana Code section 5-14-3-3(d). The exception for discretionary disclosure of law enforcement investigatory records would also be applicable, but only to information from the database that is related to a specific investigation conducted by the Police Department.

BACKGROUND

According to information provided in your complaint you made a request to the Police Department for a copy of certain information from their database on pawnbrokers' receipts that had been collected and maintained since 1997. At issue in this case is the information collected under the Fort Wayne City Code, Section 115.31, which provides the following recordkeeping and reporting requirements:

(A) Except as provided in 115.30, every person licensed as a precious metals or stones dealer shall keep and preserve on three-inch by five-inch cards or other forms which may be furnished by the Police Department, for each purchase of precious metals or stones, the following information:

(1) The date and time of each purchase.

(2) An accurate account and description of the precious metals or stones purchased including the weight and type of item purchased.

(3) The price paid for the item containing precious metals or stones.

(4) The name, address, age, sex, race, date of birth, driver's license number or social security number of the person or persons from whom the precious metals or stones were purchased.

(B) The dealer shall further require that the seller be properly identified with two verifiable pieces of identification, one of which shall be a pictured identification card.

(C) The three-inch by five-inch cards or other forms provided for in this section shall be consecutively numbered and dated, at all times during business hours shall be open to the inspection of the Chief of Police of the city or any member of the police force authorized by the Chief of Police to examine such records. Such cards or forms shall be retained at the business premises of a precious metals or stones dealer for a period of one year from date of purchase.

This ordinance does not require Fort Wayne pawnbrokers to file information with the Police Department. According to Mr. Manges, at the request of the City, the pawnbrokers voluntarily submit this information in electronic form to the Police Department under the belief that this information will be maintained as confidential.

On July 5, 2000, you made a request for the following information in electronic form: date and time of sale, the pawnbroker's name, the seller's name, age and address, a description of each item sold, and the price paid by the pawnbroker. On the following day, July 6, 2000, the Police Department denied access based upon three exceptions under the APRA: the trade secret exception, the investigatory records exception and the provision that indicates that lists of names are not required to be created. Ind.

Code §§5-14-3-4(a)(4), (b)(1) and (c).

After receiving your formal complaint, Mr. Manges responded on behalf of the City. In addition to the legal bases for the denial previously cited by the Police Department, Mr. Manges raised two (2) additional legal bases for denial: that the public records are confidential by state statute and confidential financial records obtained, upon request, from a person. A detailed review of each of the legal bases, and how they apply to the facts presented, will follow in the Analysis section, below.

ANALYSIS

The APRA states that " it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials." Ind. Code §5-14-3-1. In addition, the policy statement reminds public officials and public agencies that the burden falls upon them to justify the nondisclosure of a public record. *Id.* The Police Department is a "public agency" and, therefore information collected and maintained are "public records" under the APRA. Ind. Code § 5-14-3-2.

Any person has the right to inspect and copy the public records of a public agency unless they are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. Ind. Code §5-14-3-4. Since it is the public policy of the APRA that it is to be construed liberally in favor of disclosure, exceptions to that general rule of disclosure are to be narrowly construed. Ind. Code §5-14-3-1.

Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . . "[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. App. 1995) [Citations omitted.], quoting, *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E. 2d 726, 729 (Ind. App. 1982) [Citations omitted].

While it only takes one valid exception to support the nondisclosure of a public record, the City has cited to five (5) different exceptions in support of its denial. Three (3) of these exceptions are based upon Indiana Code section 5-14-3-4(a), which requires nondisclosure of a confidential public record unless disclosure is required by state or federal statute or ordered by a court under the rules of discovery. The knowing or intentional disclosure of confidential information by a public agency through its officials or employees is a Class A misdemeanor under the APRA. Ind. Code § 5-14-3-10. For this reason, public agencies are necessarily cautious when presented with a request for information that may be considered confidential under Indiana Code section 5-14-3-4(a).

