

April 30, 2004

Ms. Karin McKenna
1487 Hogan Avenue
Chesterton, Indiana 46304

*Re: Formal Complaint 04-FC-59; Alleged Denial of Access to Public Records
by the Department of Natural Resources*

Dear Ms. McKenna:

This responds to your formal complaint alleging that the Indiana Department of Natural Resources (DNR) violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3-1 *et seq.*), when it failed to produce records responsive to your record request within a reasonable time of receipt of that request. A copy of the DNR's response to your complaint is enclosed for your reference. For the reasons set forth below, I decline to find the DNR in violation of the law.

BACKGROUND

On March 8, 2004, you made a written request via electronic mail for the "notes" of a meeting of the Citizens Advisory Council on Captive Cervids (Council) that occurred on that same day. You renewed that request on March 9, 2004, and again on March 10, 2004. On March 12, 2004, the DNR responded in writing and stated that the notes were not yet available and would not be available until they were approved by the Council. You renewed your request for the notes again on March 17, 2004. On the following day the DNR again responded that the notes were not available and would not be made available to you until approved by the Council.

On March 22, 2004, after discussing the matter with this office, the DNR wrote to you and advised that it would provide you with the unapproved notes. The DNR further explained that the notes would be produced as soon as possible, but that the staff person responsible for transcription of the notes was on vacation. On March 30, 2004, having not yet received the notes, you signed and submitted this complaint alleging that the DNR violated the APRA by failing to produce responsive records within a reasonable time.

The DNR responds to the complaint asserting that it produced the responsive record on April 1, 2004, and providing a copy of those notes with its answer. With regard to the delay, the DNR asserts that the notes are produced during the meeting on "flip charts," and that they are thereafter transcribed to standard paper and format and then posted on the Internet after they are approved by the Council. The DNR asserts that the transcription is a time consuming and cumbersome process for its staff person who has other duties as well, and that the notes are often

times extensive (sometimes encompassing 30 pages). The notes from the March 8, 2004, meeting encompassed 10 single-spaced pages in standard format following transcription.

ANALYSIS

A public agency that receives a request for records under the APRA has a specified period of time to respond to the request. IC 5-14-3-9. A timely response to the request does not mean that the public agency must expressly decline to produce or produce the documents that are responsive to the request within the statutorily prescribed time period. Of course, a public agency is free to take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production. There are practical reasons for such a rule. A public agency may be able to produce public records immediately in some cases, but more time may be required for production when records are not in a central repository, are archived off-site, include information that may require counsel or other review for confidentiality, or include disclosable and nondisclosable information that the public agency must separate for purposes of producing what is disclosable. Other factors related to the business functions of the office and duties of the staff responsible for that production may effect resolution of the question. At bottom, interpreting Indiana Code 5-14-3-3 and 5-14-3-9 to require public agencies to produce records within a specific period of time would have the effect, in some cases, of requiring public agencies to stop activity on all other matters in order to provide the records requested. While providing information is an essential function of public agencies, the APRA also specifically provides that public agencies shall regulate any material interference with the regular functions or duties of their offices. IC 5-14-3-1; IC 5-14-3-7(a).

Your request sought the notes from the March 8, 2004, meeting. The DNR acknowledges that notes were created during the meeting on flip charts. While the DNR's initial response to the request was to deny it on the basis that the notes were not yet approved by the Council, that fact does not protect the notes from disclosure in that even a draft public record is a public record subject to the disclosure requirements of the APRA. *See* IC 5-14-3-2. You were entitled to access to draft notes prior to approval by the Council. That said, you were not entitled to access to the notes on demand. The DNR was entitled to respond to your request anytime within seven days from the receipt of the request, and it could have responded by scheduling within a reasonable time subsequent to that seven-day period an appointment for you to inspect or for the agency to produce copies of the notes in whatever form they existed at that time.

While I find that the DNR was required to produce the draft unapproved notes for inspection or copying within a reasonable time, I decline to find that the DNR violated the APRA in this manner in the context of the facts presented here. Your request anticipates, I think, that the notes would be made available to you in a specific format, that is, in a standard format transcribed from the flip charts upon which they were originally recorded. Certainly, it is clear from the DNR's responses that it did not understand your request to seek access to the flip charts, but rather that it understood the request to seek access to the notes after they were transcribed. I have no problem finding that you were entitled to inspection or, at your expense, copies of the notes in the form recorded (that is, on the flip charts) within a reasonable time after the meeting,

and I would certainly find that four weeks is too long a period to wait to see or obtain a copy of a record that was created contemporaneous with the meeting at issue. However, I decline to find that the DNR was required by the APRA to produce a transcription of the notes from the flip chart within any period of time. Indeed, a public agency is under no obligation to create a record in response to a request. Thus, to the extent that your request sought or was reasonably understood to seek the notes in a format other than as recorded on the flip chart and your complaint challenges the delay in production of the notes in that format, I do not find that there was a violation of the APRA.¹

All of this is to say that you were absolutely entitled to inspect or, at your expense, copy the notes in the form that they existed at the time of your request, within a reasonable time of your request at the mutual convenience of both you and the DNR. However, inasmuch as the DNR is not required to create a responsive record in any particular form, the APRA cannot be interpreted in a manner that requires the public agency to have the notes transcribed to another format and made available to you in that format within any specific period of time.

CONCLUSION

For the reasons set forth above, I find that the DNR did not violate the APRA.²

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Glenn Lange
Ms. Janet Parsanko

¹ Even so, I would not find the delay in production of the transcription unreasonable under the facts presented here. The production occurred prior to the next meeting, was prepared by staff assigned to that and other tasks and who was not available for much of the period of delay, and involved transcription of an extensive document that encompassed 10 single-spaced typewritten pages upon completion.

² As part of its response, but not as a defense to the instant complaint, the DNR also seeks guidance on whether the Council is a "governing body" subject to the APRA. A "governing body" is defined under the Indiana Open Door Law (IC 5-14-1.5-2(b)), and includes any "board, commission, council, or other body of a public agency which takes official action upon public business." The DNR does not provide facts or substantial argument to suggest that the Council does not meet this definition, but it does appear to acknowledge that the Council is an *advisory body* of the DNR established by the DNR Director to *receive information and make recommendations* to the DNR. See IC 5-14-1.5-2(b); IC 5-14-1.5-2(d) (defining "official action" to include receiving information and providing recommendations). Absent additional facts and argument on the point, I decline to pass on the question here. In any event, whether the Council is or is not a "governing body" under the Indiana Open Door Law is not dispositive in this matter where the complaint is based on the DNR's failure as a public agency under the APRA to tender the public records that are created and maintained by the DNR.