

---

**OPINION OF THE PUBLIC ACCESS COUNSELOR**

---

CONNIE EHRLICH

*Complainant,*

v.

PULASKI COUNTY BOARD OF COMMISSIONERS,

*Respondent.*

---

Formal Complaint No.

22-FC-56

---

Luke H. Britt

Public Access Counselor

---

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Pulaski County Board of Commissioners (Commissioners) violated the Access to Public Records Act.<sup>1</sup> Attorney Kevin Tankersley filed a response on behalf of the Commissioners. 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 April 6, 2022.

---

<sup>1</sup> Ind. Code § 5-14-3-1-10.

## **BACKGROUND**

This case involves a dispute over records regarding revisions of the Unified Development Ordinance (UDO) made by the Pulaski County Board of Commissioners.

On March 18, 2022, Connie Ehrlich (Complainant) filed a public records request with the Commissioners seeking the following:

1. All documentation regarding the drafting of the proposed UDO changes that were presented to the APC members on March 16, 2022
2. Minutes of any public meeting(s) that the Commissioners discuss and/or approve engaging Barnes & Thornburg to draft changes to the county's UDO
3. Any written communication between the Commissioners and Mammoth Solar regarding making changes to the UDO
4. Any written information regarding payment to Barnes & Thornburg for the purpose of reviewing and drafting changes to the UDO. What is the cost involved? Who is responsible for the payment?

On March 24, 2022, attorney Kevin Tankersley responded on behalf of the Commissioners. The Commissioners denied access to requested information concerning communication between parties involved with drafting the UDO and the County Attorney, citing authorities exempting attorney-client privilege from disclosure. The minutes were stated to be readily available online. Tankersley claimed the remainder of the information requested does not exist.

On April 6, 2022, Ehrlich filed a formal complaint to the Public Access Counselor. Ehrlich alleges the Commissioners' denial violated the Access to Public Records Act (APRA).

On April 13, 2022, Tankersley responded on behalf of the Commissioners. He argues that the attorney-client privilege makes any documented communication in the course of the UDO revisions exempt from production as they were solely between the county building inspector and himself. He also argues that the response to the initial request is accurate, specifically restating that Barnes & Thornburg were never hired to draft revisions of the UDO.

## 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. The Pulaski County Board of Commissioners (Commissioners) 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 agency'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. Ehrlich's requests**

This opinion seeks to address documentation generated from the drafting of an ordinance.

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). There is no dispute that the records at issue here are public records as defined by APRA. The question is whether they are disclosable. Indeed, under APRA records declared confidential by state statute are exempt from disclosure. *See* Ind. Code § 5-14-3-4(a)(1).

Specifically, Indiana Code section 34-46-3-1 codifies the attorney-client privilege, which prohibits 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 a 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.

Therefore, it is certainly plausible that the documented communication between a building inspector and the county attorney would qualify.

Typically, a county attorney will work with a point person from a public agency to develop changes to an ordinance to present to a governing body. Often the drafts are developed behind closed doors, but once presented to a board for a vote, they become public record.

This situation appears to be no different. While the county attorney in this case cites attorney-client privilege, the drafts and communication regarding those drafts are deliberative in nature. This includes in-house personnel as well as contractors such as attorneys. Under APRA, Deliberative material may be withheld from disclosure if developed as expressions of opinion or are of a speculative nature, and communicated for the purpose of decision making. *See* Ind. Code § 5-14-3-4(b)(6).

What is more, while “attorney work product” can only be withheld in anticipation of litigation,<sup>2</sup> any attorney-client communication may be withheld regardless of subject matter. So long as the communication concerns the solicitation or submission of legal advice in the scope of the attorney-

---

<sup>2</sup> *See* Ind. Code § 5-14-3-4(b)(2) as defined by Ind. Code § 5-14-3-2(u).

client relationship, the privilege applies vis-à-vis Ind. Code § ~~5-14-3-4~~(a)(1): records declared confidential by state statute.

Understandably, some confusion was invited by a commissioner's statement declaring an intention to work with outside counsel to work on changes to the UDO. According to the county attorney, that did not happen, and all revisions were developed in house. If that is the case, the portions of the request regarding Barnes and Thornburg are moot.

## **CONCLUSION**

Based on the information provided, it is the opinion of this office that the Pulaski County Board of Commissioners did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

Luke H. Britt  
Public Access Counselor

Issued: June 8, 2022.