STATE OF INDIANA

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August 17, 2011

Mr. Marc L. Griffin
821 N. Madison Avenue
Greenwood, Indiana 46142-4128

Re: Formal Complaint 11-FC-200; Alleged Violation of the Access to Public Records Act by the Clay County Assessor

Dear Mr. Griffin:

This advisory opinion is in response to your formal complaint alleging the Clay County Assessor ("Assessor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The Assessor's response is enclosed for your reference. I have granted your request for priority status pursuant to 62 Ind. Admin. Code 1-1-3(3).

BACKGROUND

In your complaint, you allege on August 10, 2011 you requested in writing from the Assessor all pages from the most currently filed Form G & O-1, State Form 9931 ("Form") for the following oil and gas leases:

Kumpf Lehner Lease – E ½ SW 15-12-7
Ashboro East # 9 Lease – 15-11-6
Bowling Green South Lease – 25-11-6.

You provided in your request that you are a person who may bid on an oil or gas interest at the upcoming Clay County treasurer's tax sale on September 26, 2011. You allege that the Assessor provided incomplete information in response to your request, specifically the applicable percentage interest and the allocation of the applicable percentage interest among the owners of the oil or gas interest (including the names and addresses of all owners) as indicated on Page 2 of the Form and all information necessary to determine the value of the gas or oil interest which would included, inter alia, the average daily production as provided on Page 1 of the Form.

In response to your request, the Assessor provided that he was unable to release information provided in the Form, per the privacy notice listed on the Form that cited I.C. § 6-1.1-35-9. The Assessor acknowledged the change in law in the most recent

legislative session, but had concerns regarding I.C. § 6-1.1-35-11, which provides that a person who disclosed confidential information in an unauthorized manner pursuant shall be dismissed.

In response to your formal complaint, the Assessor advised that he denied the records requested pursuant to I.C. § 6-1.1-35-9, which provided that the series of records you requested were confidential. The Assessor noted that he had received varying answers from State and local officials regarding the proper response to your request and was concerned about disclosing confidential information in an unauthorized manner, per I.C. § 6-1.1-35.11, which could be grounds for dismissal if violated.

ANALYSIS

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

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Assessor responded to your request within the timelines prescribed by the APRA.

The term "oil or gas interest" includes, but is not limited to royalties, overriding royalties, mineral rights, or working interest in any oil or gas located on or beneath the surface of land which lies within the State. *See* I.C. § 6-1.1-4-12.4. Oil and gas interests are subject to assessment and taxation as real property. *Id.* I.C. § 6-1.1-35-9 provides that:

> (a) All information that is related to earnings, income, profits, losses, or expenditures and that is:
> (1) give by a person to:
> (A) an assessing official;
> (B) an employee of an assessing official; or
> (C) an officer or employee of an entity that contracts with a board or county commissioners or a county assessor under IC 6-1.1-36-12; or
> (2) acquired by:

(A) an assessing official;
(B) an employee of an assessing official; or
(C) an officer or employee of an entity that contracts with a board of commissioners or a county assessor under IC 6-1.1-36-12; in the performance of the person's duties; is confidential. The assessed valuation of tangible property is a matter of public record and is thus not confidential. Confidential information may be disclosed only in a manner that is authorized under subsection (b), (c), (d), or (g).

There is no dispute among the parties that the information sought is generally considered to be confidential. In 2011, the Indiana General Assembly amended I.C. § 6-1.1-35-9 to included subsection (g), an exception to information deemed confidential under the statute. I.C. § 6-1.1-35-9(g) provides that:

> (g) Confidential information concerning an oil or gas interest, as described in I.C. 6-1.1-4-12.4, may be disclosed by an assessing official if the interest has been listed on the delinquent property tax list pursuant to IC 6-1.1-24-1 and is not otherwise removed from the property tax sale under IC 6-1.1-24. A person who establishes that the person may bid on oil or gas interest in the context of a property tax sale may request from an assessing official all information necessary to properly identify and determine the value of the gas or oil interest that is subject of the property tax sale. The information that may be disclosed includes the following:
>
> (1) Lease Information.
> (2) The type of property being sold.
> (3) The applicable percentage interest and the allocation of the applicable percentage interest among owners of the oil or gas interest (including the names and addresses of all owners).
>
> The official shall make information covered by this subsection available for inspection and copying in accordance with IC 5-14-3. Confidential information that is disclosed under this subsection loses its confidential status. A person that is denied the right to inspect or copy information covered by this subsection may file a formal complaint with the public access counselor under the procedure prescribed by IC 5-14-5. However, a person is not required to file a complaint under IC 5-14-5 before filing an action under IC 5-14-3.

The Assessor has not disputed that the properties in question have been listed on the delinquent property tax list pursuant to I.C. § 6-1.1-24-1 and are not otherwise removed for sale pursuant to I.C. § 6-1.1-24. Nor has the Assessor challenged your standing as one who has established yourself as a person that may bid on an oil or gas interest in the context of a property sale. The Assessor has provided that the he only provided partial information in response to your request due to the privacy notice on the Form, which advises that "The records in this series are confidential according to IC 6-1.1-35-9.

It would appear that the Form presented in connection with your complaint has not been updated since January of 2009. As noted above, in 2011 the Indiana General Assembly amended I.C. § 6-1.1-35-9 to include subsection (g), an exception to the general rule regarding confidential information provided under the statute. The privacy notice posted on the Form, although not entirely clear in light of subsection (g), is still valid; information provided in the Form is confidential according to I.C. § 6-1.1-35-9. It is not readily apparent from the Form that I.C. § 6-1.1-35-9 provides exceptions to its general confidential terms and a casual observer may not be aware of those exceptions.

In regards to the first part of your complaint, you allege that the Assessor did not provide the applicable percentage interest and the allocation of the applicable percentage interest among the owners of the oil or gas interest (including the names and addresses of all owners) as indicated on page 2 of the Form. That specific class of information was delineated by the General Assembly in subsection (g) as an example of information that may be disclosed. As such, it is my opinion that the Assessor violated APRA when it did not provide it to you.

In regards to the second part of your complaint, you allege that the Assessor did not provide the average daily production as indicated on page 1 of the Form. Subsection (g) provides that "all information necessary to identify and determine the value of the gas or oil interest that is the subject of the property tax sale shall be disclosed." It would logically follow that the knowing the average daily production of an oil and gas interest would assist in determining the value of the interest. Again, it is my opinion that the Assessor violated APRA when it did not disclose this information.

The General Assembly has provided its clear intent regarding what information that shall be disclosed under subsection (g), should the nature of the request meet all relevant qualifications. As it relates to subsection (g), an accessing official that denies a request for access to information provided in the Form should provide reasoning in their denial as to why the type of information being withheld would not aid in identifying and determining the value of a gas or oil interest that is the subject of a property tax sale.

The Assessor makes reference that social security numbers are provided in the Form, but I can find no such area in the Form that requires such a disclosure. If there is an updated copy of the Form that requires the disclosure of an individual's social security

number, the APRA would require that the social security numbers be redacted prior to disclosure. *See* I.C. § 5-14-3-4(a)(12); I.C. § 5-14-3-6(a).

CONCLUSION

For the foregoing reasons, it is my opinion that the Assessor violated the APRA in response to your records request.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: D. Mark Barnhart, Clay County Assessor