STATE OF INDIANA

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September 6, 2011

Mr. Lee M. Rosenthal
6910 Network Place
Indianapolis, Indiana 46278

Re: Formal Complaint 11-FC-190; Alleged Violation of the Access to Public Records Act by the Carmel City Attorney's Office

Dear Mr. Rosenthal:

This advisory opinion is in response to your formal complaint alleging the Carmel City Attorney's Office ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Douglas Haney, City Attorney, responded on behalf of the City. His response is enclosed for your reference.

BACKGROUND

In your complaint, you alleged that you received several invoices from the City Clerk's Office in response to a records request. You provided that the invoices were redacted, specifically in regards to the "subject", in violation of the APRA.

In response to your formal complaint, Mr. Haney provided that the City retained the services of a private investigator to determine whether the director of a local non-profit organization had engaged in misconduct. If the allegations were proven true, the City anticipated filing a complaint against the director and/or the non-profit organization for the misuse of City funds as well as preparing to defend against any litigation that would arise. Upon receiving invoices from the private investigator, Mr. Haney redacted a total of seven (7) words and an ampersand that identified the target(s) of the investigation or an aspect of the investigation strategy. Specifically, five (5) words and the ampersand identified the subject(s) and the remaining two (2) words identified a strategy aspect. Upon reviewing the invoices from the private investigator, Mr. Haney redacted the information described above, approved the invoices as modified, and submitted them for payment to the City's Clerk-Treasurer for payment. At no time did Mr. Haney approve, disclose, or submit for payment the original un-redacted invoices that he received from the private investigator.

Mr. Haney maintains that the City requires pursuant to I.C. § 5-14-3-3(a)(2) that all record requests be made in writing on a form proscribed by the City. Further, Mr. Haney provided that you have filed dozens of records requests with the City and are well aware of the requirements. The City advised that it did not receive a written request filed by you on or before August 5, 2011 asking for the invoices referred to in your formal complaint. The APRA would allow the City seven (7) days to respond to a written record request and requires the response be in writing. Therefore, the City maintains that even if a record request had been filed on August 5, 2011, a formal complaint filed the same day alleging a denial of that request would be improper.

Beyond the procedural issues, the City maintains that the invoices that were produced were disclosable public records; however the original versions submitted by the private investigator to the City were drafts, and as such were advisory or deliberative materials exempt from mandatory disclosure pursuant to I.C. 5-14-3-4(b)(6). Further, two of the words that were redacted in the descriptive text of the invoice were the private investigator's personal notes and independently exempt from mandatory disclosure pursuant to I.C § 5-14-3-4(b)(7). In addition, as the City's prosecuting attorney, all of the redacted information constituted investigatory material under I.C. 5-14-3-2(h) that is exempt from mandatory disclosure pursuant to I.C. 5-14-3-4(b)(1). Finally, the City has maintained that an attorney-client relationship existed and that the redacted information is attorney work product pursuant I.C. § 5-14-3-4(b)(2).

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).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). A request for inspection or copying must be, at the discretion of the agency, in writing on or in a form provided by the agency. *See* I.C. §5-14-3-3(a)(2). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, 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). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* Here, the City argues that it has no record of your request, much less any request being denied by the City. The City provided that even if you had made a request, you failed to use the proper form required by the City. I would note that you filed your formal complaint against the City Attorney's Office, but you provide that you received the invoices from the City Clerk's Office. While a public agency has a duty to respond to a written request for access to records within seven days of receipt, an agency cannot respond to a request it did not receive. Therefore, if the City did not receive your request, it did not violate the APRA by not responding. *See Opinion of the Public Access Counselor 09-FC-44.* However, I will address the substantive issues raised by both parties regarding the City's alleged response.

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. *See* I.C. § 5-14-3-2(n). The City has provided that the invoices that were submitted by the private investigator were draft copies submitted to Mr. Haney for review, revision, and approval, and as such, were advisory or deliberative materials exempt from mandatory disclosure pursuant to I.C. § 5-14-3-4(b)(6).

The APRA does not provide an exception to disclosure for records merely because they are in draft format or are not yet executed. The APRA definition of public record is "any writing . . ." It does require the writing to be completed or finalized. *See* I.C. § 5-14-3-2(n). Past counselors have advised that draft documents are public records just as completed or finalized documents are public records. *See Opinions of the Public Access Counselor 01-FC-65, 07-FC-45, 08-FC-134.* The City is free to mark the invoices with a "draft" designation, but it may not redact information on the basis it is a draft or unapproved document.

The APRA excepts from disclosure, among others, the following:

> Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.
> I.C. § 5-14-3-4(b)(6).

When a record contains both disclosable and nondisclosable information and an agency receives a request for access to the record, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1.

The Indiana Court of Appeals addressed a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.,* 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate discloseable from non-discloseable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-discloseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.

To the extent that the invoice requested contains information that is not an expression of opinion or speculative in nature, APRA provides that the information shall be disclosed.

