OPINION OF THE PUBLIC ACCESS COUNSELOR

BOB SEGALL,
Complainant,

v.

HAMILTON SOUTHEASTERN SCHOOLS,
Respondent.

Formal Complaint No.
18-FC-45

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging Hamilton Southeastern Schools ("HSE") violated the Access to Public Records Act[1] ("APRA"). HSE responded to the complaint through attorney Jessica Billingsley. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the formal complaint received

[1] Ind. Code §§ 5-14-3-1 to -10

by the Office of the Public Access Counselor on March 13, 2017.

BACKGROUND

This case is a continuation of investigative reporter Bob Segall's pursuit to uncover why Hamilton Southeastern Schools suspended Fishers High School teacher and head football coach Rick Wimmer for five days—without pay—in December of 2016. For more than a year, Segall has been requesting a factual basis for the school board's disciplinary action that resulted in Wimmer's unpaid suspension.

Segall contends that HSE—at the direction of its legal counsel—is going to great lengths to keep secret the records he is requesting; and thus, costing taxpayers.

The crux of this complaint is Segall's investigation into how many taxpayer dollars have been remitted by HSE to the law firm of Church, Church, Hittle and Antrim. On December 13, 2017, Segall and WTHR submitted a public records request to HSE seeking the following:

> All bills, invoices and statements showing costs incurred **or** funds paid by Hamilton Southeastern Schools **from June 7, 2017 through Dec 12, 2017** to the Church, Church, Hittle & Antrim law firm for charges associated with WTHR's Access to Public Records Act requests involving the suspension of Fishers High School employee Rick Wimmer and subsequent filings with the Indiana Public Access Counselor. If there are any other law firms or attorneys who received payment for legal services provided in relation to these matters, I am requesting that those bills, invoices and statements be provided, as well.

Segall's request also provided:

> I am requesting that HSE provide information to itemize these charges, i.e. clarify which charges are related to the APRA and Public Access Counselor cases involving Wimmer, as well as the total amount of money the school district has spent on legal services related to these cases.

On February 14, 2018, HSE's Director of School and Community Relations provided Segall with several pages of redacted documents and a cover letter through email. The cover letter stated the following:

> In response to your pending APRA requests, please find enclosed all records containing entries received by Hamilton Southeastern Schools in which the entries likely relate to requests for information and responses to administrative complaints related to the Access to Public Records Act.
>
> Substance within the records containing confidential attorney client communication has been redacted pursuant to I.C. 5-14-3-4(a)(1) and (8).
>
> Substance within the records unrelated to your request has also been redacted. We have identified no other records responsive to your pending requests.

The next day, Segall—after contacting this Office—reached out to HSE to request the same records without the redactions. Segall asserts that nearly a month went by with no response from HSE to his request for the non-redacted versions of the records.

As a result, on March 13, 2018 Segall filed a formal complaint with this Office.

In response to Segall's complaint, HSE denies that an APRA violation occurred in this case for two reasons. First, HSE asserts that Segall does not have statutory grounds under Indiana Code section 5-14-5-6 to even file a formal complaint with this Office. HSE argues that Segall has not requested unredacted attorney invoices from HSE; and thus, HSE could not have violated APRA without a records request. Second, HSE argues that the redactions are proper under APRA because the withheld information is protected by attorney-client privilege.

ANALYSIS

This case presents two issues. First, whether the Complainant, Bob Segall, has statutory grounds to file a formal complaint with this Office. Second, whether the redacted legal invoices released by Hamilton Southeastern Schools is in accord with 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 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 Hamilton Southeastern Schools ("HSE") 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).

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

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).

2. Grounds to File Formal Complaint with the PAC

HSE argues that Segall lacks the statutory grounds under Indiana Code section 5-14-5-6 to file a formal complaint with this Office because he has not requested unredacted attorney invoices at issue in the complaint.

This Office cannot agree.

A person who alleges a violation of the Access to Public Records Act may file either a complaint or an informal inquiry with this Office under Indiana Code section 5-14-5-6(1). What is more, Indiana Code sections 5-14-5-7, 9, and 11 establish the formal complaint and advisory opinion procedure. Part of this procedure includes defining what grounds—that is—what *reasons* are available for filing a formal complaint and receiving an advisory opinion from the Public Access Counselor.

Specifically, Indiana Code 3ection 5-14-5-6 provides the following reasons for filing a formal complaint:

> A person or a public agency *denied*:
>
> (1) the right to inspect or copy records under IC 5-14-3;
>
> (2) the right to attend any public meeting of a public agency in violation of IC 5-14-1.5; or

> (3) any other right conferred by IC 5-14-3 or IC 5-14-1.5 or any other state statute or rule governing access to public meetings or public records;
>
> may file a formal complaint with the counselor under the procedure prescribed by this chapter or may make an informal inquiry under IC 5-14-4-10(5).

