

STATE OF INDIANA)
) SS
COUNTY OF MARION)

CENTER FOR WILDLIFE)
ETHICS, INC.)
)
 Plaintiff/Petitioner,) CAUSE NO.
)
 vs.) Judicial Review,
) PAR Advisory Opinion 17-FC-270
MICAH G. VINCENT, DIRECTOR,)
INDIANA OFFICE OF)
MANAGEMENT AND BUDGET,)
IN HIS PROFESSIONAL)
CAPACITY)
)
 Defendant/Respondent.)

**PETITION FOR JUDICIAL REVIEW OF INDIANA PUBLIC
ACCESS TO RECORDS FORMAL COMPLAINT**

Petitioner, Center for Wildlife Ethics, Inc. (CWE) by and through counsel,
pursuant to Indiana Trial Rules hereby requests de novo judicial review of the
Advisory Opinion of the Indiana Public Access Counselor, Formal Complaint No.
17-FC-270 issued February 9, 2018¹.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On October 24, 2017, CWE, submitted a request for public records,

¹ Advisory Opinion of the Public Access Counselor, Formal Complaint No. 17-FC-270 issued February 9, 2018, attached hereto as P. Ex. 1.

pursuant to Ind. Code § 5-14-3-1 et seq., to the respondent agency, Indiana Office of Management and Budget (OMB)². Among other records, CWE requested:

8. All records pertaining to or identifying any exception or exceptions to Executive Order 13-03, “Regulatory Moratorium” that permit the Indiana Department of Natural Resources to promulgate the rule [LSA #17-436] notwithstanding the Moratorium.³

9. All records pertaining to any explanation as to which exception to the Regulatory Moratorium applies.

10. All records pertinent to any Fiscal Impact Analysis as described in Fiscal Management Circular (FMC) #2010-4 and FMC #2015-1.

11. All records pertinent to any Cost-Benefit Analysis as described in FMC #2010-4 and FMC #2015-1.

November 3, 2017 OMB provided CWE with four (4) “responsive records”.⁴ OMB did not provide CWE with an index or list of records the agency withheld and/or redacted which leaves CWE in the dark. CWE has no way to reasonably ascertain the identity, let alone the extent, of the records OMB withheld and/or redacted and no way to determine if OMB’s non-disclosure is justified or not.

OMB provided NRC’s September 28, 2017 cover-letter that lists ten (10)

² CWE’s request for public records to the respondent agency, Indiana Office of Management and Budget (OMB), attached hereto as P. Ex. 2.

³ Executive Order 13-03, Apr. 08, 2016 (DIN: 20130206-IR-GOV130031EOA, “Regulatory Moratorium”).

⁴ The four (4) records OMB disclosed to CWE, are attached hereto as P. Ex. 3.

records NRC transmitted to OMB when NRC sent the proposed rule package for OMB's evaluation.⁵ Item (10) is the NRC's "OMB Exemption Letter". The agency withheld the information pertinent to that record, among other records, and justified the decision with a broad claim that the redacted information is an "expression of opinion" and "speculative in nature". Speculation and opinion are not necessarily deliberative, if they were those activities would exempt nearly all but the most trivial information from public disclosure.

Significantly, OMB withheld all its own records and those NRC delivered to OMB that apply or pertain to either agency's determination that the rule package is exempt from the Regulatory Moratorium established by EO 13-03. Remarkably, OMB withheld all records pertinent to the statutory authority supporting NRC's and OMB's respective determinations that the proposal is in fact exempt. OMB claims the NRC's statement of statutory authority is interagency advisory or deliberative material communicated to OMB for the purpose of decision-making pursuant to IC § 4-22-2-1-7 and IC § 5-14-3-4-(b)(6). OMB further claims both NRC's and OMB's records setting forth the statutory authority supporting their respective findings that the rule package is exempt from EO 13-03 are "legal opinions" and that "reasonable persons might disagree about the statutory authority

⁵ See p. 4, NRC's correspondence to OMB dated September 28, 2017 is attached hereto as P. Ex. 3.

for the proposed rule and what exemption under 13-03 applies”.⁶

November 3, 2017, CWE filed the above-referenced formal complaint to the Indiana Public Access Counselor pursuant to IC § 5-14-5, et seq. On February 9, 2018, the Counselor issued the Formal advisory opinion affirming OMB’s decision to withhold and redact the requested records. Accordingly, CWE seeks judicial review of the decision, disclosure of the records, and, if necessary, *in camera* review of the redacted and withheld materials pursuant to IC § 5-14-9(h).⁷

II. ARGUMENTS

The Indiana Access to Public Records Act (APRA)⁸ expressly states its policy is to promote public access to government machinations and information. The Act’s mandate requires courts to construe ARPA liberally to implement its intent to require public bodies to disclose records; withholdings and redactions are exceptions to the rule. Both the legislature and the judiciary have established the policy that public access to government records is the primary directive and the default rule for government information.⁹

⁶ See pp. 4-5, OMB’s December 20, 2017 letter to Indiana Public Access Counselor, attached hereto as P. Ex. 4.

⁷ CWE will file a separate motion for in camera review, if necessary.

⁸ Ind. Code §§ 5-14-3 et. seq.

⁹ *Travelers Cas. & Sur. Co. v. United States Filter Corp*, 895 N.E.2d 114, 115 (Ind. 2008).

