STATE OF INDIANA

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April 8, 2009

Steven Gerber
11318 Pine Orchard Cove
Fort Wayne, Indiana 46845

Re: Formal Complaints 09-FC-75; Alleged Violation of the Access to Public Records Act by the Indiana Department of Natural Resources

Dear Mr. Gerber:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Natural Resources ("Department") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. A copy of the Department's response to the complaint is enclosed for your reference. It is my opinion the Department has not violated the APRA.

BACKGROUND

You filed the present complaint on March 9, 2009, alleging the Department has denied you access to records which constitute the factual basis for the issuance of a special order which resulted in the five day suspension of an officer in 1986. You allege you received a response to your request on February 19 wherein the Department contended it maintains no disclosable records responsive to the request. The Department contended the only records which exist are contained in an investigatory file. You contend that documents entitled "Statement of Charges" and "Statement of Circumstances" are post-investigatory files and are not exempt from disclosure. You ask that the Department be compelled to disclose the records.

The Department responded to the complaint by letter dated March 24, 2009 from Deputy Director – General Counsel Adam Warnke. The Department contends it has complied with the administrative requirements of the APRA, responding to the request two days after receiving it. Further, the Department included the specific statutory exemption for denial and indicated the name and title of the person denying access. Regarding the substance of the request, the Department contends it maintains no records entitled "Statement of Charges" and "Statement of Circumstance." The Department explains that while Special Order 1200, of which you include a copy, refers to a "Statement of Charges," that order contained boilerplate language. The Department

contends it is likely such a document was not created. Mr. Warnke indicates he personally searched for the requested records and did not locate the requested records.

Regarding the contention that the Department may not rely on the investigatory records exception, the Department contends that any records it maintains which relate to the factual basis behind Special Order 1200 are exempt from mandatory disclosure because they are investigatory records of a law enforcement agency.

ANALYSIS

The public policy of the APRA states, "[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." I.C. § 5-14-3-1. The Department is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the Department during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. If the Department does not maintain the records you have requested, it has not violated the APRA by failing to produce records which do not exist.

If the records did exist, the Department indicates it would claim the records are excepted from disclosure based on the investigatory records exception. The APRA excepts from disclosure, at the discretion of the public agency, "investigatory records of law enforcement agencies." I.C. § 5-14-3-4(b)(1). The Department is clearly a law enforcement agency for the purposes of the APRA. I.C. § 5-14-3-2(m)(6). "'Investigatory record' means information compiled during the course of the investigation of a crime." I.C. § 5-14-3-2(h).

The so-called "investigatory records exception," found at I.C. § 5-14-3-4(b)(1), is one of the broadest exceptions to disclosure found in the APRA. Nothing in the APRA provides that the exception applies only to ongoing or open investigations. Nothing provides that records covered under the exception must be disclosed once an investigation is complete. Further, nothing in the exception provides that records covered under the exception must be disclosed if no charges are filed regarding the crime which was investigated.

The APRA also provides that certain personnel records may be withheld from disclosure:

> (b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

...

(8) Personnel files of public employees and files of applicants for public employment, except for:

(A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

(B) information relating to the status of any formal charges against the employee; and

(C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

I.C. § 5-14-3-4.

Here, you have requested records containing the factual basis for the suspension affected by Special Order 1200. The Department's position is that any related records are investigatory records of a law enforcement agency and as such can be withheld from disclosure pursuant to I.C. § 5-14-3-4(b)(1).

Certainly investigatory records of the Department can be withheld from disclosure at the discretion of the agency, pursuant to I.C. § 5-14-3-4(b)(1). Any records compiled during the investigation of a crime fall under this exception. The issue here, though, is how I.C. § 5-14-3-4(b)(1) and I.C. § 5-14-3-4(b)(8)(C) can be reconciled. The latter requires disclosure of the factual basis for a disciplinary action in which final action has been taken and resulted in, among other things, suspension. Pursuant to I.C. § 5-14-3-4(b)(8)(C), the Department must disclose the factual basis for disciplinary action leading to suspension if the Department maintains a record containing that information. Nothing in the APRA would require the Department to create a record containing the factual basis for suspension if a record does not already exist. For a more detailed analysis of this issue, see *Opinion of the Public Access Counselor 08-FC-184.*

The APRA provides that when a record contains both disclosable and nondisclosable information, the agency must separate the disclosable information and make it available for inspection and copying. I.C. § 5-14-3-6. I agree with the Department that for the most part any records related to the incident are investigatory records and may be withheld from disclosure at the discretion of the agency on the basis of I.C. § 5-14-3-4(b)(1). To the extent a records contains the factual basis for termination, that portion of that record should be disclosed. In my opinion, I.C. § 5-14-3-4(b)(8) does not require an agency to allow inspection of all records related to a

personnel action. For instance, I do not think the law would require disclosure of a detailed narrative of the events leading to a suspension or termination. Instead, the factual basis for the action must be disclosed. The agency has the discretion to provide more than that but is only required to disclose the portion of the record identifying the factual basis that lead to the suspension.

Here, it is my understanding the Department does not maintain the specific records you have requested. In my opinion, though, Special Order 1200 contains information which I would consider the factual basis for the disciplinary action, namely "an incident involving conduct becoming an officer." You included a copy of Special Order 1200 with your complaint, so I understand you have already received this record containing the factual basis for the suspension.

Finally, you ask that the Department be compelled to disclose any records. I would note that even if it were my opinion the Department violated the APRA, I do not have the authority to compel production. *See* I.C. § 5-14-4-10 listing powers and duties of the public access counselor. Only a circuit or superior court of the county in which the denial occurred can compel a public agency to permit you to inspect and copy records. I.C. § 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, it is my opinion the Department has not violated the APRA.

Best regards,

Heather Willis Neal
Public Access Counselor

Cc: Adam Warnke, Indiana Department of Natural Resources