



STATE OF INDIANA

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September 2, 2011

Mr. Dwane G. Ingalls
1600 S. Paddock Road
Greenwood, Indiana 46143

Re: Formal Complaint 11-FC-199; Alleged Violation of the Access to Public Records Act by the Indiana Office of Utility Consumer Counselor

Dear Mr. Ingalls:

This advisory opinion is in response to your formal complaint alleging the Indiana Office of Utility Consumer Counselor ("Counselor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Randall Helmen, Chief Deputy Consumer Counselor, responded on behalf of the Counselor. His response is enclosed for your review.

BACKGROUND

In your complaint, you allege on May 30, 2011 you requested in writing the following records from the Counselor:

- (1) All documents related to the attached filing by the Indiana Office of Utility Consumer Counselor: Motion to Establish Sub-Docket for Investigation into IPL's Treatment of its Elect Plan Revenues and Expenses for Determination of its FAC Fuel Factor and Earnings Test. This motion was filed July 21, 2005 (IURC Cause 38703-FAC68). Documents should include, without limitation, any notes, declarations, subsequent related filing, the testimony of Peter Boerger and Robert Endris referenced in paragraph 3 of the filing and memorandums.
- (2) All documents, not limited to any notes, declaration, email, other correspondence, related to the attached agreement between your office and Indianapolis Power and Light dated October 28, 2005.

On June 10, 2011, the Counselor acknowledged your request in writing. On June 22, 2011, the Counselor provided documents responsive to your request, and denied your request in part. On June 26, 2011, you again requested disclosure of the documents that

had been withheld along with rationale to refute the Counselor's claim of confidential treatment of the two specifically requested testimonies. On July 8, 2011, the Counselor provided one of the two requested testimonies, but again declined to provide the testimony of Dr. Boerger ("Testimony"). On July 10, 2011, you asked the Counselor to reconsider its decision not to release the Testimony. On July 25, 2011, the Counselor reaffirmed its decision not to release the Testimony. On July 29, 2011, the Counselor provided that they had completed its efforts in regards to your request and had provided all records responsive to your request.

In response to your formal complaint, the Counselor provided that in regards to the Testimony, it was prepared by Mr. Helman, or an attorney under his direct supervision in 2005. The Counselor denied your request for the record pursuant to I.C. § 5-14-3-4(b)(2). The Counselor maintained that it had never shared the Testimony with any party or entity outside of the Counselor's office and as such, the Counselor retained the discretion to not disclose the record in response to your request. However, the Counselor advised that it has now produced a copy of the Testimony to you. In regards to your assertion that there still remains records that the Counselor has failed to disclose, the Counselor has provided that it has concluded a thorough search of its paper and electronic files and all records have now been produced.

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 Counselor 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 Counselor'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). 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. Here, the Counselor responded to your request within the time period required by the APRA.

One category of nondisclosable public records consists of records declared confidential by a 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. 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).

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).

If the records you sought constituted the work product of an attorney, the Counselor acted within its discretion when it denied your request for access to them. However, the Counselor has now provided a copy of the Testimony to you which I trust is in satisfaction of your complaint.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy...."). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*.

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*. Thus, if the Counselor has not produced all records responsive to your request, it has acted contrary to the APRA. However, if the Counselor has now provided all records, it has fulfilled its obligations under the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the Counselor did not violate the APRA when it denied you access to records constituting the work product of an attorney pursuant to I.C. §5-14-3-4(b)(2) and privileged communications between attorney and client pursuant to I.C. §5-14-3-4(a)(1) and I.C. § 34-46-3-1. However, as the Counselor has now provided you with a copy of the Testimony, I trust it is in satisfaction of your complaint. Further, if the Counselor has now provided to you all records responsive to your request, it has otherwise not violated the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is fluid and cursive, with the first letter of the first name being a large, stylized capital 'J'.

Joseph B. Hoage
Public Access Counselor

cc: Randall Helmen