(Emphasis added). Here, HSE contends that Segall has not requested unredacted attorney invoices; and thus, he has no reason to file a complaint. Restated, HSE contends Segall has not been denied the right to inspect or copy records in accordance with APRA because did not request unredacted attorney invoices.

The parties agree that Segall indeed made the public records request he said he did on December 13, 2017. *Ante*, at 2. The parties also agree that HSE provided Segall with redacted versions of the responsive records on February 14, 2018. The parties also do not dispute that Segall, after receiving the redacted records and consulting this Office, responded to HSE and requested unredacted copies of two insurance invoices that were part of the original request.

The gist of HSE's argument is that Segall lacks adequate grounds to file a complaint with this Office because he did not specifically request unredacted invoices in his follow-up email.

This argument comes up empty.

Undoubtedly, Segall requested the legal invoices on December 13, 2017. He received heavily redacted versions of the records two months later on February 14, 2018. Since

overly-redacted records can constitute a constructive denial under APRA, Segall had grounds to file a formal complaint when HSE provided the documents. A requestor need not make a new request for unredacted versions of responsive records and receive a subsequent denial to the new request to file a complaint.

Equally problematic for HSE's argument is that Segall timely filed his complaint under Indiana Code section 5-14-5-7.

Therefore, this Office concludes that Segall had the requisite statutory grounds to file a formal complaint with this Office.

3. Redaction of HSE Legal Invoices

Segall argues that the redacted legal invoices HSE provided in response to his request are at odds with APRA's disclosure requirements. In response, HSE 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).

3.1 Attorney-Client Privilege

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.[2]

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

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).

The attorney-client privilege is incorporated into the APRA through the disclosure exceptions for records declared confidential by statute or by rule of our supreme court. Ind. Code §§ 5-14-3-4(a)(1), (8).

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 HSE'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).

This Office recognizes and respects that communications falling "within the attorney-client privilege are confidential under state law and the rules of the Indiana Supreme Court." *Groth v. Pence*, 67 N.E.3d 1104, 1118 (Ind. Ct. App. 2017). As a result, this Office certainly does not seek to erode the sanctity of that privilege. It may, however, be necessary from time-to-time to remind public agencies of the parameters and limits of the relevant exceptions to disclosure based upon the judiciary's guidance and practical application.

3.2 Fee Information Generally not Privileged

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 HSE. The numbered invoices reference "Services Rendered," which includes specific information regarding dates, staff, rate, hours, and charges. The bills conclude with an entry for "Total for Services and Expenses." HSE released heavily-redacted versions of the requested invoices to Segall. As a demonstration, please see Appendix A.

These documents are illustrative of the general format HSE adhered to in redacting the other records it disclosed to Segall. HSE contends that the redacted information on the attorney invoices is protected by the attorney-client privilege pursuant to Indiana Code sections 5-14-3-4(a)(1) and (8).

This Office hesitates to accept the presupposition that the client/public agency is bound to confidentiality considerations when the duty of confidentiality belongs to the attorney and not the represented party. Once the record is in the custody of the public agency, release becomes optional at the discretion of the client.

Toward that end, certainly not everything in an itemization bill rises to the level of attorney-client communication. Invoices for legal services, it would seem, are communicated primarily for the purpose of securing payment for the services rendered rather than to provide professional legal advice or representation. The purpose of communication is relevant because the Indiana Supreme Court has maintained that the "privilege applies to all communications made to an

attorney for the purpose of professional advice or aid, regardless of any pending or expected litigation." *Colman v. Heidenreich*, 381 N.E.2d 866, 869 (Ind. 1978). Once again, the content of communication to be withheld is advice, opinion, recommendation, legal analysis, strategy etc. It would not include the fact of representation or the subject of the communication, facts, and the like – in most cases. Certainly mental impressions and theories of attorneys should be withheld as they are germane to legal strategy.

To be sure, exceptions exist. That is to say, when "revealing…the fee arrangement would be tantamount to the disclosure of a confidential communication." *Boulangger v. Ohio Valley Eye Inst., P.C.*, 89 N.E.3d (Ind. Ct. App. 2017) at 1116. Further, when determining whether the privilege applies to particular information, courts "must construe it narrowly as the privilege impedes the quest for truth." *Id.* Ultimately, the burden of proving the privilege applies is "on the one who asserts it." *Id.* At minimum, carrying this burden "entails establishing that the communication at issue occurred in the court of an effort to obtain legal advice or aid, on the subject of the client's rights or liabilities, from a professional legal advisor acting in his or her capacity as such." *Id.* at 1119.

