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**OFFICIAL OPINION 2019-5**

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Office of the Indiana State Chemist  
Purdue University  
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**RE: Use of Drones in Administrative Inspections**

Dear Dr. Waltz:

The Office of the Indiana State Chemist (OISC) requested an advisory opinion regarding the legal implications of using drone<sup>1</sup> technology in an administrative inspection. A wide range of questions were presented, with the key issues summarized as follows:

- Would the OISC's use of drones qualify under any type of law enforcement exclusion?
- Would the OISC's use of drones constitute a "trespass" or "unlawful photography and surveillance on" real property?
- How is the legal analysis impacted if the OISC uses infrared, multispectral, hyperspectral, or LIDAR (Light Detection and Ranging)<sup>2</sup> lenses?
- Should the OISC provide prior notice that it will conduct an inspection using drone technology?
- How is the legal analysis impacted if the OISC employs a third-party contractor?
- What are the public records implications of using drone technology?

**BRIEF ANSWER**

The OISC's use of drones in an administrative inspection would not constitute a civil or criminal trespass or an unlawful surveillance. That said, when using drone technology, the OISC should be mindful of limitations imposed by the Fourth Amendment to the United States Constitution, requirements under federal law and regulation, and the scope of its statutory inspection authority. Data obtained by a drone, whether operated by an employee of the OISC or

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<sup>1</sup> This opinion will use the common term "drone" to describe any small, unmanned aircraft that is remotely operated.

<sup>2</sup> LIDAR is a remote sensing method used to examine ground surfaces. See the National Oceanic and Atmospheric Administration's site at <https://oceanservice.noaa.gov/facts/lidar.html> (last visited March 13, 2019).

a contractor on behalf of the OISC, should be construed as a public record under the Indiana Access to Public Records Act and deemed disclosable unless there is an applicable statutory exception.

### ANALYSIS

The use of remotely operated unmanned aircraft systems, commonly referred to as “drones,” has expanded rapidly in recent years. The range of applications for drone technology is continuing to develop, with drones being tested for package delivery, window cleaning, providing mobile Wi-Fi, or fighting fires, among other things. With respect to the OISC, it proposes to use drone technology in an administrative inspection, employing drones equipped with specialty lenses which are capable of seeing things invisible to the naked eye. Incorporating these new technologies in an administrative inspection raises a variety of legal issues.

#### **Fourth Amendment Limitations on Surveillance**

At the outset, it is important to address the OISC’s request to identify “law enforcement exclusions” by clarifying that the OISC is not a law enforcement entity, and its inspectors are not law enforcement officers.<sup>3</sup> See e.g. Ind. Code §§ 5-2-9-1; 5-2-17-2; 10-11-8-2 (universally defining law enforcement agency as an entity “whose principal function” is the apprehension of criminal offenders); see also, Ind. Code §§ 15-16-2 *et seq.*; 15-16-4 *et seq.*; and 15-16-5 *et seq.* (addressing the various duties and powers of the OISC, none of which bestow law enforcement authority upon OISC inspectors).<sup>4</sup> Thus, limitations and exclusions that apply to law enforcement officers are not directly applicable to the OISC and OISC inspectors.

Law enforcement status aside, as a governmental entity the OISC must still be mindful of limitations imposed by the Fourth Amendment to the United States Constitution. The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” As a general matter, government is prohibited from conducting warrantless searches of areas where there is a “reasonable expectation of privacy.” *Oliver v. U.S.*, 466 U.S. 170, 177-179 (1984).<sup>5</sup>

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<sup>3</sup> Implicit in the OISC’s request is the notion that law enforcement officers are subject to lesser restrictions than non-law enforcement officers when operating a drone, when in fact the opposite is true. As addressed in greater detail below, drones operated during a criminal investigation will be subject to heightened scrutiny under a Fourth Amendment analysis, as legislative bodies may authorize administrative agencies to conduct warrantless searches of highly regulated industries. Additionally, Indiana law imposes heightened requirements on law enforcement officers who operate a drone.

<sup>4</sup> It is the OAG’s understanding that some OISC inspectors happen to be former law enforcement officers. Even so, the legislature did not authorize OISC inspectors with police powers when carrying out their duties. Thus, an OISC inspector who is a former law enforcement officer, or even a current law enforcement officer moonlighting as an OISC inspector, should not be viewed as possessing police powers while carrying out official OISC duties.

