



# STATE OF INDIANA

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August 20, 2014

Ms. DeAnna L. Poon, Esq.  
Indiana Utility Regulatory Commission  
101 West Washington Street, Suite 1500E  
Indianapolis, IN 46204

*Re: Informal Inquiry 14-INF-23; Public Utility Records*

Dear Ms. Poon:

This is in response to your informal inquiry regarding a request to inspect a National Code reference purchased by the Indiana Utility Regulatory Commission ("IURC"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1.

## **BACKGROUND**

On July 15, 2014, a law firm submitted a request to the IURC to review the IURC's copy of the 2012 National Electrical Safety Code ("NESC"). After review, the requestor sought copies of portions of the NESC. You did not deny the records; rather you are seeking clarification of whether copyright restrictions would prohibit the IURC from copying the records.

The Indiana Administrative Rules promulgated by the IURC incorporates by reference the 2002 NESC in 179 IAC 4-1-26. As the 2002 edition of the NESC has become part of the Indiana Administrative Code, you also are concerned the 2002 Edition may be subject to copying because it is incorporated by reference. The 2012 Edition is not incorporated in the Indiana Administrative Code.

On the cover page of the 2012 NESC, the publisher issues a copyright warning stating:

Public authorities are granted permission to republish the material herein in laws, regulations, administrative orders, ordinances, or similar documents. No other party may reproduce in any form, in an electronic

retrieval system or otherwise, any portion of this document, without the prior written permission of the publisher.

## DISCUSSION

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* Ind. Code § 5-14-3-1. The Indiana Utility Regulatory Commission is a public agency for the purposes of the APRA. *See* Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the IURC’s non-confidential public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise non-disclosable under the APRA. *See* Ind. Code § 5-14-3-3(a).

According to Ind. Code § 5-14-3-2(o), "Public record" means:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Indeed, a public agency would be hard-pressed to identify a piece of material maintained by that agency which *isn't* public record. The question becomes if it is a *disclosable* public record.

Under section 4 of the APRA, records that are required to be kept confidential by federal law may not be disclosed by a public agency. IC 5-14-3-4(a)(3). However, materials that are subject to a claim of copyright are not deemed to be “confidential” under the Copyright Act. Copyrighted materials are available for inspection and are not inherently confidential. That being said, copyright protection subsists in original works of authorship fixed in any tangible medium of expression. 17 U.S.C. §102(a). Copyright in a work vests initially in the author of the work. 17 U.S.C. §201(a).

The 2002 version of the NESC was incorporated into Indiana Administrative Code. It is unclear whether there was an agreement to do so between the publisher and the IURC or falls into a fair use exception, but this is a common practice of executive branches and legislatures. It stands to reason materials incorporated by reference in an administrative rule should be made available to the regulated community. If a person or entity is governed by a reference incorporated in code, then it should have unfettered access to the referenced document.

Consider *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc). This case held that where local law had incorporated a privately developed building code, a private party’s posting of the resulting local law did not violate copyright, because the

law was in the public domain. *Id.* at 793, 802. Again, it is unclear if the publisher intended for the NESC to become code (and therefore public domain) or gave consent for IURC to adopt it as authority. Because of the strong public policy favoring access, it is also my opinion that materials incorporated by reference should be available to the public – including copies upon request.

The 2012 Code, however, has not been incorporated into any Indiana code, rule or statute. It was purchased and maintained by the IURC and is likely referenced for policy decisions. The exclusivity of copyright is tempered by the concept of fair use. The fair use exception is found 17 U.S.C. §107. Portions of copyrighted material may be reproduced by individuals using the work for non-commercial use.

The individuals submitting the request is seeking to copy approximately 20 pages of the 2012 version, which is voluminous. To conclude if the request before you would meet the standard of fair use is a fact-based determination which would need to be evaluated by your legal team. It would depend on the size of the reproduction relative to the work as a whole; that nature of the work; the quality or importance of the copied section to the whole; and if the publisher would incur any economic or competitive disadvantage from the reproduction.

To mitigate any liability, perhaps the first step would be to contact the publisher of the NESC requesting permission to copy the portions of the code the requestor is seeking. If a good faith determination is made that the reproduction would violate copyright protection, it is my opinion that allowing inspection has satisfied the request and no copies would need to be made. If the publisher gives permission, I believe best practice would be to make copies for the requestor.

Please do not hesitate to contact me with any further questions.

Best regards,

A handwritten signature in black ink, appearing to read 'L. H. Britt', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor