November 15, 2004

Warren A. Auxier
P.O. Box 215
Hanover, IN 47243

Re: Formal Complaint 04-FC-194; Alleged Violation of the Access to Public Records Act by the Indiana Department of Natural Resources; Division of Law Enforcement

Dear Mr. Auxier:

This is in response to your formal complaint alleging that the Department of Natural Resources violated the Access to Public Records Act by denying you a training videotape.

BACKGROUND

On July 23, 2004, you directed a public records request to the Department of Natural Resources, Division of Law Enforcement ("Department"). You asked for a copy of the training video that one of the law enforcement officers had orally indicated that the Department maintained. Over the course of the following months, you made several requests for this record or records. During the various written correspondence and telephonic conversations with the Department, the parties identified two videotapes, one produced by Alert Publishing Company, which is not at issue here, and one that the Department had created of a 2001 In-Service training session presented by a contractor, Randy Means. Mr. Means is an attorney in Henderson, Nevada. I will refer to this record as the "Means tape." The purpose of creating the videotape was to afford officers who were unable to attend the training a way to view the videotaped training at a time that they are available to do so.

On August 19 and August 26, the DNR wrote you a letter regarding the records you requested, including the Means tape, to tell you that it was denying the record and citing the federal copyright law that it believed applied to the Means tape. You acknowledge that because these denials occurred more than 30 days prior to your complaint, you are not including them in your complaint because it would be untimely. However, on October 6, 2004, the Department

issued a letter responding on a different basis to your request for the Means tape. In that letter, the Department for the first time denied you access to the Means tape because:

> "it contains dialogue between law enforcement staff and Randy Means during an in-service officer training session. It is my understanding that some of the training information is of such a nature that dissemination to the public potentially could endanger officers. For obvious reasons, a law enforcement agency prefers not to reveal to the public its officers' defensive tactics and maneuvers or any other information that members of the public potentially could use to endanger officers. For obvious reasons, a law enforcement agency prefers not to reveal to the public its officers' defensive tactics and maneuvers or any other information that members of the public potentially could use to harm an officer....The training discussion between law enforcement officers and Randy Means involves law enforcement policies and procedures and may constitute agency advisory and deliberative material..."

The Department cited IC 5-14-3-4(b)(6) in its response. After receiving this response, you filed a formal complaint with my office. I received your complaint on October 19. I sent a copy of your complaint to the DNR, and have spoken with Chief Counsel Janet Parsanko. I also mention that both you and the Department have spoken with me by telephone primarily regarding the basis for denying the record on the grounds that the federal copyright laws would not allow copying the Means tape. I do not opine on this issue in this advisory opinion, again because the denials containing that basis are no longer able to be raised in the context of a formal complaint under IC 5-14-5. However, in the event that you would like my opinion on the matter of copyright, I would issue an informal inquiry response.

ANALYSIS

Any person may inspect and copy the public records of a public agency at any time during regular business hours of the agency, except as provided in Ind.Code 5-14-3-4. IC 5-14-3-3(a). The Department is clearly a public agency for the purposes of the APRA. IC 5-14-3-2. There is no dispute between the parties that the Means tape is a public record, because it is a tape recording maintained and was created by a public agency, the Department of Natural Resources. IC 5-14-3-2.

The Department has denied you access to the Means tape under IC 5-14-3-4(b)(6). This exception allows nondisclosure at the discretion of the agency:

"(r)ecords that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making."

There is very little case law interpreting IC 5-14-3-4(b)(6). There are no easy standards to be mechanically applied by a court or this office in determining whether the deliberative materials exception applies to a given record. In previous advisory opinions, this office has given the words of the statutory exception their plain meaning.

With respect to the Means tape, it appears that the record is intra-agency, because it was created by the agency and is used within the agency for viewing by its law enforcement officers as part of their training. The fact that the person appearing on the Means tape is outside the Department does not nullify the intra-agency character of the tape.

For analysis of the next two factors, it is necessary to understand the contents of the Means tape, and I should emphasize that I have not viewed the tape. I rely principally on the written denial above for my analysis of the tape's content. However, over the course of the communications between you and the Department, there were other references to the Means tape that may assist in determining whether its content have been established with sufficient clarity to allow me to make a determination whether the record fits the exception.

In order for the Department to rely on the deliberative materials exception, the record must contain communications for purposes of decisionmaking, and be advisory or deliberative material and constitute opinion or be speculative in nature. In the Department's July 30 letter to you, it seemed to indicate that the tape contained training regarding reasonable suspicion and probable cause, but not just with respect to watercraft stops. In the August 12 e-mail from Stephanie Roth, attorney for the Department, she indicated that Means had been engaged to lecture the officers "on a variety of topics." The 2001 In-Service agenda shows Randy Means's presentation titled "Search and Seizure." In its denial letter of October 6, the Department claims that the tape contains "officers' defensive tactics and maneuvers" and involves "law enforcement policies and procedures." With respect to the latter, the denial does not explain what policies or procedures are discussed. Ms. Parsanko added to the written information about the tape to indicate that the tape contains questions and answers, not just oral presentation of Randy Means.

I am unable to conclude from this limited information of the contents of the Means tape whether the tape contains communications for the purpose of decisionmaking, is advisory or speculative in nature or constitutes opinion. However, I offer the following guidance.

The Department meets its burden of establishing an exception to disclosure under the APRA by showing that the record falls within section 4(b)(6), and by establishing the content of the record with adequate specificity and not relying on a conclusory statement. IC 5-14-3-9(g)(1). At least with respect to the written basis for denial, the content of the record has not been established with adequate specificity. The October 6 letter contains mainly conclusory statements that establish only that the agency believes it would be harmful to officers to release the Means tape.

I also note that, depending on the content of the Means tape, this record may be distinguishable from the prosecutor's manual containing the policies for deputy prosecutors to use in tailoring the appropriate plea negotiation strategy. *See Newman v.Bernstein*, 766 N.E.2d 8 (Ind.Ct.App., 2002). If the Means tape contains information on how an officer makes a decision about when or how to stop or search a vehicle, it may well be deliberative material under the holding in *Newman*. It is the burden of the Department to show that the Means tape constitutes deliberative material that is part of a decisionmaking process and is opinion or speculative in nature. To the extent that the Means tape does not meet these requirements, the Means tape cannot be withheld from disclosure under IC 5-14-3-4(b)(6).

CONCLUSION

It is my opinion that the Department of Natural Resources must establish the content of the Means tape with adequate specificity to show that it meets all the requirements of the deliberative materials exception.

Sincerely,

Karen Davis
Public Access Counselor

cc: Janet Parsanko