Another exception cited is for investigatory records of a law enforcement agency, and under the APRA, the City would have discretion to disclose or not to disclose such documents under Indiana Code

section 5-14-3-4(b). The final basis for denial, which was cited in the City's denial but not in response to your formal complaint, is based upon the language of Indiana Code section 5-14-3-4(c)(1) concerning lists of names and addresses.

Confidential Records Exceptions

1. Confidential by State Statute

The APRA provides an exception from disclosure for records declared confidential by state statute. Ind. Code §5-14-3-4(a)(1). The City claims that the information you requested is, in fact, confidential under the state financial institutions statutes, specifically, Indiana Code chapter 28-7-5 and section 28-1-2-30, and therefore they cannot disclose the information requested.

Indiana Code chapter 28-7-5 governs the regulation of pawnbrokers in Indiana. The City cites to various provisions as providing authority for the notion that the pawnbrokers sales information is confidential.

"Pawnbroker" means any person, partnership, association, or corporation lending money on the deposit or pledge of personal property, or who deals in the purchase of personal property on the condition of selling the property back again at astipulated price, other than choses in action, securities, or printed evidence of indebtedness.

Indiana Code § 28-7-5-2. Pawnbrokers are licensed by the Indiana Department of Financial Institutions ("IDFI") and are required to keep certain records to evidence purchases and pledges, in a manner similar to that contemplated under the Fort Wayne City Ordinance. See, Ind. Code §§28-7-5-16(b) and 28-7-5-19. Pawnbrokers are required to keep this information and make it available to the IDFI for inspection. Ind. Code §28-7-5-16(d). These records, in contrast to filing of electronic information in Fort Wayne, are not filed with the IDFI.¹ There is no mention of the word "confidential" with respect to these records anywhere in Indiana Code chapter 28-7-5.

The City also cites to Indiana Code section 28-7-5-28.5, which permits pawnbrokers to collect a fee to cover the cost of making daily reports to local law enforcement. While this provision seems to recognize the types of reports the Police Department receives from pawnbrokers in Fort Wayne, it does not classify the public records as confidential.

The City argues that other statutes governing financial institutions in Indiana support the claim that pawnbrokers' database they maintain is protected from disclosure as confidential. The particular statute cited as authority for this is Indiana Code section 28-1-2-30, which provides that:

Except as otherwise provided, a member of the department [IDFI] or the director or deputy, assistant, or any other person having access to any such information may not disclose to any person, other than officially to the department, by the report made to it, or to the board of directors, partners, or owners, or in compliance with the order of a court, the names of the depositors or shareholders in any financial institution, or the amount of money on deposit therein

at any time in favor of any depositor, or any other information concerning the affairs of any such financial institution.

For a number of reasons, it is my opinion that this confidentiality provision does not apply to the information collected by the Police Department. First, Indiana Code section 28-1-2-30 prohibits the disclosure of financial institutions' records by the IDFI and persons having access to the information IDFI collects. IDFI may, under Indiana Code section 28-11-3-3, disclose to law enforcement agencies information that is classified as confidential under Indiana Code section 28-1-2-30, but that is not the case under the facts presented. This statute, therefore, does not speak to the collection of information under the Fort Wayne City Ordinance.

Further, for the purposes of the state financial institutions statutes, a "financial institution" is defined as:

any bank, trust company, corporate fiduciary, savings association, credit union, savings bank, bank of discount and deposit, or industrial loan and investment company organized or reorganized under the laws of this state, and includes a consumer finance institution licensed to make supervised or regulated loans under IC 24-4.5.

Indiana Code §28-1-1-13(1). Pawnbrokers are not included in the definition of "financial institution," therefore, the protections afforded by Indiana Code section 28-1-2-30 would not apply.

Exceptions to the general rule of disclosure under the APRA are to be narrowly construed. It is my opinion, therefore, that the state financial institutions statutes do not declare the public records in question as confidential, so this exception would not support the nondisclosure of access to public records by the City.

