OPINION OF THE PUBLIC ACCESS COUNSELOR

EMMA KATE FITTES,
Complainant,

v.

CARMEL CLAY SCHOOLS,
Respondent.

Formal Complaint No.
18-FC-131

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging Carmel Clay Schools ("CCS") violated the Access to Public Records Act[1] ("APRA"). Attorney Donald R. Lundberg filed an answer on behalf of CCS. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 9, 2018.

[1] Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

This complaint is about redacted legal invoices provided by Carmel Clay Schools ("CCS") to the *Indianapolis Star* in response to the newspaper's public records request.

In February, Emma Kate Fittes, a reporter for the *Indianapolis Star*, began asking CCS for certain invoices that the district received from the law firm Church Church Hittle & Antrim ("CCHA"). In mid-July, CCS provided redacted copies of some records that Fittes requested. CCS noted that it redacted the invoices to "remove information protected by the attorney-client privilege."

Fittes believed that CCS overly-redacted the invoices because nearly ever expense description was either partially or completely redacted.

On August 1, 2018, Fittes filed a second public records request with CCS seeking the following:

> …[A]n opportunity to inspect or obtain an *unredacted copy* of any bill or invoice Carmel Clay Schools or the board received from Church Church Hittle + Antrim or David Day from *Aug. 1, 2017, to present.*

Five days later, CCS sent Fittes an email acknowledging the request. On September 11, 2018, CCS informed Fittes that copies of the invoices she requested were available at the district's administrative offices. Fittes picked the records up the next day and paid the copy fee.

CCS provided claims and invoices from July 16, 2016, to August 31, 2017. Fittes contends that nearly ever expense description was either partially or completely redacted. She also noted that CCS did not include documents from August 1, 2017, to present day.

As a result, Fittes filed a formal complaint on behalf of the *Indy Star* with this Office. In sum, she contends that CCS' claims and invoices should be available to public review without redactions. Moreover, Fittes believes CCS is over-redacting the invoices to hide non-privileged information.

In its answer, CCS contends that Fittes' complaint has no merit and should be dismissed. While never stated outright, CCS appears to argue the invoices contain work product or information protected by attorney-client privilege, or both. A very thoughtful and intellectual brief was provided on the finer points of attorney-client privilege and attorney work product[2] but the response does not establish the content of the redaction with any kind of specificity nor does it attempt to apply the rules set forth in the response itself.

ANALYSIS

The fundamental issue in this case is whether the redactions Carmel Clay Schools made to the legal invoices it released to the *Indianapolis Star* are authorized under the Access to Public Records Act.

1. The Access to Public Records Act (APRA)

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the

[2] CCS' denial did not cite attorney work product as a justification for redaction.

affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1. Further, 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." *Id.* There is no dispute that Carmel Clay Schools ("CCS") is a public agency for the purposes of the APRA; and thus, subject to the Act's disclosure requirements. *See* Ind. Code § 5-14-3-2(q)(6).

Unless otherwise provided by statute, any person may inspect and copy CCS' public records during regular business hours. *See* Ind. Code § 5-14-3-3(a).

Under APRA, *public record* means:

> any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Here, the parties and this Office agree that CCS' legal invoices are *public records* as defined under APRA.

Still, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal

statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

In this case, the parties disagree about the redactions CCS made to the invoices prior their disclosure. Under APRA, redactions are appropriate if the omitted information is covered by an applicable disclosure exception.

Notably, APRA does not expressly exempt a public agency's legal invoices from disclosure. There are, however, other disclosure exceptions that may apply to certain information contained *within* a legal invoice.

2. Redaction of CCS Legal Invoices

Fittes argues that the redacted legal invoices CCS provided in response to her request are at odds with APRA's disclosure requirements. In response, CCS argues the redactions are proper because the redacted information is protected by attorney-client privilege; and thus, non-disclosable under Indiana Code sections 5-14-3-4(a)(1) and (8).

2.1 Legal Invoices

Receipts, claims, invoices and bills of service providers are public record subject to public inspection. These are amongst the most common public records requested from local and state government units, invoices of law firms being no exception.

There is no statutory requirement that a legal invoice must contain confidential information. However, in order to

demonstrate work performed, law firms will often include certain descriptive statements in its itemization that could be construed to allow a public agency to withhold it as part of its enjoyment of the attorney-client privilege.