<sup>5</sup> This does not preclude the legislature from authorizing administrative agencies to carry out warrantless inspections of “closely regulated” industries, subject to certain limitations. *New York v. Burger*, 482 U.S. 691, 702 (1987); *U.S. v. Biswell*, 406 U.S. 311 (1972); *State v. Tindell*, 399 N.E.2d 746, 747-48 (Ind. 1980). The OISC has been vested with such warrantless inspection authority pursuant to Ind. Code §§ 15-16-2-38, 15-16-4-55, and 15-16-5-69.

A home and its curtilage, generally regarded as the area immediately surrounding the home, are afforded heightened protection against warrantless searches given the longstanding “respect for the sanctity of the home.” *Id.* at 179. Conversely, an “open field” is afforded minimal protection, as the “expectation of privacy in open fields is not an expectation that ‘society recognizes as reasonable.’” *Id.* The line between a protected curtilage and an unprotected open field is not always clear, and will depend in large part on the reasonable expectation of privacy in the particular area being searched.

With respect to aerial surveillance, the Supreme Court has generally found no reasonable expectation of privacy in areas viewable from public airspace. The decision in *Dow Chemical Co. v. U.S.*, 476 U.S. 227 (1986) is particularly instructive, and involved aerial photographs taken by the federal Environmental Protection Agency (EPA) of an industrial complex owned by Dow Chemical. Similar to the OISC, the EPA was statutorily authorized to enter private property to inspect a regulated entity. After being denied an on-site inspection, the EPA contracted a commercial photographer to take aerial photographs of Dow’s complex.<sup>6</sup> *Id.* at 229.

Dow challenged the EPA’s aerial inspection by arguing that its complex was protected under the Fourth Amendment as an “industrial curtilage.” The Court acknowledged that the industrial complex possessed some characteristics of a curtilage insofar as it was enclosed, but nonetheless rejected Dow’s argument by stating “an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.” *Id.*

While *Dow* upheld the EPA’s aerial inspection, the Court did caution that newer surveillance technologies could warrant heightened scrutiny. The EPA conducted its surveillance using a precision mapping camera capable of taking photos from 12,000 feet away, which the Court approved by stating that the “mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.” *Id.* at 238. The Court did note, however, that a device which could penetrate walls to hear and record confidential discussions would “raise very different and far more serious questions.” *Id.*<sup>7</sup>

The Court’s later decision in *Kyllo v. U.S.*, 533 U.S. 27 (2001) provided guidance on the Fourth Amendment concerns with newer surveillance technologies. In *Kyllo*, law enforcement officers used a “thermal imager,” a device capable of detecting infrared radiation, to scan the interior of a criminal suspect’s home. The thermal imager was used from a public street outside

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<sup>6</sup> As an ancillary point, Dow also argued that the EPA’s use of aerial photography exceeded its statutory authority, as there was no specific statutory provision allowing for such inspection methods. The Court ultimately determined that a specific authorization for aerial surveillance was unnecessary. Issues related to the OISC’s statutory authority are addressed below.

<sup>7</sup> *Dow* was in the context of an administrative regulatory inspection, but warrantless aerial searches have also been upheld in the context of a criminal investigation. See *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989). In general, these cases stand for the proposition that the government can conduct warrantless aerial surveillance during a criminal investigation, so long as the area being surveilled is visible from public airspace. As a point of caution, *Riley* warned that a different outcome may be warranted if the government flight was operated contrary to law or regulation. *Riley*, 488 U.S. at 451.

the home and alerted to the presence of halide lights, which are commonly used to grow marijuana. This led to the issuance of a search warrant and subsequent criminal charges.

The Court ultimately determined that the thermal scan violated the Fourth Amendment. Among other things, the government argued that its use of the thermal scanner was permitted under *Dow*, which the Court rejected by noting that an industrial complex “does not share the Fourth Amendment sanctity of the home.” *Id.* at 36. The Court further reasoned that “obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search—at least where (as here) the technology in question is not in general public use.” *Id.* at 34.

