



STATE OF INDIANA

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Elizabeth Barnes
Hodges & Davis P.C.
Via Electronic Mail: elucasbarnes@hodgesdavis.com

Re: *Informal Inquiry 11-INF-43; Requests for access to attorney invoices*

Dear Ms. Barnes:

This is in response to your informal inquiry concerning access to attorney invoices. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Indiana Public Access Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.*

You pose two questions in your inquiry, which concerns requests that you have received for copies of attorney invoices for the attorney representing a particular school ("School"). First, would the attorney invoices be disclosable under the APRA? Second, if the invoices are disclosable, who is obligated to produce those invoices pursuant to a records request? I will address each of these herein.

1. Are attorney invoices disclosable records under the APRA?

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 School is a "public agency" under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the School'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 School 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 sought constitute the work product of an attorney, the School is within its discretion by denying a 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 School would be required to produce the attorney invoices, but the School has the discretion to redact confidential portions of those records prior to producing them.

2. If the invoices are disclosable, who is obligated to produce those invoices pursuant to a records request?

The custodian of public records is responsible for providing them upon request. If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[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...”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *Opinion of the Public Access Counselor 10-FC-56*. Thus, if the School is not the custodian of the attorney invoices, the School does not violate the APRA by failing to produce them.

A “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. I.C. § 5-14-3-2(m). The Indiana Court of Appeals has further added to the definition records created for or on behalf of a public agency. *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005).

In 2005 the Court of Appeals in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005) (“*Knightstown*”), held that because a private entity created a settlement agreement *for* a public agency, the settlement agreement was a public record subject to disclosure under the APRA. *Id.* at 1134. The Court did not find that the language “created, received, retained, maintained or filed by or with a public agency” in I.C. §5-14-3-2 excepted from the definition records created *for* or *on behalf of* a public agency. Furthermore, the Court said it would amount to a tortured interpretation of the statute if private attorneys could ensconce public records in their file room in order to deny the public access. *Id.* at 1133. The Court of Appeals reasoned that “the Taxpayers of a community have the right to know how and why their money is spent. Therefore, mindful of the statute’s purposes of openness, the court does not allow a public authority to thwart disclosure by having an attorney or an insurer’s attorney prepare every writing that the public authority wishes to keep confidential.” *Id.* at 1134.

You concede in your inquiry that the School does not maintain the attorney invoices, but rather the invoices are submitted to the School’s insurance company by the School’s attorney for payment. While the invoices may or may not be in the possession of the School, they are public records created or maintained by both the School’s attorney and insurance carrier. Following *Knightstown*, it is my opinion that because the invoices were created or maintained by, for, or on behalf of the School, the attorney *and* the insurance carrier are obligated to respond to a records request for the attorney invoices should they receive one.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,



Joseph B. Hoage
Public Access Counselor