STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

May 14, 2012

Stanley H. Rorick
Indiana Department of Environmental Management
100 N. Senate Avenue, IGCN 1307
Indianapolis, IN 46204-2251
Via email: srorick@idem.in.gov

Re: Informal Inquiry 12-INF-22; Disclosure of records pursuant to the Access to Public Records Act

Dear Mr. Rorick:

This is in response to your informal inquiry regarding a request for records received by the Indiana Department of Environmental Management ("IDEM") pursuant to the Access to Public Records Act ("APRA"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on the applicable provisions of the APRA, I.C. § 5-14-3-1 *et seq.*

BACKGROUND

A state agency issued a permit to a permittee. A third party (not the permittee) filed an administrative appeal pursuant to I.C. § 4-21.5-3 regarding the agency's decision to issue the permit. The state agency and the permittee are both parties to the administrative appeal and share the common legal interest of defending the decision to issue the permit. Prior to filing briefs in the administrative appeal, the attorney for the agency and the attorney for the permittee exchanged draft versions of their respective briefs via e-mail to coordinate their defense. The third party, who is appealing the issuance of the permit, has made a request to the state agency pursuant to the APRA for any correspondence between the attorney for the agency and the attorney for the permittee relating to the issuance of the permit. Before the exchange of the draft briefs between the lawyers, the draft briefs were presumably covered by the attorney-client privilege and the attorney work product doctrine. It is your understanding that federal case law recognizes a common interest doctrine that allows parties to litigation to share privileged information with other parties who have a common legal interest without waiving the applicable privilege.

Your inquiry seeks guidance on whether a state agency can legally deny access to draft briefs that were exchanged between the attorneys. More specifically, does I.C. § 5-

14-3-4(b)(2) allow the work product of the agency's attorney to be withheld from the public because it was disclosed only to someone with a common legal interest and such disclosure "would not otherwise substantially increase the ability of the adversary to gain the information." (See *Reginald Martin Agency v. Conseco Medical Insurance*, 460 F. Supp. 2d 915, 918 (S.D. Ind. 2006) and *BASF v. Reilly Industries*, 224 F.R.D. 438, 442 (S.D. Ind. 2004). Similarly, does I.C. § 5-14-3-4(a)(8) require the state agency to deny public access to the draft brief from the permittee's lawyer because a rule adopted by the Indiana Supreme Court, specifically Ind. Trial Rule 26(b)(3), provides that "a party may obtain discovery of documents . . . prepared in anticipation of litigation or for trial by another party . . . only upon showing that the party seeking discovery has substantial need of the material in preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the material by other means."

In addition, does I.C. § 5-14-3-4(a)(1) require a state agency to deny public access to the briefs, which are part of the attorney-client privilege recognized by I.C. § 34-46-3-1, even after the briefs were disclosed to a party with a common legal interest in furtherance of that common legal interest?

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." *See* I.C. § 5-14-3-1. Accordingly, any person has the right to inspect and copy a public agency's records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a). For the purposes of this informal inquiry, there is no dispute the state agency is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2.

Pursuant to the 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 and which is generated on paper, paper substitutes, photographic media, chemical based media, magnetic, or other machine readable media, electronically stored data, or any other material, regardless of form or characteristic. *See* I.C. § 5-14-3-2(n). As to your inquiry, the permittee's draft brief became a public record when it was received by the state agency. The state agency's draft brief became a public record when it was created by the state agency's attorney. The APRA does not contain a "draft" exception applicable to the definition of a public record or as a basis for denial in response to a request made for the record. "Even a draft public record is a public record subject to the disclosure requirements of the APRA." *See Opinions of the Public Access Counselor 04-FC-49; 05-FC-195; and 08-FC-54*. The APRA does not require a record to be in its final or complete form before it can be produced pursuant to a request. *See Opinion of the Public Access Counselor 08-FC-54.*

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four

hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c).

Your first inquiry deals with the application of the federal "common interest doctrine" to the APRA. The "common interest doctrine" or "joint defense doctrine" is a federal doctrine whose purpose is to "protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." U.S. v. Evans, 113 F.3d 1457, 1467 (7th Cir. 1997) [Citations omitted]. The same general rule (sometimes going by the name "common defense rule") protects "communications by a client to his own lawyer . . . when the lawyer subsequently shares them with co-defendants for purposes of a common defense." *Id*. The joint defense privilege, more properly identified as the "common interest rule," has been described as "an extension of the attorney client privilege." *Waller v. Financial Corp. of Am.*, 82 F.2d 579, 583 n. 7 (9th Cir. 1987) [Citations omitted]. It serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. *See United States v. Bay State Ambulance and Hosp. Rental Serv.,* 874 F.2d 20, 28 (1st Cir. 1989). Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected. *Eisenberg v. Gagnon*, 766 F.2d 770 (3d. Cir. Pa. 1985).

I.C. §5-14-3-4(b)(2) provides that a public agency has the discretion to withhold a record that is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

> "Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation and includes the attorney's:
> (1) notes and statements taken during interviews of prospective witnesses; and
> (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions. I.C. § 5-14-3-2(p).

Further, a public agency may not disclose records declared confidential by state statute in response to an APRA request. *See* I.C. § 5-14-3-4(a)(1). I.C. § 34-46-3-1 provides a statutory privilege regarding attorney and client communications. Indiana courts have also recognized the confidentiality of such communications:

> The privilege provides that when an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as confidential. The privilege applies to all communications to an attorney for the purpose of obtaining professional legal advice or aid regarding the client's rights and liabilities.