While it *may* disclose communication sent and received as part of an attorney-client relationship, it stands to reason a public agency would be protective of that communication, and rightfully so.

The attorney-client privilege protects the confidentiality of communications between an attorney and client. The privilege was first recognized in Indiana as part of the common law by judicial decision in *Jenkinson v. State* (1845), 5 Blackf. 465, 466. The privilege is now recognized by statute.[3]

Specifically, Indiana Code Section 34-46-3-1 codifies the attorney-client privilege by prohibiting an attorney from being required to testify as to confidential communications made to them in the course of professional business, and to advice given in such cases. In addition, an attorney has statutory duty to preserve the secrets of the attorney's client. *See* Ind. Code § 33-43-1-3. Moreover, in Indiana, a communication between an attorney and a client is privileged and not discoverable under Trial Rule 26(B)(1).

This Office has long maintained that attorney-client privilege intersects with public records and can be withheld by the client if it is documented on any manner of documentation, including attorney fee invoices.

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[3] Ind. Code § 34-46-3-1; Ind. Code § 33-43-1-3(5); Ind. Trial Rule 26(B)(1).

Indiana courts and the Seventh Circuit have long observed the general rule that "information regarding a client's attorney fees is not protected by the attorney-client privilege because the payment of fees is not considered a confidential communication between an attorney and his or her client." *Hueck v. State*, 590 N.E.2d 581, 585 (Ind. Ct. App.1992); *Matter of Witness Before Special March 1980 Grand Jury*, 729 F.2d 489, 491 (7th Cir. 1984); *see also Colman v. Heidenreich*, 381 N.E.2d, 866 (Ind. 1978).

As recently as December of 2017, the Indiana Court of Appeals applied this general rule in reaching a decision. *See Boulangger v. Ohio Valley Eye Inst., P.C.*, 89 N.E.3d 1112, 1116 (Ind. Ct. App. 2017). In *Boulangger*, the court concluded that documentation of a former employee's payment of legal fees, sought by the former employer through a non-party request for production as part of a proceedings supplemental was "not confidential nor protected by the attorney-client privilege." 89 N.E.3d at 1118.

Here, the communications consist of dated legal invoices from the law firm of Church, Church, Hittle, and Antrim to CCS.

2.2 Attorney-client communication

Indiana Courts have only once directly addressed in a binding decision the issue of public agency legal invoices in *Groth v. Pence*, 67 N.E.3d 1104 (Ind. Ct. App. 2017), an issue that originated with this Office. In its holding, the court describes legal invoices that left *un-redacted* a significant amount of information.

The *Groth* court did not describe in depth the content of redacted material after an *in camera* review. No other Indiana court, to our knowledge, publicly describes the exact communication subject to redaction, therefore we turn to persuasive holdings from other authorities. Federal courts have acknowledged the balance between disclosure and privilege:

> The identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney client privilege.

Chaudrey v. Gallerizzo, 174 F.3d. 394, 402 (4th Cir. 1999) quoting *Clarke v. American Commerce Nat'l Bank*, 974 F. 2d 127, 129 (9th Cir. 1992).

When a statute is ambiguous and Indiana Courts have not addressed an issue, the Public Access Counselor aggregates other state's holdings and statutes, best public access practices, and policy considerations to issue guidance. It is not lost on this Office that the Opinions of the Public Access Counselor have a significant amount of weight. The Indiana Supreme Court has held that Indiana government agencies should be entitled to rely on PAC guidance. *ESPN, Inc. v. Notre Dame*, 62 N.E.3d 1192 (Ind. 2016).

Toward that end, this Office has never suggested that the attorney-client privilege must be pierced in favor of the disclosure of public records. Nor has it recommended any attorney work product ever be laid bare. The Office of the Public Access Counselor is simply not interested in jimmying the lock off an attorney's safe of client secrets or upending long-standing practices of legal billing.

What this Office has intimated, however, is that the definitions of that term – attorney-client communication – is more nuanced than some public agencies, including CCS, assert. The legislature's express intent is for readers to liberally construe the Access to Public Records Act in favor of transparency[4]. Accordingly, its exceptions to disclosure are to be applied narrowly and conservatively[5].

