STATE OF INDIANA

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June 6, 2012

Michael A. Wartell
8107 Tranqulla Place
Fort Wayne, Indiana 46815

Re: Formal Complaint 12-FC-134; Alleged Violation of the Access to Public Records Act by Purdue University

Dear Mr. Wartell:

This advisory opinion is in response to your formal complaint alleging Purdue University ("University") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Lucia Anderson, Public Records Officer, responded on behalf of the University. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege on May 18, 2012 you submitted a public records request to the University seeking documentation of the claimed attorney-client relationship between the University and John Trimble. As the University has denied other records requests in the past from you based on the attorney-client privilege, you are thus seeking a substantiation of that relationship. In response to your request, the University produced a heavily redacted correspondence that referenced the hourly rate, but did not identify the services to be performed. As the University has relied on the attorney-client relationship in the past to deny other public records request, you maintain that the Public Access Counselor should require it to show that such a relationship exists by requiring the University to produce an unredacted copy of the agreement.

In response to your formal complaint, Ms. Anderson advised that the University provided to you a copy of the requested correspondence from John Trimble to the University, outlining the work that was to be performed by Mr. Trimble in his capacity as an attorney. Mr. Trimble was hired to do legal research, interview witnesses, and make recommendations to the trustee in his capacity as an attorney. The University maintains that the portions of the record that were redacted was proper under the attorney-client privilege and the attorney-work product discretionary exception found under 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 University 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 University'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). 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. Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

> Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. *Opinion of the Public Access Counselor 01-FC-47.*

The University has cited to two exceptions, the attorney client privilege and the attorney work-production exception found under I.C. § 5-14-3-4(b)(2), in denying certain portions of the record that were provided. The University would satisfy its obligation in responding to a formal complaint filed with the Public Access Counselor by complying with the requirements of section 9(c) of the APRA. If, however, the matter proceeded to litigation before a court, who would be allowed to conduct an in-camera review, the burden of proof would be on the University to sustain the denial of access to the records that were requested beyond referring solely to the exceptions to disclosure and providing the name and title of the person responsible for the denial on behalf of the agency. *See* I.C. § 5-14-3-4(f); *Opinion of the Public Access Counselor 09-FC-285.* It should also be noted that the Public Access Counselor is not a finder of fact. *See Opinion of the Public Access Counselor 11-FC-80.* The counselor issues advisory opinions, not orders, in response to formal complaints that are filed with the office. *See* I.C. § 5-14-4-10(6).

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).

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 provided the following guidance on 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 dislcosable from non-dislcosable *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-dislcosable 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-discloseble 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.

As such, to the extent that information that was redacted from the records that were produced is subject to the attorney-client privilege or is the work product of an attorney under I.C. § 5-14-3-4(b)(2), the University complied with the requirements of the section 9 of the APRA in denying your request. In producing the records that were responsive to your request, the University submitted to the requirements of I.C. § 5-14-3-6, by providing to you the information contained in the records that was not covered by any exception to disclosure found under state or federal law. Thus, it is my opinion that the University did not violate the APRA in response to your request for records.

CONCLUSION

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

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Lucia Anderson