



# STATE OF INDIANA

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May 3, 2010

Mr. Thomas E. Mason  
4800 S. 930 E.  
Wolcottville, IN 46795

*Re: Formal Complaint 10-FC-83; Alleged Violation of the Access to  
Public Records Act by the LaGrange County Auditor*

Dear Mr. Mason:

This advisory opinion is in response to your formal complaint<sup>1</sup> alleging the LaGrange County Auditor (the "Auditor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. A copy of the Auditor's response to your complaint is enclosed.

## BACKGROUND

In your complaint, you allege that you requested a copy of the legal fees submitted to the Auditor by Beers, Mallers, Backs & Salin LLP (the "Firm"). The Firm responded to your request and advised you that all or part of the documents may be withheld or redacted and cited to the APRA's exceptions for attorney-client privileged communications and attorney work product. You further state that "[f]or the past 15+ years The Firm has submitted to the [Auditor] like billings minus any omissions or redactions." [Complaint at 1]. However, you allege that the Firm's policy is now "to do whatever is necessary to restrict any and all information that used to be available to the public through The Firm's standard billing practices and now block the flow of information under the guise of [the aforementioned exceptions]." You also note that surrounding counties routinely release unredacted invoices in response to APRA requests.

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<sup>1</sup> I note that the Auditor has questioned whether or not this complaint was filed within the required 30-day deadline after the denial of access occurred. The Auditor argues that the complaint was not timely because Mr. Mason filed this complaint on April 5, 2010, and its initial letter to Mr. Mason was dated March 4, 2010. However, the Auditor's March 4th letter merely noted that the Auditor reserved the right to redact all nondisclosable information prior to Mr. Mason inspecting the invoices. Mr. Mason did not receive copies of the invoices until March 8th, at which time he learned that portions of the same had been redacted. I view the date of denial of access as March 8th because there is nothing to indicate that the Auditor explicitly refused to provide Mr. Mason with any information before March 8th. Because Mr. Mason filed his complaint within 30 days of March 8th, it is my opinion that his complaint was timely.

My office forwarded a copy of your complaint to the Auditor for a response. Attorney Kurt R. Bachman responded on behalf of the Auditor. Mr. Bachman denies that the Auditor has violated the APRA. He notes that the legal invoices that the Firm submits to the Auditor are submitted in unredacted form. They contain, among other information, the dates of service, services rendered, and the billing amount due. Mr. Bachman claims that the Auditor provided you with the same redacted documents that have been provided to all other persons who have made APRA requests for billing invoices. Further, he claims that the redacted invoices contain information that “reveals the County’s motivation for creating the [attorney-client] relationship, possible litigation strategy, the particular information researched, descriptions or summary of the actual communication had with the County or its agents, and descriptions of the advice provided to the County.” Other redactions included “information compiled by the County Attorney in reasonable anticipation of litigation, including the attorney’s notes or diary entries and statements taken during interviews of prospective witnesses, as well as the attorney’s opinions, theories, or conclusions.” [*Id.*]. Mr. Bachman maintains that this sort of information was properly redacted under the attorney-client privilege and work product exceptions to the APRA.

Mr. Bachman also denies that the Auditor violated the APRA by virtue of the fact that it previously released unredacted copies of invoices. He notes that the redacted invoices comply with *Opinion of the Public Access Counselor 08-FC-24* insofar as they include the dates of service, dollar amounts, remittance and provider information, and references to the general type and nature of the work performed. Finally, Mr. Bachman acknowledges that the redacted invoices were referenced at a public meeting, but that no waiver occurred of the confidentiality of the invoices because “there is no indication that the [i]nvoices were introduced, distributed, or their entire contents otherwise disclosed to third parties.” He notes that the Auditor prepared a one-page summary of the invoices that was reviewed and discussed at a public meeting and argues that that fact indicates an intention to maintain the confidentiality of the more detailed invoices.

## ANALYSIS

The public policy of the APRA states, “[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. The Auditor is clearly a “public agency” under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Auditor’s public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Here, the Auditor has redacted information from invoices and cited to the attorney-client privilege and attorney work product exceptions to the APRA as the legal basis for doing so. Under the APRA, one category of confidential public record includes those 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, and 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 Auditor may properly withhold from disclosure records that are subject to the attorney client privilege.

Moreover, 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). Thus, if the records you sought constitute the work product of an attorney, the Auditor acted within its discretion when it denied your request for access to them.

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. Here, the Auditor has provided you with redacted invoices that contain the dates of service, some narratives describing the services provided, costs of services, and remittance information. Because no information before me suggests that the Auditor has improperly withheld otherwise disclosable information, I cannot find that the Auditor violated the APRA. However, I note that if this matter were to proceed to judicial review, a court would be able to conduct an inspection of unredacted versions of the invoices and decide whether or not the redacted information was properly or

improperly withheld. In such a case, section 9 of the APRA notes that the Auditor would bear the burden of proof to sustain its denial of access.

Finally, in citing to the County's previous practice of fully disclosing invoices and the practices of surrounding counties<sup>2</sup>, Mr. Mason appears to allege that the Auditor has waived its right to assert its discretion to withhold attorney-client privileged information and attorney work product at this time. Indeed, the Court of Appeals has recognized that a public agency may waive an applicable APRA exception if the agency allowed access to its material to one party and denied access to another based on an APRA exception. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003). That decision, however, applied to an agency that released certain records and then subsequently refused another individual's request for access to the *exact same records*. Here, however, there is nothing to indicate that the Auditor has previously released unredacted versions of the invoices that it released to you. I can find no authority from any previous public access counselor that would lead me to believe the Auditor has waived its discretion to withhold documents that have not been previously disclosed to another requester. Consequently, it is my opinion that the Auditor did not waive<sup>3</sup> its right to withhold privileged information simply because it released similar kinds of information in response to previous requests.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Auditor did not violate the APRA.

Best regards,



Andrew J. Kossack  
Public Access Counselor

Cc: Kurt R. Bachman

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<sup>2</sup> The fact that surrounding counties release unredacted versions of attorney invoices does not mean that LaGrange County must also do so. Because the exceptions cited by the Auditor are discretionary, public agencies that cite to them may or may not withhold applicable information at their choosing. If a public agency exercises its discretion to withhold information in a manner that the public finds objectionable, the public's remedies -- for better or worse -- lie with the ballot box rather than the public access counselor.

<sup>3</sup> I also agree with the Auditor that the fact that the invoices were referenced at a public meeting is not enough to constitute a waiver of the applicable privileges cited by the Auditor. See *Opinion of the Public Access Counselor 04-FC-85*.