



STATE OF INDIANA

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April 7, 2010

Ms. Dare Hawes
719 S. Michigan St.
Plymouth, IN 46563

Re: Formal Complaint 10-FC-65; Alleged Violation of the Access to Public Records Act by the Plymouth Community School Corporation

Dear Ms. Hawes:

This advisory opinion is in response to your formal complaint alleging the Plymouth Community School Corporation (the "PCSC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* I have enclosed the PCSC's response from attorney Edward R. Ruiz.

BACKGROUND

According to your complaint, the PCSC has refused to provide you with "copies of the complete, itemized (with a description of the work performed) original billing statements of Attorney Thomas Wheeler, II or any statement whatsoever for Attorney Joe Morris." You cite to a previous opinion from Counselor O'Connor, *Opinion of the Public Access Counselor 00-FC-16*, in which she concluded that a school corporation was required to produce original billing statements in response to a public records request. You believe this precedent also requires the PCSC to produce attorney billing statements.

My office forwarded a copy of your complaint to the PCSC. In response, Mr. Ruiz denies that the PCSC has violated the APRA. He claims that you have already been provided with the legal billing statements that you requested, and asserts that you filed this complaint "simply due to the fact that [the PCSC was] unable to provide her with this information by the arbitrary deadline [that you] demanded." Mr. Ruiz also argues that your reliance upon Counselor O'Connor's opinion is misplaced because Counselor O'Connor noted that the school corporation could redact portions of the invoices that were subject to the attorney-client privilege.

ANALYSIS

The public policy of the APRA states, “[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. The PCSC does not contest that it is a “public agency” under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the PCSC’s public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

One category of confidential public records is those declared confidential by state statute. *See* I.C. §5-14-3-4(a)(1). Indiana Code § 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. (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). Therefore, the PCSC does not violate the APRA when it withholds from disclosure information that is subject to the attorney client privilege.

Moreover, pursuant to I.C. §5-14-3-4(b)(2) a public agency has the discretion to withhold a record that is the work product of an attorney representing a public agency:

“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). Therefore, if the records you sought constitute the work product of an attorney, the PCSC acted within its discretion when it denied your request for access to them.

The parties disagree about the impact of Counselor O'Connor's opinion in *Opinion of the Public Access Counselor 00-FC-16*. Both that opinion and a subsequent opinion from Counselor Neal stand for the proposition that, generally, invoices and attorney bills are disclosable records, but information contained within those records may be redacted if it is either attorney-client privileged or attorney work product. *See id.*; *Opinion of the Public Access Counselor 07-FC-317*. Thus, in this matter, the PCSC was required to produce the attorney invoices, but the PCSC also had the discretion to redact confidential portions of those records prior to producing them. Because the PCSC has produced the original billing statements per your request, it is my opinion that the PCSC acted in accordance with the APRA requirements as outlined in these opinions.

Here, the PCSC has assured me that it has produced all responsive billing statements in accordance with your request. I trust this resolves your complaint as to those records. To the extent that the PCSC failed to produce itemized billing statements for Mr. Morris' legal services to the PCSC, Mr. Ruiz maintains that Mr. Morris' services were provided pursuant to a retainer agreement. As a result, no itemized bills were created. Because nothing the APRA requires a public agency to create a record in response to a request, it is my opinion that the PCSC did not violate the APRA by failing to create or produce such a record. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy....").

Regarding your apparent allegations that the PCSC did not produce the records you requested in a timely fashion, there are no prescribed timeframes when the records must be produced by a public agency. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. I.C. §5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45*. The PCSC does not explain why it required from January 20, 2010, until March 8, 2010, to produce the invoices for Mr. Wheeler's services to the PCSC. Consequently, it is my opinion that the PCSC has not yet sustained its burden of proof to show that such a time period was reasonable.

CONCLUSION

For the foregoing reasons, it is my opinion that the PCSC did not violate the APRA. Further, it is my opinion that the PCSC has not yet sustained its burden of proof to demonstrate that the time it took to produce Mr. Wheeler's invoices was reasonable.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

Cc: Edward R. Ruiz