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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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MICHELLE L. FULLHART,  
*Complainant,*

v.

HAMILTON EAST PUBLIC LIBRARY,  
*Respondent.*

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Formal Complaint No.  
23-FC-80

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Hamilton East Public Library violated the Access to Public Records Act.<sup>1</sup> Attorney Christopher P. Greisl filed an answer on behalf of the library. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on August 23, 2023.

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

## **BACKGROUND**

In this case we consider whether copying an attorney on an email justifies nondisclosure of an email under the attorney-client privilege.

On July 10, 2023, Michelle Fullhart (Complainant), filed a public records request with Hamilton East Public Library (HEPL) seeking communication (email and text messages) between HEPL Board members and the library's director regarding changes the Board's July meeting.

HEPL acknowledged Fullhart's request the next day. After some back-and-forth revising of the request, HEPL produced several emails on August 11. Among those emails, Fullhart takes exception to the redaction of email exchange between the library director and the HEPL Board President from July 7, 2023. Notably, HEPL's attorneys were copied on that email.

After Fullhart questioned the redactions, attorney Mark Crandley explained that the full message was not disclosed due to attorney-client privilege protections.

Nonplussed by that response, Fullhart filed a formal complaint with this office on August 22 alleging HEPL violated the Access to Public Records Act (APRA) by redacting the email. Specifically, Fullhart contends that merely copying attorneys on an email is not enough to invoke the attorney-client privilege.

On August 29, 2023, HEPL filed an answer to Fullhart's complaint. HEPL maintains that the message was privileged because it concerned the solicitation or submission of legal advice in the scope of the attorney-client relationship.

Although Fullhart asked this office to review the unredacted copy of the disputed email, HEPL did not provide it for *in camera* review.

Notably, the discretion to provide the unredacted email for review is with HEPL. Although it would have been helpful, the library was not required to do so as a part the formal complaint process.

## ANALYSIS

### 1. The Access to Public Records Act

The Access to Public Records Act (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.” Ind. Code § 5-14-3-1. Hamilton East Public Library (HEPL) is a public agency for purposes of APRA; and therefore, is subject to law’s requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy HEPL’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

At the same time, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

This case involves the applicability of the attorney-client privilege to an email exchange between the HEPL director and the HEPL board president with attorneys copied.

## **2. Public records and attorney-client privilege**

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). There is no dispute that the email at issue here is a public record as defined by APRA. The question is whether they are disclosable. Indeed, under APRA records declared confidential by state statute are exempt from disclosure. *See* Ind. Code § 5-14-3-4(a)(1).

### **2.1 Attorney-client privilege**

Indiana Code section 34-46-3-1 codifies the attorney-client privilege, which prohibits 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.

Additionally, an attorney has a 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 Indiana 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 it is documented.

Here, the HEPL director and HEPL Board president were the primary sender and recipient of the disputed email, but HEPL attorneys were copied on the correspondence. In other words, the attorney was neither the primary sender nor the primary recipient of the communication.

Undoubtedly, Indiana Code section 34-46-3-1 seeks to address—and protect the fidelity of—attorney-client communication, and rightfully so. Nonetheless, the privilege cited does not explicitly address client-client communication.

Notably, in a dispute over access to public records the burden proof for the nondisclosure is on the agency denying access. *See* Ind. Code § 5-14-3-1.

The same is true for a party seeking to invoke attorney-client privilege. Toward that end, the Indiana Supreme Court has explained that in order “[t]o invoke attorney-client privilege, the invoking party must establish by a preponderance of the evidence (i) the existence of an attorney-client relationship and (ii) that a confidential communication was involved.” *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985, 995 (Ind. 2014).

Moreover, the Court observed:

“Minimally, meeting this burden entails establishing that ‘the communication at issue occurred in the course of an effort to obtain legal advice or aid, on the subject of the client’s

rights or liabilities, from a professional legal advisor acting in his or her capacity as such.” *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985, 995–96 (Ind. 2014) (quoting *Mayberry v. State*, 670 N.E.2d 1262, 1266 (Ind. 1996)).

In this case, HEPL offers little to support its assertion that the privilege applies to the email in question. Granted, the library correctly cites relevant statutory law, but it doesn’t specifically explain how or why the privilege applies to the redacted email, which would make it exempt from disclosure under APRA. Equally problematic for HEPL is the lack of any cited legal authority to support the claim that a client-to-client email—with an attorney copied—is inherently protected by attorney-client privilege.

Indeed, our courts have not addressed the specific question of whether or when the attorney-client privilege applies to a communication—specifically a client-to-client email—where an attorney is simply copied on the message.

In any event, we have client-client communication without evidence of, or even an argument suggesting the email contains attorney input or solicitation of legal advice. Likewise, it does not appear that the subject matter in the unredacted portion implicates any legal rights or liabilities.

Notably, business or public relations considerations would not apply to the attorney-client communication. While other exceptions may apply, this one most likely is not the way to go.

Without more, this office cannot conclude that HEPL’s denial is appropriate under APRA.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that Hamilton East Public Library has not carried its burden of nondisclosure under APRA. Without more, this office cannot agree that the disputed email is exempt from disclosure based on attorney-client privilege.



Luke H. Britt  
Public Access Counselor

Issued: October 13, 2023