

October 13, 2005

*Sent Via Facsimile*

Joel Wieneke  
1915 W. 18<sup>th</sup> Street, Suite A  
Indianapolis, IN 46202

*Re: Formal Complaint 05-FC-203; Alleged Violation of the Access to Public Records Act by the Indiana Department of Natural Resources*

Dear Mr. Wieneke:

This is in response to your formal complaint alleging that the Indiana Department of Natural Resources (“DNR”) violated the Access to Public Records Act (“APRA”) by failing to produce certain records. I find that the DNR did not comply with the Access to Public Records Act when it omitted correspondence concerning the matter.

#### BACKGROUND

On September 9, 2005 you hand-delivered a request to the DNR for certain records regarding a permit application, in a matter I will call “the permit matter.” Specifically, you requested:

“The opportunity to inspect and copy all public records prepared or received by the [DNR] on or after March 1, 2004, relating to Centre Properties’ permit application FW-22,170, including especially but not exclusively the updated hydraulic modeling information referenced in the Final Order of the Natural Resources Commission issued August 26, 2005...”

You went on to state in relevant part:

“In addition, this request includes but is not limited to all public documents which constitute administrative, environmental, and technical reviews, as well as other correspondence and e-mails, relating to permit application FW-22,170, which were prepared or received on or after March 1, 2004.”

The DNR sent you a responsive letter on September 13, 2005. In the letter, Chief Legal Counsel Adam Warnke stated that the DNR would be compiling responsive records and would contact you to arrange a mutually acceptable time for inspection. According to Mr. Warnke, you had actually inspected the permit matter file maintained by the DNR the previous day, but I do not believe that inspection to be the subject of your complaint. In any case, you followed up with your written request of September 9 because the DNR had not yet gathered in one file all the records you were interested in viewing.

On September 20, 2005, you viewed records involving the permit matter. You were not convinced that the DNR had disclosed all the records set out in your written request; hence, you filed your formal complaint with my office on October 6, 2005. You requested priority status for your complaint. Because you alleged facts that demonstrated the need for priority status, this advisory opinion is being issued within seven days of my receipt of your complaint. *See 62 IAC 1-1-3.*

I sent a copy of your complaint to the DNR. I received a written response from Mr. Warnke, which I enclose for your reference. Aside from discussing other matters having to do with Mr. Warnke's inability to meet with you the day you came to the DNR's office and the DNR's reluctance to waive copying fees, his response may be characterized as follows. With respect to the administrative and environmental reviews, those reviews took place when the permit matter was filed in 2003; therefore, the memoranda were created prior to your designated date of March 1, 2004. Following a telephone call to Mr. Warnke, I learned that with respect to the administrative and environmental reviews, those pre-2004 reviews were actually in the file that you reviewed.

With respect to the technical review, Mr. Warnke stated that the DNR did not prepare an internal memorandum of this review, having resolved the issues that had been identified during the review process over the course of several meetings. Hence, the DNR was not required to produce a record that did not exist.

Finally, Mr. Warnke states that the DNR staff responsible for reviewing the permit application also had a small number of e-mail exchanges regarding the file, of both an internal nature and with representatives of the permit applicant. Mr. Warnke explains that at the time of your September 20 inspection, the staff believed that only the modeling data and review memoranda--information that would typically be maintained in the permit file--were requested by you. Mr. Warnke states that had you clarified your request during the September 20 inspection that you also wanted to inspect such correspondence, the DNR would have provided all nonprivileged e-mails to you.

## ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). If a public agency receives a request for a record that is hand-delivered, the agency is required to respond within 24 hours or the next business day, or the request is deemed denied. IC 5-14-3-9(a). A request for a record must be stated with reasonable particularity. IC 5-14-3-3(a)(1). If an agency does not understand what record the person is requesting, the agency is required to contact the requester for clarification or more information.

You do not raise any issue with respect to the time in which the DNR issued a response. Hence, I am unsure whether Mr. Warnke's letter of September 13 was the first responsive contact you received from the DNR. If the September 13 letter was issued more than 24 hours after the agency received your hand-delivered request on Friday, September 9, then it would have been tardy under IC 5-14-3-9(a).

Your complaint is founded on the belief that the DNR is withholding responsive records from you. Taking the DNR's facts as true, the review records were either provided to you in the file (but in any case did not fit your request which was limited to only those records created or received after March 1, 2004), or, in the case of the technical review, simply do not exist. An agency that does not maintain a record and is not required by law to create a record has not violated the APRA by not disclosing it. No violation of APRA is apparent under this set of facts. If you still maintain that the DNR is withholding a review record, you may put the DNR to the test in a court action to compel the agency to produce a record, under IC 5-14-3-9(e).

However, the missing correspondence is a different matter. Mr. Warnke admits the salient facts: that certain e-mail correspondence relating to the permit matter did exist on September 20, but was not produced. I reviewed your September 9 written request. You did not request records using the word "file." Rather, you describe a record that "includes but is not limited to...correspondence and e-mails, relating to permit application..." The e-mail correspondence, according to Mr. Warnke, is not normally maintained in the permit file. Your request does not limit itself to any particular place where the DNR maintains the record; hence, the DNR's rationale for not providing the e-mails on September 20 is unavailing. Also, it was not incumbent on you to renew a request for the correspondence, where you had clearly stated, in writing, that you wanted to inspect the correspondence and e-mails relating to the permit matter. Often, public agencies insist on receiving a complex record request in writing, to avoid any misunderstanding as to the scope of the request. Our office endorses such a policy. *See* IC 5-14-3-3(a)(2). Where the agency has such a writing to refer to when compiling records, it should utilize it, and ask the requester for clarification if needed. The DNR clearly had notice that you wished to inspect the e-mail correspondence that Mr. Warnke admits the DNR possesses. In my opinion, the DNR should contact you to arrange for the belated inspection of the e-mail, subject to any exemptions that individual e-mails may be subject to. Any denial of particular e-mail should meet the requirements of IC 5-14-3-9(c).

The DNR's failure to identify all responsive records that were clearly stated in your written request was a denial under the APRA.

#### CONCLUSION

For the foregoing reasons, I find that the Indiana Department of Natural Resources denied you a record in violation of the Access to Public Records Act.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Mr. Adam Warnke