



STATE OF INDIANA

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March 2, 2015

Mr. James P. Lamb
P.O. Box 480370
Fort Lauderdale, FL 33348

Re: Formal Complaint 15-FC-13; Alleged Violation of the Access to Public Records Act by the Indiana Department of Revenue

Dear Mr. Lamb,

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Revenue ("DOR") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The DOR has responded via Mr. Collin Davis, Esq. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on January 16, 2015.

BACKGROUND

Your complaint dated January 16, 2015 alleges the Indiana Department of Revenue violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On January 2, 2015, you submitted to the DOR a public records request seeking the following information:

“a list of carriers that have not paid 2013 & 2014 UCR in furtherance of:
<http://ucr.in.gov/MCS/UCR%202014%20State%20Percentages.pdf> and
<http://ucr.in.gov/MCS/UCR%202013%20State%20Percentages.pdf>”

In your complaint you contended the DOR withheld the information requested unlawfully and made misrepresentations as to the existence of the information. Specifically, you contend the information requested is in the possession of a DOR employee and that you have received this list before.

On February 3, 2015, DOR responded to your complaint, claiming the DOR does not have the list requested. It DOR receives master lists each April but that information from the Federal Motor Carrier Safety Administration (“FMCSA”) would now be out of date.

Mr. Davis acknowledges the DOR employee you reference in your complaint does receive a list from FMSCA each April of those carriers with active USDOT numbers who have not paid their Unified Carrier Registration (“UCR”) fees. Mr. Davis also acknowledges the DOR may have received the information you requested, but the information would be out of date and the DOR does not have the capability to generate such a list.

In his correspondence to the PAC, Mr. Davis contends the denial was proper under Indiana law. Indiana Code provides confidential information does not need to be disclosed under the APRA and the information requested falls under Ind. Code §§ 6-8.1-7-1(a) and 6-8.1-1-1, the DOR’s confidentially statutes.

ANALYSIS

The public policy of the APRA states that “(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.” See Ind. Code § 5-14-3-1. The Indiana Department of Revenue is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy DOR’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

From the information provided, it is clear DOR maintains a number of lists. The contention is it does not maintain a list responsive to your request despite representations of specific DOR employees. DOR states the FMCSA generates the list, however, the State does not have the capability to unilaterally do so. To this extent this is true, the DOR does not have an obligation to generate or create a list of which it does not maintain custody. As DOR indicates, the appropriate channel for obtaining this information from FMCSA would be a Federal Freedom of Information Act request addressed to FMCSA. However, if DOR receives a copy, it is potentially disclosable public record under the Indiana Access to Public Records Act (APRA).

If DOR does in fact have a copy of the list in its possession, the question then becomes whether it is a disclosable public record. DOR maintains the records are confidential under Ind. Code § 5-14-3-4(a)(1) and Ind. Code §§ 6-8.1-7-1(a) and 6-8.1-1-1

Ind. Code § 5-14-3-4(a)(1) states that public records which have been declared confidential by state or federal law are not to be disclosed. Ind. Code §§ 6-8.1-7-1(a) states:

Unless in accordance with a judicial order or as otherwise provided in this chapter, the department, its employees, former employees, counsel, agents,

or any other person may not divulge the amount of tax paid by any taxpayer.

The UCR fee would fall under the definition of tax under Ind. Code § 6-8.1-1-1. The DOR argues the list, if released, could potentially disclose taxpayer information. While you contend it does not, this is a matter of fact and not law. If the information is non-identifiable, then it would not fall under the confidentiality exception of the APRA. If one could use the list to extrapolate personally identifiable information, then it would fall under the exception.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor if the DOR maintains a list responsive to your request which does not individually identify a taxpayer, it should be released. If the DOR does not maintain such a list, it is not obligated to create one.

Regards,

A handwritten signature in black ink, appearing to read 'L. Britt', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Collin G. Davis, Esq.