

---

**OPINION OF THE PUBLIC ACCESS COUNSELOR**

---

AARON TERR,  
*Complainant,*

v.

OFFICE OF THE ATTORNEY GENERAL,  
*Respondent.*

---

Formal Complaint No.  
22-FC-41

---

Luke H. Britt  
Public Access Counselor

---

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Office of the Attorney General violated the Access to Public Records Act.<sup>1</sup> Advisory Division Chief Counsel John Walls filed an answer on behalf of the office. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on March 14, 2022.

---

<sup>1</sup> Ind. Code § 5-14-3-1-10.

## **BACKGROUND**

This case involves a dispute over access to public records related to the Office of the Attorney General's (OAG) investigation into Valparaiso University's Confucius Institute.

On December 9, 2021, Aaron Terr (Complainant), a Senior Program Officer with the Foundation for Individual Rights in Education (FIRE), filed a public records request with the OAG seeking the following:

Copies of all subpoenas, interrogatories, document requests, and other civil investigative demands or communications issued to Valparaiso University in connection with the Office of the Indiana Attorney Generals investigation into Valparaiso University's association with the Confucius Institutes.

The OAG acknowledged Terr's request on December 20, 2021. On February 14, 2022, the OAG denied Terr's request. The agency concluded the records were excepted from disclosure under the Access to Public Records Act (APRA) in accordance with Indiana Code section 5-14-3-4(a)(1) and Indiana Code section 5-14-3-4(b)(2).

On March 14, 2022, Terr filed a formal complaint with this office alleging the OAG violated APRA by improperly applying the law's disclosure exceptions.

On April 1, 2022, the OAG filed an answer to Terr's complaint. The agency argues that it properly applied the disclosure exceptions. Specifically, the OAG contends the requested documents are confidential because they constitute material obtained pursuant to an investigative demand under Indiana Code section 4-3-6-9; and thus, the records are

exempt from disclosure under APRA.<sup>2</sup> Additionally, the agency contends it has discretion under APRA to withhold the records from disclosure because they are the work product of an attorney. *See* Ind. Code § 5-14-3-4(b)(2).

## ANALYSIS

### 1. The Access to Public Records Act

The Access to Public Records Act (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.” Ind. Code § 5-14-3-1. The Office of the Attorney General (OAG) is a public agency for purposes of APRA; and therefore, subject to the law’s requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the OAG’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

### 2. Attorney work product

The request itself seeks discovery materials and investigative demands issued to Valparaiso University.

Under APRA, the “work product of an attorney” is exempted from disclosure at the discretion of a public agency. Ind. Code § 5-14-3-4(b)(2). “Work product of an attorney”

---

<sup>2</sup> *See* Ind. Code § 5-14-3-4(a)(1).

means “information compiled by an attorney in reasonable anticipation of litigation,” which 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.

Ind. Code § 5-14-3-2(u). The work product exception does not merely apply to litigation that has been threatened in writing. It may apply when an attorney—in their independent legal judgment—reasonably expects litigation to occur.

The purpose of this exception is to protect litigation strategy and not tip an agency’s hand to a potential adversarial opponent. It also preserves the ability of a public sector attorney to express opinion or strategy internally or with a client. While this provision applies to the OAG’s office, this public records request does not, expressly or tacitly, seek any of this type of material.

Here, Terr seeks documentation already sent to Valparaiso University. The requested material—to the extent it exists—has been externalized to the adversarial opponent and loses the quality of confidentiality or privilege because the mental impressions or legal theories of the attorneys have already been projected to the opposing party.

The OAG cites the confidentiality of grand jury subpoenas as an analogy, but notably this is distinguishable from the insular, self-contained, and statutorily confidential grand jury proceedings and records.

### **3. OAG investigative demands**

The OAG also argues that Terr is seeking records that have been declared confidential by the legislature as materials obtained pursuant to an investigative demand.

If the OAG has reasonable cause to believe that a third party may be in possession of documentary material to support an investigation of certain violations, it may issue discovery-type demands in accordance with Indiana Code section 4-6-3-3.

Indiana Code section 4-6-3-9 mandates that the Attorney General keep answers and documentary materials obtained from those investigative demands confidential.

Again, Terr requested the investigative demand itself and not the answer. In other words, Terr requested the call but not the response.

The OAG argues that certain answers or materials could be reverse engineered from the investigative demands themselves. Even if that is true, the law is silent as it relates to the demand itself. The statute only protects the response. If the legislature intended to treat the entirety of the investigative demand process as a vacuum, it could have done so. However, as written, that does not appear to be the case.

The statute lists materials or testimony that have already been provided but is silent on the investigative demand itself.

## **CONCLUSION**

Based on the foregoing, it is the opinion of this office that, absent a court order to the contrary, the Office of the Attorney General must disclose the investigative demand records served upon Valparaiso University, but not the answers or the documentary materials obtained in response.



Luke H. Britt  
Public Access Counselor

Issued: May 18, 2022