October 31, 2005 Guidance Regarding Disclosure of Copyrighted Photographs Maintained by the Office of Tourism Development

October 31, 2005

Mr. Chad Frahm
General Counsel
Office of Lieutenant Governor Becky Skillman
200 West Washington Street, Room 333
Indianapolis, IN 46204

Re: Informal Inquiry Response; Guidance Regarding the Use of Copyrighted Material Under the Access to Public Records Act

Dear Mr. Frahm:

You have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request. Specifically, you have asked me to opine on whether photographic images that the Office of Tourism Development ("Tourism") has in its possession are public records that must be available for the public to copy and use pursuant to the Access to Public Records Act ("APRA"). In addition, you have asked me to issue guidance regarding a use policy for such materials.

You stated that Tourism acquires the photos in several different ways: (1) Tourism pays a photographer to shoot images, the photographer owns the photo/images, and Tourism has the right to use the image in publications; (2) Tourism pays a photographer to shoot images and the images become the property of Tourism; and (3) tourist destinations give an image to Tourism for Tourism's use in its publications. In all cases, the photos/images are on file in the Office of Tourism Development.

Hence, your question is whether these public records can be obtained by a person under the APRA and then used for commercial purposes (such as to make and sell postcards or calendars featuring the photographic image). Also, since the images are public records, can Tourism create and enforce a use policy? You suggest that such a use policy would require correct attribution if the image is used, or require that the person obtain approval from the photographer if the photo is owned by the photographer, or require payment for use of the photo owned by the state. You are concerned that a person's unfettered access and use of photographic images could jeopardize the contract between the state and the photographer.

Although the office of the public access counselor has, on occasion, received questions about copyright, I have been unable to locate any comprehensive guidance from this office concerning the interplay between copyrighted materials and the Access to Public Records Act. Your question requires a fairly comprehensive response. Therefore, I am issuing guidance in the form of this lengthy letter. I hope that the guidance herein can be used in a number of situations in which Tourism and other public agencies are faced with requests for material that is copyrighted.

This guidance, while fairly comprehensive, cannot be used in all situations. Some issues that may arise in the future would have to be evaluated in more detail. In most of those cases, a public agency's counsel would be more appropriate to evaluate issues such as whether a valid copyright assignment has occurred in a particular instance, or whether a proposed use of copyrighted material is infringement or a fair use. Again, it is my opinion that understanding these underlying issues is essential to my response to your question about Tourism's responsibilities under the APRA. Therefore, I give a summary response to your questions, and then follow with an analysis of the principles of copyright law and Indiana's access laws that underlay my short advice.

Summary Response

Tourism must permit any person to *inspect* any photographic images [hereinafter, "images"], that it maintains, irrespective of copyright ownership in the images. Where Tourism owns the right to reproduce photographic images or owns the entire copyright in the images, Tourism must allow copying of those images. Tourism may not limit a person's commercial use of an image in which Tourism owns the copyright. Tourism may request attribution if the image is displayed or reproduced for commercial purpose, but may not require it as a condition for a person to receive a copy of the image. Likewise, Tourism may not require payment for use of the image where Tourism owns the copyright; it may only charge the copying fee established by the APRA.

If Tourism has only a nonexclusive license in the image--the photographer or some other person or entity owns the copyright in the image, Tourism must allow copying that would be a fair use; in other words, does not infringe the copyright of the copyright holder. If the person requesting a copy of the image that Tourism does not own the copyright to wishes to use it for commercial purposes, Tourism may deny the person the right to make a copy using the agency's equipment without permission of the copyright owner. In the absence of permission from the copyright owner, it is my opinion that Tourism must allow the person to make a copy of the image using that person's own equipment.

Relevant Provisions of the APRA

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. "Public record" means any material that is created, received, retained, maintained, or filed by or with a public agency. IC 5-14-3-2(m). No request may be denied because the person making the request refuses to state the

purpose of the request, unless such condition is required by other applicable statute. IC 5-14-3-3(a). A public agency shall either provide the requested copies to the person making the request, or allow the person to make copies on the agency's equipment or on the person's own equipment. IC 5-14-3-3(b).

