STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

September 7, 2011

Mr. Larry Lee
2384 S. Richman Way
New Palestine, Indiana 46163

Re: Formal Complaint 11-FC-218; Alleged Violation of the Access to Public Records Act by the South Hancock County Community School Corporation

Dear Mr. Lee:

This advisory opinion is in response to your formal complaint alleging the South Hancock County Community School Corporation ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Jon Bailey, Attorney, responded on behalf of the School. His response is enclosed for your review.

BACKGROUND

In your complaint, you allege that you submitted a written request to the School on July 26, 2011 for a copy of the following public records:

(a) All records, letters, memos, and emails to Jon Bailey that involve the discussion or negotiations on the topic of salary increases and/or benefits since 2007 for all superintendents, teachers, and staff
(b) All records, letters, memos, and emails from Jon Bailey that involve the discussion or negotiations on the topic of salary increases and/or benefits since 2007 for all superintendents, teachers, and staff.
(c) All records, letter, memos, and emails to and from Jon Bailey regarding requests for the production of records related directly or indirectly to the inquiries from Larry Lee or Kara Kinney on the topic of salary increases, benefits, perks, and retirement funds for the School Superintendent.

The School responded to your request in writing on August 1, 2011 and provided the following response to each of your requests:

(a) All records responsive to this request were exempt from disclosure pursuant to I.C. § 5-14-3-4(a)(1) and I.C. 34-46-3-1, which requires exemption of communications to and from the School and counsel for purposes of drafting the contracts. I.C. 5-14-3-4(b)(2), which exempts the work product of an attorney representing a public agency. I.C. 5-14-3-4(b)(6) which permits exemption of records that are intra-agency advisory or deliberative material that are expressions of opinion or are of a speculative nature, and are communicated for the purpose of decision making.

(b) I.C. § 5-14-3-4(a)(1) and I.C. § 34-46-3-1 which requires the exemption of communication to and from the School and its counsel for purposes of ensuring that the salary and benefits for the named categories of employees are properly structured. I.C. § 5-14-3-4(b)(2) which exempts the work product of an attorney representing a state agency. I.C. 5-14-3-4(b)(6) which permits exemption of records that are intra-agency advisory or deliberative material that are expressions of opinion or are of a speculative nature, and are communicated for the purpose of decision making.

(c) I.C. § 5-14-3-4(a)(1) and I.C. § 34-46-3-1 which requires the exemption of communications to and from the School and its counsel for purposes of the proper implementation of the APRA. I.C. 5-14-3-4(b)(2) which exempts the work product of an attorney representing a state agency. I.C. 5-14-3-4(b)(6) which permits exemption of records that are intra-agency advisory or deliberative material that are expressions of opinion or are of a speculative nature, and are communicated for the purpose of decision making.

In response to your formal complaint, the School advised that the records that you requested were exempt from disclosure pursuant to I.C. § 5-14-3-4(a)(1) and I.C. § 35-46-3-1. Further, the attorney work product exception, I.C. § 5-14-3-4(b)(2), and the deliberative materials exception, I.C. § 5-14-3-4(b)(6), provide the School with discretion in disclosing records that were responsive to your request. The School also noted that the administrator contracts that you had requested have already been providing along with the relevant budget excerpts and supporting documents.

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 School 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 School'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 School responded to your request within the seven-day 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). The essential prerequisites to invoking the privilege are (1) the existence of an attorney-client relationship; and (2) that a confidential communication was involved. *Mayberry v. State*, 670 N.E.2d 1262, 1266 (Ind. 1996).

There is no dispute that Mr. Bailey is an attorney hired by the School. Further, you specifically requested correspondence between the School and Mr. Bailey, in his professional capacity as the School's attorney. It can not be alleged that the School is attempting to evade disclosure by providing Mr. Bailey with a courtesy copy of the correspondence, as again you are requesting direct correspondence between the School and its attorney. As such, the School did not violate the APRA when it withheld from disclosure information that was subject to the attorney client privilege.

I.C. §5-14-3-4(b)(2) provides that a public agency has 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).

Therefore, if the School had denied your request solely on the attorney work product exception, if the records were compiled in reasonable anticipation of litigation and contain the attorney's opinions, theories, or conclusions, then the School acted within its discretion when it denied your request for access to them.[1]

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):

---

[1] In your formal complaint, you reference Opinion of the Public Access Counselor *08-FC-38* in support of the premise that you are entitled to review the redacted records. In *08-FC-38*, Counselor Neal opined that the School could not sustain its burden in denying access to the records pursuant to the attorney-work exception provided in I.C. § 5-14-3-4(b)(2) because the record was not compiled by an attorney in reasonable anticipation of litigation. However, Counselor Neal went on to state that the School could sustain denial pursuant to I.C. § 5-14-3-4(a)(1), citing I.C. § 34-46-3-1, which is what the School has provided in responding to your complaint.

> 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.
>
> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id*. at 913-14.

If the School had relied solely on the deliberative materials exception to deny your request, to the extent the record contained information that was not an expression of opinion or speculative in nature, and were not inextricably linked to non-disclosable information, APRA provides that the information shall be disclosed.

Finally, the APRA does not require public agencies to provide multiple copies of the same record to a requester. *See Opinions of the Public Access Counselor 01-FC-97, 05-FC-94, and 11-FC-58*. Accordingly, if the School has already provided a record to you in response to a public records request, it does not violate APRA by failing to provide you with an additional copy in response to a subsequent request. Only if the record was modified or changed would the School have to produce a newly modified record.

CONCLUSION

For the foregoing reasons, it is my opinion that the School did not violate the APRA.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Jon Bailey