



# STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR  
LUKE H. BRITT

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)234-0906  
Fax: (317)233-3091  
1-800-228-6013  
www.IN.gov/pac

February 15, 2016

Mr. Dale Marmaduke  
1153 Pilgrim Road  
Greenwood, Indiana 46142

*Re: Formal Complaint 16-FC-02; Alleged Violation of the Access to Public Records Act by the City of Greenwood*

Dear Mr. Marmaduke:

This advisory opinion is in response to your formal complaint alleging the City of Greenwood ("City") and Ms. Krista Taggart, City Attorney violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 et. seq. The City has responded via Ms. Taggart. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on January 4, 2016.

## BACKGROUND

Your complaint dated December 24, 2015 alleges the City of Greenwood violated the Access to Public Records Act by improperly denying your request.

You requested a copy of the summary of lawsuits filed by the City. Ms. Taggart denied your request citing attorney-client privilege.

On January 5, 2016 the City responded and reasserted the attorney-client privilege. Ms. Taggart notes the requested summary was a memo which contained updates related to the current litigation and such editorializing on the status of cases amounts to privileged communication.

## 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." See Ind. Code § 5-14-3-1. The City of Greenwood is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the City's disclosable public records during

regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

Initially, it should be noted that in your original correspondence with this Office, you discussed two (2) different documents, a litigation summary and a notice of pending lawsuits. These documents are distinct and would contain dissimilar information. Therefore, the applicability of the exemptions under the APRA would differ between the two.

The City has cited the attorney-client privilege as grounds for non-disclosure. Records declared confidential by state statute are exempt from disclosure. See Ind. Code § 5-14-3-4(a)(1). Ind. 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). 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.

Here, your initial request sought copies of records created by the City Attorney related to future and pending suits against the City. There is no dispute the City Attorney represents the City in legal matters. Therefore, the City has the ability to raise the attorney client privilege. Additionally, pursuant to Ind. Code § 5-14-3-4(b)(2), work product of an attorney is subject to discretionary release by a public agency. The records created have to be created pursuant to the attorney’s employment with the public agency.

Under Ind. Code § 5-14-3-2(r), work product is defined as “information compiled by an attorney in reasonable anticipation of litigation.” In *Ind. St. Hwy Comm’n v. Morris*, Justice Shepard writes that the attorney client privilege is meant to “protect those in need of services [...] by ensuring that [their] confidences will not be revealed. 528 N.E.2d 648, 474. The summary of pending litigation could contain a lawyer’s strategy or otherwise privileged client communication. The City has stated the summary contains updates on the litigation and includes “opinions and anticipated future actions.” The litigation summary can be protected by the attorney work product exemption.

A mere notice of pending litigation (and associated costs) should not contain any sensitive information. A docket search can easily reveal this type of information and does not particular to the attorney-client relationship. If the City maintains a list of case filings, it should be released to you upon request. Additionally, an attorney invoice demonstrating costs of litigation is public record if billed to a public entity. If, for example, the City hired outside counsel to defend a suit and that firm bills the City, such an invoice should be made available for public inspection. See *Opinion of the Public Access Counselor 14-FC-223*.

## CONCLUSION

Based on the forgoing, it is the Opinion of the Public Access Counselor the City of Greenwood's denial of the request for a litigation summary was proper. However, the City should release a list of pending litigation and associated costs if one exists.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor

Cc: Ms. Krista Taggart, Esq.