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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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NIKI KELLY  
*Complainant,*  
v.

INDIANA COMPTROLLER,  
*Respondent.*

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Formal Complaint No.  
23-FC-117

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the counselor:

This advisory opinion is in response to the formal complaint alleging the Indiana Comptroller violated the Access to Public Records Act.<sup>1</sup> Legal director Mark Hawkins filed an answer on behalf of the agency. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on November 4, 2023.

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

## **BACKGROUND**

This case involves a dispute over the redactions made to legal invoices.

Niki Kelly (Complainant) requested copies of attorney invoices from the Indiana Comptroller's office for July 2022 through July 2023. The invoices were for legal services provided to the Office of the Indiana Attorney General.

Kelly received heavily redacted invoices from July 2022 through April 2023. She contends the redactions leave the documents unreadable. While the law firm in question was retained for a federal case, several other state-level cases have been added onto the provider agreement. Kelly seeks to know what costs were associated with what case. While relevant statutes were properly cited in the denial, she argues the redactions make the services indistinguishable.

As a result, Kelly filed a formal with this office complaint on November 3, 2024, challenging the propriety of the redactions.

On November 30, 2023, the agency filed a response. For its part, the Comptroller's Office takes a position that it functionally serves as the go-between for state agencies submitting invoices for payment and the vendors receiving payment. Therefore, it takes a cautious approach when dealing with potentially sensitive information.

Here, the Office of the Indiana Attorney General (OAG) submitted its outsourced legal services receipts to the Comptroller for issuance of payment. When a request came in for those invoices, the Comptroller's office redacted them

with an overabundance of caution. Seemingly, this is because the Comptroller is not the client of the law firm in question – the OAG is the client. The Comptroller did solicit input from the OAG before the redactions were made.

## ANALYSIS

### 1. The Access to Public Records Act

The Access to Public Records Act (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.” Ind. Code § 5-14-3-1. The Indiana Comptroller and the Office of the Attorney General are public agencies for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy state agencies’ public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

### 2. Redaction of attorney invoices

This case is substantially similar to a previous case reviewed by this office; and thus, the opinion from that case is incorporated by reference. *See Opinion of the Public Access Counselor*, 18-FC-131 (2018). This issue has not been addressed in some time and therefore much of the analysis will be revisited here.

## 2.1 Legal invoices

Under APRA, receipts, claims, invoices, and bills of service providers are public records subject to public inspection. *See* Ind. Code § 5-14-3-2(r). These are among the most common public records requested from state and local government. Legal invoices are no exception.

As a preliminary matter, it is important to acknowledge there is no statutory requirement that a legal invoice provided to a public agency must contain confidential information. Even so, to demonstrate the work performed, law firms will often include certain descriptive statements in its itemization that could be construed to allow a public agency to withhold it as part of its enjoyment of the attorney-client privilege.

Although a public agency *may* disclose communication sent and received as part of an attorney-client relationship, it stands to reason it would be protective of that communication, and rightfully so.

The attorney-client privilege protects the confidentiality of communications between an attorney and client. The privilege was first recognized in Indiana as part of the common law by judicial decision in *Jenkinson v. State* (1845), 5 Blackf. 465, 466. The privilege is now recognized by statute.<sup>2</sup>

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<sup>2</sup> Ind. Code § 34-46-3-1; Ind. Code § 33-43-1-3(5); Ind. Trial Rule 26(B)(1).

Specifically, Indiana Code section 34-46-3-1 codifies the attorney-client privilege by prohibiting an attorney from being required to testify as to confidential communications made to them in the course of professional business, and to advice given in such cases. In addition, an attorney has statutory duty to preserve the secrets of the attorney's client. *See* Ind. Code § 33-43-1-3. Moreover, in Indiana, a communication between an attorney and a client is privileged and not discoverable under Trial Rule 26(B)(1).

This office has long maintained that attorney-client privilege intersects with public records and can be withheld by the client if it is documented on any manner of documentation, including attorney fee invoices.

Indiana courts and the Seventh Circuit have long observed the general rule that "information regarding a client's attorney fees is not protected by the attorney-client privilege because the payment of fees is not considered a confidential communication between an attorney and his or her client." *Hueck v. State*, 590 N.E.2d 581, 585 (Ind. Ct. App. 1992); *Matter of Witness Before Special March 1980 Grand Jury*, 729 F.2d 489, 491 (7th Cir. 1984); *see also Colman v. Heidenreich*, 381 N.E.2d, 866 (Ind. 1978).

The Indiana Court of Appeals applied this general rule in reaching a decision. *See Boulangger v. Ohio Valley Eye Inst., P.C.*, 89 N.E.3d 1112, 1116 (Ind. Ct. App. 2017). In *Boulangger*, the court concluded that documentation of a former employee's payment of legal fees, sought by the former employer through a non-party request for production as part of a proceedings supplemental was "not confidential nor

protected by the attorney-client privilege.” 89 N.E.3d at 1118.

