



STATE OF INDIANA

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February 1, 2022

Christian Sheckler
635 S. Lafayette Blvd.
South Bend, IN 46601

VIA EMAIL: csheckler@sbtinfo.com

RE: 21-INF-12; Application of the Attorney-Client Privilege Exception

Dear Mr. Sheckler:

This informal opinion examines whether the attorney for St. Joseph County had the authority to withhold certain records based on the application of the attorney-client privilege exception found in the Access to Public Records Act (APRA). Specifically, you filed a request for public records with the county seeking the following:

1. All emails and text messages, whether to/from public or "personal" email addresses/phone numbers, between (a) Derek Dieter/Michael Misch, (b) Deb Fleming/Michael Misch, and (c) Andy Kostielney/Michael Misch, from July 1-Nov. 8, 2021, related to redistricting and/or state legislation concerning St. Joseph County's redistricting process.
2. All emails and text messages, whether to/from public or "personal" email addresses/phone numbers, between (a) Derek Dieter/Michael Misch, (b) Deb Fleming/Michael Misch, and (c) Andy Kostielney/Michael Misch, from Jan. 1-June 31, 2021, related to redistricting and/or state legislation concerning St. Joseph County's redistricting process.

You state in your inquiry that the requested communications were sent between the Board of Commissioners and attorney Michael Misch *before* he was officially appointed county attorney. Official minutes put Misch's appointment sometime between November 9 and November 15, 2021. Therefore, you ask whether the requested communications can be withheld pursuant to the attorney-client privilege exception.

1. Access to Public Records Act (APRA)

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. The Access to Public Records Act (APRA) says “(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.” *Id.* 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). 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. Attorney-client privilege in public records

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* 5 Blackf. 465, 466 (Ind. 1840).

The privilege is now recognized by statute. 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 if communicated in any manner of documentation, which includes email or text messages.

The attorney-client privilege “applies to all communications between the client and his attorney for the purpose of obtaining legal advice or aid, regarding the client’s rights and liabilities.” *Groth v. Pence*, 67 N.E.3d 1104, 1118 (Ind. Ct. App. 2017).

To assert the privilege, a person must show “(1) an attorney-client relationship existed and (2) a confidential communication was involved.” *Id.* What is more, the privilege is “intended to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’” *Lahr v. State*, 731 N.E.2d 479, 482 (Ind. Ct. App. 2000) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

Here, the question is whether the attorney-client relationship exists. This consideration is critical because “the attorney-client privilege does not exist unless the communication is confidential.” *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 703 (Ind. Ct. App. 1995). Consider the preamble to the Indiana Rules of Professional Conduct for Attorneys:

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Point being is that it would be all too easy to retrofit communication between a layperson and a lawyer into privileged communication for convenience’s sake. It is unclear what the relationship between Misch and the St. Joseph County Commissioners was before November 8, 2021.

To assert a privilege is not a summarily dismissed exercise. In order to justify a denial to the courts (and to this office), an agency must establish “the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit.” *See* Ind. Code § 5-14-3-9(g)(1)(B).

In this case, the Commissioners would be required to provide context for an existing attorney-client relationship with the lawyer and why the communication qualifies as privileged. Anything less would be a failure to meet the burden of proof or persuasion.

That's not to say the bar is high, only that it must engage in a good faith exercise to overcome it. Based on the information provided, this office is not yet convinced that the attorney-client relationship existed at the time of the communication in question but reserves the right to reevaluate with sufficient additional context. Please do not hesitate to contact me with any further questions.

Best regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor