



STATE OF INDIANA

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September 28, 2007

Dorene Philpot
1140 North High School Road
Indianapolis, Indiana 46224

Re: Your informal inquiry

Dear Ms. Philpot:

This is in response to your informal inquiry dated August 14, 2006. I apologize for the delay in the response, but as you know since we discussed it by telephone, I took office July 1 of this year and am currently endeavoring to address the backlog of informal inquiries. Your inquiry relates to certain records you requested from the Decatur County Community School Corporation ("Corporation") and the Bartholomew County Special Services Cooperative ("Cooperative") pursuant to the Access to Public Records Act ("APRA") (Ind. Code §5-14-3).

BACKGROUND

Having received your inquiry on August 14, 2006, former Counselor Davis telephoned you seeking further information. You submitted a letter to her on August 16 providing further information relative to your inquiry. You indicated the Corporation and Cooperative were both named as respondents in an Article 7 hearing, a civil rights special education hearing under 511 IAC 7 and the federal Individuals with Disabilities Education Improvement Act. You indicated an insurance company, Indiana Insurance ("Insurer"), insures both the Corporation and the Cooperative, under different policies, to pay the costs of their legal fees in regard to their own counsel and, if they lose a case, to the parents' counsel. You serve as an attorney for parents who received a decision that the Corporation was in violation of "multiple state and federal laws."

The issue here involves your request for records created by and in the possession of the Insurer and outside counsel for the Corporation, Cooperative, and Insurer. You assert that the decision in *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005) requires disclosure of the records at issue.

You indicate you have received some of the records you requested, but the records about which you inquire are billing statements for any legal professionals representing the Corporation, Cooperative or parents related to any Article 7 matter in

2005 and 2006 as well as billing statements for hearing officers, court reporters, and transcript fees including but not limited to Article 7 matters during 2005 and 2006.

On behalf of the Corporation and the Cooperative, attorney Sarah Steele Riordan submitted a response to your inquiry to Counselor Davis dated August 23, 2006. Ms. Riordan indicated the Corporation and Cooperative provided records in response to your June 30, 2006 request. The Corporation and Cooperative did not provide legal invoices from the law firm of Bose McKinney & Evans, LLP (“BME”), Ms. Riordan’s firm, because neither the Corporation nor the Cooperative has ever employed BME. Ms. Riordan indicated BME is retained by the Insurer to represent the Corporation and the Cooperative. Ms. Riordan asserted *Knightstown Banner* did not apply in this particular matter because that case involved a settlement agreement to which the public agency was a party. Further, the public agency was under a statutory duty to maintain a copy of the agreement, approved the agreement in a public meeting, and obligated itself to pay public funds to the plaintiff.

Ms. Riordan further asserted that the attorney fee invoices in this matter are different in that the Corporation and Cooperative were not party to the invoices, did not pay them, and had no authority to review or approve them. They did not impose any obligation for the public agencies or require the expenditure of public funds. Further, Ms. Riordan asserted any description of specific legal services in the invoices is subject to the attorney client and work product privileges and is therefore not subject to disclosure under I.C. §5-14-3-4.

While Ms. Riordan did not concede BME’s invoices are public records, the Corporation, Cooperative and Insurer authorized production of summary invoices, which contain a general description of the categories of services provided, the number of hours expended on each category, and the names and hourly rates of the billing professionals.

While those records have since been provided to you, you indicated you did not wish to withdraw this inquiry but renewed your request for a response.

ANALYSIS

The public policy of the 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." I.C. §5-14-3-1.

Indiana Code §5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of APRA. A “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. I.C. §5-14-3-2.

The issue here involves your request for records created by and in the possession of the Insurer and outside counsel for the Corporation, Cooperative, and Insurer. In *Knightstown Banner*, the court held that a settlement agreement created by an attorney retained by a public agency's insurance company to represent the public authority is a public record subject to the requirements of the APRA. *Knightstown Banner*, 838 N.E.2d 1127, 1134. Ms. Riordan has argued *Knightstown Banner* does not apply in this particular matter because that case involved a settlement agreement to which the public agency was a party; the public agency was under a statutory duty to maintain a copy of the agreement, approved the agreement in a public meeting, and obligated itself to pay public funds to the plaintiff; and that here the Corporation and Cooperative were not party to the invoices, did not pay them, and had no authority to review or approve them. Further, the invoices did not impose any obligation for the public agencies or require the expenditure of public funds.

While the factors Ms. Riordan lists may be true, it is my opinion those factors are not enough to move the invoices out of the realm of public records. In *Knightstown Banner*, the court indicates its decision is in line with sister states and cites *Tribune-Review Publishing Company v. Westmoreland County Housing Authority*, 833 A.2d 112 (Pa. 2003). There Pennsylvania Supreme Court held that "the fact that [the insurance company] defended the suit on behalf of the housing authority, drafted the settlement agreement and signed it, . . . does not alter the fact that it ended the lawsuit between the housing authority and its employee. Thus, the settlement agreement is a public document . . ." *Knightstown Banner* at 1133 qtg. *Tribune-Review Publishing Company* at 120. Here, while the factors Ms. Riordan recites are indeed true, the fact remains that the invoices at issue relate to an Article 7 hearing between the Corporation and Cooperative and the parents of a child served by both. *Tribune-Review Publishing Company* is a case with facts more closely aligned to our present issue, and a decision with which the court in *Knightstown Banner* indicated it agreed. As such, it is my opinion the *Knightstown Banner* decision brings into the realm of public record the invoices at issue here.

Ms. Riordan argues, however, that even if the invoices were public records, they would not be disclosable because they are attorney-client confidential communications and attorney work product because they contain a description of specific legal services. Under the APRA, records declared confidential by state statute may not be disclosed by a public agency. I.C. §5-14-3-4(a). Communications between attorneys and their clients are confidential by statute in Indiana. I.C. §34-46-3. However, as Counselor O'Connor opined in *Opinion of the Public Access Counselor 00-FC-16*, it is difficult to conceive of an invoice containing only confidential communication. To the extent a record contains disclosable and non-disclosable information, the agency shall separate the material that may be disclosed and make it available. I.C. §5-14-3-6. Here, Corporation and Cooperative could provide summary invoices, which I understand is ultimately what they did, or could redact the portions of the detailed invoices that are indeed confidential.

Regarding Ms. Riordan's assertion the invoices are attorney work product, the APRA does allow the work product of an attorney representing a public agency to be excepted from disclosure at the discretion of the agency. I.C. §5-14-3-4(b)(2). The

definition of work product in the APRA is information compiled by an attorney in reasonable anticipation of litigation, including the attorney's notes and statements taken during interviews of prospective witnesses and legal research, records, correspondence, reports or memoranda to the extent each contains the attorney's opinions, theories or conclusions. I.C. §5-14-3-2(p). I do not believe invoices fall under the definition of attorney work product for purposes of the APRA.

It is my opinion the Corporation and Cooperative showed a good faith interest in providing access to public records in making available the summary invoice documents. But I do not agree with their assertion the invoices are not public records under the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Sarah Steele Riordan