



STATE OF INDIANA

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September 29, 2009

Mr. Garry Coleman
1004 Lismore South Drive, Apartment C
Indianapolis, IN 46227-9375

Re: Formal Complaint 09-FC-195; Alleged Violation of the Access to Public Records Act by the State Personnel Department

Dear Mr. Coleman:

This advisory opinion is in response to your formal complaint alleging the Indiana State Personnel Department ("SPD") violated the Access to Public Records Act ("APRA"), Ind. Code §5-14-3-1 *et seq.*, when it refused to produce records that SPD claimed were protected by the attorney work product doctrine and attorney-client privilege. For the following reasons, my opinion is that SPD did not violate the APRA.

BACKGROUND

The relevant, undisputed facts are as follows. You sent an email to SPD on July 6, 2009, requesting access to records concerning your former employment with SPD. On June 13, 2009, SPD attorney Keith Beesley responded to your request with a letter enclosing sixty-two (62) pages of documents, including your personnel file and documents relating to unemployment insurance. Mr. Beesley further informed you that documents protected by the attorney work product doctrine and attorney-client privilege were withheld pursuant to I.C. §5-14-3-4(a)(8) and I.C. §5-14-3-4(b)(2). After SPD refused to provide you with additional information about the withheld documents, you filed your complaint with this office alleging that SPD violated the APRA by refusing to provide "justification" for its denial of access.

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." I.C. §5-14-3-1. Any person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are exempt from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-

3(a). The SPD is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the SPD during regular business hours unless the public records are exempt under the APRA. I.C. §5-14-3-3(a).

One category of confidential public records is those declared confidential by state statute. *See* I.C. §5-14-3-4(a)(1). Indiana Code §34-46-3-1 provides a statutory privilege regarding attorney and client communications. Indiana courts have also recognized the confidentiality of such communications:

The privilege provides that when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as confidential. The privilege applies to all communications to an attorney for the purpose of obtaining professional legal advice or aid regarding the client's rights and liabilities.

Hueck v. State, 590 N.E.2d 581, 584. (Citations omitted.) “Information subject to the attorney client privilege retains its privileged character until the client has consented to its disclosure.” *Mayberry v. State*, 670 N.E.2d 1262, 1267 (Ind. 1996), *citing Key v. State*, 132 N.E.2d 143, 145 (Ind. 1956). Moreover, the Indiana Court of Appeals has held that government agencies may rely on the attorney-client privilege when they communicate with their attorneys on business within the scope of the attorney’s profession. *Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley*, 580 N.E.2d 371 (Ind. Ct. App. 1991). Therefore, the SPD may properly withhold from disclosure records that are subject to the attorney client privilege.

Pursuant to I.C. §5-14-3-4(b)(2) a public agency has the discretion to withhold a record that is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

“Work product of an attorney” means information compiled by an attorney in reasonable anticipation of litigation and includes the attorney’s:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney’s opinions, theories, or conclusions.

I.C. §5-14-3-2(p). If the records you sought constitute the work product of an attorney, the SPD acted within its discretion when it denied your request for access to them.

Regarding your request for a list of each withheld document, nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. As

such, it is my opinion the SPD has not violated the APRA by denying your request for a record that does not exist.

You further allege that the SPD must somehow justify its reliance upon the work product and attorney-client privilege exemptions of the APRA. The APRA, however, requires merely that SPD's denial of your written request for records be in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record(s), and the name and the title or position of the person responsible for the denial. I.C. §5-14-3-9(c). Thus, the SPD's letter of June 13, 2009 met its obligations under the APRA.

To the extent a record contains disclosable and non-disclosable information, the APRA requires an agency to separate the material that may be disclosed and make it available. I.C. §5-14-3-6. If any of the withheld records contain disclosable and non-disclosable information, I urge the SPD to redact the confidential material and make the remainder available to you. However, because no information before me suggests that SPD has improperly withheld otherwise disclosable information, I cannot find that SPD violated the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the SPD did not violated the APRA when it denied you access to records constituting the work product of an attorney pursuant to I.C. §5-14-3-4(b)(2) and privileged communications between attorney and client pursuant to I.C. §5-14-3-4(a)(1) and I.C. §34-46-3-1.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Keith Beesley, Indiana State Personnel Department