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IN THE
INDIANA COURT OF APPEALS

Case No.: 49A04-1605-PL-01116

WILLIAM GROTH, Appellant (Plaintiff below),	)	Appeal from the Marion Superior Court
vs.	)	Trial Court Case No. 49D07-1506-PL-021548
MIKE PENCE, as Governor of the State of Indiana, Appellee (Defendant below)	)	The Honorable Michael D. Keele, Judge

CORRECTED BRIEF OF APPELLANT

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Statement of Issues

The Governor redacted some documents requested under Indiana's Access to Public Records Act, and withheld others. After this Court conducts its own *de novo in camera* review of the documents, should the Court hold that the Governor improperly denied access to public records?

Statement of Case

On December 10, 2014, a citizen of Indiana, William Groth, presented a written request to Governor Mike Pence asking for certain documents relating to the Governor's

> discretionary decision to hire outside counsel at Barnes & Thornburg to represent your office and/or the State of Indiana in *State of Texas, et al v. United States of America*, pending in the United States District Court for the Southern District of Texas, Brownsville Division, challenging the November 20, 2014 action of the President of the United States to exercise discretion with respect to certain individuals who came to the United States as children and whose parents are United States citizens or permanent residents.

(App. at 8, 12.) The Governor produced certain documents in response to the request, but those documents included substantial redaction. (App. at 9-10, 13-30.) The response included a November 25, 2014, electronic mail message from Daniel Hodge to thirty recipients in various states asking officials from those states to join a lawsuit against President Obama. The message included an attachment, but the Governor failed to produce the attachment in his response. (App. at 10.)

The requester presented a formal complaint to the Indiana Public Access Counselor on April 15, 2015, pursuant to Ind. Code 5-14-5. (App. at 10.) On May 27, 2014, the Counselor issued his advisory opinion, which is available at http://in.gov/pac/advisory/files/15-FC-133.pdf. On June 30, 3015, the requester sued the

Governor in the Marion Superior Court, asking for an *in camera* review of the redacted and withheld materials pursuant to Ind. Code § 5-14-3-9(h), and for an order to disclose any improperly withheld information. (App. at 2, 8-30.)

On November 6, 2015, the requester filed a motion asking the trial court to conduct an *in camera* review of the redacted and withheld documents. (App. at 3, 31-34.) He also asked the trial court "to describe the general nature of the redacted information, [and] to give Plaintiff an opportunity to present a brief to argue for disclosure . . .." (App. at 34.) In response to the motion, the Governor agreed to produce the withheld information for *in camera* inspection, and agreed the parties should be allowed to submit briefs, but opposed the request to have the trial court describe the general nature of the redacted information. (App. at 3, 35-43.) On December 7, 2015, the Governor submitted the withheld information under seal. (App. at 3-4, 45-47.)

On April 22, 2016, the trial court issued a one-page order resolving the lawsuit. The trial court denied the request to describe the general nature of the redacted information and ruled that the Governor's redactions and refusals were proper. (App. at 5-6.)

On May 23, 2016, the requester filed his Notice of Appeal. (App. at 5.)

Statement of Facts

On November 21, 2014, President Barack Obama announced he is "taking new steps to fix America's broken immigration system." The plan included three elements: "Cracking Down on Illegal Immigration at the Border," "Deporting Felons, not Families," and "Accountability – Criminal Background Checks and Taxes." President Barack

Obama, *Taking Action on Immigration*, *at* https://www.whitehouse.gov/issues/immigration, (last visited July 19, 2016).

