



STATE OF INDIANA

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December 30, 2008

Dorene Philpot
1140 North High School Road
Indianapolis, Indiana 46224

Re: Formal Complaint 08-FC-243; Alleged Violation of the Access to Public Records Act by the Hamilton Southeastern School Corporation and Hamilton-Boone-Madison Special Services Cooperative

Dear Ms. Philpot:

This advisory opinion is in response to your formal complaint alleging the Hamilton Southeastern School Corporation and Hamilton-Boone-Madison Special Services Cooperative (collectively, the "School") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. A copy of the School's response to the complaint is enclosed. In my opinion the School may not withhold the entirety of the invoices from disclosure on the basis of the two exceptions cited.

BACKGROUND

You filed the present complaint on December 1, 2008. You allege that on October 14, 2008 you requested a number of records from the School. You received a letter from the School dated November 13 denying you access to those records. You do not provide a narrative detailing the nature of your complaint, so I assume you allege the School cannot assert the attorney work product or attorney-client privilege communication exceptions to disclosure for the attorney invoice records you have requested. You requested priority status for the complaint but did not allege any of the circumstances for priority status provided in 62 IAC 1-1-3, so priority status was not granted.

The School responded to the complaint by letter dated December 12 from attorney Andrew Manna. The School indicates that your request comes in the context of an actively litigated administrative hearing and that you are counsel for the parent in the litigation. The School contends that it provided you a response to the October 14 request on October 16. The School then provided a more detailed response on November 13. The School contends this issue must be viewed in the context of the ongoing litigation, asserting that "[r]ecords pertaining to pending litigation that mean little to a non-party

nevertheless have the potential to reveal far more than a party-opponent in the litigation is entitled to know.”

The School indicates that its defense in the litigation is provided by Liberty Mutual Group (“Liberty”). Bose McKinney & Evans LLP, which serves as counsel, must support its billing with a detailed narrative describing each activity of counsel in the defense of the covered matter. The School contends these narrative entries are akin to the defense counsel’s daily journal or defense plan for litigation. The School argues there is no equivalent of APRA disclosure for billing while the matter is pending.

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 School is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the School during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A “public record” means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. § 5-14-3-2(n). The issue presented here is not whether the records are public records created, received, retained, maintained, or filed by or with the School. The School does not argue that the records are not records maintained by the School. Rather, the School argues that the APRA request must be considered in the context of the ongoing litigation. While I understand the School’s argument, the APRA does not provide that requests must be considered differently when such requests are made during ongoing litigation.

This office has addressed the issue of requests for access to attorney invoices on several occasions. Counselor O’Connor addressed the issue *Opinion of the Public Access Counselor 00-FC-16*, issued July 10, 2000. I have also addressed the issue and cited Counselor O’Connor’s opinion. Rather than reiterate the analysis, I am enclosing a copy of an informal opinion I issued in response to an informal inquiry you submitted. In the opinion, dated September 28, 2007, I agreed with Counselor O’Connor’s opinion that an invoice does not contain *only* confidential information. I further indicate my opinion that an invoice in its entirety is not attorney work product. As such, it is my opinion attorney invoices maintained by public agencies are public records.

I would reiterate, though, my opinion from September 28, 2007, that certain information contained on the invoices may indeed be nondisclosable at the discretion of the agency. For instance, the School describes narrative entries contained in the invoices which are “akin to the defense counsel’s daily journal or defense plan for the litigation.” Certainly this information may fall under the attorney work product exception to

disclosure found in I.C. § 5-14-3-4(b)(2)(A) or the exception for attorney-client confidential communications found at I.C. § 34-36-3-2 (and therefore nondisclosable pursuant to I.C. § 5-14-3-4(a)(1)).

The School cites *Opinion of the Public Access Counselor 06-FC-62* as an opinion from this office which would allow the School to withhold the records on the basis of the attorney-client confidential communication exception. In that opinion, Karen Davis opined as follows:

Indiana Code 34-46-3-1 provides that communications between an attorney and her client are confidential. Hence, if the diary entries on the billing statements contain or reveal communications between an attorney and the client that are within the privilege, those entries may be withheld under IC 5-14-3-4(a)(1). In addition, any diary entries that reveal work product of an attorney may be withheld in the public agency's discretion. IC 5-14-3-4(b)(2).

As I read this opinion, I believe Counselor Davis expressed an opinion similar to that of Counselor O'Connor and similar to the opinion I provide today, that "the entries" which contain confidential or otherwise nondisclosable information may be withheld.

The APRA requires that when a record contains disclosable and nondisclosable information, the disclosable information must be separated, and access to that portion of the record provided. I.C. § 5-14-3-6. While a majority of the information contained in the records at issue may be information which may or must be withheld from disclosure, it is my opinion that any portion of the invoices which do not constitute attorney work product or attorney-client confidential communication (e.g. invoice dollar amounts, remittance information, and similar information) must be disclosed.

CONCLUSION

For the foregoing reasons, it is my opinion the School may not withhold the entirety of the invoices from disclosure on the basis of the two exceptions cited.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Andrew Manna, Bose McKinney & Evans LLP