



STATE OF INDIANA

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January 20, 2015

Mr. Kurt Disser
7210 E. CR 700 N.
Brownsburg, IN 46112

Re: Formal Complaint 14-FC-315; Alleged Violation of the Access to Public Records Act by the Town of Brownsburg

Dear Mr. Disser,

This advisory opinion is in response to your formal complaint alleging the Town of Brownsburg ("Town"), violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* Counsel, Mr. Kevin D. Koons, Esq., has responded and his reply 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 December 17, 2014.

BACKGROUND

Your complaint dated December 16, 2014 alleges the Town of Brownsburg violated the Access to Public Records Act (Ind. Code § 5-14-3) by failing to produce records responsive to your request.

On or about November 6, 2014, you requested four invoices from a special legal consultant for the Town. On November 21, 2014, you received two of the four invoices; however, a portion of the invoices was redacted. The Town claimed they were deliberative materials, work product, attorney-client privilege, and/or executive session materials. You also obtained the non-redacted invoices for comparison. You cite several authorities as to why the exceptions do not apply.

The Town responded first by explaining only two of the invoices you requested exist. Although they are non-sequential, they were developed by the contract for its office use and the two redacted versions are the only ones which exist pursuant to your request. The Town relies on the attorney-client privilege to withhold the records claiming they are confidential communication between the Town and its legal consultant.

ANALYSIS

The public policy of the APRA states that “a (p)roviding person 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 Town of Brownsburg is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Any person has the right to inspect and copy the Town’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).

It appears as if the special consultant was acting in a representative capacity and therefore the attorney-client privilege may be invoked if applicable. Ind. Code § 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).

An invoice describing legal services rendered could conceivably be considered to fit into the description offered by the *Hueck* Court. This is consistent with prior opinions from this Office. Please consider the *Opinion of the Public Access Counselor 06-FC-62* wherein Counselor Davis opined on the issue of legal invoices:

Hence, if the diary entries on the billing statements contain or reveal communications between an attorney and the client that are within the privilege, those entries may be withheld under IC 5-14-3-4(a)(1). In addition, any diary entries that reveal work product of an attorney may be withheld in the public agency’s discretion. IC 5-14-3-4(b)(2).

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).).

It is unclear how you received the un-redacted versions of the invoices, however, it is clear the intention of the Town is for them to remain confidential and they continue to

claim the privilege in this instance. I do not consider a “leak” of un-redacted material to amount to consent.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Town of Brownsburg has not violated the Access to Public Records Act.

Regards,

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

Luke H. Britt
Public Access Counselor

Cc: Mr. Kevin D. Koons, Esq.