Even before the official announcement of the President's policy, Republican Governors criticized the plan. *Republican Governors Blast President Obama's Immigration Plans*, Time, Nov. 19, 2014, *available at* http://time.com/3596513/obama-immigration-republican-governors/. Texas Governor Rick Perry announced that his state planned to sue to stop the plan. *Id.*

Indiana's Governor called the policy "a profound mistake." *Id.* Indiana's Attorney General, however, issued a press release saying, "state governments do not have legal authority to enact and enforce immigration policy on their own; only the federal government possesses that authority." (App. 23.) Although Ind. Code § 4-6-3-2(a) states, "The attorney general shall have charge of and direct the prosecution of all civil actions that are brought in the name of the state of Indiana or any state agency[,]" Attorney General Greg Zoeller granted the Governor permission to hire a private law firm to join the Texas litigation. Maureen Groppe, *Gov. Pence: Indiana to Join Immigration Lawsuit*, Indianapolis Star, December 2, 2014, at A1. This permission was apparently granted under Ind. Code § 4-6-5-3(a).

On December 10, 2014, the requester sought information relating to the Governor's decision to join in the Texas lawsuit, the decision to hire outside counsel, and the cost to Indiana taxpayers relating to the lawsuit. (App. 12.) The Governor responded to the request by producing redacted invoices from the private law firm, and by producing 57 pages of electronic mail messages with redactions. (App. 9-10, 13-30.)

One of the electronic mail messages was sent by Daniel Hodge on November 25, 2014. The message was sent to thirty recipients from various states. Hodge wrote that he is "Texas Governor-Elect Greg Abbott's Chief of Staff." The message had a "white paper" attached "outlining the legal theories supporting the State's legal challenge" "to the President's recent executive orders on immigration." (App. 30.)

The message was an invitation for other states to join the Texas lawsuit. The message included the following language:

> Our hope is that other states will join the State of Texas' legal action so that we will have a broad coalition to challenge the President's action – just as we did when 26 states banded together to challenge ObamaCare. Because Gov-Elect Abbott currently serves as Attorney General of Texas, we have also contacted many of your Attorneys General to inquire about their interest in joining Texas' legal challenge. Those offices have also been provided a copy of the attached white paper.
>
> However, because some Governors indicated last week that their Attorneys General may not elect to join our legal challenge, Gov-Elect Abbott asked that I share this white paper with your office so that Governors whose AGs decline to join the case may do so on behalf of their states. Deputy Solicitor General Andy Oldham is lead counsel for this matter and the drafter of the attached white paper. To the extent any of your General Counsels have questions about the white paper or would like to discuss this matter in greater depth, please feel free to have them get in touch with Andy . . ..
>
> * * *
>
> Given the short turnaround, we'll be checking email over the holiday weekend and are happy to visit with anyone who wants to discuss this before next week. At this time, our plan is to file something next week. With that in mind, **if your state would like to join this legal challenge, please let us know by close of business on Tuesday, December 2**.

(App. 30 (emphasis in original).)

The Governor never produced the white paper to the requester. (App. 10.)

Summary of Argument

After William Groth requested documents from Governor Mike Pence, the Governor produced certain documents containing various redactions, and omitted an attached "white paper" from an electronic mail message. The requester sued for an *in camera* judicial inspection of the documents and for disclosure of any information improperly denied.

Indiana has a strong policy in favor of government transparency. That policy places the burden on the public agency to show it has complied with the public records laws, or to show an authorized reason for denial. Case law requires a party asserting a privilege to prove the privilege exists. Where a trial court conducts an *in camera* review and issues a summary ruling, this Court should consider the case *de novo* with no deference to the trial court.

The white paper the Governor refused to disclose was part of a solicitation by Texas state officials urging other states to join its lawsuit seeking to invalidate immigration initiatives by President Obama. The Governor asserts the white paper is a confidential document protected from disclosure.

The white paper, although possibly written by a lawyer, was not written by the Governor's attorney. To assert attorney-client privilege, the Governor must show an attorney-client relationship, and must show the communication was confidential to that relationship. The white paper was sent to thirty recipients from various states. The Governor failed to show there was an attorney-client relationship, and failed to show the document was not communicated to non-clients.

