

April 1, 2005

Mr. Robert Crawford
3398 West 200 North
Danville, IN 46122

Re: Formal Complaint 05-FC-46; Alleged Violation of the Access to Public Records Act by the Indiana Attorney General

Dear Mr. Crawford:

This is in response to your formal complaint alleging that the Indiana Attorney General violated the Access to Public Records Act by denying you records. I find that the Attorney General did not violate the Access to Public Records Act.

BACKGROUND

On February 21, 2005, you sent a letter to deputy attorney general Gregory F. Zoeller requesting the following records:

- A copy of the letters from Indiana Department of Labor OSHA referring discrimination cases to the Attorney General's Office recommending litigation, for the past two years;
- A copy of the letters from the Attorney General's Office to the Indiana Department of Labor OSHA in reply to their recommending litigation in these cases, for the past two years; and
- Information on how many cases the Indiana Department of Labor OSHA has recommended litigation to the Attorney General's Office in the past five years, and how many of these cases has the Attorney General's office brought an action in court in the past five years.

On February 22, 2005, Mr. Zoeller sent you a response via facsimile. In his response, he states that items #1 and #2 are nondisclosable because the records are subject to the attorney client privilege and the deliberative process. He cites Ind. Code 34-46-3-1 and IC 5-14-3-4(a) as the specific exemptions authorizing withholding of the records. He also cites IC 5-14-3-4(b)(6)

because the records in items #1 and #2 contain intra-agency or interagency advisory or deliberative material that express opinions and are used for decision-making.

With respect to item #3, Mr. Zoeller stated that his office does not have a record that is responsive to your precise request. However, he stated that some information is maintained in an electronic database. The database shows cases as either open or closed, and the table in the letter shows the number of such OSHA cases, designated as open or closed.

You filed your formal complaint with my office on March 2, 2005. You claim that Mr. Zoeller's response is vague and that he is hiding behind the attorney-client privilege. You also state that there is more information in the database than is being given to you.

I sent a copy of the formal complaint to Mr. Zoeller. Although he did not send me a separate written response to your complaint, he told me that the letter of February 22 which he sent to you stands as the basis for denial.

ANALYSIS

Any person may inspect and copy the public records of a public agency during the agency's regular business hours, except as provided in section 4 of the Access to Public Records Act. IC 5-14-3-3(a). One category of confidential public records is those declared confidential by state statute. IC 5-14-3-4(a)(1). Under Indiana Code section 34-46-3-1, a statutory privilege between an attorney and the client is recognized. Upon the request of the Commissioner of Labor, the attorney general is authorized to prosecute any violation of any law, rule, or order that the commissioner has the duty to enforce. IC 22-1-1-18. Accordingly, there is an attorney-client relationship between the department of labor and the Indiana Attorney General. The privilege protects communications between the attorney general and the department of labor.

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).

The Indiana Court of Appeals has held that government agencies may also rely upon this privilege when they communicate with their attorneys on business within the scope of the attorney's profession:

As long as the communication is within this scope, it is of no moment to the privilege's application that there is no pendency or expectation of litigation. Neither is it of any moment that no fee has been paid. Rather what is essential to the privilege is a 'confidential relation of client and attorney.' Within such a confidential relation, the privilege applies to all communications made to an attorney for the purpose of professional advice or aid, upon the subject of the client's rights or liabilities.

Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley, 580 N.E.2d 371 (Ind. Ct. App. 1991).

Therefore, I do not find your complaint persuasive to the extent that you believe that the attorney general's denial based on the attorney-client privilege is inappropriate. To be sure, he may not waive the privilege for his client. I also do not believe there is anything vague in his February 22 response to you, which included full citations to statutory and caselaw authority and explained in clear narrative the basis for denial.

Also, you contend that the attorney general has not given you full information regarding cases in the database. You are seeking data on how many cases the attorney general has been asked to litigate by the department of labor, and how many he has brought suit on in the last five years. The attorney general has stated that the only information in the database that is responsive to your request shows only whether an IOSHA case has been opened or closed. Further, he gave you that information in his February 22 response. A public agency is not required to create a record in order to fulfill a request for data or information. If you still believe that the attorney general has not been forthcoming to you in response to item #3, your remedy is to file a lawsuit under IC 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, I find that the Indiana Attorney General did not violate the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. Greg Zoeller