## **2.2 Attorney-client communication**

Indiana Courts have only once directly addressed in a binding decision the issue of public agency legal invoices in *Groth v. Pence*, 67 N.E.3d 1104 (Ind. Ct. App. 2017), an issue that originated with this Office. In its holding, the court describes legal invoices that left *unredacted* a significant amount of information.

In *Groth*, the court did not describe in depth the content of redacted material after an *in camera* review. No other Indiana court, to our knowledge, publicly describes the exact communication subject to redaction, therefore we turn to persuasive holdings from other authorities. Federal courts have acknowledged the balance between disclosure and privilege:

The identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney client privilege.

*Chaudrey v. Gallerizzo*, 174 F.3d. 394, 402 (4th Cir. 1999) quoting *Clarke v. American Commerce Nat'l Bank*, 974 F. 2d 127, 129 (9th Cir. 1992).

Still, this office has never suggested that the attorney-client privilege must be pierced in favor of the disclosure of public records. Nor has it recommended any attorney work product ever be laid bare. The Office of the Public Access Counselor is simply not interested in jimmying the lock off an

attorney's safe of client secrets or upending long-standing practices of legal billing.

What this office has intimated, however, is defining the term "attorney-client communication" is more nuanced than some public agencies, including the Comptroller's response, assert. The legislature's express intent is for readers to liberally construe the Access to Public Records Act in favor of transparency.<sup>3</sup> Accordingly, its exceptions to disclosure are to be applied narrowly and conservatively.<sup>4</sup>

The attorney-client privilege "applies to all communications between the client and his attorney for the purpose of obtaining legal advice or aid, regarding the client's rights and liabilities." 67 N.E.3d at 1118. To assert the privilege, a person must show: "(1) an attorney-client relationship existed and (2) a confidential communication was involved." *Id.* What is more, the privilege is "intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Lahr v. State*, 731 N.E.2d 479, 482 (Ind. Ct. App. 2000)(quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

Here, there is no dispute that the attorney-client relationship exists. The issue is whether the redacted information in the OAG's legal bills constitutes confidential communication. This consideration is critical because "the attorney-client privilege does not exist unless the communication is

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<sup>3</sup> Ind. Code § 5-14-3-1.

<sup>4</sup> *Robinson v. Indiana Univ.*, 659 N.E.2d 153, 156 (Ind. App. 1995).

confidential.” *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 703 (Ind. Ct. App. 1995).

Point being that not everything an attorney documents in the scope of representation is *de facto* confidential even if it meets the definition of communication. Invoices are not inherently communicated for the purpose obtaining legal advice or aid; they are communicated for the purpose of demanding payment.

Even so, to the extent privileged information makes its way onto a bill as a vehicle for communication, the why and how of communication is privileged, but not always necessarily the what, when, where, and who.

### **2.3 Practical considerations**

In a previous dispute, this office was highly critical of the practice of redacting the entirety of an invoice save for a firm’s letterhead and a few random de-contextualized numbers. *See Opinion of the Public Access Counselor*, 18-FC-45 (2018).

We have a similar situation here. All descriptions of work performed have been redacted. This does not allow the public to know whether it got the benefit of the bargain from the service provider hired by the state. As stated previously, attorney invoices may have more redactions than other types of service providers, nonetheless, the public is entitled to know that its money is going to good use. Pinpoint, specific redactions are much more effective at accomplishing that goal.



To be sure, stratagems can be withheld, but other invoices recently reviewed (and released) by public agency leave unredacted descriptions such as: “Review and revise draft of Agreement;” “Attend meeting;” “draft email to Board;” “Review Correspondence;” “Video call with working group;” “Conference with Client;” “Telephone call;” etc.

These details do not lay bare any sensitive information, yet provide assurances that work was being performed in a tangible way. Here, however, the entirety of the description was left unredacted and the public does not have any idea what service the vendor provided.

Complicating the issue is the role of the Comptroller, not as the client, but as the state entity paying the bill. We do not fault the Comptroller for exercising caution on behalf of the OAG. Nonetheless, input from the OAG should have been consistent with basic tenets of transparency and good governance. I recommend in the future that the Complainant’s seek documents directly from the source so that other go-between agencies, such as the separately elected Comptroller, are not caught in the middle of a dispute.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that the Indiana Comptroller's Office did not violate the Access to Public Records Act by redacting information on behalf of the Office of the Attorney General. Nonetheless, the amount of redaction is unusually high based on other similar documents reviewed by this office.

Even still, without the benefit of seeing an unredacted copy, we cannot make a conclusive determination as to compliance.

It is my recommendation, however, that the OAG revisit these materials and potentially redact the invoices with a much lighter touch so that the documentation is objectively readable.



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