STATE OF INDIANA

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May 28, 2014

Mr. Charles Costanza
Via email

Re: Informal Inquiry 14-INF-16; Alleged Violation of the Access to Public Records Act by the Indiana Department of Natural Resources, the Natural Resource Commission and its AOPA Committee

Dear Mr. Costanza,

This is in response to your informal inquiry regarding the Department of Natural Resources ("DNR"), the Indiana Natural Resources Commission ("NRC") and the AOPA ("Administrative Orders and Procedures Act") Committee of the Indiana Natural Resources Commission. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-1.5-1 *et seq.*

BACKGROUND

The background facts regarding your inquiry are appreciatively complex in terms of the various proceedings and statutes relative to your grievance. In the course of investigating the circumstances, I have solicited information from you and the agencies involved. All materials provided to this Office are available upon request. I will reflect the record as accurately as possible given the information available.

On or about October 11, 2013, a Deer Cull Permit Application was filed with the Indiana Department of Natural Resources for the Town of Ogden Dunes. The permit was granted on October 28, 2013. On November 11, 2013, a Petition for Review and Issuance of Stay of Effectiveness of the issuance of the permit was submitted to DNR under the administrative purview of Administrative Law Judge Stephen Lucas, a hearing officer appointed by the Natural Resources Commission. The NRC is the body which adjudicates petitions of DNR actions. The matter was set for administrative review pursuant to the Administrative Orders and Procedures Act ("AOPA") Ind. Code § 4-21.5 *et seq.* You ultimately became a party to the administrative litigation on January 30, 2014. A Non-Final Order dismissing the case was eventually filed by Judge Lucas on

March 19, 2014 after considering a motion by DNR to dismiss. You and your fellow Claimants timely submitted objections to the Order, however, the Non-Final Order was ratified by the NRC's AOPA Committee on April 24, 2014.

You submitted a request for an Informal Advisory Opinion to this Office on May 12, 2014. On May 19, 2014, I received supplemental information from former fellow co-claimants. I have included them on the distribution of this Opinion.

You take overall exception with the ALJ's adjudication of this matter, however, you ostensibly have identified two "public access" issues for me to consider. The first is DNR's alleged deviation from internal policies and procedures in the issuance of the deer cull permit. You were provided with the applicable DNR policies in November of 2013 and they ultimately became part of the operative controversy in the administrative proceeding. You posit "[i]f information is given and said to govern the issuance of permits, but then is not followed or recognized, then the Access to Public Information Act has no effect or reason to exist and that any public information given by a said agency is bogas [sic] and not followed."

The second issue concerns the information supplemented by your former co-claimants. Before the initiation of the administrative proceeding, Jon and Joan Machuca wrote two letters to DNR staff members on October 22, 2013 wherein they requested the staff members answer a series of questions related to the deer cull permit application. The staff members did not respond at the time, however, testimony taken at a November 22, 2013 preliminary hearing officiated by Judge Lucas indicated answers to the questioned asked in the letters existed and would have been available on October 22.

DISCUSSION

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 agencies referenced in this Opinion are public agencies for the purposes of the APRA. *See* Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the agencies' non-confidential public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise non-disclosable under the APRA. *See* Ind. Code § 5-14-3-3(a).

Although this is not an adversarial exercise as no formal complaint was submitted, I have scrutinized the record of the proceedings and your communication with the agencies in a light most favorable to you. Your primary contention appears to be with the Administrative Law Judge's Dismissal Order and the affirmation of that Order by the NRC AOPA Committee. You believe DNR to have acted contrary to its own internal policies and procedures. Please note this is not a public access issue, rather a matter considered by the Administrative Orders and Procedures Act. The Office of the Public Access Counselor does not review agency actions as contemplated by the AOPA under Ind. Code § 4-21.5-1-4(3). The Claimants/Petitioners in the administrative cause

exercised their right under AOPA to challenge DNR's actions in relation to the deer cull permit. You joined that proceeding as well and had the opportunity to avail yourself of all rights and privileges afforded by the AOPA.

Furthermore, the Office of the Public Access Counselor does not evaluate the orders of administrative law judges for validity. AOPA delegates that responsibility to the ultimate authority of a public agency as defined by Ind. Code § 4-21.5-1-15. This would be the NRC's AOPA Committee in the instant case. Likewise, the Office of the Public Access Counselor does not appraise the final affirmation of an order by an ultimate authority. Judicial review is the remedy at law for any appealable error under Ind. Code § 4-21.5-5 *et. seq*.. It appears you have exhausted your administrative remedy through an AOPA proceeding and judicial review would be the next step in challenging the decision.

I have stated *ad nauseum* in prior opinions that discovery issues raised in the course of a legal proceeding should be considered exclusively by the judiciary or in this case, administrative hearing officers and authorities. Although not explicitly stated in the APRA, it would be contrary to public policy for the Public Access Counselor, an executive branch official, to judge the merits of a discovery order. Similarly, the PAC declines to pass judgment on the soundness of a decision of an arbiter weighing credibility or admissibility of evidence. The Access to Public Records Act and other court or trial rules (including AOPA) are mutually exclusive.

The only potential public access issue I discovered among the totality of the information provided involve the two letters sent by the former fellow co-Claimants, the Machucas, in October 2013. The letters were addressed to two DNR staff members and contained a narrative grievance followed by a number of questions. The letters were never answered. On November 22, 2013 during a preliminary hearing, DNR introduced into evidence testimony from the staff members answering some of the questions. Supplemental photographic evidence was also introduced into evidence.

Prior Public Access Counselors have opined public officials are not obligated by the Access to Public Records Act to answer questions. See *Op. of the Public Access Counselor 11-FC-32* ("It is important to distinguish what constitutes a question and an actual records request").

The rationale behind this position is that public agencies are not required to create or develop a public record when one does not previously exist in order to satisfy a public records request. See *Opinion of the Public Access Counselor 08-239*. The Machucas specifically asked for a response in writing. None of the questions requested any existing documentation. The letters are simply an invitation for a call-and-response regarding the Town of Ogden's application for the permit. To be subject to the APRA, a public records request should be somewhat conspicuously labeled as such (e.g.: "APRA", "FOIA", "access to records", or any derivation thereof putting the public agency on notice that a record is being requested). At a minimum, a request should seek inspection, copying or production of a particular record. This would not be a high burden to satisfy. After reviewing the two letters, however, it appears the Machucas were merely asking

questions and not seeking an actual record. If the letters or any other communication to DNR specifically requested the inspection and copying of records, DNR would be obligated to produce them.

In your communication with this Office, as well as your objections to the ALJ's findings, you state the ALJ accepted into evidence a series of photographs not previously provided to you. You indicate that you or your co-claimants made "a valid public information request" upon DNR personnel for the entirety of the application record. I have no indication any such request was made and can only surmise this is in reference to the Machucas' letters. Again, I do not consider those letters to be public records requests contemplated by the APRA.

In regard to whether the photographs were properly introduced into evidence by the ALJ, I decline to comment. Those are evidentiary matters to be considered at the discretion of the Judge and/or the ultimate authority. If you disagree with how discovery is conducted by an agency hearing officer, remedies are available to you and governed by AOPA and not the Public Access Counselor.

Please do not hesitate to contact me with any other questions.

Best Regards,

Luke H. Britt
Public Access Counselor

cc: ALJ Stephen Lucas