The City has provided that the information that was redacted identified the target(s) of the investigation and an aspect of the investigation strategy. Pursuant to I.C. § 5-14-3-4(b)(6), the City may only redact information that is an expression of opinion or of a speculative nature that is communicated for the purposes of decision making. The City has not established how the information that was redacted in the private investigator's invoices was communicated for the purpose of decision making. For example, a report compiled by the private investigator that detailed his findings would assist the City in determining whether to file a complaint against the director. Invoices are typically sent to request remuneration for services rendered and are not communicated for the purposes of making a decision. The City has failed to meet its burden in showing that the invoices here are atypical to those used in the normal course of business. As such, it is my opinion that the City failed to meet its burden when it justified the redaction of the information by citing the deliberative materials exception.

In regards to the City's citing to the APRA's diary/journal exception provided in I.C. § 5-14-3-4(b)(7), it is unclear to me how that exception applies to the information that was redacted. The City has maintained that seven (7) words and ampersand were redacted; five (5) words and the ampersand identified the target(s) of the investigation and the other two (2) words revealed the investigation's strategy. It is unclear from the City's response whether the two (2) words that were redacted pursuant to the diary/journal exception were in addition to, or part of, the seven (7) words that were redacted. Under the APRA, a public agency that withholds a public record bears the burden of proof to show that the record is exempt. *See* I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. *See* I.C. § 5-14-3-1. While it is

possible that the two (2) words that were redacted could fall under this I.C. § 5-14-3-4(b)(7), it is my opinion that the City has not yet sustained its burden of proof to demonstrate that the exception applies here.

The investigatory records exception to the APRA provides that a law enforcement agency has the discretion to disclose or not disclose its investigatory records. An investigatory record is "information compiled in the course of the investigation of a crime." *See* I.C. § 5-14-3-2(h). A law enforcement agency "means an agency or department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of the alleged criminal offenders, such as . . . prosecuting attorney . . ." *See* I.C. § 5-14-3-2(l)(6). The investigatory records exception does not apply only to records of ongoing or current investigations. Moreover, it does not apply only to an investigation where a crime was charged or an investigation where it was adjudicated that a crime was indeed committed. Instead, the exception applies to all records compiled during the course of the investigation of a crime, even where a crime was not ultimately charged, and even after an investigation has been completed. The investigatory records exception affords law enforcement agencies broad discretion in withholding such records. *See Opinion of the Public Access Counselor 09-FC-157*.

The City has provided that the investigation was commenced in anticipation of preparing a complaint against the director and/or the non-profit organization for the misuse of City funds. In defining "law enforcement agency", the statute specifically makes reference to a public agency that engages in the investigation, apprehension, arrest, or prosecution of the alleged *criminal* offender. (emphasis added). The City has not provided what type of complaint, criminal and/or civil, that it anticipated filing if the allegations were accurate. Nor has the City provided any analysis on how it qualifies as a "law enforcement agency" beyond citing the statutory exception for investigatory records. Thus, it is my opinion that the City has not met its burden of proof to demonstrate the investigatory records exception applies.

Under the APRA, one category of confidential public record includes those records declared confidential by state statute. *See* I.C. § 5-14-3-4(a)(1). I.C. § 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). It is not clear from the facts presented whether the attorney-client privilege existed between the City and the private investigator. The City's reference to prior opinions of the public access counselor are not applicable, as those factual scenarios pertain to legal invoices submitted by an attorney hired by a public agency. There is nothing before me to indicate that the private investigator hired by the City was an attorney. As such, it is my opinion that the City did not meet its burden in regards to I.C. § 5-14-3-4(a)(1) and I.C. § 34-46-3-1.

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" 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).

The definition of attorney work product includes documents that are "legal research or records" such as the invoices that are at issue here. The City does not claim that every aspect of the invoices contains its original "opinions, theories, or conclusions." The context of the work product exception does not appear to limit work product to information *created* by the attorney. Rather, the inclusion of "legal research or records" indicates that the General Assembly intended to except from disclosure those materials that, while not created by the attorney himself or herself, nevertheless reveal the attorney's "opinions, theories, or conclusions" due to their content. *See Opinion of the Public Access Counselor 10-FC-266.* Again, I would note that the Public Access Counselor is not a finder of fact. Thus, if the seven (7) words that were redacted contain information that would reveal an attorney's opinions, theories, or conclusions, the City would be allowed to exercise its discretion and redact the information.

CONCLUSION

For the foregoing reasons, if the City did not receive your request, it did not violate the APRA by not responding. It is my opinion that the City failed to meet its burden in citing the deliberative materials, diary/journal, and investigatory records exceptions in redacting information provided in the invoice. The City further failed to establish that an attorney-client relationship existed. However, to the extent that the invoices constituted attorney-work product, if the information that was redacted revealed

an attorney's opinions, theories, or conclusions, the City would be allowed to exercise its discretion to redact the information.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Douglas Haney