2. Confidential Financial Records Obtained from a Person

The APRA also provides an exception from disclosure for confidential financial records obtained from a person under Indiana Code section 5-14-3-4(a)(5). This exception provides that public agencies may not disclose public records that are:

(c) 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.

Since there are no Indiana cases that explain just what is "confidential financial information" contemplated in this exception, we must therefore rely upon the rules of statutory construction to ascertain its meaning.

"Generally, when construing a statute, the interpreting body attempts to give words their plain and ordinary meanings." *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99, 103 (Ind. 1998), *citations omitted*. Non-technical, undefined words

are to be defined by their ordinary and accepted dictionary meaning. *Bulkomatic Transport v. Department of Revenue*, 629 N.E.2d 955, 957 (Ind. Tax 1994), citations omitted. The plain meaning of "confidential" is "private" or secret." MERRIAM-WEBSTER COLLEGIATE ONLINE DICTIONARY, www.m-w.com (2000) "Financial" means of or relating to "finance," which is further defined as "money or other liquid resources of a government, business, group, or individual." Id.

Certainly, the information the pawnbrokers in Fort Wayne are providing to the Police Department relates to the money or resources of their businesses and would qualify as financial information. While state statutes and city ordinances require pawnbrokers to keep this information open to inspection, it is likely that pawnbrokers would keep such information and keep it private or secret. Pawnbrokers in Fort Wayne are undoubtedly aware that information they provide to the Police Department, whether through inspection at the place of business or through electronic means, will not always remain subject to nondisclosure. For example, if the Police Department relates a transaction to a pending case, that information would become part of the investigative file, and possibly, be used in a criminal prosecution.

Another key element to the exception at Indiana Code section 5-14-3-4(a)(5) is that the confidential financial information is not subject to being a confidential public record once provided to a public agency if that information was provided under the obligations of a state statute. While the state statutes and the City Ordinance require the maintenance of such information by pawnbrokers, there is no obligation under state statute for pawnbrokers to file that information with the Police Department. The City contends that the pawnbrokers submit this information with the expectation that this information would always remain private or secret, but given the rationale for creating the database, this may not be possible. If the purpose of the database is to help the Police Department work on pending cases, there is a very real possibility that all or parts of the information provided will be revealed at some point in the furtherance of their duties. If this exception did apply to the entire database, then the Police Department would be required to obtain a court order to disclose any of the data gathered in order to work their cases, which is neither practical nor realistic.

It is my opinion that, for the reasons cited above, pawnbrokers sales information cannot be considered "confidential" for the purposes of Indiana Code section 5-14-3-4(a)(5). Exceptions under the APRA are to be narrowly construed and to extend this exception to permit nondisclosure under the circumstances would not be appropriate.

3. Trade Secret Information

The City also contends that information concerning sales information collected under the Section 115.31 is confidential as a "trade secret" of the pawnbrokers under Indiana Code section 5-14-3-4(a)(4). The question is whether pawnbrokers' sales information constitutes a trade secret under Indiana law.

A "trade secret" for the purposes of the APRA has "the meaning set forth in IC 24-2-3-2,"

the Indiana Uniform Trade Secrets Act (IUTSA.) Ind. Code § 5-14-3-2.

"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.

A trade secret that may be protected under the IUTSA has four key characteristics:

- (1) it is information
- (2) which derives independent economic value
- (3) that is not generally known, or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and
- (4) it is the subject of efforts reasonable under the circumstances to maintain its secrecy.

Ackerman v. Kimball International, Inc., 634 N.E.2d 778, 783 (Ind. App. 1994), vacated in part, adopted in part, 652 N.E.2d 507 (Ind. 1995). The City claims that the customer names, pricing information and inventory information provided in electronic form is trade secret information that should be protected under the IUTSA and the APRA.