In reviewing this Petition, this court owes no deference to the Public Access Counselor, the appropriate standard is de novo review.¹⁰ The public agency, OMB in this case, carries the burden of justifying its decision to not disclose the requested records¹¹ and therefore must provide factual justification that the redacted and withheld records are “deliberative privilege and interagency communications”.¹² Additionally, OMB must establish the identity of undisclosed and redacted records so the court and CWE can identify them with adequate specificity.¹³

A. OMB Cannot Withhold or Redact the Statutory Authority for the Agency’s Decision to Grant the Rule an Exemption from EO 13-03

OMB withheld the most important information, the statutory authority OMB relied upon to grant the exception to the Regulatory Moratorium in EO 13-03. Absent express statutory authority, OMB’s decision to grant the exception to the Moratorium is an illegal agency act and the entire proposal is void. Likewise, OMB withheld the NRC’s statutory authority for the rule and its exception to the

¹⁰ *Woolley v. Wash. Twp. of Marion County Small Claims Court*, 804 N.E.2d 761, 763 (Ind. Ct. App. 2004).

¹¹ Ind. Code § 5-14-3-9(f)(1)(A).

¹² *See* p. 3, P. Ex. 1.

¹³ *Newman v. Bernstein*, 766 N.E.2d 8, 11 (Ind. App. 2002) (*citing* I.C. § 5-14-3-9(f)(1)(B)); *see also*, *Travelers Cas. & Sur. Co. v. United States Filter Corp*, 895 N.E.2d 114, 115 (Ind. 2008).

Moratorium.¹⁴ OMB claims the respective agencies' statutory authority are "legal opinion" and that "Reasonable persons might disagree about the statutory authority for the proposed rule and what exception under EO applies".¹⁵ As with all things legal, "reasonable persons might disagree", but the contention an issue "might" be debated in no way implies the issue ever was, is, or will be.

Furthermore, many issues are contentious but that in no way suggests the issue is or ever was "deliberative". Deliberation and argument may be similar colloquially but the issues are entirely separate for purposes of ARPA.

OMB suggests the redaction is justified as a legal opinion, however that by itself is not privileged attorney work product. Indiana Code § 5-14-3-4(b)(2) is limited to "The work product of an attorney representing, pursuant to state employment or an appointment by a public agency: (A) a public agency; (B) the state; or (C) an individual." There is no evidence that OMB's and NRC's decisions, although possibly made by attorneys, were made by OMB's or NRC's attorneys in the course of an attorney client relationship. Neither OMB nor NRC alleged, let alone proved, an attorney-client relationship with the "reasonable persons" whose opinions may differ.

Indiana courts have held that there is a difference between an attorney's

¹⁴ Ind. Code §5-14-3-1.

¹⁵ See pp. 4-5, P. Ex. 4 (emphasis added).

opinions, theories, or conclusions, and facts learned by the attorney. “Work product does not protect the facts an adverse party has learned or the persons from whom such facts were garnered.”¹⁶ The NRC provided OMB with a sweeping omnibus rule affecting a wide range of issues, from shooting squirrels from boats to use of public property. The suggestion that OMB granted an exception to the Moratorium based only on legal theories and no facts strains credulity.

B. OMB’s Claim of Deliberative Privilege, “Speculation” and “Opinion” Lacks Any Factual Support

OMB claims the redacted materials are “deliberative material” exempt from disclosure under IC § 5-14-3-4-(b)(6). That statute exempts “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 is expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.” The “deliberative materials” exemption cited here swallows the rule. While there is no question the exemption set forth in IC § 5-14-3-4(b)(6) covers materials delivered from one agency to another, the mere act of delivery does not trigger the exemption, there must be some evidence of a deliberative process.¹⁷ Here, there is not only no evidence of deliberation, all the

¹⁶ *Burr v. United Farm Bureau Mut. Ins. Co.*, 560 N.E.2d 1250, 1257 (Ind. Ct. App. 1990)(quoting *Laxalt v. McClatchey*, 116 F.R.D. 438 (D. Nev. 1987)).

¹⁷ *Travelers Cas. & Sur. Co. v. United States Filter Corp*, 895 N.E.2d 114, 115

available evidence indicates NRC and OMB, more significantly, completed their respective decision-making processes, otherwise the promulgation process would not have moved forward and arrived at its current stage of near-completion.

Public access to government records is the primary directive and the default rule for information submitted to government entities.¹⁸ Ind. Code § 5-14-3-1 provides, in pertinent part, “This chapter shall . . . place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.” To prevent the exception from swallowing the rule, the party seeking to assert a privilege carries the burden to allege and prove the applicability of the privilege “as to each question asked or document sought”.¹⁹ The statutory language gives a clear mandate to courts; they must require a public agency to provide a factual basis and demonstrate a proper reason for any denial of a public records request.

C. OMB’s Failure to Provide Description of the OMB Documents Violates
CWE’s Right To Due Process and Undermines Ind. Code§ 5-14-3-4

To provide full judicial review, this court must insure that a minimum of due process is granted. Ind. Const. Art. 1, § 12 states, “[E]very person . . . shall have

(Ind. 2008).

¹⁸ *Travelers Cas. & Sur. Co. v. United States Filter Corp*, 895 N.E.2d at 115.

