



STATE OF INDIANA

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December 6, 2016

Mr. David Garrett
10430 Driver Drive
Evansville, Indiana 47725

Re: Formal Complaint 16-FC-273; Alleged Violation of the Access to Public Records Act by the Evansville Water and Sewer Utility

Dear Mr. Garrett:

This advisory opinion is in response to your formal complaint alleging the Evansville Water and Sewer Utility ("EWSU") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-3-1 et. seq. EWSU has responded to your complaint via Mr. Dirck Stahl, Office of Corporation Counsel. His response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on October 18, 2016.

BACKGROUND

Your complaint dated October 18, 2016, alleges EWSU has violated the APRA by not providing requested documents pursuant to your request on September 19, 2016. Your request asked for the documents or reports which measure the amount of savings to the Utility as a result of replacing residential water meters as part of a Johnson Controls project. EWSU acknowledged your request the same day.

On October 17, 2016, you sent correspondence asking if you can expect the records by October 19, 2016. You received correspondence from EWSU via Ms. Vivian Holiday on October 20, 2016; stating the documents or reports which contain the results of testing -they do not currently have any such records. She did attach a schedule of the performance contract which addressed the measured and un-measured savings of the agreement. Also indicating Jonson Controls has not completed and submitted the reports per the contract requirements.

EWSU has responded stating the records which you have requested do not exist as Johnson Controls, Inc., ("JCI") has not yet provided them with the measurement data. JCI per the agreement is not required to report on the measured benefits until 60 days after the commencement "Guarantee Term" is defined

as commencing “on the first day of the month next following the Final Completion date for the Project.” The final completion of the project has not occurred, so JCI has not sent those reports to EWSU.

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 Indiana Code § 5-14-3-1*. The Evansville Water & Sewer Utility is a public agency for the purposes of the APRA. *See Indiana Code § 5-14-3-2(n)(1)*. Accordingly, any person has the right to inspect and copy the EWSU’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14-3-3(a)*.

I have held on many occasions a public agency does not have to create a document in order to satisfy a public records request. Generally, if a public agency has no records responsive to a public records request, the agency 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 which do not exist or are not maintained by the public agency is not a denial under the APRA. If the records do not exist, certainly JCI could not be required to produce a copy. Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. In this scenario, the EWSU has stated the records you requested do not exist because the project has not been completed. Pursuant to the agreement with JCI, they do not have to provide measurement data until 60 days after the final completion date for the project.

CONCLUSION

Based on the aforementioned, it is the Opinion of the Public Access Counselor the City of Evansville Water and Sewer Utility did not violate the Access to Public Records Act.

Regards,



Luke H. Britt
Public Access Counselor

Cc: Mr. Dirck Stahl, Esq.