The Governor argued that the white paper is deliberative material, and therefore excepted from disclosure. Deliberative material, however, must come from a public agency, which APRA defines as an agency within Indiana. The Texas officials presenting the white paper are not an Indiana public agency, so the deliberative materials exception does not apply.

The Governor suggested the white paper is attorney work product. In addition to failing to show an attorney-client relationship that is necessary for the existence of attorney work product, the Governor failed to distinguish between legal theories and factual information. Because the white paper is likely to contain factual information, the white paper must be disclosed.

The Governor produced the invoices from his attorney who worked on the Texas lawsuit. The Governor redacted many items in the invoices. The same limitations relating to attorney confidentiality apply to these invoices. If the redacted information shows discussions with non-clients, or identifies factual information rather than legal theories and analysis, that information must be disclosed.

Without seeing the information that was redacted or withheld, the requester is under a severe handicap when attempting to argue this case. This Court must ensure a minimum of due process. That due process includes identifying the purported confidential information with enough specificity to allow the requester to make an argument for disclosure.

Mr. Groth is counting on this Court to protect his rights and to vindicate Indiana's clear policy of government transparency. He asks the Court to review the redacted and withheld materials *in camera*, and to order the disclosure of all public information.

Argument

1. Indiana Favors Transparency in Government

Indiana enacted the Access to Public Records Act (APRA) in 1983. The General Assembly began the act with a broad public policy statement:

> A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the 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. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

Ind. Code § 5-14-3-1. "Both the Indiana General Assembly and this Court have adopted public accessibility as the default rule for information submitted to government entities, including the state's courts." *Travelers Cas. & Sur. Co. v. United States Filter Corp.*, 895 N.E.2d 114, 115 (Ind. 2008).

In this case, Governor Mike Pence responded to an APRA public records request with heavy redaction and a refusal to produce a political "white paper." In order to uphold this policy of transparency, this Court should order the Governor to produce the documents.

2. The Burden is on the Governor

a. <u>APRA Imposes Burden on Public Agency to Justify Non-disclosure</u>

Ind. Code § 5-14-3-1 specifically states, "This chapter shall . . . place the burden of proof for the nondisclosure of a public record on the public agency that would deny

access to the record and not on the person seeking to inspect and copy the record." Ind. Code § 5-14-3-3(a) permits a person to "inspect and copy the public records of any public agency during the regular business hours of the agency . . .."[1] Ind. Code § 5-14-3-3(b) states, "A public agency may not deny or interfere with the exercise of the right stated in subsection (a)." Ind. Code § 5-14-3-9(e) states, "The person who has been denied the right to inspect or copy need not allege or prove any special damage different from that suffered by the public at large." Ind. Code § 5-14-3-9(f) places the burden of proof on the public agency to sustain any denial of disclosure.

All of these statutory pronouncements give a clear mandate to the courts to require a public agency to demonstrate a proper reason for any denial of a public records request. In this case, it is the Governor who must persuade this Court that the redacted and withheld records should not be disclosed.

b. A Party Asserting a Privilege Must Prove the Privilege

Where the Governor asserts attorney-client privilege, or work product, the Governor must meet his burden to show the document fits those categories. *Owens v. Best Beers of Bloomington, Inc.*, 648 N.E.2d 699, 702 (Ind. Ct. App. 1995)(The party seeking to assert a privilege has the burden to allege and prove the applicability of the privilege "as to each question asked or document sought."). "Claims of privilege must be made and sustained on a question-by-question or document-by-document basis." *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985, 994 (Ind. 2014)(citation and quotation omitted). "Claims of privilege cannot be used as a general bar to all inquiry or proof. Instead, the party seeking to assert a privilege has the burden to allege and prove the

[1] This section provides an exception to the public agency if Ind. Code § 5-14-3-4 applies.

applicability of the privilege as to each question asked or document sought." *Price v. Charles Brown Charitable Remainder Unitrust Trust*, 27 N.E.3d 1168, 1175 (Ind. Ct. App. 2015).