¹⁹ *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 702 (Ind. Ct. App. 1995).

remedy by due course of law.” Here, OMB has failed to provide CWE with the general nature of the withheld and redacted records. Without more specificity, CWE lacks any meaningful opportunity to raise an argument, let alone persuade this court that OMB improperly withheld and/or redacted the records. The statutory mandate established in IC § 5-14-3-4 has no meaning if OMB is not required to describe withheld and redacted records. Absent some description of the records and their contents, CWE cannot identify a particular record and cannot fully assert its rights in a fair process. To protect CWE’s due process rights, this court should require OMB to disclose all records or deliver a detailed description of all records to the court, or for *in camera* inspection if need be.

Accordingly, Petitioner respectfully requests that this honorable court grant the following relief:

- A. Order OMB to disclose all withheld and redacted records; and,
- B. Order OMB to reimburse CWE for its reasonable costs and attorneys’ fees; and,
- C. Any further relief this court deems just, equitable, and proper to the cause.

Respectfully Submitted,

CENTER FOR WILDLIFE ETHICS

/s/ Laura M. Nirenberg
Laura M. Nirenberg, Chief Counsel

Center for Wildlife Ethics, Inc.
4988 W. 150 North
La Porte, IN 46350
(219) 379-4401
Laura@centerforwildlifeethics.org
Attorney No. 29292-46

OPINION OF THE PUBLIC ACCESS COUNSELOR

THE CENTER FOR WILDLIFE ETHICS,
Complainant,

v.

THE OFFICE OF MANAGEMENT & BUDGET,
Respondent.

Formal Complaint No.
17-FC-270

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Office of Management and Budget (“OMB”) violated the Access to Public Records Act¹ (“APRA”). The OMB responded to the complaint through general counsel Justin McAdam. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the

¹ Ind. Code §§ 5-14-3-1 to -10

formal complaint received by the Office of the Public Access Counselor on December 1, 2017.

BACKGROUND

The Center for Wildlife Ethics, via Laura Nirenberg (“Complainant”), filed a formal complaint alleging the OMB failed to fully satisfy her public records request.

Complainant’s organization, the Center for Wildlife Ethics (“CWE”) submitted a public records request on October 24, 2017, seeking twenty-one categories of records. For the sake of brevity, the entirety of the request will not be restated other than to note the CWE sought information regarding an administrative rule amendment by the Indiana Department of Natural Resources (“DNR”). On November 3 (after a revised request), OMB partially fulfilled the request. The agency cited two statutes as justification for withholding some of the requested records: Indiana Code section 5-14-3-4(b)(6) and Indiana Code section 4-22-2-17.

CWE expresses concern as to the applicability of the withholding authorities. It argues Indiana Code section 4-22-2-17 does not apply as it does not exempt records, but merely clarifies what *is* subject to public access. Secondly, it contends Indiana Code section 5-14-3-4(b)(6) does not apply as the records sought are not deliberative material as contemplated by the statute.

In its response, OMB contends that proposals sent for consideration for rule adoption or amendment are very much deliberative in nature. Pursuant to standing executive orders and statutory guidelines for rule promulgation, the

agency was justified in considering the proposal process deliberative.

ANALYSIS

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.” Ind. Code § 5-14-3-1. The Indiana Office of Management and Budget is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2(n). Therefore, unless an exception applies, any person has the right to inspect and copy the OMB’s public records during regular business hours. Ind. Code § 5-14-3-3(a). A request for inspection or copying must identify with reasonable particularity the record being requested. Ind. Code § 5-14-3-3(a)(1).

The legislature has provided public agencies with the discretion to withhold from disclosure those records that constitute deliberative materials. *See* Ind. Code § 5-14-3-4(b)(6). The subdivision provides, in relevant part:

Records that are intra-agency or interagency advisory or deliberative material...that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Deliberative materials include information that reflects, for example, one’s ideas, consideration, and recommendations on a subject or issue for use in a decision making process. The purpose of protecting such communications is to “prevent injury to the quality of agency decisions.” *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002)(quoting

NLRB v. Sears, Roebuck & Co. 421 U.S. 132, 151 (1975)). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Id.* at 12.

In order to withhold such records from disclosure under Indiana Code section 5-14-3-4(b)(6), the documents must be interagency or intra-agency records of advisory or deliberative material and are also expressions of opinion or speculative in nature.

The deliberative materials exemption is indeed broad and can be subject to abuse. Some have called it the exception that swallows the rule. Potential abuse notwithstanding, as the *Newman* court indicates, it has valuable and sound application and can certainly be exercised consistent with good governance and transparency principals.

The OMB is the financial and auditing arm of the executive branch of state government. It is a set of agencies charged with reviewing state expenditures and ensuring government efficiency and stewardship. In addition to many other duties, the agency evaluates and analyzes proposed rulemaking actions pursuant to Executive Order 13-03 and Executive Order 2-89 for fiscal impact. Agencies submit those proposals (or “packages”) to OMB for review. A proposal submission is not a guarantee of approval. Executive Order 13-03 is known as the “Regulatory Moratorium” and OMB has lone authority to grant exceptions to the moratorium.

