



STATE OF INDIANA

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October 19, 2005

Paulla Weinberg
6405 Olcott Avenue
Hammond, IN 46320

Re: Formal Complaint 05-FC-190; Alleged Violation of the Access to Public Records Act by the City of Hammond

Dear Ms. Weinberg:

This is in response to your formal complaint alleging that the City of Hammond ("City") violated the Access to Public Records Act ("APRA") by denying you access to public records.

BACKGROUND

You filed a complaint with the Office of the Public Access Counselor on September 19, 2005. On September 8, 2005 you requested "any and all correspondence and communications including e-mail with attorney David Weigle from August 2004 through December 2004." Although it is not indicated in your request, from the City's September 9th response, you may be interested in information regarding a "Uniform Property Acquisition Offer." On September 9, 2005 you received a response from Corporation Counsel William Joseph O'Connor on behalf of the City. He indicated that the Law Department did not prepare the Uniform Property Acquisition Offer and does not possess any documents that may have been used in its preparation." The City enclosed an e-mail exchange with a Mr. Dmyterko and asserted that there is no other written or electronic correspondence for the period in question. The Department then explained that Mr. Weigle served as defense counsel for the City and had responsibility for over 50 files during the time frame in question and that correspondence and communication in those files would number in the hundreds. The City asserted that many of the records would be either privileged as attorney client communications or are subject to nondisclosure as the work product of an attorney. He also stated that many of the records would be unrelated to the Uniform Property Acquisition Offer that you are interested in. Mr. O'Connor stated that he is not convinced that your request is for all e-mail, correspondence, and communications in that time period, and requested that you advise if he is correct. Mr. O'Connor declared that the (law) department had furnished all documents in that department pertaining to your request.

On September 12, 2005 Mr. O'Connor forwarded an additional letter to you regarding "Request for Public Records – Mayor's Office." This letter acknowledged receipt of your request for records of communications between Mr. Weigle and the Mayor's office. He then

stated, “[p]lease be advised that those documents are subject to attorney-client privilege and attorney-work product privilege, and therefore will not be produced.”

Mr. O’Connor responded to your formal complaint on behalf of the City by letter dated September 26, 2005. A copy of that letter is enclosed for your reference. Mr. O’Connor again asserts that the communications between the attorney and the City are exempt from production pursuant to IC 5-14-3-4 as attorney work product and as privileged attorney-client communications.

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.” Ind. Code § 5-14-3-1. Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in IC 5-14-3-4. IC 5-14-3-3(a). An agency may deny a written request if the denial is in writing or by facsimile and the denial includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c)

The City denied your request in writing in its September 12th letter. However, the City’s denial fell short of the requirements of IC 5-14-3-9(c). The City should have cited the APRA exemptions and any other statutory authority upon which it relied in denying your request. The September 12th letter should have included IC 5-14-3-4(a)(1) “those records declared confidential by state law” in conjunction with IC 34-46-3-1 to assert the attorney client privilege, and IC 5-14-3-4(b)(2) the “attorney work product exception.”

Additionally, the City indicated that “nearly all” of the records requested fell into one of the exemptions upon which it relied. That statement indicates that there may be records that are not subject to the above two exemptions. If the City maintains e-mail or correspondence and communication records that are not subject to the stated exemptions, it is in violation of the APRA for failing to either provide those records or provide a different basis for the denial of the records.

The City asserted, as the basis for its denial, that the records you seek are subject to the attorney client privilege and are the work product of an attorney.

One category of confidential public records is those declared confidential by state statute. IC 5-14-3-4(a)(1). Under Indiana Code section 34-46-3-1, a statutory privilege between an attorney and the client is recognized. Indiana courts have 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).

The Indiana Court of Appeals has held that government agencies may also rely upon this 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 may properly withhold from disclosure records that are subject to the attorney client privilege.

Pursuant to IC 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” 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.

IC 5-14-3-2(p). If the records you seek constitute the work product of an attorney, the City may withhold them.

CONCLUSION

For the foregoing reasons, I find that, while the City of Hammond may deny you access to records that are subject to the exemptions in the Access to Public Records Act for records that constitute the work product of an attorney pursuant to IC 5-14-3-4(b)(2) or as privileged communications between attorney and client pursuant to IC 5-14-3-4(a)(1) and IC 34-46-3-1, the City violated the Access to Public Records Act by failing to properly cite to the statutory authority upon which it relied in denying your request pursuant to IC 5-14-3-9(c)(2).

Sincerely,

Karen Davis
Public Access Counselor

cc: William J. O’Connor