
OPINION OF THE PUBLIC ACCESS COUNSELOR

CHRISTIAN J. SHECKLER,
Complainant,

v.

ST. JOSEPH CO. BOARD OF COMMISSIONERS,
Respondent.

Formal Complaint No.
21-FC-195

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the St. Joseph County Board of Commissioners violated the Access to Public Records Act.¹ Attorney Alexandra Keller filed an answer on behalf of the county. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on November 23, 2021.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over access to communications between county commissioners and an attorney that allegedly happened before the county retained the attorney as counsel.

There is little dispute over the facts. This office addressed this issue in a recent informal opinion.²

That opinion is incorporated by reference, but the complainant, Christian Sheckler, sought communication from the current St. Joseph County attorney, Michael Misch, prior to his official retention as county attorney about local redistricting. The question became whether those communications could be considered privileged prior to that appointment. Misch previously represented the county in some capacity, but the scope is unclear. Sheckler filed a formal complaint on November 23, 2021.

In response, St. Joseph County argues there is no functional difference between a salaried attorney and a contracted attorney; and thus, the communications can be privileged irrespective of that fact. The County argues Misch has a history of being in an attorney-client relationship with St. Joseph County but does not describe as to what degree the relationship entailed.

² *Informal Opinion of the Public Access Counselor*, 21-INF-12 (2021).

ANALYSIS

1. The Access to Public Records Act

The Access to Public Records Act (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.” Ind. Code § 5-14-3-1. St. Joseph County (County) is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the County’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

2. Attorney-client privilege

A detailed analysis of the attorney-client privilege and its connection with public records can be found in the informal opinion underlying this dispute. Typically, this office would not address an issue twice. Sheckler, however, filed a formal complaint and St. Joseph County is entitled to its say in the matter.

While the entirety of 21-INF-12 will not be repeated here, the operative consideration was as follows:

Point being is that it would be all too easy to retrofit communication between a layperson and a lawyer into privileged communication for convenience's sake. It is unclear what the relationship between Misch and the St. Joseph County Commissioners was before November 8, 2021.

To assert a privilege is not a summarily dismissed exercise. In order to justify a denial to the courts (and to this office), an agency must establish "the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit." *See* Ind. Code § 5-14-3-9(g)(1)(B).

In this case, the Commissioners would be required to provide context for an existing attorney-client relationship with the lawyer and why the communication qualifies as privileged. Anything less would be a failure to meet the burden of proof or persuasion.

That's not to say the bar is high, only that it must engage in a good faith exercise to overcome it. Based on the information provided, this office is not yet convinced that the attorney-client relationship existed at the time of the communication in question but reserves the right to reevaluate with sufficient additional context.

Here, the County argues there is no functional difference when it comes to privilege between a salaried attorney and a contracted lawyer.

This office agrees, but that is not the question at hand.

There does not seem to be a dispute that Misch had some involvement in county affairs before he was designated as

county attorney. At the same time, St. Joseph County previously retained and designated another lawyer as county attorney who was not Misch. The question is to what extent the representation entailed. If it was just in a tertiary way as a member of firm with a retainer agreement with the county, that would likely not be enough to assert a privilege to withhold the requested records under APRA. Similarly, if the scope of his representation was limited to specific matters unrelated to the subject matter of the communication, it would not be enough to assert the privilege generally.

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.” *Corll [v.Edward Jones]*, 646 N.E.2d at 724 [Ind.Ct.App.1995]. A person asserting the privilege must show that “(1) an attorney-client relationship existed and (2) a confidential communication was involved.” *Id.* “Minimally, meeting this burden entails establishing that ‘the communication at issue occurred in the course 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.’” *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985, 995–96 (Ind. 2014) (quoting *Mayberry v. State*, 670 N.E.2d 1262, 1266 (Ind. 1996)).

Groth v. Pence, 67 N.E.3d 1104, 1118 (Ind. Ct. App. 2017). Here the question was never whether Misch had some kind of attorney-client relationship with St. Joseph County; the question is what was the scope?

If the scope of representation was narrow enough as to only cover a finite subject matter, the privilege as to communications would only extend to that subject matter and not to matters generally. If the representation was broader, it could encompass any number of subject matters.

The County does not address those considerations in its response.

It is also unclear if the communication “occurred in the course 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.” *Groth* at 1119

The communication about redistricting may have occurred to solicit and inform as to political or practical guidance, all legalities aside. Or it may have been communicated during a designated attorney-client relationship to obtain legal advice.

Without a more thorough description of Misch representative capacity prior to him becoming county attorney, it is impossible to make an accurate determination of whether a recognized privilege applies. Notably, the burden is on St. Joseph County to carry that argument and not Sheckler. A retainer or engagement agreement; scope of work; an invoice; or a reasonable description thereof would have satisfied that burden. None was provided.

CONCLUSION

Based on the foregoing, it is the opinion of this office that St. Joseph County has not carried its burden to demonstrate a denial of records was justified in this case.



Luke H. Britt
Public Access Counselor