While the General Assembly delegates rulemaking authority to administrative agencies, the rule making (or amend-

ment) process does not proceed until OMB grants a variance from the moratorium. An agency with rulemaking authority submits the proposal to OMB as an expression of its opinion—that opinion being that the Indiana Administrative Code should be amended. While that opinion may be buttressed with facts and data, a proposal is ultimately speculative in nature. A proposal is defined as “a plan or suggestion, especially a formal or written one, put forward for consideration or discussion by others.” Merriam-Webster.com, *Proposal*, <https://www.merriam-webster.com> (last visited Feb. 2, 2018).

In this case, the ultimate decision-making authority for executive branch agencies’ proposals is OMB. A speculative proposal is deliberative and communicated by agencies for the purpose of decision-making. While a preliminary decision has indeed been made on DNR’s part to submit, this is very much part of the overall decision-making process of the executive branch of State Government. A decision to go forward with the rule making is not final until OMB’s final approval. At that point, the process becomes public-facing and is transparent. The decision-making deliberations of agencies to develop rules and propose them internally may not be as visible, however, Indiana Code section 4-22 et seq. ensures the public has full notice and knowledge of the promulgation process. The process is not without accountability protections.

First, the agency must publish a notice of intent to adopt a rule in the Indiana Register. Ind. Code § 4-22-2-23(b). The publication notice must include an overview of the intent and scope of the proposed rule, and its statutory authority. *Id.* This notice must be published at least 28 days before the second notice.

Next, the agency must publish notice of a public hearing in one newspaper of general circulation in Marion County, Indiana that includes: (1) the date, time, and location of the hearing; (2) a general description of the subject matter of the proposed rule; (3) an explanation that *the proposed rule and any data, studies, or analysis relied upon may be inspected and copied at the office of the public agency*. See Ind. Code § 4-22-2-24 (emphasis added). In addition, the agency must also publish the notice of the public hearing in the Indiana Register along with the full text of the agency's proposed rule. *Id.* These notices must be published as described at least 21 days before the public hearing is convened.

After the notices and the text of the agency's proposed rule are published, the agency must conduct a public hearing on the proposed rule. Ind. Code § 4-22-2-26(a). The agency must afford any person attending the public hearing an adequate opportunity to comment on the proposed rule through the presentation of oral and written facts or argument. Ind. Code § 4-22-2-26(c).

What is more, the law requires an agency to fully consider comments received at the public hearing and any other information prior to adopting the rule. Ind. Code § 4-22-2-27. After an agency has complied with the above procedure it may formally adopt the rule in accordance with Indiana Code section 4-22-2-29. It should also be noted that the Indiana Attorney General (a separately elected official from that of the Governor's administration) has oversight as to that procedure as well. Ind. Code § 4-22-2-31.

While the ultimate purpose of the Access to Public Records Act is for agencies to provide full and complete information regarding the affairs of the government, there are clear exceptions to the rule. The deliberative materials exception is

one of them. Although overuse of the exception is often a pitfall for agencies, it does not appear as if this is one of those instances. Finally, there are statutory safeguards built into the promulgation process to ensure that the public is fully informed as to the rule before it takes effect.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Indiana Office of Management and Budget has not violated the Access to Public Records Act.

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

From: Center for Wildlife Ethics Legal [<mailto:wildlifelaw@gmail.com>]
Sent: Tuesday, October 24, 2017 3:09 PM
To: McAdam, Justin L <JMcadam@gov.IN.gov>; Center for Wildlife Ethics Legal
<wildlifelaw@gmail.com>
Subject: REVISED Public Access to Records Request; LSA #17-436

**** This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email. ****

Thank you for your response. Please find the revised Public Access to Records Request below. My apologies for any confusion.

Dear Mr. McAdam,

CWE makes this request to the Indiana Office of Management and Budget (OMB) pursuant to the Indiana Access to Public Records Act, Ind. Code §5-14-3-1 et seq.

CWE is seeking all responsive records made or kept in connection with LSA #17-436 regarding amendments to 312 IAC 9 governing wildlife-related rules, referred to herein as the "Proposed Rule". Please provide copies in electronic format, whenever possible, of any record responding to the requests made herein.

1. All records made, kept, or delivered to OMB pertinent to the Proposed Rule that address:
 - a. Health
 - b. Safety
 - c. Any emergent or emergency situation.
2. All records pertaining to the Proposed Rule's potential to promote private-sector job growth and/or foster private-sector economic development in Indiana.
3. All records pertinent to an estimated date of the Proposed Rule's adoption.
4. All records pertaining to the history and background of the Proposed Rule.
5. All records pertaining to the reasons for the Proposed Rule.

6. All records pertaining to the statutory authority for the Proposed Rule.
7. All records pertaining to the existing legal framework governing the subject matter of the Proposed Rule.
8. All records pertaining to or identifying any exception or exceptions to Executive Order 13-03, "Regulatory Moratorium" that permit the Indiana Department of Natural Resources to promulgate the rule notwithstanding the Moratorium.[1]
9. All records pertaining to any explanation as to which exception to the Regulatory Moratorium applies.
10. All records pertinent to any Fiscal Impact Analysis as described in Fiscal Management Circular (FMC) #2010-4 and FMC #2015-1.
11. All records pertinent to any Cost-Benefit Analysis as described in FMC #2010-4 and FMC #2015-1.
12. All records pertinent to the current or any previous copies or drafts of the proposed rule.
13. All records: (a) pertinent to any determination the Proposed Rule is necessary to avoid a violation of a court order or federal law and (b) demonstrating that failure to promulgate the Proposed Rule would result in sanctions by any court or other tribunal.
14. All records pertinent to the Proposed Rule and its relationship to job creation and increasing investment in Indiana or to improve the quality of Indiana's workforce in the private sector.
15. All records pertinent to or demonstrating the Proposed Rule will or will not repeal existing rules or reduce their regulatory impact.
16. All records pertinent to the Proposed Rule and federal mandate.
17. All records pertinent to any effect the Proposed Rule may have on matters pertaining to the control, mitigation, or eradication of waste, fraud, or abuse within a state agency or wasteful or abusive activities perpetrated against a state agency.

