



STATE OF INDIANA

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April 17, 2013

David Johnson
7980 Royal Avenue
Zionsville, Indiana 46077

Re: Informal Inquiry 13-INF-20; Indiana Department of Environmental Management

Dear Mr. Johnson:

This informal opinion is in response to your inquiry regarding the Indiana Department of Environmental Management's ("Department") response to your request for records. Thomas W. Easterly, Commissioner, responded in writing on behalf of the Department. His response is enclosed for your reference. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

BACKGROUND

On or about February 19, 2013, you submitted a written request to the Department for the "procedure or the legal citation for sanitary sewer construction permit renewal procedures as found within the Indiana code" and "a list of all studies within IDEM's control that demonstrate that sewers are superior to septic tanks." To date, you have yet to receive any records in response to your request.

In response to your inquiry, Mr. Easterly advised that all records maintained by the Department that would be responsive to your request have been provided. The Department received the following request for records from you on February 6, 12, and 22, 2013:

1. I am requesting a list of all studies within IDEM's control that demonstrate that sewers are superior to septic tanks. I would also request a copy of IDEM's official policy regarding the use of septic systems versus sewers.
2. I would like a copy of the procedure or legal citation for sanitary sewer construction permit renewal procedures as found within the Indiana Codes.
3. I am requesting independent testing results comparing HDPE piping with those currently approved by the State of Indiana Codes. These should include the life

test data and failure comparisons. I would further request a detailed procedure of how you and/or Whitestown were able to determine no sewer lines would be closer to any drinking water well in Royalton than 10 feet given the fact Whitestown has admitted that they a. do not know how many wells there are & b. have never conducted a study to determine what type of wells they are.

4. I am requesting a detailed procedure of how you and/or Whitestown were able to determine no sewer lines would be closer to any drinking water well in Royalton than 10 feet given the fact that Whitestown has admitted that they a. do not know how many wells there are, b. have never conducted a study to determine what type of wells they are and c. have never surveyed the area to determine property lines. If there are citations for such a matter, I would further appreciate a copy of the citation so I can look it up in the regulations.”

The Department timely acknowledged the receipt of each record request pursuant to the requirements of section 9(b) of the APRA. On March 26, 2013, the Department produced all records that it maintained that were responsive to your request. In response to your second request, the Department provided copies of 327 IAC 3, Waste Water Treatment Facilities; Issuance of Permits; and Construction and Permit requirements. As to your first, third, and fourth requests, the Department advised that it did not maintain any records that were responsive.

As to your first request, while a variety of articles exist addressing the advantages of using a sewer system as compared to a septic tank, the APRA would not require the Department to conduct research or create a record and/or list in response to a request. As to your third request, the Department does not have specific studies that show how HDPE piping compares to other pipes as the Department relies on ASTM and AWWA standards in its decision making so that regulated entities employ the most up-to-date technologies in their construction. As to your fourth request, the Department does not have any records responsive to your request. Any documents created by Whitestown would need to be requested directly from the town.

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 Department 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 Department’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 include information regarding how or when the agency intends to comply. Here, the Department acknowledged in writing the receipt of each written request that was submitted within seven (7) days. As such, is my opinion that the Department complied with section 9(b) of the APRA by acknowledging the receipt of your written requests within seven (7) days of submission.

If a public agency has no records responsive to a public records request, the agency generally does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). The APRA does not require a public agency to create a new record in order to satisfy a public records request nor does it require an agency to conduct research on your behalf. *See Opinions of the Public Access Counselor 03-FC-146; 05-FC-25; 10-FC-56; 10-FC-272; 12-INF-01*. The Department has provided that it does not maintain any records responsive to the first, third, and fourth requests that were submitted. As such, it is my opinion that the Department did not violate the APRA by not maintaining a record responsive to your request or by failing to create a record or conduct research in order to satisfy your request. The Department has indicated that records responsive to your fourth request may be maintained by Whitestown. If Whitestown maintained any records that would be responsive to the request, it would be required to either produce the record or cite to the specific statutory authority that would allow the agency to withhold the record that has been requested. *See* I.C. § 5-14-3-9(c).

The APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that among the factors to be considered in determining if the requirements of section 3(b) have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and redacted prior to disclosure. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency’s failure to provide “instant access” to the requested

records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121.*

Here, you submitted four separate requests to the Department for records regarding sewer systems, septic tanks, and other water related issues. The Department complied with the requirements of section 9(b) of the APRA in acknowledging the receipt of each request in writing within seven (7) days of receipt. After conducting a search based on the criteria that you provided, the Department produced all records maintained by the agency that would be considered responsive to your request on March 26, 2013. In addition, the Department advised that should you need any further assistance in locating records, you could contact the Department's Public Records Office to assist you in your search. In light of these factors, the Department's responsibility to maintain the normal duties of the agency, which include responding to other public records requests that have been submitted, it is my opinion that the Department complied with section 3(b) of the APRA in providing all records responsive to the four requests that were submitted in a reasonable period of time.

Please let me know if I can be of any further assistance.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Thomas W. Easterly, Lori Endris