



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
ANDREW J. KOSSACK

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
[www.IN.gov/pac](http://www.IN.gov/pac)

October 14, 2009

Mr. Gary S. Yackimicki  
140 Plaza Chica  
Greenwood, IN 46143

*Re: Formal Complaint 09-FC-206; Alleged Violation of the Access to Public Records Act by the State Board of Accounts*

Dear Mr. Yackimicki:

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

## BACKGROUND

According to your complaint, SBA denied your request for access to emails between State Personnel Department General Counsel Keith Beesley and John Jacob of SBA. You acknowledge that SBA has disclosed various other emails in response to your requests. You argue, however, that SBA has improperly relied upon the attorney-client privilege in refusing to provide you with the Beesley/Jacob emails.

My office forwarded a copy of your complaint to SBA. SBA General Counsel Paul Lottes responded to your allegations by stating that the Beesley/Jacob emails are covered by the attorney-client privilege as set forth in I.C. § 34-46-3-1 and, therefore, excepted from disclosure pursuant to I.C. § 5-14-3-4(a)(1). Mr. Lottes further states that Mr. Beesley has been working in his capacity as the State's attorney with respect to you and, therefore, communications between him and Mr. Jacob -- a State employee -- regarding your situation are covered by the attorney-client privilege.

## 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 SBA 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 SBA 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 consists of records 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 (Ind. Ct. App. 1992) (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, it is my opinion that SBA did not violate the APRA if it withheld attorney-client communications between Mr. Beesley and Mr. Jacob because attorney-client privileged communications are exempt from disclosure under I.C. § 34-46-3-1 and I.C. § 5-14-3-4(a)(1).

#### CONCLUSION

For the foregoing reasons, it is my opinion that SBA did not violate the APRA if it denied you access to privileged communications pursuant to I.C. § 34-46-3-1 and I.C. § 5-14-3-4(a)(1).

Best regards,



Andrew J. Kossack  
Public Access Counselor

Cc: Paul Lottes, State Board of Accounts