18. All records pertinent to any effect the Proposed Rule may have on State spending.

19. All records pertaining to OMB's policy, formula or equation that OMB uses for ascertaining the need for the Proposed Rule.

20. All records pertaining to OMB's evaluation and cost-benefit analysis of the existing administrative rules effected by the Proposed Rule.

21. All records pertaining to any Proposed Rule(s) that OMB has denied.

Please inform me via email (laura@centerforwildlifeethics.org) if any of the requested records, or portions thereof, cannot be sent electronically. Also provide the reason for any denial of any portion(s) of a requested record, along with the specific Access to Public Records Act exemption relied upon to withhold redacted documents. If you determine that portions of the requested records are exempt from disclosure, please provide the non-exempt portions along with the name and address of the person or body to whom an appeal should be directed.

Kindly consider this letter an official request for a fee waiver if any costs are incurred for reproducing the remainder of the records. CWE is a 501(c)(3) nonprofit organization headquartered in Indiana. The disclosure of the records sought is in the public's interest and will substantially enhance the public's understanding of issues related to the Proposed Rule. The records in this request are not sought for commercial purposes.

Your prompt attention to this request is appreciated.

[1] Executive Order 13-03, Apr. 08, 2016 (DIN: 20130206-IR-GOV130031EOA, "Regulatory Moratorium").

--

Laura M. Nirenberg, Esq.
Founding Executive Director
Center for Wildlife Ethics
[219/379-4401](tel:2193794401)
Laura@centerforwildlifeethics.org
www.centerforwildlifeethics.org

Notice of Intent to Adopt a Rule
LSA Document #17-436

EXHIBIT #3

Under IC 4-22-2-23, the Natural Resources Commission intends to adopt a rule concerning the following:

OVERVIEW: Amends 312 IAC 9-2-2 to allow the use of motor driven conveyances to hunt squirrels. Amends 312 IAC 9-2-3 to allow bobcats and their parts to be sold. Amends 312 IAC 9-2-11 governing the taking or chasing of wild animals, except fish, on state parks and historic sites. Adds 312 IAC 9-2-16 governing the release of captive-bred mammals, reptiles, amphibians, and mussels. Amends 312 IAC 9-3-12 governing the taking of foxes, coyotes, and skunks. Amends 312 IAC 9-3-13 governing the taking of minks, muskrats, and long-tailed weasels. Amends 312 IAC 9-3-14 governing the taking of raccoons and opossums. Amends 312 IAC 9-3-14.5 governing the possession of furbearing mammals. Amends 312 IAC 9-3-18.1 governing the taking of bobcats. Amends 312 IAC 9-3-18.2 governing the trapping of river otters. Amends 312 IAC 9-3-18.4 by removing the prohibition on the possession of the carcass, hide, or any part of a bobcat. Amends 312 IAC 9-3-18.5 governing exotic mammals. Adds 312 IAC 9-3-18.7 governing the taking of bats. Adds 312 IAC 9-3-18.8 governing black bears. Amends 312 IAC 9-3-19 governing endangered species of mammals. Amends 312 IAC 9-4-2 governing general requirements for migratory birds and waterfowl. Amends 312 IAC 9-4-11 governing wild turkey hunting. Amends 312 IAC 9-4-14 governing endangered species of birds. Amends 312 IAC 9-9-4 governing endangered species of invertebrates. Amends 312 IAC 9-10-4 governing the game breeders license. Amends 312 IAC 9-10-11 governing the nuisance wild animal control permit. Amends 312 IAC 9-10-12 governing fur buyers' licenses. Adds 312 IAC 9-10-25 to establish a deer control permit. Adds 312 IAC 9-10-26 to establish a propagation permit for endangered species. Amends 312 IAC 9-11-2 governing the wild animal possession permit. Effective 30 days after filing with the Publisher. Questions may be sent to the Division of Hearings, Natural Resources Commission, Indiana Government Center North, 100 North Senate Avenue, Room N103, Indianapolis, IN 46204-2200, at nrcrules@nrc.in.gov, or by telephone at (317) 232-4699. Comments may be sent by regular mail to the address above or through <http://www.in.gov/nrc/2377.htm>. Statutory authority: IC 14-10-2-4; IC 14-11-2-1; IC 14-22-2-6; IC 14-22-13.