The attorney-client privilege "applies to all communications between the client and his attorney for the purpose of obtaining legal advice or aid, regarding the client's rights and liabilities." 67 N.E.3d at 1118. To assert the privilege, a person must show "(1) an attorney-client relationship existed and (2) a confidential communication was involved." *Id.* What is more, the privilege is "intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Lahr v. State*, 731 N.E.2d 479, 482 (Ind. Ct. App. 2000)(quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

Here, there is no dispute that the attorney-client relationship exists. The issue is whether the redacted information in CCS's legal bills constitutes a confidential communication. This consideration is critical because "the attorney-client privilege does not exist unless the communication is confidential." *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 703 (Ind. Ct. App. 1995).

Point being that not everything an attorney documents in the scope of representation is *de facto* confidential even if it

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[4] Ind. Code § 5-14-3-1

[5] *Robinson v. Indiana Univ.*, 659 N.E.2d 153, 156 (Ind. App. 1995)

meets the definition of communication. Invoices are not inherently communicated for the purpose obtaining legal advice or aid; they are communicated for the purpose of demanding payment.

Even still, to the extent privileged information makes its way onto a bill as a vehicle for communication, the why and how of communication is privileged, but not always necessarily the what, when, where and who.

Furthermore, much of CCS' response focused on an attorney's obligation to keep the attorney-client privilege under Indiana Trial Rules and litigation discovery considerations. Neither was implicated by the Complainant's public records request nor was it documented as a reason for the denial.

Work product has a statutory definition[6] and will not be discussed herein as it was not raised in CCS' denial. This case does not involve a request for an attorney's litigation notes and statements taken during interviews of prospective witnesses nor of an attorney's opinions, theories or conclusions.

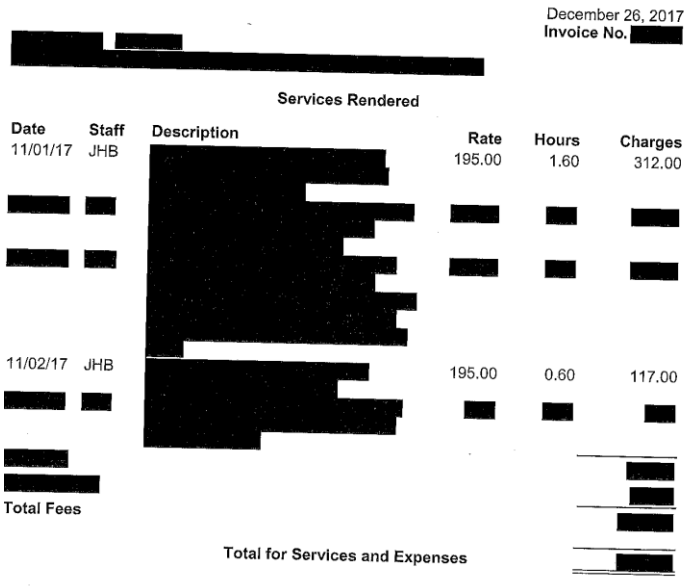
Additionally, the public records request was made upon Carmel Clay Schools and not on any attorney or law firm therefore it is unnecessary to discuss the Indiana Rules of Professional Responsibility or an attorney's obligation to protect client secrets. These are, in no way shape or form, at issue in the present case. This Office very much recognizes the difference between the confidentiality obligations as it pertains to an attorney and the disclosure requirements of the APRA, which are mutually exclusive. Once again, the public records request was not made on Church, Church, Hittle &

[6] Ind. Code § 5-14-3-2(u).

Antrim, but only its client, Carmel Clay Schools. Therefore CCS is the entity responsible for redacting what is appropriate, with or without its attorney's input.

2.3 Practical Considerations

In *Opinion of the Public Access Counselor* 18-FC-45, this Office was highly critical of the practice of redacting the entirety of an invoice save for a firm's letterhead and a few random de-contextualized numbers. To wit:



Interestingly enough, CCS condemns the recommendations of 18-FC-45 as preposterous yet concedes the practice highlighted above would indeed be over-redaction as the public has the opportunity to inspect, *at the very least*, the aggregate amount of the invoice. This is inconsistent with CCS' current response.

