



STATE OF INDIANA

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December 5, 2014

Mr. Ryan P. Sink, Esq.
8465 Keystone Crossing
Indianapolis, IN 46240

Re: Formal Complaint 14-FC-261; Alleged Violation(s) of the Access to Public Records Act by the City of Fort Wayne

Dear Mr. Sink,

This advisory opinion is in response to your formal complaint alleging the City of Fort Wayne, ("City") violated the Indiana Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Ms. Carol Helton, Esq., Legal Counsel, has responded to your complaint. It is attached 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 October 30, 2014.

BACKGROUND

Your formal complaint dated October 30, 2014, alleges the City violated APRA by denying your clients access to all notes taken by the City Labor and Employee Relations Manager, during three (3) interviews conducted with City employees and your clients Mr. John Claywood and Ms. Betsy Keisler. The interviews took place on October 14, 16, and 21, 2014 respectively. Ms. Helton, Legal Counsel, also generated notes during some of these interviews.

On October 25, 2014, Mr. Claywood and Ms. Keisler submitted, in person, a request for ten (10) public records. On October 29, 2014, the City, by counsel, responded by letter acknowledging your request. The City agreed to disclose seven (7) of the requested documents within a reasonable time frame and denied access to the three (3) at issue in this case. The City contended the Labor and Employee Relations Manager's notes are attorney work product compiled in anticipation of litigation and thus do not require disclosure under APRA.

In your formal complaint you claim the attorney work product doctrine does not apply, and the three documents the City has denied access to should be released because (1) the

City, through Counselor Helton acted as an investigator and not as an attorney, and (2) the notes were not created in anticipation of litigation.

On November 18, 2014, the City responded to your formal complaint. The City claims the records in question are excepted from mandatory disclosure requirements of APRA as the work product of attorneys representing a public agency. Additionally, the City argues the records are protected from disclosure by the attorney-client privilege.

This issue turns on whether the three sets of notes taken by the City's Labor and Employee Relations Manager, a direct report of City Attorney Helton, during three (3) interviews with Mr. Claywood and Ms. Keisler is excepted from disclosure because the records are attorney work product and/or protected by attorney client privilege.

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 City of Fort Wayne 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 City'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).

APRA does allow for certain records to be excepted from disclosure, including "[t]he work product of an attorney representing, pursuant to state employment or an appointment by a public agency: (A) public agency; (B) the state; or (C) the individual." See. Ind. Code § 5-14-3-4(b)(2). See also Ind. Code § 5-14-3-2(r):

"Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation. The term 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 and conclusions.

In order for the work product exception to apply, the records would first need to be created by an individual in their capacity as an attorney or an agent thereof. The Labor and Employee Relations Manager does not appear to have been acting in a representative capacity as an attorney nor was he creating material pursuant to Ms. Helton's representative capacity. He was on a fact-finding mission unrelated to any threatened litigation, which appears to be an administrative function carried out pursuant to his

duties associated as the human resources professional. Nothing in the materials provided suggest he was taking notes during the interview to formulate litigation strategy or to express attorney-client communication.

As the City points out, Indiana Code §34-46-3-1 also 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).

The Labor and Employees Relations Manager may have been acting at the direction of a City Attorney, but not for the purpose of dispensing legal advice. Not all work product of a public employee at the direction of an attorney is attorney work product. To suggest such would be to suggest that *all* of the Manager's work product would fall into the exception, because there is always a *potential* of litigation. This would lead to an absurd result.

To borrow from the case cited by the complainants, the remote possibility of litigation does not suffice to shield documents. *Wartell v. Purdue University*, case no. 1:13-cv-000099 (N.D. Ind. July 24, 2014). There will undoubtedly be instances where the attorney work product exception and the attorney-client privilege will apply to the withholding of public records. It is my opinion this is not one of them.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the City of Fort Wayne may not use the attorney work product exception to the APRA to withhold the documents requested.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Ms. Carol Helton, Esq.