For purposes of IC 4-22-2-28.1, the Small Business Regulatory Coordinator for this rule is:

Linnea Petercheff
Staff Specialist
Division of Fish and Wildlife
Department of Natural Resources
402 West Washington Street, Room W273
Indianapolis, IN 46204
(317) 233-6527
lpetercheff@dnr.in.gov

For purposes of IC 4-22-2-28.1, the Small Business Ombudsman designated by IC 5-28-17-6 is:

Katelyn Colclazier
Small Business Ombudsman
Indiana Economic Development Corporation
One North Capitol, Suite 700
Indianapolis, IN 46204
(317) 431-1560
kcolclazier@iedc.in.gov

Resources available to regulated entities through the small business ombudsman include the ombudsman's duties stated in IC 5-28-17-6, specifically IC 5-28-17-6(9), investigating and attempting to resolve any matter regarding compliance by a small business with a law, rule, or policy administered by a state agency, either as a party to a proceeding or as a mediator.

Posted: 09/27/2017 by Legislative Services Agency
An [html](#) version of this document.

State Budget Agency Rule Promulgation Submission Form (NRC Form G2)

1. Notice of Intent File Date:
2. LSA Document Number:
3. Primary Point of Contact:
- Name:
- Agency:
- Phone:
- Email:

4. Statutory Authority for Rule Promulgation:

5. Agency requests an expedited review of the proposed rule. See p. 5 of FMC 2010-4 for more information regarding the expedited review process.

Yes No

Explain reason(s) an expedited review is necessary, including any relevant dates associated with external deadlines:

6. Submit to SBA/OMB via SBARules@sba.in.gov. Please include supporting materials listed below:

Submission Checklist:

<input checked="" type="checkbox"/>	SBA Rule Promulgation Submission Form (this form)
<input checked="" type="checkbox"/>	Cover letter
<input checked="" type="checkbox"/>	Proposed or Draft Rule
<input checked="" type="checkbox"/>	Fiscal Impact Analysis on State and Local Government (FMC 2010-4)
<input checked="" type="checkbox"/>	Cost Benefit Analysis (IC 4-3-22-13, IC 4-22-2-28, FMC 2010-4)
<input checked="" type="checkbox"/>	Notice of Intent (IC 4-22-2-23) or if applicable relevant notice from IC 13-14
<input checked="" type="checkbox"/>	Economic Impact Statements (IC 4-22-2.1-5) & (IC 4-22-2.5-3.1(c) & (d) (if appl.))
<input checked="" type="checkbox"/>	Justification Statement (IC 4-22-2-24(d)(3))
<input checked="" type="checkbox"/>	Rule Standards Analysis (IC 4-22-2-19.5)



STATE OF INDIANA

Eric J. Holcomb
Governor

OFFICE OF MANAGEMENT & BUDGET

212 State House
Indianapolis, Indiana 46204-2796
317-232-5610

Micah G. Vincent
Director

June 2, 2017

Joe Hoage
General Counsel
Indiana Department of Natural Resources
402 W Washington St
Indianapolis, IN 46204

Dear Mr. Hoage,

On December 2, 2016, OMB received your submission attached hereto seeking a determination whether the Department of Natural Resources' request to amend sections of 312 IAC 9 falls within an exception of Executive Order 13-03.

Based on DNR's submission, the request qualifies for an exception under paragraph [REDACTED] of Executive Order 13-03. Therefore, DNR may proceed with the rule proposed in its December 2, 2016 submission.

Sincerely,

Micah G. Vincent
OMB Director



Eric J. Holcomb, Governor
Bryan W. Poynter, Chair

September 28, 2017

George Angelone
Attorney, Legislative Council
SENT: legislative.council@iga.in.gov

Micah Vincent
Director, State Budget Agency
SENT: sbarules@sba.in.gov

Re: LSA Document #17-436

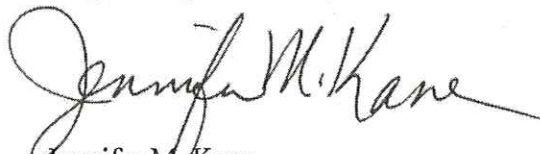
Dear Messrs. Angelone and Vincent:

Attached is a proposed rule package that amends rules within 312 IAC 9 governing wildlife.

Enclosed are the following: (1) SBA Rule Promulgation Submission Form; (2) NRC Cover Letter; (3) Proposed LSA Document #17-436; (4) Fiscal Impact Analysis on State and Local Government; (5) Cost-Benefit Analysis; (6) Notice of Intent to Adopt a Rule; (7) IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Business (EIS); (8) Justification Statement (IC 4-22-2-24(d)(3)); (9) Rule Standards Analysis (IC 14-22-2-19.5); and (10) OMB Exemption Letter.

Please forward to this office your budget analysis letter. If you have any questions, please contact Sandra Jensen at 317-232-4229 or sjensen@nrc.in.gov. If you have questions regarding the fiscal analysis specifically, you may also contact the Small Business Regulatory Coordinator for this proposal, Linnea Petercheff at 317-233-6527 or lpetercheff@nrc.in.gov.