A state agency may adopt a rule under Indiana Code 4-22-2 prescribing the conditions under which a person who receives information on disk or tape under subsection 3(d) may or may not use the information for commercial purposes. IC 5-14-3-3(e). A public agency may not enter into or renew a contract or an obligation that requires the public to obtain a license or pay copyright royalties for obtaining the right to inspect and copy the records unless otherwise provided by applicable statute, if the contract obligation, license, or copyright unreasonably impairs the right of the public to inspect and copy the agency's public records. IC 5-14-3-3(g)(2). A state agency may charge only the copying fee established under IC 5-14-3-8(c) for a copy of an image on standard size paper, which is $.10 per page, unless a specific statute allows a different fee. IC 5-14-3-8(c); IC 5-14-3-8(f).

General Provisions of the Copyright Act and Copyright Law

Copyright protection subsists in original works of authorship fixed in any tangible medium of expression. 17 U.S.C. §102(a). Works of authorship include pictorial, graphic and sculptural works. *Id.* Photographs are included in such works of authorship. 17 U.S.C. §101 (defining "pictorial, graphic, and sculptural works"). Copyright in a work vests initially in the author of the work. 17 U.S.C. §201(a). In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of the Copyright Act. 17 U.S.C. §201(b). A "work made for hire" is a work prepared by an employee within the scope of his or her employment or a work specially ordered or commissioned as certain specified works, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. 17 U.S.C. §101 (defining "work made for hire"). The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law. 17 U.S.C. §201(d)(1). Any of the exclusive rights comprised in a copyright, including any of the rights specified by section 106 may be transferred and owned separately. 17 U.S.C. §201(d)(2). The exclusive rights in copyright include the right to reproduce the work, or in the case of pictorial works (like photographs) to display the work publicly. 17 U.S.C. §106(1) and (5). Ownership of a copyright, or any of the exclusive rights under copyright, is distinct from ownership of any material object in which the work is embodied. 17 U.S.C. §202. A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. 17 U.S.C. §204.

Ownership of the relevant copyright is a matter to be determined from the parties' contract. *Bernstein v. Glavin*, 725 N.E.2d 455 (Ct. App. 2000). No magic words must be included in a document to satisfy the requirements of the Copyright Act's transfer provision. Rather, the parties' intent as evidenced by the writing must demonstrate a transfer of the copyright. *Id.*

Analysis

Who Owns the Copyright in the Images Maintained by Tourism?

You have sent me samples of agreements that have been entered into between Tourism's prime contractor Hirons & Company Communications and a photographer. The Boyer contract states that photographer Boyer has been compensated for "unlimited usage, unlimited time beginning immediately. The forty-five images may not be sold or provided for use to any outside party by the photographer unless there is specific written permission granted by the state." The photographer Boyer retains the right to use the images for self-promotion. Boyer retains the original negatives but will lend the negatives to the state for scanning at the State's request. The Eicher contract states that a sum for each original photograph used by the state allows the State and Hirons "unlimited usage for all advertising and promotional materials developed for and by the State and its agencies." The contract also provides that the Agency and the State will make all efforts to ensure that photographic credit is given whenever an original photograph is used.

It is not clear from your question whether the State regards these agreements as having transferred the copyright in the images from the photographer to the State, as either an assignment or as an exclusive license to the State, although either could effectuate a transfer of copyright ownership. 17 U.S.C. §101 (defining "transfer of copyright ownership"). The contracts are not required to use the words "copyright" or specify the rights being transferred in order to qualify as a transfer of copyright ownership. *Bernstein* at 459. Beyond the observation that the images are not works made for hire because no employment relationship exists and the contract does not memorialize that the works produced under the contract are "works made for hire," I offer no opinion regarding whether the contracts submitted do or do not effectuate a transfer of copyright ownership from the creator of the images in each case to the State (via its agent, Hirons). Such legal opinion goes beyond the scope of this analysis, but I note that it is critical to determining whether the copyright in images produced as a result of these or other contracts belong to the State or to the photographer.

