

May 1, 2008

Corinne Finnerty
McConnell Finnerty Waggoner PC
38 North 5th Street
Post Office Box 90
North Vernon, Indiana 47265

Re: Your informal inquiry

Dear Ms. Finnerty:

This is in response to your informal inquiry received April 22, 2008. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

You write to inquire about records withheld from disclosure by the Indiana State Department of Agriculture (“ISDA”) pursuant to I.C. § 5-14-3-4. You inquire whether a reference by the ISDA Director about an opinion obtained from the Indiana Attorney General waived the attorney client privilege the ISDA has asserted.

The Access to Public Records Act (“APRA”)(Ind. Code 5-14-3) provides two general categories of records which may or must be withheld from disclosure upon request for access. I.C. § 5-14-3-4(a) contains a list of the mandatory exceptions to disclosure, or the confidential records. I.C. § 5-14-3-4(b) contains a list of records which are public records but may be withheld from disclosure at the discretion of the agency. The ISDA has asserted the records you requested are excepted from disclosure pursuant to both I.C. § 5-14-3-4(a)(1) and I.C. § 5-14-3-4(b)(6). You inquire whether the ISDA has waived both assert exceptions.

You allege that it is your understanding that at a public meeting of the Indiana Grain Indemnity Board, the Director of the ISDA agreed to obtain an opinion from the Indiana Attorney General regarding a matter at issue. You allege that you understand the Director represented that the attorney general would authorize the action at issue. You allege that if there were any attorney client privilege or deliberative process protections for the requested information, it appears to have been waived by the Director.

The ISDA asserts a different account of the events at the public meeting and presents minutes of the meeting of the Board in support of its account. The minutes of the meeting

indicate that during the conversation at issue, a member of the Board made a motion to ask for an opinion from the attorney general on the matter. The motion carried, and the chairman indicated he would work with the Director to resolve the matter. Based on the account presented in the properly recorded minutes, I see no evidence that the Director could have waived any attorney client privilege since the ISDA had not yet received an opinion from the attorney general.

If an attorney client relationship existed at the time of the meeting and if your account of the meeting were accurate, it is still my opinion the privilege was not waived. Former counselor Michael Hurst addressed this issue in *Opinion of the Public Access Counselor 04-FC-85*.

The source of the attorney-client privilege in Indiana is found in Indiana Code section 34-46-3-1, which provides that the confidential communications between attorney and client are privileged and may be kept confidential. IC 34-26-3-1(1); *see Buntin v. Becker*, 727 N.E.2d 734, 740-41 (Ind. Ct. App. 2000). And, the APRA exempts from disclosure any records declared confidential by state statute. IC 5-14-3-4(a)(1). Other exemptions may also apply to these communications. *See, e.g.*, IC 5-14-3-4(a)(8) (exempting records and information protected as confidential under court rules). Of course, the public agency must establish that the records at issue fall within this exemption, and the applicability of the privilege must be established as to each question asked or document sought. *Buntin*, 727 N.E.2d at 740-41; *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 702 (Ind. Ct. App. 1995). The essential prerequisites to invocation of the privilege are (1) the existence of an attorney-client relationship; and (2) that a confidential communication was involved. *Buntin*, 727 N.E.2d at 740-41; *Mayberry v. State*, 670 N.E.2d 1262, 1266 (Ind. 1996).

...

Certainly, a communication not treated as confidential cannot be treated as privileged. Just as certainly, a communication not maintained as confidential cannot be treated as privileged. This is true whether the communication is intentionally or inadvertently disclosed. *See, e.g.*, *Hayworth v. Schilli Leasing*, 669 N.E.2d 165, 169 (Ind. 1996); *Taylor v. Taylor*, 643 N.E.2d 893, 898 (Ind. 1994); *Lewis v. State*, 451 N.E.2d 50, 55 (Ind. 1983). However, there is not evidence here to support your claim that the letter was “introduced” at a public meeting and thus not maintained as confidential. *While it was referenced at the meeting in support of action or, more specifically, inaction, taken by the Town Board, it is not the law in Indiana that the mere reference to and characterization of a communication from counsel to client or client to counsel waives the privilege as to the content of that communication. You have not provided any evidence to show that the letter was distributed or its contents otherwise disclosed to third parties. Moreover, it is clear that the Town, as client, intends that the letter be maintained as confidential.* The Town communicated that intent through the oral response the Town Clerk-Treasurer made to your oral request, and through the subsequent but rather immediate written response you received from the Town’s counsel. On these facts, I decline to find that the letter was not maintained as a confidential communication from attorney to client. The attorney-client privilege applies in this matter to exempt the letter from production under the APRA. *Opinion of the Public Access Counselor 04-FC-85* (emphasis added).

If your account of the meeting is accurate, the instant issue is nearly identical to the issue raised in *Opinion of the Public Access Counselor 04-FC-85*. I agree with Counselor Hurst's opinion. As such, it is my opinion that even if the Director did reference a communication from the ISDA's counsel, such a reference did not waive the privilege for the purposes of the APRA.

Regarding your inquiry about waiver of the deliberative materials exception, that exception, found at I.C. § 5-14-3-4(b)(6), is discretionary. The exception may be used by the ISDA at its discretion, so long as the denial of access is not arbitrary or capricious. I.C. § 5-14-3-9(g). Because the exception is discretionary, it is my opinion it cannot be waived. As such, it is my opinion the ISDA has not violated the APRA.

Please do not hesitate to contact us if we can provide further assistance.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: DeAnna Bruner, Indiana State Department of Agriculture