



STATE OF INDIANA

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May 18, 2017

William Michael Lawrence
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Re: Informal Inquiry 17-INF-08; Attorney Invoices

Dear Mr. Lawrence,

This is in response to your informal inquiry regarding what information is subject to redaction on attorney invoices submitted to a City. I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 et. seq.

BACKGROUND

You seek a determination as to what types of information would be subject to redaction contained in attorney invoices submitted to a public agency for remuneration. Pursuant to your public records request, the City Attorney redacted the date, time, description of services, and hourly rate paid of each invoice. You are inquiring as to the propriety of this action.

ANALYSIS

According to the APRA, Ind. Code § 5-14-3-1, Indiana public policy provides that, "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees."

Here, the city attorney has redacted information from invoices and claimed confidentiality 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 Ind. Code §5-14-3-4(a)(1)*. Ind. 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 city attorney may properly withhold from disclosure records which are subject to the attorney-client privilege.

Furthermore, pursuant to Ind. Code §5-14-3-4(b)(2) a public agency has the discretion to withhold a record which 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.

Ind. Code § 5-14-3-2(p).

Thus, if the invoices constitute the work product of an attorney, the invoices may be redacted by the city. 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. *See Ind. Code §5-14-3-6*.

The question becomes whether the redacted information in the invoices provided to you should have been disclosed or withheld. Certainly not everything in an itemization bill is going to be attorney-client communication. That kind of communication is advice, opinion, recommendation, legal analysis, etc. It would not include the fact of representation or the subject of the communication, facts, and the like. “The purpose of the [work product] privilege is to protect the mental impressions and legal theories of attorneys and their clients”, *Outback Steakhouse of Florida, Inc. v. Markley*, 856 N.E.2d 65, 78 (Ind. 2006).

Information like the hourly rate paid or the time and date services were performed generally would not be considered mental impressions or legal theories. They are facts which would not, in my opinion, jeopardize any legal process or compromise the bond between the attorney and client. So long as the description of services on the invoices did not include advice, opinions, recommendations, legal analysis, and the like, it would probably not fall under the statutory exemption for disclosure.

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 pursuant to Ind. Code § 5-14-3-9(e). In such a case, the APRA states the city would bear the burden of proof to sustain its denial of access. And so it is with this Office either, the burden of non-disclosure is, and should be, a high bar.

Please do not hesitate to contact me with any further questions.

Best regards,

A handwritten signature in black ink, appearing to read 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. Delmar Weldon, Esq.