Respectfully submitted,


Jennifer M. Kane
Paralega

Encl.
Cc: Joseph Dant (JDant@sba.IN.gov)



STATE OF INDIANA

Eric J. Holcomb
Governor

OFFICE OF MANAGEMENT & BUDGET

212 State House
Indianapolis, Indiana 46204-2796
317-232-5610

Micah G. Vincent
Director

December 20, 2017

EXHIBIT #4

Mr. Luke H. Britt
Indiana Public Access Counselor
402 W. Washington Street, Room W470
Indianapolis, IN 46204-2745

RE: Formal Complaint 17-FC-270

Dear Mr. Britt,

This letter is in response to your notice of formal complaint 17-FC-270 filed by Laura M. Nirenberg on behalf of the Center for Wildlife Ethics, Inc. (hereinafter "CWE") against the Office of Management and Budget ("OMB") on December 1, 2017. CWE alleges that the withholding and redaction of certain records by OMB was improper and that CWE is entitled to receive all of the pertinent responsive records in unredacted form.¹ You have requested a response from OMB by December 28, 2017. OMB respectfully requests that you find in favor of OMB and declare that OMB acted properly in withholding and redacting the records sought by CWE.

BACKGROUND

Public Records Request

CWE first submitted a request for public records on October 19, 2017.² In its first request, CWE asked for "all responsive records made or kept in connection with Administrative Cause No. 16-161D, 'Consideration of preliminary adoption of amendments to 312 IAC 9 governing wildlife-related rules'."³ OMB responded on October 24, 2017, stating:

We are unable to locate any records matching the description you have provided. Specifically, we do not have any records or any administrative rules that are identified as "Administrative Cause No. 16-161D". When we spoke via telephone two weeks ago, you indicated that you were looking for records related to the administrative rule identified as LSA Document #17-436; however, this rule is not identified as Administrative Cause No. 16-161D on any documentation we have received. If you still wish for us to search for records, please provide additional information so that we can identify the records you are seeking.⁴

¹ Compl. at 1.

² Ex. A at 1.

³ *Id.*

⁴ Ex. A at 1.

CWE then submitted a revised request (the subject of this Formal Complaint 17-FC-270) the same day, seeking “all responsive records made or kept in connection with LSA #17-436 regarding amendments to 312 IAC 9 governing wildlife-related rules.”⁵ OMB responded on October 25 acknowledging receipt of CWE’s revised public records request.⁶ On November 3, 2017, OMB provided its final response, stating:

After a diligent and good faith search, we have located records responsive to your request. We have attached those records that are responsive and not exempt from disclosure under IC § 4-22-2-17 and IC § 5-14-3-4. The remaining responsive records have been withheld pursuant IC § 4-22-2-17 and IC § 5-14-3-4(b)(6) because they are interagency advisory or deliberative material and have been communicated to OMB for the purpose of decision making.⁷

OMB withheld certain responsive records and provided others in redacted form to CWE.⁸ OMB has received no further communication from CWE.

The only records responsive to CWE’s request in OMB’s possession are those provided to OMB by the Natural Resources Commission (“NRC”) in conjunction with NRC’s requests for approval to proceed with rulemaking pursuant to Executive Orders 13-03 and 2-89. OMB does not have any other documents aside from those provided by NRC that are responsive to CWE’s request.

Review of Agency Rules

CWE’s public records request pertains to records received by OMB under Executive Order No. 13-03 (“EO 13-03”) and Executive Order No. 2-89 (“EO 2-89”).⁹ Each of these executive orders requires OMB or the State Budget Agency (“SBA”) to decide whether to allow an executive branch agency like NRC to proceed with the rulemaking process for a proposed rule.

EO 13-03 is known as the Regulatory Moratorium.¹⁰ It suspends agency rulemaking for all rules except those satisfying one of the seven enumerated exceptions.¹¹ Agencies may not commence formal rulemaking activity until OMB determines that the proposed rule

⁵ Ex. B at 2.

⁶ Ex. B at 1.

⁷ *Id.*

⁸ Exs. C, D, E, and F. (The copies of the responsive documents given to CWE by OMB appear to match the copies provided in CWE’s complaint. They have been included here for ease of reference.)

⁹ Executive Order 13-03 (Jan. 14, 2013) (available at http://www.in.gov/omb/files/EO_13-03.pdf) (“EO 13-03”); Executive Order 2-89 (Jan. 17, 1989) (available at http://www.in.gov/omb/files/EO_2-89.pdf) (“EO 2-89”).

¹⁰ EO 13-03 at 1.

¹¹ *Id.* at 2.

qualifies for an exception.¹² Agencies must submit a letter to OMB requesting a determination.¹³ The request must include a detailed summary of the proposed rule, an explanation and identification of the applicable exceptions, a fiscal impact analysis, a cost-benefit analysis, and a draft of the proposed rule.¹⁴

EO 2-89 requires any rule promulgated by a state agency to be approved by the State Budget Director prior to the proposed rule being published in the Indiana Register.¹⁵ Any proposed rule that is not approved or otherwise exempted from EO 2-89 by the Budget Director will not be approved by the Governor.¹⁶ Agencies must submit a letter to SBA requesting approval from the State Budget Director.¹⁷ Agencies must provide a current draft of the proposed rule, a fiscal impact analysis, a cost-benefit analysis, the notice of intent filed with the Legislative Services Agency under IC 4-22-2-23, and the small business economic impact statement required by IC 4-22-2.1.¹⁸

DISCUSSION

The Indiana Access to Public Records Act (“APRA”) permits a state agency to withhold “[r]ecords that are intra-agency or interagency advisory or deliberative material . . . that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.”¹⁹ “The purpose of protecting such communications is to prevent injury to the quality of agency decisions. The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result.”²⁰

