



STATE OF INDIANA

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October 21, 2010

Ms. Paulene Poparad
The Chesterton Tribune
Via email to bprad@comcast.net

Re: Informal Inquiry 10-INF-47: Contracts for Legal Services

Dear Ms. Poparad:

This is in response to your informal inquiry regarding whether "a simple contract for legal services with a public agency can be withheld from inspection by the public." Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"). I have enclosed the response of the Burns Harbor Town Council ("Town") for your reference.

By way of background, your inquiry concerns the Town's hiring of the law firm Ice Miller LLP (the "Firm") to handle the Town's appeal of a decision by the Board of Zoning Appeals. You state that the associate town attorney informed you that the Town's legal services contract with the Firm "might be a privileged attorney/client document and therefore not disclosable to the public." The attorney acknowledged that the Firm's claims for payment would be disclosable public records, but no such documents have been submitted to the Town yet. You ask whether the contract between the Town and the Firm is disclosable under the APRA.

Attorney Charles F.G. Parkinson responded to your inquiry on behalf of the Town. Mr. Parkinson states that no written contract between the Firm and the Town currently exists. As to whether such a record would be disclosable if it did exist, Mr. Parkinson argues that such an analysis depends on the nature of the contract. Due to the fact that no such contract exists here, Mr. Parkinson views the question as premature.

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." Ind. Code § 5-14-3-1. The Town is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Town's public records 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).

One category of confidential public records is those 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. 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).

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 a public agency:

“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).

However, as Counselor O’Connor observed in an opinion she issued in 2000, “it is difficult to conceive of an invoice for legal services containing *only* information that is subject to the attorney-client communication privilege.” *Opinion of the Public Access Counselor 00-FC-16*. Upon receipt of a request for partially disclosable records, public agencies are obligated to separate nondisclosable information from disclosable information and to produce the disclosable portions of responsive records for inspection and copying. I.C. § 5-14-3-6(a).

The simplest answer to your inquiry is that, generally, invoices and attorney bills are disclosable records, but information contained within those records may be redacted

if it is either attorney-client privileged or attorney work product. *See, e.g., Opinion of the Public Access Counselor 07-FC-317; Opinion of the Public Access Counselor 00-FC-16.* Here, because no contract exists between the Town and the Firm, it is not possible to apply these principles to such a document in order to determine what portions, if any, would be accessible under the APRA. If and when such record is created in the future, I trust that the Town will release it to you in accordance with the APRA and the legal framework outlined above.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

cc: Charles F.G. Parkinson