



# STATE OF INDIANA

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November 25, 2009

Mr. James O. Griffin  
Riley Bennett & Egloff, LLP  
141 E. Washington St.  
Fourth Floor  
Indianapolis, IN 46204

*Re: Formal Complaint 09-FC-254; Alleged Violation of the Access to Public Records Act by the Indiana Secretary of State Securities Division*

Dear Mr. Griffin:

This advisory opinion is in response to your formal complaint on behalf of your client, Robert J. Nice, alleging the Indiana Secretary of State Securities Division ("SOS") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* For the following reasons, my opinion is that the SOS did not violate the APRA.

## BACKGROUND

In your complaint, you allege that Mr. Nice was named a respondent in an administrative action commenced by the SOS's securities division. On September 17, 2009, you served a request on the SOS seeking records related to the investigation and prosecution of the administrative action. According to your complaint, the SOS then denied your request "in its entirety and asserted conclusory statements that some or all of the requested public records were confidential." You allege that your client is entitled to the records as they are necessary to prepare and assert a defense to the action initiated by the SOS.

My office forwarded a copy of your complaint to the SOS. The response of Jeffrey Bush, chief deputy securities commissioner, is enclosed for your review. Mr. Bush states that in the course of the administrative action against Mr. Nice, Mr. Nice requested authority to conduct discovery under 710 I.A.C. 1-19-11, which was granted by the administrative hearing officer. As a result of that order, Mr. Nice was entitled to conduct discovery pursuant to the applicable discovery provisions of the Indiana Trial Rules. Mr. Nice submitted a request for interrogatories and a request for production of evidence on September 17, 2009, which the SOS responded to on November 6, 2009.

Mr. Bush further notes that the SOS denied your request for access to the securities division's investigative file because those records are confidential according to statute, regulation, and attorney work product. Mr. Bush claims the statutory authority for the confidentiality of such records is Indiana Code section 23-19-6-7, which provides that all items obtained in an investigation under the Indiana Uniform Securities Act are confidential. Moreover, records declared confidential by state statute are nondisclosable under section 4(a)(1) of the APRA. Mr. Bush also cites to 710 I.A.C. 1-21-2, which classifies as confidential information and documents obtained by the securities division in the course of an investigation unless the SOS chooses to publish such information through the administrative process. As that is a regulation rather than a statute, Mr. Bush notes section 4(a)(2) of the APRA, which provides that items declared confidential by regulation are not disclosable. Finally, Mr. Bush cites to Indiana Code section 5-14-3-4(b)(2) for his position that attorney work product is exempt from disclosure at the agency's discretion.

## ANALYSIS

The public policy of the 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." I.C. § 5-14-3-1. Any person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are exempt from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a). The SOS does not contest that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the SOS during regular business hours unless the records fall within one of the APRA's exceptions to disclosure. I.C. § 5-14-3-3(a).

Initially, I note that I did not grant your request for priority status. Under 62 I.A.C. 1-1-3(3), a formal complaint has priority if the complainant has filed a complaint concerning denial of access to public records and at least one (1) of the public records requested was sought for the purpose of presenting the public record in a proceeding to be conducted by *another* public agency. You allege that you sought the record from the same public agency that you intended to present it to. Therefore, it was not necessary for me to issue the opinion within seven days because you did not allege the circumstances of 62 IAC 1-1-3(3).

Pursuant to section 4 of the APRA, one category of confidential public records consists of records declared confidential by state statute or rule. *See* I.C. §§ 5-14-3-4(a)(1), (2). Mr. Bush has proffered statutes and administrative rules that classify the investigative files of the SOS as confidential. Consequently, it is my opinion that the SOS did not violate the APRA when it denied your request for access to such information.

Additionally, 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 (Ind. Ct. App. 1992) (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 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, it is my opinion that the SOS did not violate the APRA if it withheld attorney-client communications regarding Mr. Nice’s administrative proceeding because attorney-client privileged communications are exempt from disclosure under I.C. § 34-46-3-1 and I.C. § 5-14-3-4(a)(1).

#### CONCLUSION

For the foregoing reasons, it is my opinion that the SOS did not violate the APRA.

Best regards,



Andrew J. Kossack  
Public Access Counselor

Cc: Jeffrey Bush, Indiana Secretary of State Securities Division