3. This Court, Using *de novo* Review, Owes No Deference to the Trial Court

The appellate standard of review is difficult to ascertain. Many of these disputes are resolved by summary judgment in the trial court. *See e.g.*, *Woolley v. Wash. Twp. of Marion County Small Claims Court*, 804 N.E.2d 761 (Ind. Ct. App. 2004). In that case this Court applied the same legal standard as the trial court. *Id.* at 763 ("A party appealing the denial of summary judgment carries the burden of persuading this court that the trial court's decision was erroneous. The movant must demonstrate the absence of any genuine issue of fact as to a determinative issue and only then is the non-movant required to come forward with contrary evidence.").

In this case, the requester asked the trial court to review the unredacted documents *in camera* pursuant to Ind. Code 5-14-3-9(h). (App. 2-3, 11, 31-34.) The Governor submitted the documents under seal, (App. 3-4, 45-47,) trial court allowed briefing, (App. 4, 56), and the trial court ruled after a hearing. (App. 5-7.) Although no summary judgment motion was filed, the specific documents were presented to the trial court for a summary ruling.

In the context of appellate review of a trial court's *in camera* process, this Court has suggested it has the power to conduct the *in camera* review *de novo*. *Lewis v. State*, 726 N.E.2d 836, 844 (Ind. Ct. App. 2000)("Of course, Lewis is unable to identify particular relevant items since he did not have access to the entries. Likewise, we are unable to determine whether any of the items were in fact relevant because a copy of

the diary is not included in the record. If Lewis had wished for this court to review the substance of the trial court's decision, the proper procedure would have been to petition this court to review the diary *in camera*."). The requester has petitioned for this appellate *in camera* review.

Because this appeal involves review of documents *in camera*, and because the trial court's process was summary in nature, this Court should review the documents *de novo*, with no deference to the trial court. *South Bend Tribune v. South Bend Community Sch. Corp.*, 740 N.E.2d 937, 938 (Ind. Ct. App. 2000)("Appellate courts review questions of law under a de novo standard and owe no deference to a trial court's legal conclusions.").

4. A Political "White Paper" Is a Public Record

The November 25, 2014, electronic mail message from Daniel Hodge to thirty recipients in various states asking officials from those states to join a lawsuit against President Obama included an attachment that the Governor failed to produce. (App. at 10.) The Governor should be ordered to produce this white paper.

a. The Attorney-Client Privilege Does Not Apply

The Governor points to Ind. Code §§ 5-14-3-4(a)(1) and (8), 33-43-1-3, 34-46-3-1, and Ind. Professional Conduct Rule 1.6 as support for withholding the white paper because of the attorney-client privilege. (App. 39-40.)

When a party seeks to invoke the attorney-client privilege to prevent disclosure, that

> party must "establish by a preponderance of the evidence (i) the existence of an attorney-client relationship and (ii) that a confidential communication was involved." *Id.* Minimally, meeting this burden entails establishing that "the

> communication at issue occurred in the course of an effort to obtain legal advice or aid, on the subject of the client's rights or liabilities, from a professional legal advisor acting in his or her capacity as such." *Id.*

Kesling, 15 N.E.3d at 995-996 (quoting *Mayberry v. State*, 670 N.E.2d 1262, 1266 (Ind. 1996)).

The Governor must prove there was an attorney-client relationship. *Purdue Univ. v. Wartell*, 5 N.E.3d 797, 800 (Ind. Ct. App. 2014)("If the attorney was not acting as Purdue's legal counsel, then Purdue may not assert the attorney-client privilege and the work-product doctrine to prevent disclosure of the information that Wartell seeks."). This white paper, although presumably prepared by a lawyer, was not prepared for his client. The Governor presented no evidence to show the author, Mr. Oldham, was his attorney.

