



# STATE OF INDIANA

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May 31, 2011

Ms. Dare Hawes  
719 South Michigan Street  
Plymouth, IN 46563

*Re: Formal Complaint 11-FC-111; Alleged Violation of the Access to Public Records Act by the Plymouth Community School Corporation*

Dear Ms. Hawes:

This advisory opinion is in response to your formal complaint alleging the Plymouth Community School Corporation ("PCSC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* PCSC's response from Superintendent Daniel Tyree is enclosed for your reference.

## BACKGROUND

In your complaint, you allege<sup>1</sup> that PCSC thrice denied your request for a copy of a legal opinion (the "Legal Opinion") from PCSC's attorney regarding a PCSC roofing project. You claim that Supt. Tyree stated publicly on March 31, 2011, that the Legal Opinion would be available for public review. On April 14, 2011, you sent an email to Supt. Tyree which read, "Please identify that attorney [that issued the Legal Opinion] and send copies of both his legal opinion and a copy of the invoice for his specific services." On April 17th, Supt. Tyree responded by stating, "The letter you requested is protected by the attorney client privilege. There was no invoice for services."

On April 18th, you sent a second request to Supt. Tyree which read, "Please send the name of this attorney who has advised you on the roofing project and his contact information so that we can thank him personally for his services to our school system!... [sic] This is my 2nd official written request under IPA [sic]." The next day, Supt. Tyree replied, "The attorney who did the research and who provided our board with the opinion was our board attorney, Mr. Ed Ruiz."

<sup>1</sup> I acknowledge that your complaint contains several allegations that are outside the scope of this office's authority, which is to issue advisory opinion regarding alleged violations of the public access laws. See I.C. § 5-14-4-10. Consequently, this opinion is based only on those portions of your complaint alleging violations of either the APRA.

On April 20th, you send a third request which read,

I have communicated at length with Andrew Kossack, IPA counselor [sic], and reviewed the applicable Indiana Code Statutes [sic] . . . Seeing as the legal opinion prepared by Mr. Ruiz and provided to the board by himself is not a document prepared in preparation for a law suit, or in response to ANY threat of law suit, I again ask for a copy of Mr. Ruiz's publicly paid legal opinion . . . This requested document is also one that both you and Roger publicly declared was available for anyone who wanted to see it. I want to see it, as do others. Please send it to me, or have Mr. Ruiz forward it to me. This is my 3rd and last IPA [sic] request.

The same day, Mr. Ruiz responded for Supt. Tyree. Mr. Ruiz wrote via email, "I am writing to advise the [sic] you will not receive any memorandum prepared for my client, the PCSC. It is confidential as my attorney work product and under attorney / client privilege." On April 22nd, you replied to Mr. Ruiz and informed him of your opinion that the Legal Opinion was not exempt from disclosure, but he responded the same day and maintained the PCSC's denial on the basis of attorney client privilege.<sup>2</sup>

On May 5, 2011, in response to your complaint, Supt. Tyree sent a letter to my office in which he maintained the PCSC's position that the Legal Opinion is exempt from disclosure because it constitutes an attorney-client privileged communication. According to Supt. Tyree, the Legal Opinion contains legal opinions and advice and is not subject to disclosure absent a waiver of the privilege.

I also note that on April 30, 2011, you supplemented your complaint with information regarding the Legal Opinion itself, which was "leaked" to the public and posted on the internet. I reviewed the Legal Opinion, which discusses the legal aspects of construction work done for various schools under PCSC's jurisdiction. It also outlined some public criticism of PCSC's handling of these projects and analyzed the probability of certain outcomes if litigation were initiated against PCSC. The bottom of the letter includes a disclaimer, which reads, "This document is confidential in that it contains legal opinions and advice. It is therefore not subject to disclosure with any third parties absent a waiver of this privilege."

## ANALYSIS

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 PCSC 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 PCSC's public records

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<sup>2</sup> You highlight strong language used by Mr. Ruiz in his responses to you, which I acknowledge but do not discuss here because the tone of Mr. Ruiz's responses have no bearing on whether or not they were legal or illegal under the APRA. I note, however, that it is my understanding that Mr. Ruiz resigned as the PCSC's attorney effective May 17, 2011.

during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a). Under the APRA, a public agency that withholds a public record bears the burden of proof to show that the record is exempt. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. I.C. § 5-14-3-1.

Here, PCSC argues that it had the discretion to withhold the Legal Opinion based on the attorney-client privilege. PCSC claims that the Legal Opinion was a confidential communication between the PCSC board and Mr. Ruiz, who served as the board's attorney. Generally, if such a relationship does exist between an attorney and a public official or public agency, such records may be withheld. 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. *Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley*, 580 N.E.2d 371 (Ind. Ct. App. 1991). Because one category of nondisclosable public records consists of records declared confidential by a state statute, see I.C. § 5-14-3-4(a)(1), PCSC did not violate the APRA by withholding an attorney-client privileged communication because Ind. Code § 34-46-3-1 permits PCSC to do so.<sup>3</sup>

I do note, however, that it does not appear that PCSC ever cited to any statute that authorized its nondisclosure of the Legal Opinion. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record. I.C. § 5-14-3-9(c). Consequently, the PCSC's failure to deny your request in accordance with subsection 9(c) violated the APRA. That said, it does not appear that the substance of PCSC's denial violated the

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<sup>3</sup> You argue that PCSC cannot withhold the record as attorney work product, which may or may not be true but appears to be a moot point here due to the fact that PCSC repeatedly stated that it was withholding the Legal Opinion as an attorney-client privileged communication rather than attorney work product. Under Ind. Code § 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. Because this was not cited by the PCSC as a basis for its denial, I do not have enough information to determine whether or not the exception applies. Again, however, because the attorney-client privilege applies to the Legal Opinion, it is unnecessary to analyze the application of the attorney work product exception because the PCSC had a legal basis for its denial.

APRA because the withheld document is nondisclosable under Ind. Code § 34-46-3-1 and Ind. Code § 5-14-3-4(a)(1).

#### CONCLUSION

For the foregoing reasons, it is my opinion that the PCSC did not violate the APRA by denying you access to the Legal Opinion because it was protected by the attorney-client privilege. That said, the form of PCSC's denial violated subsection 9(c) of the APRA because the PCSC failed to cite a statutory basis for its denial in its responses to you.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack  
Public Access Counselor

cc: Supt. Daniel Tyree