



# STATE OF INDIANA

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July 12, 2013

Mr. Melvin Bontrager

Via email: [mbontrag@purdue.edu](mailto:mbontrag@purdue.edu)

*Re: Informal Inquiry 13-INF-34; City of Elkhart*

Dear Mr. Bontrager:

This informal opinion is in response to your inquiry regarding the denial of records issued in response to your request that was submitted to the City of Elkhart ("City") pursuant to the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. Margaret M. Marnocha, Attorney, responded on behalf of the City. Her response is enclosed for your reference.

## BACKGROUND

As applicable to your inquiry, you provide that the City and Ontwa Township ("Ontwa") entered into an Inter-local Agreement ("Agreement"). On May 14, 2013, you submitted a request pursuant to the APRA for:

"The credit amount provided every year to Ontwa for their capital costs as described in section 5, letter C."

In response to your request, Ms. Marnocha informed you that as of May 14, 2013, there had been no credit given to Ontwa for their capital costs pursuant to the Agreement. Ms. Marnocha further advised that the City was currently involved in a contractual dispute with Ontwa; as such the capital cost issue calculation was considered attorney work product and therefore excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(2).

On June 7, 2014, you replied to the City's response and challenged the City's authority to cite to the attorney-work product exception to deny your request as you were not aware of any current lawsuit that existed between the City and Ontwa. Ms. Marnocha responded to your reply and provided that she was unable to provide any information regarding the dispute between the City and Ontwa as she was an attorney, and to disclose further information would violate her professional responsibility to her client. Prior to filing your informal inquiry, you contacted Ontwa officials who stated they were unaware of any existing dispute or legal action with the City.

In response to your informal inquiry, Ms. Marnocha advised that your request did not seek a record maintained by the City; rather you sought the credit amount provided to Ontwa for their capital costs as described in the Agreement. The City answered your question and as of July 3, 2013, the City's answer remains that Ontwa has never been credited any amount for their capital costs pursuant to the Agreement. You have previously been provided a copy of the Agreement, including all amendments. The reference to the attorney-client privilege and the attorney-work product exception noted in the City's denial were only cited if there had been any document responsive to your request. Prior to and continuing until after May 14, 2013, the City was involved with a dispute with Ontwa, which the City anticipated would proceed to litigation. Included with the City's response is an Affidavit from Laura Kolo, City Utility Manger, who states that the City was involved in a dispute with Ontwa relating to the Agreement; the City had unsuccessfully attempted for many months to resolve the dispute, after many months with no resolution, the City began preparations for litigation; certain documents may have been created with the City's attorney as part of the litigation preparation; and the City has not given permission to Ms. Marnocha to disclose any of the relevant information or documents relating to the City's preparations for litigation.

#### 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 City 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 City'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).

Under the ARRA, a request for inspection or copying must identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). While the term "reasonable particularity" is not defined in the APRA, it has been addressed a number of times by the public access counselor and recently by the Indiana Court of Appeals. *See Jent v. Fort Wayne Police Dept.*, 973 N.E.2d 30 (Ind. Ct. App. 2012); *Anderson v. Huntington County Bd. of Com'rs.*, 983 N.E.2d 613 (Ind. Ct. App. 2013); *See also Opinions of the Public Access Counselor 99-FC-21 and 00-FC-15*. As to request made for information, rather than for a record maintained by the public agency, Counselor Hurst addressed a similar issue in *Opinion of the Public Access Counselor 04-FC-38*:

A request for public records must "identify with reasonable particularity the record being requested." IC 5-14-3-3(a)(1). While a request for *information* may in many circumstances meet this requirement, when the public agency does not organize or maintain its records in a manner that permits it to readily identify records that are responsive to the request, it is under no obligation to search all of its records for any reference to the information being requested. Moreover, unless otherwise required by law, a

public agency is under no obligation to maintain its records in any particular manner, and it is under no obligation to *create* a record that complies with the requesting party's request. *Opinion of the Public Access Counselor 04-FC-38.*

I would agree with the City's assertion that the plain language of your request did not seek any records maintained by the City. You asked what credit amount has been provided to Ontwa for their capital costs pursuant to the Agreement. The City responded at that time and presently reaffirms that Ontwa has not been credited any amount for their capital costs pursuant to the Agreement. There is no dispute that you have been provided with a copy of the Agreement and all subsequent amendments. The City would not violate the APRA by failing to answer questions; the APRA would only require that the City provide all records responsive to a request. Accordingly, it is my opinion that the City did not violate the APRA in response to the inquiries that you submitted on May 14, 2013.

Alternatively, assuming that you had submitted a request for records, the APRA requires that 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). 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" is defined as:

“. . .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(r).

You maintain that the City is not involved in litigation with Ontwa; as such it has no authority to cite to the attorney-work product exception. You further provide that you contacted Ontwa officials who stated they were unaware of any existing dispute or legal action with the City. In response to your allegation, Ms. Marnocha advised that prior to and continuing until after May 14, 2013, the City was involved with a dispute with Ontwa, which the City anticipated would proceed to litigation. In support, the City provided an affidavit from its Utility Manager reaffirming the City's response. It is my opinion that had a request for records been submitted, the City would have met its burden to demonstrate that it complied with the requirements of section 9(c) of the APRA in denying your request pursuant to the attorney-work product exception for all records created in reasonable anticipation of litigation.

In addition to the attorney work-product exception, 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). ). Specifically:

“The communications sought are communications between a client (PERF) and its attorney (the Attorney General) discussing potential legal problems concerning the way in which PERF was carrying out its duties. These fall within exceptions to disclosure under the public records statute because they are protected by the attorney client privilege which makes them confidential under statute and supreme court rule. See IC 34-1-14-5; IC 34-1-60-4; Prof.Cond.R. 1.6(a).” *Morley*, 580 N.E.2d at 374.

Contrary to the work-product exception found under I.C. § 5-14-3-4(b)(2), the authority to cite to the attorney-client privilege is not premised on a reasonable expectation of litigation. As applicable here, had the City been in receipt of a request for records, it would have had authority to deny the request for any records sought that included communication between the City and its attorneys that was conducted for the purpose of the City obtaining professional legal advice or aid regarding the City’s rights and liabilities.

Please let me know if I can be of any further assistance.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage  
Public Access Counselor

cc: Margaret M. Marnocha