Applied to the OISC, there are several Fourth Amendment issues to consider in its use of drone technology. As a threshold matter, using a drone for general aerial surveillance presents minimal constitutional concern. This is especially true given the OISC’s status as an administrative agency statutorily authorized to conduct on-site inspections. And per *Dow*, there is no constitutional barrier in using a drone equipped with a zoom lens.

The more novel question relates to the OISC’s proposed use of multispectral, hyperspectral, infrared, and LIDAR lenses. Presumably, these lenses are capable of seeing wavelengths outside the visible spectrum (*i.e.*, see things the human eye cannot). In light of *Kyllo*, heightened consideration is warranted when such lenses are used by a government agency.

On the one hand, the OISC’s specialty lenses seem to share the same sense-enhancing capabilities at issue in *Kyllo*. But *Kyllo*’s holding was not based solely out of concern for sense-enhancing technology, but the use of such technology to surveil the inside of a criminal suspect’s home. Those same concerns are not present here given that the OISC will be inspecting open fields, both literally and figuratively, as the term is used in a Fourth Amendment analysis. As outlined above, to the extent the Fourth Amendment affords stringent privacy protection to a home, it affords minimal protection to open fields.

To further distinguish this matter from *Kyllo*, the OISC is not a law enforcement agency, and its inspectors will not be conducting a criminal investigation. While that does not necessarily shield an OISC inspection from Fourth Amendment scrutiny, it is nonetheless a factor which makes the present circumstance more analogous to *Dow* than *Kyllo*. Unlike the law enforcement search in *Kyllo*, the OISC (like the EPA in *Dow*) is a civil administrative agency vested with statutory inspection authority.<sup>8</sup>

In many respects, the OISC’s proposed use of drone technology is analogous to the permissible inspection in *Dow*. In both cases, aerial surveillance is being conducted from public airspace and carried out by an administrative agency vested with statutory inspection authority.

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<sup>8</sup> The OISC’s statutory warrantless inspection authority could also be argued to permit a drone inspection using sense-enhancing lenses. Still, the EPA possessed similar authority in *Dow*, yet the Supreme Court did not specifically rely on such authority in upholding the EPA’s warrantless aerial inspections. Instead, the Court in *Dow* relied on the open field nature of *Dow*’s industrial complex as the dispositive issue in upholding the EPA’s aerial surveillance.

The OISC's lenses, while arguably more sophisticated than the EPA's zoom lenses, still cannot see through walls like the hypothetical device that concerned the Court in *Dow*. Thus, absent an expansion of *Kyllo*'s prohibitions from a controlling court, it is reasonable to conclude that an OISC administrative inspection that uses a drone equipped with a specialty lens, flown from public airspace in accordance with federal regulations, would not violate the Fourth Amendment.

This opinion is based on the assumption that the OISC will be inspecting literal open fields, and not the interior spaces of any buildings or storage facilities. As noted by the 6<sup>th</sup> Circuit in *US v. Elkins*, 300 F.3d 638 (6<sup>th</sup> Cir. 2002), it is unclear whether *Kyllo*'s prohibition on thermal imaging technology extends to commercial buildings. *See id.* At 646 (“There is a reasonable expectation of privacy in business premises, yet it is less than the reasonable expectation of privacy enjoyed by the home. There is little federal precedent on the thermal imaging of commercial property, and none since *Kyllo*.”); *see also US v. Nagy*, 345 F.Supp.3d 887, n. 2 (N.D. Ohio 2018) (noting that the application of *Kyllo* to commercial property remains an unresolved issue). In the absence of further case law addressing *Kyllo*'s application to commercial buildings, the OISC should be mindful that using specialty lenses to inspect the interior of a commercial building or storage facility may be subject to greater scrutiny than using such technology to inspect an open field. Out of an abundance of caution, if the OISC deems it necessary to inspect the interior area of a commercial building or storage facility using specialty lenses, it would be prudent to obtain a warrant and/or express consent to conduct such a search.<sup>9</sup>