When Tourism Owns the Copyright of An Image

When Tourism owns the copyright to images, it must allow inspection and copying of the image upon request. There is no exclusive right in copyright that is violated when a person merely inspects a record. Furthermore, where the person requests a copy of the image, there is no exemption in the APRA that would allow a public agency to exempt copying of a record for which the State claims copyright ownership.[1]

[1] Copyright protection is not available for any work of the United States Government, but the United States government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise. 17 U.S.C. §105. Nothing in the Copyright Act precludes a state from holding a copyright under the federal law. However, IC 5-14-3-3(g) restricting public agencies from requiring the public to pay copyright royalties for obtaining the right to inspect and copy records except under applicable statute, casts doubt on whether an Indiana public agency could hold a copyright in its public records. A narrow exception for geographic information systems would appear to allow a public agency to recoup costs of maintaining, upgrading and enhancing an electronic map from a person requesting the map, but this provision confers nothing resembling a copyright in an electronic map. *See* IC 5-14-3-8(j). Still, where the U.S. government may obtain an interest in copyright by

Further, the APRA would not permit a condition such as a use policy to be placed on a person's right to reproduce a record in which the State owns a copyright. The only provision in the APRA that would allow a state agency to limit commercial use of a record by adopting a rulemaking action appears to me to apply to only *information* or *data* stored in an electronic data storage system. *See* IC 5-14-3-3(e). A digital image of a photograph arguably would not come under this provision's ambit. Requiring that a person make attribution when reproducing or displaying an image owned by Tourism does not have support in the APRA, although the law would not be offended by a request for such attribution.[2]

When a Third-Party Owns the Copyright in a Public Record

As previously stated, under the APRA, a public agency must allow inspection and copying of a public record unless the record is exempt under section 4. The APRA does not contain an exemption from disclosure for material that is copyrighted, by a third party or otherwise. Under section 4 of the APRA, records that are required to be kept confidential by federal law may not be disclosed by a public agency. IC 5-14-3-4(a)(3). However, materials that are subject to a claim of copyright are not deemed to be "confidential" under the Copyright Act. *See* Advisory Opinion of the State of New York Department of State Committee on Open Government, FOIL-AO-14190 ("Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being 'specifically exempted from disclosure...by...statute.'") at http://www.dos.state.ny.us/coog/ftext/f14190.htm. Hence, none of the section 4 exemptions of the APRA would apply to allow Tourism to deny a person the right to reproduce third-party copyrighted photographic images.[3]

Moreover, the legislature provided that a public agency may not enter into or renew a contract or an obligation that requires the public to obtain a license or pay copyright royalties for obtaining the right to inspect *and copy* the records unless otherwise provided by applicable statute, if the contract, license, or copyright unreasonably impairs the right of the public to inspect and copy the agency's public records. IC 5-14-3-3(g)(2).

Other states have dealt with the seeming conflict between the Copyright Act and that State's records access law by finding consistency in the fair use doctrine. Notwithstanding the exclusive rights granted by the Copyright Act, the fair use of a copyrighted work, including such use by reproduction in copies for purposes such as criticism, comment, news reporting, teaching,

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conveyance, it seems likely that a state agency could hold a copyright where one is conveyed to the state. Further, the Copyright Act expressly does not preempt the common law or statutes of any State with respect to subject matter that does not come within the subject matter of copyright. 17 U.S.C. §301(b)(1). I found no case that held that the Copyright Act preempted state public records access laws. In my opinion, the APRA is not preempted by the Copyright Act.

[2] The Copyright Act confers on an author the right to claim authorship of a still photographic image that is a limited edition of 200 copies or fewer and the copies are signed and numbered by the author. 17 U.S.C.§106A.

[3] Computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it and portions of electronic maps entrusted to a public agency by a utility may be withheld in the public agency's discretion. Although this provision is not limited by its terms to copyrighted material, generally such material would be copyrighted.

scholarship, or research, is not an infringement of copyright. 17 U.S.C. §107. A multi-prong test stated in §107 has spawned caselaw around the country. The determination turns on peculiar facts, and is an equitable rule of reason. Although non-commercial uses do not always qualify as fair use, commercial use tends to vitiate a claim of fair use, from my understanding of the fair use provision in the Copyright Act.