Indiana courts have noted that defining what may constitute a trade secret can be difficult, but there is some support for the notion that financial information may qualify as trade secrets. *Amoco Production Co. v. Laird*, 622 N.E.2d 912, 916 (Ind. 1993). In *Bridgestone/Firestone, Inc. v. Lockhart, et al*, 5 F. Supp. 2d 667, 680-81 (S.D. Ind. 1997), a federal district court, interpreting the IUTSA, found that "knowledge of financial information indicating a company's strengths and weaknesses . . . sales information . . . broken down by product . . . could be helpful to another manufacturer of competing products, especially in highly competitive, relatively fungible products" have been considered protectable trade secrets by the Indiana courts. Also, the Indiana Supreme Court has held that "where duplication or acquisition of alleged trade secret information requires a substantial investment of time, expense, or effort, such information may be found 'not being readily ascertainable' so as to qualify for protection under the" IUTSA. *Amoco Production Co.*, at 919.

In *Hydraulic Exchange and Repair, Inc. v. KM Specialty Pumps, Inc.*, the Indiana Court of Appeals addressed the issue of customer and pricing information as trade secrets. 690 N.E.2d 782 (Ind. App 1998). The Court found that despite the fact that the customer base in this very specialized industry was not in and of itself a protected trade secret, the combination of specific customer information and pricing and the efforts by KM to maintain that information as confidential was "entitled to protection even if the customer names may generally be known. . . . In addition, the nature of KM's business, which relies heavily on goodwill among its clients and

potential customers, requires KM to compile this type of account history information to better serve customers and, thus, KM derives economic value from it." Id. at 786.

Unfortunately, there are no Indiana cases directly on point determining whether pawnbrokers' sales information qualify as trade secrets. The public records you have requested certainly qualify as information. The more difficult questions arise when we look at the other elements of a trade secret. According to the City, this information does derive independent economic value in that other pawnbrokers could use this information to obtain a competitive advantage by knowing, for example, the pricing, names and addresses of customers, and inventory. The City also contends that this information is not generally known or readily ascertainable by competitors and it is unlikely that a pawnbroker would willingly share it. The information requested has been the subject of reasonable efforts to maintain its secrecy in that the database is password protected and only six Police Department personnel have access to review the information.

In July, 1999, I issued an opinion on a similar matter involving the Hoosier Lottery and Indianapolis Newspapers, Inc. The Hoosier Lottery maintains a database of retailer-specific sales information and the Indianapolis Star requested a copy of that information. In Opinion 99-8, I opined that the Hoosier Lottery retailers' sales information that is filed with the Hoosier Lottery and maintained in a database was not subject to the trade secret exception under the APRA.

But, there are clear distinctions between the Hoosier Lottery issue and the present fact situation. First, it is my understanding that the pawnbroking business is highly competitive, while the Hoosier Lottery is a monopoly and therefore, there are no competitors in Indiana. One need only look around their own cities to see the rapid growth in the number of pawnbroking establishments in Indiana, which certainly provides some evidence of the competition these businesses are facing today as opposed to even a few years ago. While the City and the Police Department are public agencies that are subject to the APRA, the pawnbrokers in question are not. In fact, the state pawnbroking statutes and the City Ordinance merely require the pawnbrokers to maintain information on their own premises-neither the statute nor the ordinance contemplates that the information will leave the pawnbroking location. If pawnbroking businesses want to operate in Indiana, they must submit to the recordkeeping requirements under statute and ordinance in Fort Wayne-their only other choice would be to not do business as a pawnbroker in this state. Hoosier Lottery retailers, in contrast, are not required to sell lottery tickets in order to do business, for example, as grocery stores or gas stations.

Based upon my review of the information provided to me, the most vital information from a competitive standpoint in the pawnbroking industry, would appear to be the transaction-specific information provided by each pawnbroker. Certainly, one could obtain a quoted price on an item from a pawnbroker upon demand, but the specific information by customer and item sold may have some economic value to competitors. This information is also not generally known and is only being provided to the City under the City Ordinance. The Fort Wayne pawnbrokers do provide the information to the Police Department in electronic form-a fact not contemplated by the City Ordinance-but it is likely that if they believed that their transaction-specific information

would then be subject to disclosure, the pawnbrokers would be hesitant to do so.

