STATE OF INDIANA

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November 28, 2011

Amy K. Pohl
Jones Day
500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219

Re: Formal Complaint 11-FC-275; Alleged Violation of the Access to Public Records Act by the Office of the Attorney General

Dear Ms. Pohl:

This advisory opinion is in response to your formal complaint alleging the Office of the Attorney General ("Attorney General") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Matt Light, Chief Counsel for Advisory and ADR Services, responded on behalf of the Attorney General. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on July 21, 2011 you submitted a public records request pursuant to the APRA to the Attorney General for records referencing the federal Higher Education Act, 20 UU.S.C. § 1094 *et seq*., and the United States Department of Education's implementing regulations, 34 C.F.R. §§ 5.20 & 5.21, created during or after 2001. On July 26, 2011, the Attorney General acknowledged receipt of your request in writing. On September 6, 2011, you submitted a written inquiry to the Attorney General as to the status of your July 21, 2011 request. On September 30, 2011, the Attorney General provided all records that were responsive to your request, pursuant to the receipt of payment of the respective copying fees. The Attorney General provided that certain documents were withheld pursuant to I.C. § 5-15-3-4(b)(2), I.C. § 5-14-3-4(a)(1) referencing I.C. § 34-46-3-1, and I.C. § 4-6-9-4(b); and that as to specific parts of your request, it did not have any records that were responsive.

On October 5, 2011, you submitted further correspondence to the Attorney General requesting clarification of certain aspects of the September 30, 2011 response and a privilege log identifying the records purportedly withheld by the Attorney General on grounds of "work product." As of October 28, 2011, the date you filed your formal

complaint with the Public Access Counselor, you had yet to receive a response from the Attorney General to your October 5, 2011 correspondence.

You advise that the Attorney General may not cite I.C. § 5-14-3-4(b)(2) in denying certain parts of your request as the exception is only applicable to records that were part of or created in connection with or in anticipation of litigation. Two of the requests made of the Attorney General specifically requested records provided to non-litigants, outside the State of Indiana, outside the Attorney General's Office, and outside the scope of any particular litigation matter. Such external communications and documents are not protected from disclosure under the attorney-work product doctrine, citing *JWP Zack, Inc. v. Hoosier Energy Rural Elec. Co-op, Inc.,* 709 N.E.2d 336, 342 (Ind. App. 1999) and *Shell Oil Co. v. Internal Revenue Service*, 772 F. Supp. 202, 2011 (D. Del. 1991). Any factual material contained in records relating to the "fact finding working group" outside the Attorney General's Office is required to be disclosed, even if other aspects of the records are privileged.

Further, even if certain privileges possibly exist, the Attorney General waived these privileges by virtue of the Attorney General's intervention in *United States ex rel. Washington v. Education Management Corporation, et al*. Privileges are impliedly waived as to information or documents placed at issue in a litigation matter. *See, e.g., In re Pharmaceutical Industry Average Wholesale Price Litigation*, 254 F.R.D. 35, 39-43 (D. Mass. 2008); *Blue Lake Forest Products, Inc. v. United States*, 75 Fed. Cl. 779, 783-784 (Fed. Cl. 2007); *Children First Foundation, Inc. v. Martinez*, No. 1:04-cv-0927, 2007 WL 4344915, at * 7 (N.D.N.Y. Dec. 10, 2007). As the privileges are already waived in terms of litigation, they are likewise waiver for the purposes of the APRA.

In addition, the Attorney General should at a minimum provided a privilege log which itemizes the particular records withheld on grounds of "attorney work product." Such a log or index is routinely required for Freedom of Information Act ("FOIA") Requests.

In response to your formal complaint, Mr. Light provided that certain documents that were responsive to your request were withheld pursuant to I.C. § 5-14-3-4(b)(2) of the APRA. The records contained information compiled by an attorney in reasonable anticipation of litigation, more specifically litigation to which the state ultimately intervened. The exception to the APRA protects all information compiled in reasonably anticipation of litigation, without qualification. Further, the Attorney General has not waived the privilege or voluntarily disclosed the records to third parties. Issues relating to the discovery of information in litigation are not applicable here as you have made your request via the APRA.

As to the request for a privilege log, the APRA and its provisions relate to public records requests, not the FOIA or case law interpreting the FOIA. A privilege log or *Vaughn* index is not required to be provided pursuant to the APRA. As to the request for the Public Access Counselor to conduct an in-camera review of the withheld records,

such a review would jeopardize the work product privilege and constitute a waiver of the privilege.

