

June 21, 2004

Mr. R. Perry Shipman
205 North Madison Avenue
P.O. Box 373
Fowler, Indiana 47922

*Re: Formal Complaint 04-FC-85; Alleged Denial of Access to Public Records
by the Town of Oxford*

Dear Mr. Shipman:

This is in response to your formal complaint alleging that the Town of Oxford (Town) violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3), when it denied your request for public records. The Town's response to your complaint is attached for your reference. For the reasons set forth below, I find that the Town's denial did not violate the APRA.

BACKGROUND

Your complaint alleges that you made an oral request for public records to the Town on May 20, 2004. Specifically, you requested a copy of a letter written by the Town's attorney to the Town Council regarding a matter you characterize as the "Wainscott/Woodward feud." You note that this letter was referenced in a public meeting of the Town Council. On the same day you made your oral request for this letter, the Town, through the Clerk-Treasurer, advised you that the record would not be produced. You subsequently received a letter from the Town's attorney, dated the same day you made your record request, effectively confirming the denial. You thereafter filed this complaint alleging that the letter from counsel to client was a public record subject to disclosure. The Town asserts that the request was properly denied because the letter is protected by the attorney-client privilege, and is therefore exempt from disclosure under the APRA.

ANALYSIS

Indiana Code 5-14-3-3(a) provides that any person has the right to inspect and copy the public records of any public agency. IC 5-14-3-3(a). Certainly, the Town is a public agency subject to the requirements of the APRA, and every record maintained by the Town, including the correspondence from the Town's attorney, is a "public record" of that agency. *See* IC 5-14-3-2 (defining public record). However, not every public record is subject to disclosure under the APRA. Indeed, Indiana Code 5-14-3-4 sets forth thirty-one (31) exemptions to disclosure of public records (IC 5-14-3-4), and Indiana Code 5-

14-3-3(a) subjects access to public records to the exemptions as set forth in that section (IC 5-14-3-3(a)). The Town asserts that the attorney-client privilege falls within these recognized exemptions, and applies to exempt disclosure of the letter at issue.

The source of the attorney-client privilege in Indiana is found in Indiana Code section 34-46-3-1, which provides that the confidential communications between attorney and client are privileged and may be kept confidential. IC 34-26-3-1(1); *see Buntin v. Becker*, 727 N.E.2d 734, 740-41 (Ind. Ct. App. 2000). And, the APRA exempts from disclosure any records declared confidential by state statute. IC 5-14-3-4(a)(1). Other exemptions may also apply to these communications. *See, e.g.*, IC 5-14-3-4(a)(8) (exempting records and information protected as confidential under court rules). Of course, the public agency must establish that the records at issue fall within this exemption, and the applicability of the privilege must be established as to each question asked or document sought. *Buntin*, 727 N.E.2d at 740-41; *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 702 (Ind. Ct. App. 1995). The essential prerequisites to invocation of the privilege are (1) the existence of an attorney-client relationship; and (2) that a confidential communication was involved. *Buntin*, 727 N.E.2d at 740-41; *Mayberry v. State*, 670 N.E.2d 1262, 1266 (Ind. 1996).

Here, there is no dispute that an attorney-client relationship exists between the author of the record at issue and the Town. Your claim for the record instead appears to be based on your assertion that the record was not maintained as confidential. You state:

I believe an attorney's letter to a client introduced and referenced by such client at a public meeting is a public document and a copy must be furnished to any one [*sic*] who so requests it under the Access to Public Record Statutes [*sic*] of the State of Indiana.

Certainly, a communication not treated as confidential cannot be treated as privileged. Just as certainly, a communication not maintained as confidential cannot be treated as privileged. This is true whether the communication is intentionally or inadvertently disclosed. *See, e.g.*, *Hayworth v. Schilli Leasing*, 669 N.E.2d 165, 169 (Ind. 1996); *Taylor v. Taylor*, 643 N.E.2d 893, 898 (Ind. 1994); *Lewis v. State*, 451 N.E.2d 50, 55 (Ind. 1983). However, there is not evidence here to support your claim that the letter was "introduced" at a public meeting and thus not maintained as confidential. While it was referenced at the meeting in support of action or, more specifically, inaction, taken by the Town Board, it is not the law in Indiana that the mere reference to and characterization of a communication from counsel to client or client to counsel waives the privilege as to the content of that communication. You have not provided any evidence to show that the letter was distributed or its contents otherwise disclosed to third parties. Moreover, it is clear that the Town, as client, intends that the letter be maintained as confidential. The Town communicated that intent through the oral response the Town Clerk-Treasurer made to your oral request, and through the subsequent but rather immediate written response you received from the Town's counsel. On these facts, I decline to find that the letter was not maintained as a confidential communication from

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attorney to client. The attorney-client privilege applies in this matter to exempt the letter from production under the APRA.

CONCLUSION

For the reasons set forth above, I find that the Town's denial did not violate the APRA.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Jud Barce