As a final constitutional consideration, it is important to note that Indiana's Constitution includes an identical provision to the Fourth Amendment under Article 1, § 11. Despite their identical language, Indiana courts do not apply the well-established reasonable expectation of privacy test in analyzing a search under the Indiana Constitution, but instead evaluate the search based on the “totality of the circumstances.” *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). To date, no Indiana court has addressed an aerial surveillance challenge under Indiana's Constitution, but like their federal counterparts, Indiana's courts have upheld the constitutionality of aerial searches under the Fourth Amendment. *See Blalock v. State*, 483 N.E.2d 439 (Ind. 1985); *Troyer v. State*, 605 N.E.2d 1183 (Ind. Ct. App. 1993). In application, the differing standards would not compel different outcomes with respect to the constitutionality of the OISC's proposed use of drone technology.<sup>10</sup>

### **Federal Regulations Governing Drone Use**

In addition to constitutional limitations, the OISC's proposed use of drones also requires consideration of federal law and regulation. The federal government possesses “exclusive sovereignty” over the national airspace, and pursuant to that authority Congress has delegated the responsibility of drone regulation to the Federal Aviation Administration (FAA).<sup>11</sup> Given the

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<sup>9</sup> To the extent the OISC intends to incorporate drone technology into its administrative inspection, it may want to give due consideration to enacting internal policies and procedures governing its use of such technology.

<sup>10</sup> As to the OISC's question about Fourth Amendment implications in using satellite images from the U.S. Geological Survey, the above analysis in *Dow* leads to the conclusion that the Fourth Amendment does not prohibit the OISC from relying on these aerial satellite images. Additionally, the fact that the federal government has made the images publicly available provides additional assurance they can be relied upon by the OISC.

<sup>11</sup> 49 U.S.C. § 40103(a); 49 U.S.C. § 44802.

federal government's exclusive jurisdiction in this area, this opinion will not go into great detail on the various federal requirements governing drone operations. The discussion below is intended merely as a general, non-comprehensive overview of various federal laws and regulations that are potentially relevant to the OISC.

As a governmental entity, the OISC may qualify for "public aircraft" status, a designation that comes with limited federal oversight.<sup>12</sup> Public aircrafts are generally defined as aircrafts used by a governmental entity for a governmental purpose.<sup>13</sup> A public aircraft designation does not preclude the governmental entity from employing civil contractors.<sup>14</sup> Operating under a public aircraft designation requires application to the FAA.<sup>15</sup>

A governmental entity that qualifies for public aircraft status can also elect to operate subject to civil regulations under 14 C.F.R. Part 107.<sup>16</sup> These FAA rules impose a number of requirements and restrictions on drone operations, including but not limited to the requirement that an operator maintain a visual line of sight to the aircraft, restrictions to daylight hours, ban on flying over humans, and an altitude restriction of 400 feet.<sup>17</sup> If the OISC elects to operate subject to civil regulations, it should ensure that its operations are in compliance with all applicable requirements and restrictions under 14 C.F.R. Part 107.<sup>18</sup>

### **Indiana Laws Governing Drone Use**

The federal government's exclusive sovereignty over the national airspace precludes States from regulating air traffic control issues such as permissible flight paths, altitudes, or navigable airspace. But States are not otherwise prohibited from enacting ancillary regulations

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<sup>12</sup> See FAA Advisory Circular 00-1.1B pg. 3, ¶¶ 8.5-8.6, (noting that "the FAA has no regulatory authority over PAO [public aircraft operations] other than those requirements that apply to all aircraft operating in the NAS [national airspace]"), available at [https://www.faa.gov/documentLibrary/media/Advisory\\_Circular/AC\\_00-1.1B.pdf](https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_00-1.1B.pdf) (last visited March 6, 2019).

<sup>13</sup> 49 U.S.C. § 40102(a)(41); 49 U.S.C. § 40125(b).

<sup>14</sup> See FAA Advisory Circular 00-1.1B, pg. 5 at ¶ 9.2-9.2.1.

<sup>15</sup> The application is available online at: [https://www.faa.gov/about/office\\_org/headquarters\\_offices/ato/service\\_units/systemops/aaim/organizations/uas/coa/](https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/aaim/organizations/uas/coa/) (last visited March 6, 2019).

<sup>16</sup> See FAA Advisory Circular 00-1.1B, pg. 10, at ¶ 12 ("Government agencies may conduct both public and civil aircraft operations with the same aircraft. However, when conducting operations under civil regulations, the operator will be required to maintain the aircraft in accordance with the appropriate regulations applicable to civil aircraft operations").

<sup>17</sup> See 14 C.F.R. Part 107 for a full list of operating restrictions.

<sup>18</sup> As of the date of this opinion, the FAA is proposing various rule changes to 14 C.F.R. Part 107. These proposed changes can be accessed at [https://www.faa.gov/uas/programs\\_partnerships/DOT\\_initiatives/media/2120-AK85\\_NPRM\\_Operations\\_of\\_Small\\_UAS\\_Over\\_People.pdf](https://www.faa.gov/uas/programs_partnerships/DOT_initiatives/media/2120-AK85_NPRM_Operations_of_Small_UAS_Over_People.pdf) (last visited March 6, 2019).

related to land use, zoning, privacy, or law enforcement operations.<sup>19</sup> Consistent with this concurrent authority, Indiana has enacted laws prohibiting a person, *inter alia*, from using a drone to aid in the hunting of wild animals in season; harass others; or “peep.” Ind. Code §§ 14-22-6-16<sup>20</sup>; 35-45-10-6; 35-45-4-5. Presumably, these statutory prohibitions will not be at issue with the OISC’s proposed use of drone technology.

Potentially relevant to the OISC is the requirement under Indiana Code § 35-33-5-9 that a “law enforcement officer” obtain a search warrant in order to use a drone (with exceptions).<sup>21</sup> While the OISC should be mindful of this statutory requirement, it is unlikely to apply to an OISC inspection given that the OISC’s investigators are not “law enforcement officers” as defined by Indiana’s criminal code. *See* Indiana Code § 35-31.5-2-185. This should not be construed, however, to suggest that OISC personnel would never be required to obtain a warrant when using a drone. Instead, this portion of the opinion is merely to address the non-application of Indiana Code § 35-33-5-9 to OISC administrative inspectors.<sup>22</sup>

### **The Scope of the OISC’s Statutory Authority**

The OISC’s use of drone technology must also fall within the scope of its delegated statutory authority. Pursuant to Ind. Code §§ 15-16-2-38, 15-16-4-55, and 15-16-5-69, the legislature has broadly authorized the OISC or its agent to enter public or private property, “during regular business hours,” Ind. Code §§ 15-16-2-38(b) and 15-16-4-55(1), or “at reasonable times,” Ind. Code § 15-16-5-69(a), to conduct inspections and investigations. Its inspection authority includes the right to inspect and sample fertilizer and pesticide materials, inspect storage facilities for these materials, and even inspect records related to the transportation, sale, and use of these materials. Ind. Code § 15-16-2-38(a), (b); Ind. Code § 15-16-4-55(1); Ind. Code § 15-16-5-69(a).

The OISC’s statutory inspection authority does not, however, include explicit authorization to use drones. Still, “[n]ot all power and authority granted [to an agency] is

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<sup>19</sup> The FAA issued a formal statement on July 20, 2018 regarding its position on the scope of permissible state regulations governing drone use. The FAA statement is available at [https://www.faa.gov/news/press\\_releases/news\\_story.cfm?newsId=22938&omniRss=press\\_releasesAoc&cid=102\\_P\\_R](https://www.faa.gov/news/press_releases/news_story.cfm?newsId=22938&omniRss=press_releasesAoc&cid=102_P_R) (last visited March 6, 2019).

<sup>20</sup> This statute, which is designed to specifically address the use of drones in hunting wild animals, contains two interesting exceptions. The statute’s prohibitions do not apply to “[e]mployees or agents of a governmental entity while performing official duties” or to the “[u]se of an unmanned aerial vehicle to monitor areas of agricultural production[.]” Ind. Code § 14-22-6-16(a)(1), (5).

<sup>21</sup> The exceptions to the warrant requirement under Indiana Code § 35-33-5-9 were recently amended, to take effect July 1, 2019. *See* Pub. Law 136-2019; HEA 1358 (2019). Of note, a prior reference to “governmental entities” has been deleted, thereby clarifying an ambiguity that previously suggested that any governmental entity needed a warrant when using a drone, which arguably could have been construed to include OISC administrative inspectors. The amendments clarify the legislature’s intent that the warrant requirement under Indiana Code § 35-33-5-9 is limited to law enforcement officers.