It is therefore my opinion that transaction-specific information collected from the pawnbrokers and compiled into the database from which you requested access may be subject to trade secret under Indiana Code section 5-14-3-4(a)(4). It is also my opinion, however, that the Police Department may be able to provide information in a format that does not reveal transaction-specific data, but would still provide some information from the public records contained in the database. Under Indiana Code section 5-14-3-3(d), the City has a duty to make "reasonable efforts" to provide disclosable data from a database upon request. Since it is clear that the database as a whole is a public record, it is incumbent upon the City, to make those reasonable efforts to provide, in response to your July 5th request, any information² that would not reveal transaction-specific details.

Discretionary Records Exception

4. Investigatory Records of a Law Enforcement Agency

The City also claims that the information compiled in their database constitutes an investigatory record of a law enforcement agency, the Police Department, and therefore, is nondisclosable at their discretion. Ind. Code §5-14-3-4(b)(1). An "investigatory record" of a law enforcement agency includes "information compiled in the course of the investigation of a crime." Ind. Code § 5-14-3-2. Investigatory records of law enforcement agencies are disclosable at the discretion of the agencies under Indiana Code section 5-14-3-4(b)(1).

Again, relying upon the principles of statutory construction, it is my opinion that this exception was intended to be used by law enforcement agencies with respect to specific investigations, hence, the phrase "investigation of a crime" was used rather than "investigation of crime." As exceptions to disclosure under the APRA are to be narrowly construed, any other interpretation of Indiana Code section 5-14-3-4(b)(1) would permit law enforcement agencies to avoid disclosure of any or all records on the basis that they might be used in an investigation. For these reasons, it is my opinion that the City may use this exception with respect to any database information that relates to the particular investigation of a crime. The City may not, however, discretionarily withhold all information from the database based upon the possibility that some of the information may be used for this purpose in the future.

Disclosure of Lists of Names and Addresses

5. Duty to disclose information stored in a database.

Finally, one of the bases for nondisclosure of the information you requested is that you had requested a list of names and addresses. Under Indiana Code section 5-14-3-4(c)(1), the City has apparently determined that, since they had not created such a list, then they would not be required to create one in order to accommodate your request. I agree with your assertion that you were not requesting a list of names and addresses, but rather a copy of that information and more

from a database maintained by the Police Department.

Since the City did not raise this argument again in response to your formal complaint, I will not provide an extensive analysis of this issue. The City is bound by the requirements of Indiana Code section 5-14-3-3(d) with respect to databases they maintain and are obligated to make reasonable efforts to provide disclosable data upon request. See, Opinion of the Public Access Counselor, 99-8, for more discussion on this topic.

CONCLUSION

It is my opinion that only two of the exceptions cited by the City of Fort Wayne in response to your formal complaint justify nondisclosure, but only in a limited manner. The transaction-specific information relating to customers and pricing by pawnbrokers may be subject to trade secret protection under Indiana Code section 5-14-3-4(a)(4). It is the duty of the City, however, to make reasonable efforts to provide information from the database that would not infringe upon this trade secret information under Indiana Code section 5-14-3-3(d). Also, the exception for discretionary disclosure of law enforcement investigatory records would also be applicable, but only to information from the database that is related to a specific investigation conducted by the Police Department.

Sincerely,

Anne Mullin O'Connor

cc: Mr. Tim Manges, Attorney
City of Fort Wayne

¹According to Mr. Phil Goddard, Chief Counsel for IDFI, the Department does not receive or maintain the records required to be created by pawnbrokers under Indiana Code chapter 28-7-5.

²Unlike the Hoosier Lottery case, the City did not present this as an option, but it may be an alternative that provides you with some information while preserving the transaction-specific trade secret information contained therein.