What is more, if a public record contains both disclosable and nondisclosable information, APRA requires a public agency to separate the material that may be disclosed and make it available for inspection and copying. Ind. Code § 5-14-3-6(a).

Based on the evidence presented to this Office there is no way to determine, without guesswork, if the invoices actu-

ally contain information that is indeed protected by the attorney-client privilege as HSE suggests. As a result, this Office will not speculate on that issue because the facts are insufficient to do so. Even courts may not make a determination as to the applicability of the attorney-client privilege in "ignorance of the facts on which the privilege must depend." *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 702 (Ind. Ct. App. 1995). Instead, if necessary, the court may conduct an *in camera* inquiry to inform itself sufficiently to act. 648 N.E.2d at 702.

Even without the benefit of an *in camera* review, this Office has enough information (and has enough familiarity with public agency attorney invoices) to reasonably infer that HSE, in all likelihood, over-redacted the legal bills it released to Segall. Stated differently, HSE appears to have redacted non-privileged information from a statement of a service provider.

This Office, through its current occupant and those prior, has opined for years on the issue of attorney invoices and almost all have reached the same conclusion: *legal invoices cannot be redacted in their entirety.*

As an aside, if the issue of non-disclosure of fee invoices based on attorney-client privilege is ultimately litigated, the burden of proving the privilege applies falls on the one who asserts it. *Colman v. Heidenreich*, 381 N.E.2d 866, 868 (Ind. 1978). Here, that initial burden would be HSE's to carry.

HSE would do well to remember that it works for the taxpayers and the law firm works for HSE. The constituents in the district who are paying for services rendered to HSE are entitled to scrutinize—consistent with the law—whether

they are getting what they pay for. The public paying for the services gets to know if the juice is worth the squeeze.

Segall already knows the general scope of work; it is inherent in the request. Moreover, information like the hourly rate paid or the time and date services were performed typically would not be considered mental impressions or legal theories. They are facts that would not, in this Office's opinion, jeopardize any legal process or compromise the bond between the attorney and client. So long as the description of services on the invoices did not include advice, opinions, recommendations, legal analysis or strategy and the like, - based upon the prior decisions of the judiciary - it would likely not be protected by the attorney-client privilege.

Finally, consider the following from *Opinion of the Public Access Counselor*, 17-FC-199 (2017):

> Indeed it is a curious thing why law firms will put such sensitive information in writing on an [public agency] invoice knowing full well they are disclosable public records. Other vendors do not put trade secrets in their receipts. Taxpayers like to know what they get when their resources are used to pay for services. And make no mistake, the money used to pay for legal services comes from the pockets of taxpayers – a concept…lawyers and their clients sometimes tend to misperceive. The mental impressions of attorneys in the scope of representation are sacrosanct, but memorializing them on invoices—as opposed to a client memo or brief—has always been a bemusing curiosity to this office…Surely municipal attorneys can communicate a demand for payment

> without including a profound treatise of legal theory and strategy. Nevertheless, the redaction of attorney-client communication is permissible. And despite the puzzling inefficiency of [over]including them on billing statements, the practice is a known quantity. It has been addressed enough times by this office and the courts, that requesters should expect some redaction when seeking them.

The operative term of course, being *some* redaction and not *militant and aggressive* redaction. "Legislatures create evidentiary privileges to shield selected information from discovery, and those shields may not be wielded as swords at the will of a party." *Brown v. Katz*, 868 N.E.2d 1159, 1168 (Ind. Ct. App. 2007) (quoting *Madden v. Indiana Dept. of Transportation*, 832 N.E.2d 1122, 1128 (Ind. Ct. App. 2005)).

Although possible, this Office remains unconvinced—based on existing precedent—that Indiana courts would embrace HSE's rigid, seemingly all-or-nothing approach that a public agency's legal invoices and fee information are categorically protected by the attorney-client privilege as a vehicle for communicating sensitive legal strategy; and therefore, excluded from disclosure under APRA. Granted, exceptions may apply in certain circumstances, but the general rule is that fee information and basic services rendered – as documented on a bill from a service provider - is not protected by the attorney-client privilege as a wholesale construct.[3]

Luke H. Britt
Public Access Counselor

[3] This opinion is based exclusively on the facts and circumstances described in the formal complaint and response; and thus, is given based on the presumption that the representations—express or implied—provided by the parties contains a full and fair description of the facts and circumstances relevant to this Office's consideration of the issues presented. Existence of additional factual background not contained in the complaint or response might result in a different conclusion.