<sup>22</sup> Statutory requirements aside, the Fourth Amendment can also impose a duty to obtain a warrant. Based on the above analysis, it is reasonable to conclude that the Fourth Amendment does not require the OISC to obtain a warrant for the limited purpose of using a drone during an administrative inspection of an open field.

explicitly delineated” in statute, as it is “well settled that an administrative agency has such implicit power and authority as is inherent in its broad grant of power from the legislature to regulate which is necessary to effectuate the regulatory scheme outlined by the statute.” *Northern Indiana Public Service Co. v. Citizens Action Coalition of Indiana, Inc.*, 548 N.E.2d 153, 158 (Ind. 1989); *see also Dow*, 476 U.S. at 233 (noting that where a legislature vests an agency with investigatory authority, “it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission”).

Notwithstanding the absence of an express legislative authorization, it is reasonable to conclude that the OISC has inherent authority to use drone technology in the course of an administrative inspection. To find otherwise would be inconsistent with the broad grant of inspection authority conferred upon the OISC by the legislature.

As to the OISC’s specific question whether it should provide prior notice of a drone inspection, it is important to note that the OISC’s inspection statutes do not require prior notice of an inspection.<sup>23</sup> The OISC nonetheless appears to be providing such notice, which could be construed as more of a courtesy on its part rather than a legal obligation. That said, if the OISC elects to provide prior notice of an inspection, it would be prudent to also notify the entity that the inspection will or could involve the use of drone technology, assuming that is the case. While the OISC may not be explicitly obligated to provide such notice under statute, doing so adds a degree of transparency to the inspection process.

The OISC also asked whether its use of a drone would constitute a trespass. Trespass requires entering property without a legal right to do so. *Travelers Indemnity Co. v. Summit Corporation of America*, 715 N.E.2d 926, 937, n. 15 (Ind. Ct. App. 1999); *K.B. Home Indiana Inc. v. Rockville TBD Corp.*, 928 N.E.2d 297 (Ind. Ct. App. 2010). Even if we assume that flying a drone constitutes entry onto property, an assumption subject to debate, the OISC has an explicit statutory right of entry based on the statutes cited above. Moreover, to the extent the OISC is concerned with possible tort liability, the Indiana Tort Claims Act provides immunity for any loss caused by “[e]ntry upon any property where the entry is expressly or impliedly authorized by law.” Ind. Code § 34-13-3-3(13). Therefore, it is the OAG’s opinion that use of a drone by the OISC would not constitute a trespass.

While the OISC has been vested with broad inspection authority, it is also important to mention that its authority is not without limits. Under Indiana Code § 15-16-5-69(b), the “state chemist may, upon showing a need, apply to any court with jurisdiction for a search warrant authorizing access to the property. The court may, after receiving the application and finding a need, issue the search warrant for the purposes requested.” Notably, this provision is located within a statute authorizing OISC to conduct warrantless inspections, leading to the conclusion that the warrant provision was intended to limit the OISC’s warrantless inspection authority. That is, the OISC’s authority to apply for a warrant could, in some respects, be construed as a duty to apply for a warrant under certain circumstances. To read the statute otherwise would

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<sup>23</sup> *See generally* Ind. Code §§ 15-16-2-38; 15-16-4-55; 15-16-5-69.

effectively render the warrant provision meaningless, and thus run contrary to well-established rules of statutory construction.<sup>24</sup>

Unfortunately, apart from the general instruction that the OISC may apply for a warrant “upon showing a need,” the legislature has failed to identify the circumstances that give rise to a duty to apply for a warrant. Ind. Code § 15-16-5-69(b). The reasonable interpretation is that the OISC need only obtain a warrant where the scope of an investigation will exceed the bounds of its warrantless inspection authority, such as conducting a drone inspection *after* regular business hours.

Apart from what has been noted above, it is difficult to provide more specific guidance on the OISC’s statutory duty to apply for a warrant under Indiana Code § 15-16-5-69, absent additional clarification from the legislature. To the extent there is any question whether a drone inspection should be conducted pursuant to a warrant, it would be a better practice to err on the side of obtaining a warrant. This is especially true given that the OISC’s regulatory violations carry potential criminal penalties. Ind. Code §§ 15-16-1-14; 15-16-4-77; 15-16-5-70.

