

December 2, 2003

Mr. Charles R. Waggoner
McConnell & Finnerty
38 North 5th Street
Post Office Box 90
North Vernon, Indiana 47265

*Re: Formal Complaint 03-FC-128;
Alleged Denial of Access to Public Records by the Jefferson County
Health Department*

Dear Mr. Waggoner:

This is in response to the formal complaint you submitted on behalf of your clients, Levi and Shirley Lewis, alleging that the Jefferson County Health Department violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3-1 *et seq.*), when it failed to respond to your September 25, 2003, and October 20, 2003, requests for records. The Jefferson County Health Department (Department), by its Administrator, has submitted a response to your complaint, and a copy of that written response is enclosed for your reference. For the following reasons, I conclude that the Department did not violate the APRA when it failed to respond to the request made on September 25, 2003. With regard to the request made on October 20, 2003, the Department denies receipt of that request, and I am unable to find to the contrary based on the record before me. Assuming receipt, the Department would have been required to respond to the request in writing and within seven (7) days of receipt, and its failure to do so would constitute a violation of the APRA.

BACKGROUND

On September 25, 2003, your clients wrote to the Department's Administrator, Ralph Armand, and alleged that they have been unable to sell a parcel of property situated in Jefferson County because the Department denied the prospective buyers a permit to operate a business on that property. Your clients requested that Mr. Armand "put in writing, the reasons why [the Department] [would] not permit in any way, shape or fashion the utilization of [the] property" as indicated. The letter was addressed to the Jefferson County Health Department at its business address, and was sent by certified mail, return receipt requested. The return receipt shows that the letter was received by the Department on October 3, 2003. No response was forthcoming.

On October 20, 2003, you wrote a letter to the Jefferson County Health Officer, Dr. H. Schirmer Riley, at the Jefferson County Health Department. In that letter and on behalf of your clients you noted that the prospective buyers of the property had contacted the Department and were told that a "Health Permit" would not be issued for the property. Your letter requested copies of the investigations and inspections of the property that were the basis for that determination, and copies of any correspondence, documented decisions, or rulings related to the property. That letter was addressed to the health officer at the Department's business address, and is acknowledged to have been sent by regular mail. No answer was forthcoming.

On November 26, 2003, you wrote a second letter to the Jefferson County Health Officer. This letter was addressed to the health officer at the Department's business address, and a copy was also forwarded to his home address. This letter referenced and attached the prior requests and again requested documents relating to the property at issue and any inspections or investigations relating to that property. This letter too was sent by regular mail.

Also on November 26, 2003, you submitted a complaint to this office alleging that your clients were denied access to public records in violation of the APRA for the reason that your requests of September 25, 2003, and October 20, 2003, were not responded to in a timely manner. This office requested that the Department submit a response to your complaint. On December 1, 2003, the Department submitted a letter, addressed to you and copied to this office. In that letter the Department's Administrator responds¹ that he has visited the property on multiple occasions over the past 20 years and that the property cannot support a septic system. The Department's Administrator further states that the Department has no records relating to the property or any prior inspection of the property, but instead sets forth in his December 1, 2003, letter the reasons supporting the Department's determination. In further response to your complaint, the Department's Administrator advised this office that he did not recall receiving either the September 25, 2003, letter, or the October 20, 2003, letter requesting records. The Department's Administrator further indicated that he reviews mail delivered to the Department and which is addressed to the Department's health officer.

ANALYSIS

I find that the September 25, 2003, letter was received by the Department but was not a request for public records under the APRA. Accordingly, the Department's failure to respond to that letter was not a violation of the APRA. Although I find that the October 20, 2003, record was a proper request for public records under the APRA, I cannot determine from this record whether the request was received by the Department, and the Department denies that it received the request. Assuming receipt, the Department's failure to respond to the written request would violate the APRA. No complaint is alleged here challenging the Department's action on the November 26, 2003, request, and the Department's December 1, 2003, response satisfies its response obligations under the APRA.

