STATE OF INDIANA

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January 15, 2018

Cathy Knapp
4736 Hickory Wood Row
Greenwood, IN 46143

Re: Informal Opinion 18-INF-15; Deliberative Materials and Attorney-Client Privilege

Dear Ms. Knapp:

This informal opinion is in response to your inquiry about whether the City of Bloomington properly withheld material under the Access to Public Records Act ("APRA"). In accordance with Indiana Code section 5-14-4-10(5), I issue the following informal opinion to your inquiry.

BACKGROUND

On March 25, 2018, you submitted a public records request for emails regarding the Bloomington Police Department's purchase of an armored vehicle for its critical incident response team. The City denied certain records based upon the deliberative materials exception and for attorney-client privilege.

You then sought additional information, specifically, a description of the documents the City withheld and the specific exemption allowing them to do it. The City responded by arguing it does not have to create an index or a log itemizing the records it withheld.

You pose three main questions in your inquiry related to the lack of a detailed itemization:

1. Whether the deliberative materials exception would apply after-the-fact once a decision has been made; and
2. Does the City have to describe any documents withheld by the attorney-client privilege?
3. Is a privilege log required to claim multiple exceptions as applied to multiple documents?

DISCUSSION

1. The Access to Public Records Act ("APRA")

The Access to Public Records Act ("APRA") expressly states that "it is the public policy of the [State of Indiana] that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." Ind. Code § 5-14-3-1. In general, APRA governs access to public records in Indiana. What is more, public records are presumptively disclosable unless an exception applies.

APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14- 3-4(b).

2. Deliberative Materials Exception

One of the discretionary exceptions to disclosure is concept of "deliberative materials." Deliberative materials are defined by statute as:

> Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). By definition, this exception is considerably broad. So broad, in fact, that is it often called the exception that swallows the rule. The rule, of course, being that public records carry a presumption of disclosability as opposed to starting with an exception and working backward toward transparency. Therefore, the exception, while often meritorious in its application, is a way that public agencies can laconically dismiss a public records request.

Surmising that all communication is *de facto* deliberative, agencies rely on this categorization as an easy way to deny public records requests. This Office cannot say this is the case in the current instance as we have not seen the records withheld (or the ones disclosed for that matter).

Your specific question seeks guidance on whether a public agency can still claim the deliberative exception after it makes a decision.

The purpose of the deliberative materials exception is to preserve the frank and honest exchange of ideas among decision makers. Opinions, speculations, brainstorming, etc., can often generate sound plans in a vacuum. Setting aside the broad scope of the statute itself, the purpose of the statute is legitimate.

For example, this office is a decision-maker for, at times, some of the most sensitive controversies in state and local government. If deliberative material were to be disclosed between myself and my staff, that communication may be used to craft a complaint or response that manipulates my thought processes, methodologies, and strategies. It is in the public interest that those outside of this agency make arguments and communicate without having knowledge of how I make my decisions.

Therefore, it matters not if a decision has been made, the recorded communications leading up to a decision potentially remain privileged indefinitely in order to preserve the mental impressions of the decision-makers. The Indiana Court of Appeals established this in *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2003).

That same theory also extends to local government. While it is true that the business of government should be conducted in the sunlight, certain deliberations can still take place behind closed doors and a public agency's conduct can still be considered to be transparent. Indeed this is a fine line to walk, and the discretion to deliberate outside of the public view should be exercised judiciously.

3. Attorney-client privilege

The attorney-client privilege protects the confidentiality of communications between an attorney and client. The privilege was first recognized in Indiana as part of the common law by judicial decision in *Jenkinson v. State* (1845), 5 Blackf. 465, 466. The privilege is now recognized by statute.[1]

Specifically, Indiana Code Section 34-46-3-1 codifies the attorney-client privilege by prohibiting 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 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 agency if it is documented on any manner of documentation.

Your particular question, however, alludes to whether the privilege may be invoked if a lawyer is merely carbon copied on a piece of communication or if the lawyer is acting in a non-legal capacity.

The seminal case discussing this matter as it pertains to public records is *Purdue Univ. v. Wartell*, 5 N.E.3d 797 (Ind. Ct. App. 2014). In *Wartell*, the Court held that in order for a public agency to claim the attorney-client privilege, an attorney has to be conducting business in a representative capacity *as an attorney*. Lawyers can wear many hats, but the

[1] Ind. Code § 34-46-3-1; Ind. Code § 33-43-1-3(5); Ind. Trial Rule 26(B)(1).

mere fact that an individual is an attorney does not allow the agency to apply the Midas treatment to any material an attorney touches.[2]

4. Privilege Log

The City is correct that a privilege log or any other type of index is not required to itemize statutory exemptions as applied to public records. Simply put, unless otherwise stated, the APRA does not generally require a record to be created to respond to a request.

Indiana Code Section 5-14-3-4(d) states that pursuant to a denial, an agency must only state an exemption and the person responsible for the denial. The law does not require further explanation.

It should be noted that you originally filed your inquiry as a formal complaint, thus triggering the adversarial process. As we have previously discussed, the complaint was outside the statutory deadline for filing, therefore it was converted to an informal inquiry. Were the formal complaint timely, the burden of justifying an exemption to disclosure would have shifted to the City to explain the application of exemptions.

As a result, the public is not completely in the dark without a privilege index. Anyone denied records can appeal to this Office who in turn will request an explanation from a public agency. However, I am disinclined to mandate any kind of supplemental log to accompany an initial denial of a public records request.

Please do not hesitate to contact me with any questions.

Best regards,

Luke H. Britt
Public Access Counselor

[2] See also: *Colman v. Heidenreich*, 381 N.E.2d 866, 869 (Ind. 1978): "privilege applies to all communications made to an attorney for the purpose of professional advice or aid, regardless of any pending or expected litigation."