### **Public Records Considerations**

The OISC has also asked about the public record implications arising from the use of drone technology, which requires an analysis under Indiana’s Access to Public Records Act (APRA), Indiana Code § 5-14-3 *et seq.*<sup>25</sup> Generally speaking, APRA is liberally construed to advance the State’s policy that citizens are entitled to full and complete information regarding the affairs of government, with the burden of non-disclosure on the agency seeking to deny access to a record. Indiana Code § 5-14-3-1.

As to any question regarding contractors, a public agency does not absolve itself of its duties under APRA merely because it retains the services of a private entity. *See Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127, 1133-34 (Ind. Ct. App. 2005) (holding that a settlement agreement prepared by a private attorney retained by the Town of Knightstown, an entity subject to APRA, constituted a public record even where the agreement was never in the custody or possession of Knightstown). Additionally, a public agency may not enter into a contract that unreasonably impairs the right of the public to inspect the agency’s public records. Ind. Code § 5-14-3-3(g); *see also* Public Access Counselor Opinion 17-FC-202 (relying on *Knightstown* to state “a public agency cannot obfuscate access by transferring a public record to a private party”).<sup>26</sup> Applied here, to the extent the OISC employs a private entity to operate a

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<sup>24</sup> Construing the warrant provision as a limit on the OISC’s inspection authority is also consistent with the notion that the legislature cannot bestow unlimited discretion to an agency to conduct warrantless inspections. *Burger*, 482 U.S. at 710-711.

<sup>25</sup> The OISC also asked about its duties under the “freedom of information provisions,” otherwise known as FOIA. FOIA requirements apply only to federal agencies. *Lane-El v. Spears*, 13 N.E.3d 859, 872 (Ind. Ct. App. 2014); *see also* Indiana Public Access Counselor Formal Opinion 07-FC-16 (noting that FOIA does not apply to state officials). The opinion is available at <https://www.in.gov/pac/advisory/files/07-FC-16.pdf> (last visited March 6, 2019).

<sup>26</sup> The opinion is available at <https://www.in.gov/pac/advisory/files/17-FC-202.pdf> (last visited March 6, 2019).

drone or otherwise perform imaging services, documents created or retained by the private entity should be construed as a public record to the same extent as if created or retained by the OISC itself.

Whether such documents are disclosable under APRA is a different matter, and will depend in large part on whether an exception under Indiana Code § 5-14-3-4 applies. Certain categories of documents are mandatorily excepted from and cannot be disclosed by a public agency as a matter of law, while other categories of documents are excepted from disclosure at the discretion of the agency. Ind. Code § 5-14-3-4(a), (b). Additionally, even if a document is mandatorily excepted from APRA, it may still be disclosable pursuant to a court order. Ind. Code § 5-14-3-4(a).

Given the fact-specific nature of APRA's exceptions, it is difficult to provide an abstract opinion whether drone data, generally, constitutes a disclosable record. APRA exceptions are typically determined on a case-by-case basis, where the scope of a particular request for public records is compared against the characteristics of the documents requested, and then analyzed to determine whether an exception under Indiana Code § 5-14-3-4 applies.<sup>27</sup> With that in mind, any issues involving public records should be guided by the principle that data obtained by a drone in the course of a statutory inspection constitutes a public record, and such data are subject to disclosure in response to a valid request for public records, unless an applicable exception applies.

### CONCLUSIONS

The OISC's proposed use of drones presents an innovative application of this expanding technology. And while innovation should generally be encouraged, such use must also comply with applicable constitutional, statutory, and regulatory requirements. Consistent with the above analysis, it is reasonable to conclude that the OISC is lawfully permitted to use drone technology during the course of its statutorily authorized administrative inspections. That said, the OISC should be mindful of surveillance limitations under the Fourth Amendment, requirements under federal law and regulation, and the scope of its own statutory authority. Additionally, data obtained by a drone should be treated as public records, disclosable in response to a valid request for public records unless an applicable statutory exception is found to apply.

Sincerely



Curtis T. Hill, Jr.  
Attorney General

David P. Johnson, Chief Counsel  
William H. Anthony, Assistant Chief Counsel  
Brian L. Park, Deputy Attorney General

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<sup>27</sup> Specific disclosure inquiries can also be made to the Indiana Public Access Counselor through an informal or formal opinion request.