¹ The Administrator advises this office that the December 1, 2003, letter is a response to both your November 26, 2003, request for records and your November 26, 2003, complaint to this office.

A public agency that receives a request for public records under the APRA has a specified period of time to respond to the request. IC 5-14-3-9. "Public record" is defined under the APRA and means any writing or other material that is created, received, maintained, used, or filed by or with the public agency and which is generated on paper or other tangible form or media. IC 5-14-3-2 (Defining "Public Record"). A timely response to a public records request does not mean that the public agency must produce or expressly decline to produce the documents or other material 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. When a public records request is made in writing and delivered to the public agency by mail or facsimile, the public agency is required to respond to that request within seven (7) days of *receipt* of the request. IC 5-14-3-9(b). If that period of time elapses without a response, the request is presumed denied. IC 5-14-3-9(b). When a public records request is denied, the requesting party may bring an action under the APRA (IC 5-14-3-9(d)), or may file a formal complaint with this office (IC 5-14-5-6). For requests tendered by mail, the date of *receipt* by the public agency is the operative trigger to begin the statutorily prescribed response time. IC 5-14-3-9(b). Consistent with the practice in other contexts, and absent evidence or allegation to the contrary, this office calculates and assumes *receipt* within three (3) days of the date of mailing (*Cf.* Ind. Trial Rule 6(E); Ind. Appellate Rule 25(C)).

With regard to the September 25, 2003, letter, I find that this was not a public records request under the APRA and thus the Department's failure to respond to the letter within the statutory time period was not a violation of that statute. Initially, I note that the Department Administrator denied knowledge of that letter; however, as indicated above it is clear that the Department received the letter and acknowledged receipt on October 3, 2003. That said, the letter did not request public records that were alleged to exist with the Department. Indeed, the letter requested that the Department *create* a record by composing the reasons for its alleged denial of a health permit to the prospective purchasers of property. A public agency is not required to respond to a request for information and thereby create a public record to satisfy that request where no record containing the requested information is already in existence. *See* IC 5-14-3-2 (Defining "Public Record"). The September 25, 2003, letter was a request for information and did not obligate a response under the APRA.

With regard to the October 20, 2003, letter, I find that this was a proper request for public records to a public agency under the APRA. The Department was required to respond to this written request in writing within seven (7) days of *receipt* of the request. IC 5-14-3-9(b). Assuming receipt within three (3) days of the date of mailing, the Department's response would have been due to be tendered no later than October 30, 2003. There is no dispute that the Department did not respond to the request at all, let alone within the statutory seven (7) day period. The Department's failure to respond would not be excused based on its contention that it does not have records that could be produced in response to the request; the APRA nonetheless requires a timely response to the request. In this case, the Department denies receipt of the request, and notes in support that it responded immediately when it received the more recent request on November 26, 2003. Based on the record before me I cannot determine whether the

Department received the October 20, 2003, request, and make no finding in that regard. However, for purposes of any subsequent action taken by the parties, I find that the request, if received by the Department, warranted a response pursuant to the APRA and the Department's failure to respond within the statutory time frame would constitute a violation of the APRA. IC 5-14-3-9(b).²

As noted above, no allegations are made challenging the Department's actions regarding the November 26, 2003, request for records, and the Department's subsequent response to that request appears to satisfy its response obligations under the APRA.

CONCLUSION

For the reasons set forth above, I conclude that the Department did not violate the APRA when it failed to respond to the request made on September 25, 2003. With regard to the request made on October 20, 2003, the Department denies receipt of that request, and I am unable to find to the contrary based on the record before me. Assuming receipt, the Department would have been required to respond to the request in writing and within seven (7) days of receipt, and its failure to do so would constitute a violation of the APRA.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Ralph Armand, Jefferson County Health Department

² I note that the December 1, 2003, letter responding to the November 26, 2003, request indicates that the Department does not maintain any public records that were responsive and could have been produced in response to the earlier request. The Department would not be in violation of the APRA for failing to produce records that it maintains do not exist. I further note that the December 1, 2003, letter went beyond the requirements of the APRA by creating, within that letter, a responsive record.