The Governor must also show there was a confidential communication. The communication is not confidential if it is shared outside the attorney-client relationship. *Lewis v. State*, 451 N.E.2d 50, 55 (Ind. 1983). "[C]ommunications intended to be transmitted to a third person are not privileged." *Airgas Mid-America, Inc. v. Long*, 812 N.E.2d 842, 845 fn.3 (Ind. Ct. App. 2004). The electronic mail message with the attached white paper was sent to thirty recipients. The context of the message itself shows that the recipients were not clients of the author, because it specifically discusses parties who may or may not have decided to join the lawsuit. (App. 12.)

"Privileged communications are protected, but relevant facts are not." *Price*, 27 N.E.3d at 1175. The Governor must demonstrate that the communications in the white paper are privileged communications rather than facts. Even without reviewing the document, it seems apparent that a political document such as this one includes substantial factual recitation. By withholding the entire document, rather than redacting

only the parts that are true attorney-client communications, the Governor has improperly denied disclosure of a public record.

The Governor asserts that he had a common interest with the Texas author of the white paper. (App. 6-7.) "[C]ommon interest assertions by government agencies must be carefully scrutinized." *Hunton & Williams v. United States DOJ*, 590 F.3d 272, 274 (4th Cir. 2010).

> For the [common interest] doctrine to apply, an agency must show that it had agreed to help another party prevail on its legal claims at the time of the communications at issue because doing so was in the public interest. It is not enough that the agency was simply considering whether to become involved.

Id.

The Governor showed no common interest. He presented no joint defense agreement. The November 25, 2014, message was clearly a solicitation sent to a large number of recipients. There is no evidence that the recipients ever met together or agreed to discuss the possibility of joining the Texas lawsuit.

Because the white paper was not an attorney-client communication, the Court should order the Governor to disclose it.

b. <u>The White Paper Is Not an Intra- or Inter-agency Document</u>

The Governor asserted that the white paper is "deliberative material" exempt from disclosure under Ind. Code § 5-14-3-4-(b)(6). (App. 66.) That statute exempts "Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making." Ind. Code § 5-14-3-2(n) defines public agency broadly, but does not include out-of-state agencies in the definition. The "deliberative materials"

referred to in Ind. Code § 5-14-3-4-(b)(6) are limited to those coming from another "agency," meaning an agency (or that agency's contractor) from within the State of Indiana. To the extent a document comes from an agency outside of Indiana, that document is not covered by the deliberative materials exception.

c. The White Paper Is Not Attorney Work Product

The Governor cites Ind. Code § 5-14-3-4(b)(2) as authority to withhold attorney work product information from disclosure. (App. 67.) That exception, however is limited to "The work product of an attorney representing, pursuant to state employment or an appointment by a public agency: (A) a public agency; (B) the state; or (C) an individual." Because Mr. Oldham appears not to be an attorney appointed by an Indiana public agency, the white paper would not be properly exempted as attorney work product.

Indiana courts have held that there is a difference between an "attorney's opinions, theories, or conclusions," and facts learned by the attorney. "Work product does not protect the facts which an adverse party has learned or the persons from whom such facts were garnered." *Burr v. United Farm Bureau Mut. Ins. Co.*, 560 N.E.2d 1250, 1257 (Ind. Ct. App. 1990)(quoting *Laxalt v. McClatchey*, 116 F.R.D. 438 (D. Nev. 1987)). With a political white paper discussing the nation's complex immigration problems, it is inconceivable to suggest the white paper discussed only legal theories and no facts.

5. The Attorney Invoices Were Improperly Redacted

The redacted invoices do not present a question of whether the attorneys involved had the Governor as their client. All of the other limitations on the attorney-client privilege and work product, however, still apply.

a. Discussion with Third Persons Is Not Confidential

The attorney-client privilege does not extend to communications not held in secret with the client. *Lewis*, 451 N.E.2d at, 55; *Airgas Mid-America, Inc.*, 812 N.E.2d at 845 fn.3. If the invoices show meetings with persons not employed by the Governor, the communications are not privileged. If the Governor's attorneys met with third persons, the names of those persons and the subject matter of those discussions must be disclosed.

b. Work Product Does Not Protect Factual Information

Work product does not include factual information. *Burr*, 560 N.E.2d at 1257. To the extent the attorney invoices show factual information, this Court must order the Governor to disclose that information.

