



# STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR  
LUKE H. BRITT

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

June 19, 2014

Mr. Ron Shoemaker  
255 N. Alabama St.  
Indianapolis, IN 46204

*Re: Formal Complaint 14-FC-115; Alleged Violation of the Access to Public Records Act by the Indiana State Police*

Dear Mr. Shoemaker,

This advisory opinion is in response to your formal complaint alleging the Indiana State Police ("ISP") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The ISP has responded via Ms. Cynthia Forbes, Esq. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on May 23, 2014.

## BACKGROUND

Your complaint dated May 22, 2014 alleges the Indiana State Police ("ISP") violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On May 9, 2014, you, by counsel, made a request to ISP for documents. Specifically, you were seeking "[a]ll Position Statements submitted by the Indiana State Police Department in response to all charges of discrimination filed with the Equal Employment Opportunity Commission by Ron Shoemaker" and "all exhibits to all Positional Statements submitted by the Indiana State Police Department in response to all charges of discrimination filed with the Equal Employment Opportunity Commission by Ron Shoemaker."

ISP responded to your request on May 19, 2014. ISP satisfied your request for "all exhibits to Positional Statements". However, ISP denied your request, asserting the attorney work product exception under Ind. Code § 5-14-3-4(b)(2). ISP stated that "[t]his document was prepared by the Indiana State Police's Legal Office in response to a charge of discrimination and contains legal opinions and conclusions prepared in reasonable anticipation of litigation."

In your complaint, you argue that ISP “has waived any right to claim attorney work product protection by submitting its Position Statement to the EEOC, a third party.” (Citing *Jenkins v. State*, 637 N.E.2d 789, 798 (Ind. 1993).)

On June 10, 2014, ISP provided a response to your complaint. ISP once again asserts the attorney work product exception. Additionally, ISP asserts an exception under Ind. Trial Rule 26(B)(3), as authorized by Ind. Code § 5-14-3-4(a)(8) (excepting from disclosure records declared confidential by or under rules adopted by the Supreme Court of Indiana), and as applied by Informal Inquiry of the Public Access Counselor 12-INF-22.

ISP argues that release to a third party does not necessarily nullify the attorney work product exception under Ind. Code § 5-14-3-4(b). Rather, the effect of the release should be considered under the “common interest doctrine”; that for the exceptions under Ind. Code § 5-14-3-4(b)(2) or Ind. Trial Rule 26(B)(3) to apply, “the party must show that the disclosure has not substantially increased the likelihood that an adversary would obtain the information or that the third party shares a common interest with it.” (Citing *Coachmen Indust., Inc. v. Kemlite*, 2007 U.S. Dist. LEXIS 82196). ISP states they were “told by the EEOC that a position statement would not be released by them.” Therefore, since the disclosure to the EEOC did not substantially increase the likelihood an adversary would obtain the position statement; ISP did not waive their exception to disclosure requirements.

## 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 Ind. Code § 5-14-3-1. The Indiana State Police is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the ISP’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

To my knowledge, there exists no provision in the United States Code or the Code of Federal Regulations declaring EEOC position statements confidential. EEOC may have a policy of releasing or not releasing them, however, I am not aware of any authority which suggests any guidance on the matter. I am left to conclude a Freedom of Information Act request upon EEOC for position statements would be successful.

To that end, EEOC position statements are not exclusively submitted to EEOC investigators by attorneys. To suggest they are work product would create two kinds of position statements; those statements from employers who choose to submit them through managers or owners would be treated differently than those submitted by attorneys. I hesitate to believe the EEOC would draw a distinction between the two.

Position statements, whether drafted by an attorney or a layman, are the agency's or company's response to a charge. It is not the ideas or decision-making thought processes of anyone; it is a rebuttal to an allegation of discrimination. These are often fact-based arguments. Those statements drafted by attorneys undoubtedly are flavored with legal citations and precedents, but are not work product as contemplated by trial rules or rules of evidence.

Various authorities cited by the parties, including the APRA, hold sacred the notion attorneys exist to advise and counsel a client; disclosure of the speculative opinions or views of attorneys in a representative capacity would chill frank discussion of strategy. These communications are internal between the attorney and the client and disclosure is discretionary. EEOC position statements do not fall into this category. They are declarations of fact and law to an investigator for the purposes of resolving an EEOC dispute. They are no different than a brief, a memo, or a statement in open court.

### CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access Counselor that EEOC position statements are not attorney work product nor are they attorney-client communication. Their release is not excepted from disclosure by the APRA or any other authority of which I am aware. By denying their release the Indiana State Police has acted contrary to the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'L. H. Britt', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor

Cc: Ms. Cynthia Forbes, Esq.  
Mr. Ryan P. Sink, Esq.