CCS takes exception to guidance that attorneys may want to be mindful of what they put on a receipt that may become a public record. This was simply a practical consideration. CCS is explicitly dismissive of the optics of heavy redaction, but perception is always a significant consideration in public service whether it is convenient or not.

Public client legal invoices are like a Coca-Cola can. A soda label contains basic ingredients and the nutritional information mandated by the FDA, but it doesn't give away the famous secret formula. The consumer knows what it's getting but Coke hasn't revealed its trade secrets.

And so it is with a legal invoice. This Office is confident enough in attorneys' acumen that they should be able to craft an invoice demonstrating basic and general work performed for a public agency without giving away the intimate secrets of their legal wizardry. But in those situations where privileged communication absolutely must be included on an invoice, some redaction is acceptable.

In contrast to 18-FC-45, which CCS makes no attempt to distinguish, the invoices in the present case are different in that the redactions are more precise and contain contextualized charges. This is inching closer to what the expectations of this Office has traditionally been.

They still, however, contain curiosities. Consider the following example of the current redactions:

Services Rendered

Date	Staff	Description	Rate	Hours	Charges
09/07/17	JHB	Communicate with opposing counsel regarding [redacted]	195.00	0.90	175.50
09/12/17	JHB	Communicate with opposing counsel regarding [redacted]	195.00	0.30	58.50
Sub Total					234.00
10% Discount					-23.40
Total Fees					**$210.60**
		Total for Services and Expenses			**$210.60**

Presumably the privilege and work product exceptions exist, at least in part, to preserve the integrity of litigation strategy – a worthwhile reason for redaction. Yet redaction of subject matter would serve no legitimate purpose if the scope of the work performed is communicated to *opposing counsel*. So, from whom is the information being withheld? Not a strategic adversary but presumably from the public at large which is paying for these services.

Notably, CCS does not attempt to defend or argue this or any other redaction, nor does it state any reasonable justification as to why any of the redacted information would specifically be construed as confidential attorney-client communication. It could very well reveal negotiation tactics, methodology or strategy, but CCS instead relies on a blanket assertion of the privilege.

Finally, what appears to be lost on CCS here and in the past is that this Office always attempts to strike a balance between transparency and privacy; disclosure and privilege in all manners. While we are always advocates for the public's right to know, we are also proponents of good responsible

government. And as the Office is staffed with attorneys, also the maxims of professional responsibility and ethics.

This Office is, however, recommending that public agencies and their attorneys be conscious of an agency's obligations under APRA and endeavor in good faith to be sensitive and not dismissive of the public's right to know where and how their money is being spent. The public agency client is distinguishable from its private, nongovernmental counterpart because the public agency is subject to APRA.

This Office remains convinced that middle ground on this issue exists where the attorney representing a public agency client provides invoices to their client that have sufficient information for audit purposes and to keep their clients adequately informed.

Some agencies indeed argue, including CCS in its response, that the public has absolutely no right to know anything beyond the total amount of taxpayer money spent by a public agency on legal representation. Liberally construing the APRA, this Office cannot agree with an interpretation that stands in such tension with the legislature's intent that it is the duty of a public agency to provide full and complete information regarding the affairs of the government.

This Office is not tone deaf to the requirement of attorneys to keep client secrets, but neither is it willing to ratify a public agency's non-disclosure of critical information relating to the expenditure of taxpayer funds. *Toward that end, this Opinion is not directed at attorneys at all, but at their clients who represent the public.*

Curiously enough, CCS' response does not address the disputed redactions directly. Instead it takes the opportunity to

school the Public Access Counselor on the finer points of attorney-client communication. In that regard, we find very little of the response with which to disagree or that hasn't been addressed in PAC Opinions in the past.

Although the redactions in the invoices in the current case are more precise than past invoices scrutinized by this Office, they still have further to go in demonstrating to the taxpayers that their money has been spent in a fiscally sound manner on services provided by a contractor.

Perhaps one day the legislature or the courts will have the opportunity to clarify what specific information the people of Indiana have a right to know about the legal fees paid by the public agencies on their behalf

Until then, the Public Access Counselor will continue interpret APRA in way that requires a public agency to disclose something more than just the total amount of taxpayer money spent on service providers. Anything less would run contrary to the statutory charge of the Office.

Luke H. Britt
Public Access Counselor