The requester cannot see beneath the black redaction marks. He is counting on this Court to protect his rights under APRA. Where the Court sees information in the attorney invoices that does not fit within a recognized APRA exception, the Court must order disclosure.

6. Due Process Requires that the Requester Be Given an Adequate Description of the Documents at Issue

The opportunity for the requester to make legitimate argument on whether an item was properly redacted under Ind. Code § 5-14-3-4 is necessarily hampered by his inability to see what the particular item is. See *Pa. v. Ritchie*, 480 U.S. 39, 60 (1987)("[The *in camera*] rule denies Ritchie the benefits of an 'advocate's eye' . . .."). Because the requester will not see the redacted information unless the Court orders it disclosed, the requester will never have an adequate opportunity to argue his case. While the Court must maintain neutrality in deciding the matter, it must take particular

care not to disadvantage a party that has a limited ability to advocate on his own behalf. An advocate, who has an interest in the outcome of the dispute has a stronger incentive to research and pursue arguments to bolster his position than does a court striving to maintain neutrality.

The United States Circuit Court of Appeals for the Second District described the problem in *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977):

> *In camera* proceedings are extraordinary events in the constitutional framework because they deprive the parties against whom they are directed of the root requirements of due process, i.e. notice setting forth the alleged misconduct with particularity and an opportunity for a hearing. They can only be justified and allowed by compelling state interests. Whenever the legal rights of individuals are to be adjudicated, the presumption is against the use of secret proceedings. ... The principal function of the due process clause is to ensure that state power is exercised only pursuant to procedures adequate to vindicate individual rights. As the Supreme Court stated, "The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte* because the court does not have available the fundamental instrument of judicial judgment: an adversary proceeding in which both parties may participate."

567 F.2d at 1187-88 (citation omitted). In order to protect the requester's rights under APRA, this Court must insure that a minimum of due process is granted to him. Ind. Const. art. 1, § 12 states, "[E]very person . . . shall have remedy by due course of law."

The requester demanded a minimum of due process by asking the trial court to

> report[] to the parties on the general nature of the information with enough specificity to alert the parties to what type of information is redacted in order to give the parties an opportunity to make arguments whether that type of information is required to be disclosed under the public records laws.

(App. 32, 50.)

The *Kesling* decision, 15 N.E.3d at 994, referred to Ind. Trial Rule 26(B)(5)(a), which provides,

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material,

> the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

The *Price* decision imposes on a party asserting a privilege the specificity requirement in T.R. 26(B)(5)(a). 27 N.E.3d at 1175.

T.R. 26(B)(5)(a) offers the type of help that the requester seeks. The rule recognizes the impropriety of having the court assess the privilege without hearing from all advocates in the case. The rule recognizes the advocate's inability to make proper argument without some minimal description of the documents in question.

Throughout this case, and even in this brief, the requester has not been able to fully assert his rights in a fair process, because he has never seen the documents, and has not been given an adequate description of their contents. In order to protect the requester's due process rights, this Court should require the trial court, or the Governor, to give him the description that is required by T.R. 26(B)(5).

Conclusion

William Groth respectfully asks this Court to review the redacted or refused documents, to order the disclosure of the improperly withheld documents, to remand to the trial court for a determination of attorney fees, and for all other appropriate relief.

Respectfully submitted,

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Certificate of Service

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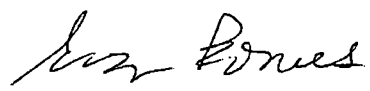

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