All of the responsive records requested by CWE in this matter are interagency advisory or deliberative materials and were communicated for the purpose of decision making. NRC prepared all of the documents, except for the letter from OMB granting an exception to the Regulatory Moratorium, and provided them to OMB in support of its requests for authorization to proceed with its proposed rulemaking under EO 13-03 and EO 2-89. As explained above, NRC is required to submit the documents at issue here in order to receive the requisite approvals required under EO 13-03 and EO 2-89. The

¹² Financial Management Circular #2015-1, 2, Indiana State Budget Agency (Dec. 18, 2015) (available at [http://www.in.gov/omb/files/FMC_Circular_-_EO_13-03_Moratorium_Requirements_\(FINAL\).pdf](http://www.in.gov/omb/files/FMC_Circular_-_EO_13-03_Moratorium_Requirements_(FINAL).pdf)) (“FMC 2015-1”).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ EO 2-89 at 1. The State Budget Director may waive application of EO 2-89 at his discretion. *Id.*

¹⁶ *Id.*

¹⁷ OMB provides administrative and legal support to the State Budget Director and the State Budget Agency in carrying out the requirements of EO 2-89. Agencies are directed to submit requests for approval of proposed rules with supporting documentation to OMB. Rule Approval Process, Indiana Office of Management and Budget, <http://www.in.gov/omb/2626.htm>.

¹⁸ Financial Management Circular 2010-4, 1-5, Indiana State Budget Agency (Nov. 1, 2010) (available at http://www.in.gov/omb/files/fmc_2010-4_Administrative_Rulemaking.pdf).

¹⁹ IC 5-14-3-4(b)(6).

²⁰ *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 909-910 (Ind. Ct. App. May 2, 2003) (quoting *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002)).

documents are directly related to the decisions that OMB and SBA are required to make under the executive orders. They represent the NRC's understanding of its proposed rule and the information that it wants OMB and SBA to know about the proposed rule. The information contained in the documents is intended to inform OMB and SBA about the nature and context of the rule. The information is necessary to enable OMB and SBA to make informed decisions about the appropriate policies for the State of Indiana.

CWE argues that the documents could not have been communicated for the purpose of decision making because "[b]y the time the rule package was submitted to OMB, no decision was required [and] [a]ny deliberation or decision making required by [NRC] had already been made by the time it submitted its materials to OMB."²¹ CWE focuses on the wrong decision. The relevant decision is not NRC's decision on whether to pursue the proposed rule. The relevant decisions are the decisions that EO 13-03 and EO 2-89 require OMB and SBA to make regarding the proposed rule. They are the reason that NRC provided the information about its proposed rule to OMB and SBA. At bottom, the decisions required of OMB and SBA are nothing more than an extension of the governor's power to approve or disapprove administrative rules under IC 4-22-2-34.²²

With the exception of the documents provided to CWE, the documents provided to OMB by NRC supporting its requests under EO 13-03 and EO 2-89 are expressions of opinion or speculative in nature. They outline, as required by the applicable executive orders and financial management circulars, NRC's assessment of the fiscal impact of its proposed rule, NRC's assessment of the cost-benefit of the propose rule, NRC's assessment of the impact of the proposed rule on small businesses, NRC's assessment of the economic impact of the proposed rule, and drafts of the proposed rule. All of these matters turn on NRC's own interpretation of its proposed rule and its effect both inside and outside government. At bottom, they represent NRC's policy judgment for the Executive Branch regarding the subject matters addressed therein.

Of course, not all of the documents are expressions of opinion or speculative in nature. The Notice of Intent to Adopt a Rule, State Budget Agency Rule Promulgation Submission Form (NRC Form G2), the letter from OMB granting an exception to the Regulatory Moratorium, and the letter from NRC to OMB contain little or no opinions or speculations. All of these documents were either provided in their entirety or in redacted form.²³ The two redactions were minor and applied only to the specific pieces of information that are opinion. The first redaction was to the State Budget Agency Rule Promulgation Submission Form (NRC Form G2).²⁴ OMB redacted NRC's statement of its statutory authority for its proposed rule. The second redaction was to the letter from

²¹ Compl. at 3.

²² See EO 2-89 at 1 ("WHEREAS, the Governor of the State of Indiana is required by I.C. 4-22-2-34 to approve or disapprove rules....") ("Section 1. The Governor of the State of Indiana will not approve any rule pursuant to I.C. 4-22-2-34 unless the director of the Budget Agency approves the proposed rule pursuant to Section 2 of this Executive Order...."); see generally EO 13-03 (Requiring OMB approval of proposed administrative rules prior to beginning formal rulemaking process.).

²³ Exs. C, D, E, and F.

²⁴ Ex. D.

OMB granting an exception to the Regulatory Moratorium.²⁵ OMB redacted its assessment of which exception to the Regulatory Moratorium applied under EO 13-03. Both pieces of redacted information represent the legal opinions of NRC and OMB respectively. Reasonable persons might disagree about the statutory authority for the proposed rule and about what exception under EO 13-03 applies.

CWE also argues that IC 4-22-2-17 does not provide an independent exemption from APRA's disclosure requirements. OMB agrees. IC 4-22-2-17 merely makes clear that APRA applies to documents created during the formal rule making process. It is cited in the response for that purpose alone.

Sincerely,

Justin L. McAdam
General Counsel & Policy Director

²⁵ Ex. E.