In any event, some state public access laws contain exemptions for "records that are trade secrets or are submitted to an agency by a commercial enterprise...and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." N.Y. PUBLIC OFFICERS LAW §87(2)(d)(the New York Freedom of Information Law). Hence, in New York, the Committee on Open Government has opined that New York agencies may prevent reproduction of a copyrighted work that would cause substantial injury to the competitive position of the subject enterprise, finding the FOIL limitation to be coterminous with the fair use doctrine. Advisory Opinion of the Committee on Open Government, *supra*. Indiana, while exempting trade secrets, does not otherwise exempt records for which disclosure (or copying) would cause substantial injury to the competitive position of an enterprise.

The Texas Attorney General found that public agencies must comply with the Copyright Act and are not required to furnish copies of copyrighted records, but nevertheless stated that if a member of the public wishes to make copies of copyrighted materials, the person must do so "unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit." 2003 Tex. AG LEXIS 9459 (Tex. AG 2003)

Where Indiana law contains no exemption for disclosures causing "substantial injury to the competitive position of a subject enterprise," and fair use copying does not infringe on the exclusive right of a copyright holder, it appears that there is no basis upon which a public agency may deny a person a copy of a third-party copyrighted record that constitutes a fair use. Your question, I believe, assumed that a person would likely put the images to a commercial use, but I am concerned that Tourism may receive such fair use requests, and might apply my guidance too broadly to deny all reproduction of third-party copyrighted material.

Where the reproduction would not be a fair use, if a person requests the right to reproduce the images where the photographer retains the copyright, Tourism, in performing the copying, may well place itself in peril as an infringer, or by allowing use of a copying machine to copy the images, as a contributory infringer. The Texas guidance that counsels against the public agency participating in the copying, in my view, permits the liberal construction of Indiana's public access laws,[4] but allows the public agency to maintain a low risk position with respect to infringement of a third-party's copyright.[5]

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[4] The Access to Public Records Act shall be liberally construed to implement the policy of openness. *See* IC 5-14-3-1.

[5] You also sent me a June 10, 2005 "Agreement for Reproduction of Indiana Office of Tourism Development Images." This agreement was called a Photo Usage Policy by Tourism's Carrie Lambert, but it appears to be in the nature of a licensing agreement between Tourism and Cellet Public Relations, referred to by Ms. Lambert as one of Tourism's "partners." Any policy should not contain specifics regarding a particular transaction, but instead would be stated in general terms. It appears that Tourism deems the photographer to own the copyright because it states that requests for commercial use of the image will be forwarded to the originating photographer for purchase and/or

A person who has been denied the right to inspect or copy a public record by a public agency may file an action under IC 5-14-3-9(e) in circuit or superior court. Whenever an action is filed, the public agency must notify each person who supplied any part of the public record at issue that a request for release of the public records has been denied and whether the denial was in compliance with an informal inquiry response or advisory opinion of the Public Access Counselor. Such persons are entitled to intervene in any litigation that results from the denial. IC 5-14-3-9(e). Accordingly, if a public agency denies a person the right to copy a copyrighted record, there is a procedure by which the third-party copyright owner may assert his or her exclusive rights in the material. In such an action, a court shall award reasonable attorney fees, court costs, and other reasonable expenses of litigation to the plaintiff if he substantially prevails, except that the plaintiff is not eligible for the award if the plaintiff filed the action without first seeking and receiving an informal inquiry response or advisory opinion from the public access counselor. IC 5-14-3-9(i).

I hope this guidance is helpful to you. Please contact me if you have any questions.

Sincerely,

Karen Davis
Public Access Counselor

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permission. If the photographer owns the copyright and the person wishes to use the images for a commercial enterprise, any copying should be done with permission of the copyright owner, or copying could be performed only by the person on that person's own equipment.