

August 13, 1998

Mr. Clark Kahlo  
4454 Washington Boulevard  
Indianapolis, IN 46205

*Re: PAC Opinion 98-1; Disclosure of draft summary of public hearing comments.*

Dear Mr. Kahlo:

You have asked whether an agency-prepared summary of public hearing comments made to a Department of Natural Resources hearing officer in an official proceeding constitutes a disclosable public record. The Department has responded to your concerns and I have attached a copy for your information. For the reasons set forth below, it is my opinion that draft summaries of public hearings are disclosable public records so long as the recipient of such documents has been notified that such drafts are subject to change and the approval of the appropriate person or governing body.

#### *Background*

On December 9, 1997, the Department of Natural Resources, Division of Water, conducted a public hearing on a floodway filing permit application. You contacted the Department on April 1, 1998, requesting a copy of the summary of the public comments received at the December hearing in order to make it part of the record of an Army Corp of Engineers public hearing to be held the next day. A draft summary of the public hearing comments had been prepared, but had not been proofread or signed at the time of your request. A staff attorney for the Department informed you that the draft summary would not be produced and that the authority for nondisclosure was Indiana Code 5-14-3-4(b)(6), which allows agencies discretion in disclosing deliberative materials. However, on April 2, 1998, a copy of the draft summary of public comments was provided to you. In response to your inquiry, the Department has acknowledged that the draft summary is a public record subject to disclosure, but has suggested that a public agency should be afforded some discretion when asked to produce an unedited and unverified working draft of public comments prior to finalization.

#### *Analysis*

The Access to Public Records Act ("Act") provides that a public record is "any writing, paper, report . . . that is . . . generated on paper" and that, as a general rule, public records are open for inspection and copying except as provided in the Act. IND. CODE §§ 5-14-3-2; 5-14-3-3. In this case, the Department created a public record summarizing the comments received at a public

hearing that is subject to inspection to copying unless disclosure is prohibited or subject to the discretion of the public agency under Indiana Code 5-14-3-4.

The Department cited to Indiana Code 5-14-3-4(b)(6), which allows a public agency discretion as to whether to disclose the following information:

Records 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 purposes of decision making.

There is very little case law interpreting this statutory provision, in particular, what is deliberative material, and there is no case law directly on point regarding draft summaries of public hearings. We must, therefore, turn to the rules of statutory construction for guidance.

"Generally, when construing a statute, the interpreting body attempts to give words their plain and ordinary meanings." *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, \_\_\_\_\_ N.E.2d \_\_\_\_\_ (Ind. 1998), *citations omitted*. Non-technical, undefined words are to be defined by their ordinary and accepted dictionary meaning. *Bulkomatic Transport v. Department of Revenue*, 629 N.E.2d 955, 957 (Ind. Tax 1994), *citations omitted*. The plain meaning of "deliberative" is "assembled or organized for [or] . . . characterized by or for use in deliberation or debate." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 349 (1981). "Deliberation" means "thoughtful and lengthy consideration . . . [t] houghtfulness in decision or action." *Id.* In the context of the Act, deliberative material includes information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decisionmaking process.

Applying these principles of statutory construction, it is clear that a draft summary of public comments received at a public hearing is merely a summary of information received, not deliberative material. While there is naturally a concern about accuracy in draft summaries of public comments following a meeting, there is no provision in the Act that would make such information nondisclosable. However, it is always important that the recipient of the information is notified that the draft is subject to change upon approval of the appropriate person or governing body. In this way, disclosure is possible, but the concern about someone relying upon the draft summary is minimized.

### *Conclusion*

It is my opinion that a draft summary of public hearing comments is a disclosable public record so long as the recipient is informed that the draft is subject to change.

Sincerely,