Hueck v. State, 590 N.E.2d 581, 584 (Ind. Ct. App. 1992) (citations omitted). "Information subject to the attorney client privilege retains its privileged character until the client has consented to its disclosure." *Mayberry v. State*, 670 N.E.2d 1262, 1267 (Ind. 1996), *citing Key v. State*, 132 N.E.2d 143, 145 (Ind. 1956). Moreover, the Indiana Court of Appeals has held that government agencies may rely on the attorney-client privilege when they communicate with their attorneys on business within the scope of the attorney's profession. *Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley*, 580 N.E.2d 371 (Ind. Ct. App. 1991).

I am only aware of two advisory opinions issued by the Public Access Counselor's Office that have made reference to the common interest doctrine. *See Opinions of the Public Access Counselor 00-FC-20 and 07-FC-202*. In 00-FC-20, Counselor O'Connor advised that the joint defense privilege was not applicable to the complaint in question as the lawsuit was no longer pending and the agency and the outside entity were not co-defendants when the request was received. *See Opinion of the Public Access Counselor 00-FC-20.* Further, Counselor O'Connor provided that the two entities were not "pursuing a joint claim." *Id.* In Advisory Opinion 07-FC-202, Counselor Neal provided the following:

> Finally is the question whether the "common interest doctrine" applies here. The purpose of this federal doctrine is to "protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." U.S. v. Evans, 113 F.3d 1457, 1467 (7th Cir. 1997) [Citations omitted]. However, as you point out in your complaint, privilege is governed by Indiana state law rather than federal law. *Reginald Martin Agency, Inc. v. Conseco Med. Ins. Co.*, 460 F.Supp.2d at 917. I do not locate any Indiana case law acknowledging the federal "common interest doctrine" as applicable to the law of privilege in Indiana. *Opinion of the Public Access Counselor's Office 07-FC-202.*

As Counselor Neal advised in 2007, I am not aware of any Indiana case law acknowledging that the federal "common interest doctrine" is applicable to the law of privilege in Indiana. As such, it is my opinion that "common interest doctrine" does not

except attorney/client communications from disclosure under the APRA. The Court of Appeals has recognized that a public agency may waive an applicable APRA exception if the agency allowed access to its material to one party and denied access to another based on an APRA exception. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003). I do not find any authority to indicate that the disclosure of the draft briefs between the permittee and the state agency was not a waiver of the privilege for the purposes of the APRA, as such it is my opinion that the agency may not cite to the attorney-client privilege or I.C. § 5-14-3-4(b)(2) to deny a request for the records that have been sought by the third party. *See Opinion of the Public Access Counselor 07-FC-202.*

You further inquire whether I.C. § 5-14-3-4(a)(8) would allow the state agency to deny the request pursuant to Ind. Trial Rule 26(b)(3). I.C. § 5-14-3-4(a)(8) provides that records declared confidential by or under rules adopted by the Supreme Court of Indiana may not be disclosed. Ind. Trial Rule 26(b)(3) provides:

> (3) Trial preparation: materials. -- Subject to the provisions of subdivision (B)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (B)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
>
> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

> (a) a written statement signed or otherwise adopted [or] approved by the person making it, or
> (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Counselor Davis advised that it was not apparent whether Indiana Trial Rule 26 declared any record confidential. *See Opinion of the Public Access Counselor 07-FC-129.* In a separate opinion, Counselor Davis further provided that issuing an opinion regarding the applicability of Ind. Trial Rule 26(B)(3) was beyond the scope of the authority of the Office of the Public Access Counselor. *See Opinion of the Public Access Counselor 04-FC-235.* Ind. Trial Rule 26 sets out that "party seeking discovery" must show substantial need of the material. However, in a request made pursuant to the APRA, there is no such requirement. Discovery is separate and distinct from the APRA. *See Opinions of the Public Access Counselor 08-FC-234 and 11-FC-314.* Further, 26(B)(3) provides that "In ordering discovery of such materials when the required showing has been made. . ." From what has been provided, I do not believe that the "required showing" has been made or that the draft briefs have been declared confidential pursuant to 26(B)(3) by the Administrative Law Judge. It is my opinion, as provided by Counselor Davis in 07-FC-219, it is not evident that the draft briefs at issue here would be considered confidential pursuant to Ind. Trial Rule 26(B)(3). As such I do not believe that the state agency may deny the third-party request's pursuant to I.C. § 5-14-3-4(a)(8), citing to Ind. Trial Rule 26(B)(3).

As to your last inquiry whether I.C. § 5-14-3-4(a)(1) requires a state agency to deny access to records which are subject to the attorney-client privilege recognized by I.C. § 34-46-4-1, even after the briefs were disclosed to a party with a common legal interest, as provided *supra* the federal doctrine of "common legal interest" has never been found to be applicable to the law of privilege in Indiana. The privilege applies to confidential communications made to attorneys in the course of their professional business and to advice given in such cases. *See* I.C. §36-46-3-2(1). The privilege does not extend to separate attorneys representing separate clients. *See Opinion of the Public Access Counselor 07-FC-202.* Furthermore, the Court of Appeals has recognized that a public agency may waive an applicable APRA exception if the agency allowed access to its material to one party and denied access to another based on an APRA exception. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003). I do not find any authority to indicate the disclosure by the state agency and the permittee was not a waiver of the privilege for the purposes of the APRA. *See Opinion of the Public Access Counselor 07-FC-202.*

If I can be of additional assistance, please do not hesitate to contact me. To the extent that the permittee may disagree with the informal opinion, it may always avail itself to the judicial process by filing a preliminary injunction with the appropriate trial court, prohibiting the release of the draft briefs prior to trial court reviewing the issues involving the APRA, the federal common defense doctrine, and the Indiana Trial Rules.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: W.C. Blanton