As to the case law cited in your formal complaint, the Attorney General has not voluntarily disclosed the records at issue to a third party or waived any privilege under the APRA, has not cited the deliberative materials exception to the APRA in denying your request, the records at issue do not contain a hybrid combination of privileged and non-privileged material, and you made your request via the APRA, not the discovery process. As such, your reliance on the cases that have been cited is either misplaced or irrelevant. Further, *Children First Foundation, Inc. v. Martinez*, held that in most instances, the work product doctrine extends to facts, but those facts can be readily revealed upon a showing of substantial need. *Children First Foundation*, 2007 WL 4344915 at 12. A document which has been prepared of the prospect of litigation will not lose its protection under the work product doctrine, even though it may assist in business or policy decisions. *Id*.

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." *See* I.C. § 5-14-3-1. The Attorney General is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Attorney General's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Attorney General responded to your request within the timelines provided by section 9 of the APRA.

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). The APRA does not obligate public agencies to

create any records in response to a public records request, including a privilege log. *See Opinion of the Public Access Counselor 09-FC-285.* I note the following analysis from Counselor O'Connor in a prior advisory opinion:

> Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. (emphasis added). *Opinions of the Public Access Counselor 01-FC-47 and 09-FC-285.*

As the Attorney General has satisfied its obligations under section 9(c) of the APRA, I agree with Counselors O'Connor and Neal's analysis. The Attorney General is not required to provide you with any additional information at this point. If, however, this matter proceeded to litigation before a court, the burden of proof would indeed be on Attorney General to sustain its denial. *See* I.C. § 5-14-3-9(f). As such, it is my opinion that the Attorney General did not violate the APRA by failing to create and disclose a privilege log in response to your public records request.

One category of nondisclosable public records consists of records declared confidential by a state statute. *See* I.C. § 5-14-3-4(a)(1). I.C. § 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).

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).

The Attorney General has provided that the records at issue were properly withheld pursuant to I.C. § 5-14-3-4(b)(2), were compiled in reasonable anticipation of litigation, and at no time has it waived the work produced exception, or voluntarily disclosed the records. You disagree with these assertions. The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* If the records you sought constitute the work product of an attorney, compiled in reasonable anticipation of litigation, the Attorney General properly exercised its discretion under I.C. § 5-14-3-4(b)(2) in denying your request. Alternatively, if the records do not fall within the attorney-work product exception, the Attorney General acted contrary to the APRA in denying your request. I would further note that the court, not the public access counselor, has the authority to conduct an in camera review to determine whether any records may be withheld under the APRA. *See* I.C. § 5-14-3-9(h).

The APRA exists to allow persons access to inspect and copy records of a public agency. The APRA operates independently of the discovery process. *See Opinion of the Public Access Counselor 02-FC-38; 08-FC-24; and 09-FC-94.* The Trial Rules do not prohibit a party in litigation from making a public records request under the APRA. Accordingly, case law concerning discovery related matters and requests would generally not be applicable in reviewing a request made pursuant to the APRA. In addition, the Attorney General did not cite I.C. § 5-14-3-4(b)(6), commonly referred to as the deliberative materials exception, in denying your request. Case law that has interpreted

requests made pursuant to FOIA and the applicability of the deliberative materials exception may provide guidance, but are not binding on a public agency in responding to a request made under the APRA where the public agency has not availed itself to said exception.

The APRA provides that if a public record contains disclosable and nondisclosable information, the public agency, shall, upon receipt of a request, separate the material that may be disclosed and make it available for inspection and copying. *See* I.C. § 5-14-3-6(a). The Indiana Court of Appeals held the following in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.,* 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate discloseable from non-discloseable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-discloseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
>
> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id*. at 913-14.

The University denied a request for a public record pursuant, in part, to I.C. § 5-14-3-4(b)(6). *Id. a*t 909-910. Here, the Attorney General has not cited to I.C. § 5-14-3-4(b)(6) in denying your request. However, I.C. § 5-14-3-6(a) is not exclusively applicable to the deliberative materials exception found in (b)(6) and applies to all exceptions found within the APRA. However, the Attorney General has provided that the request here does not involve records that contain a combination of privileged and non-privileged information; the records were withheld as the work product of attorney pursuant to I.C. § 5-14-3-4(b)(2). As such, if the Attorney General properly considered and applied I.C. § 5-14-3-6(a) in conjunction with I.C. § 5-14-3-4(b)(2) in denying your request, it has not acted contrary to the APRA.

CONCLUSION

For the foregoing reasons, if the records that were requested constitute the work product of an attorney pursuant to I.C. § 5-14-3-4(b)(2) and the Attorney General properly considered I.C. § 5-14-3-6(a) in denying your request, it is my opinion that the Attorney General did not act contrary to the APRA.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Matt Light