OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

November 22, 2022

**PUBLIC ACCESS OPINION 22-013**
**(Request for Review 2022 PAC 73136)**

FREEDOM OF INFORMATION ACT:
Evidentiary and Discovery Rules Do Not
Exempt From Disclosure Private Attorney's
Letter on Behalf of Clients

Mr. Gregory Pratt
*Chicago Tribune*
160 North Stetson Avenue
Chicago, Illinois 60601

Ms. Anna Lentsch
FOIA Specialist
Department of Law, City of Chicago
2 North LaSalle Street, Suite 460
Chicago, Illinois 60602

Dear Mr. Pratt and Ms. Lentsch:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2020)). For the reasons discussed below, this office concludes that the City of Chicago Department of Law (Department) improperly denied Mr. Gregory Pratt's August 16, 2022, FOIA request.

## BACKGROUND

On October 26, 2021, Mr. Pratt, on behalf of the *Chicago Tribune*, submitted a FOIA request to the Department seeking copies of certain e-mails.[1] On November 9, 2021, the Department provided copies of records but withheld a letter from a private attorney on behalf of

[1]E-mail from Gregory Pratt, Chicago Tribune, to LAWfoia@cityofchicago.org (October 26, 2021).

clients pursuant to section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2021 Supp.)).[2] The Department's response asserted that "both the federal and state rules of evidence prohibits the disclosure of settlement negotiations."[3] On November 11, 2021, Mr. Pratt submitted a Request for Review (2022 PAC 72362) contesting the denial of the letter.[4] On July 22, 2022, the Public Access Bureau issued a non-binding determination which concluded that the Department improperly withheld the letter and requested that it provide Mr. Pratt with a copy. Ill. Att'y Gen. PAC Req. Rev. Ltr. 72362, issued July 22, 2022, at 5. On August 26, 2022, the Department informed the Public Access Bureau that it would not comply with the determination because "[p]roducing the materials requested would eviscerate the City's ability to litigate and negotiate cases and would not serve any public interest."[5]

Meanwhile, on August 16, 2022, Mr. Pratt had submitted another FOIA request to the Department, this time seeking "copies of all records the Attorney General's Office found to be inappropriately withheld in 2022 PAC 72362."[6] On August 22, 2022, the Department again denied the letter pursuant to section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2021 Supp.), as amended by Public Acts 102-791, effective May 13, 2022; 102-1055, effective June 10, 2022).[7] On August 23, 2022, Mr. Pratt submitted a Request for Review disputing the denial of his request.[8] He asserted that "[t]here is no federal or state law forbidding the release of this letter, and the city is attempting to inject courtroom rules of evidence that don't govern how FOIA works and only govern courtroom rules of evidence."[9]

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[2]E-mail from Anna Lentsch, FOIA Specialist, Department of Law, City of Chicago, to Gregory Pratt (November 9, 2021).

[3]E-mail from Anna Lentsch, FOIA Specialist, Department of Law, City of Chicago, to Gregory Pratt (November 9, 2021).

[4]E-mail from Gregory Pratt, Chicago Tribune, to Steve [Silverman] and PAC (November 11, 2021).

[5]Letter from Matthew J. Walters, Chief Assistant Corporation Counsel, Department of Law, City of Chicago, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (undated; transmitted via e-mail August 26, 2022), at 1.

[6]E-mail from Gregory Pratt, Chicago Tribune, to LAWFOIA and Anna Lentsch (August 16, 2022).

[7]E-mail from Anna Lentsch, FOIA Specialist, Department of Law, City of Chicago, to Gregory Pratt (August 22, 2022).

[8]E-mail from Gregory Pratt, Chicago Tribune, to [Sarah] Pratt (August 23, 2022).

[9]E-mail from Gregory Pratt, Chicago Tribune, to [Sarah] Pratt (August 23, 2022).

On August 26, 2022, this office sent a copy of the Request for Review to the Department and asked it to provide a detailed explanation of the factual and legal bases for the applicability of section 7(1)(a) to the letter, adding that it was not necessary to provide a copy of the letter because the Public Access Bureau previously received a copy in connection with 2022 PAC 72362.[10] On September 9, 2022, the City submitted a response reiterating that the letter is exempt from disclosure pursuant to section 7(1)(a) as well as section 7(1)(f) (5 ILCS 140/7(1)(f) (West 2021 Supp.), as amended by Public Acts 102-791, effective May 13, 2022; 102-1055, effective June 10, 2022).[11] On September 16, 2022, this office sent a copy of that response to Mr. Pratt.[12] He replied on September 27, 2022.[13]

On October 19, 2022, this office extended the time within which to issue a binding opinion by 30 business days, to December 7, 2022.[14]

## ANALYSIS

Section 1 of FOIA (5 ILCS 140/1 (West 2020)) declares that it is "the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." Under FOIA, "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2020).

The Department's assertion of sections 7(1)(a) and 7(1)(f) is based on the premise that the record in question documents privileged settlement negotiations. The record is a letter to the Department from a law firm concerning a legal matter. Although the letter does request certain actions, it does not propose or demand a settlement that would resolve the matter or

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[10]Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Anna Lentsch, FOIA Specialist, Department of Law, City of Chicago (August 26, 2022).

[11]Letter from Matthew J. Walters, Chief Assistant Corporation Counsel, Department of Law, City of Chicago, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (undated; transmitted via e-mail September 9, 2022).

[12]Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Gregory Pratt, *Chicago Tribune* (September 16, 2022).

[13]E-mail from Gregory Pratt to Steven Silverman (September 27, 2022).

[14]Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Gregory Pratt, *Chicago Tribune*, and Anna Lentsch, FOIA Specialist, Department of Law, City of Chicago (October 19, 2022).

request that the City engage in negotiations concerning a possible settlement. Thus, as a threshold matter, the City has not demonstrated that the record reflects settlement negotiations encompassed by the evidentiary and discovery rules that the City claims are applicable. Even if the letter could be construed as a record reflecting settlement negotiations, it is not exempt from disclosure under FOIA for the reasons discussed below.

**Section 7(1)(a) and Evidentiary Rules**

Section 7(1)(a) of FOIA exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The Department based its assertion of section 7(1)(a) on a Federal court rule (Fed. R. Evid. 408) that restricts the admissibility of evidence of settlement negotiations in court proceedings:

> **(a) Prohibited Uses.** Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
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> **(1)** furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
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> **(2)** conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
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> **(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The Department also cited the Federal rule's State court corollary (Ill. R. Evid. 408, effective January 1, 2011) to Federal Rule of Evidence 408:

> **(a) Prohibited Uses.** Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to

validity or amount, or to impeach through a prior inconsistent statement or contradiction:

**(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

**(2)** conduct or statements made in compromise negotiations regarding the claim.

**(b) Permitted Uses.** This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of settlement negotiations. This rule also does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness' bias or prejudice; negating an assertion of undue delay; establishing bad faith; and proving an effort to obstruct a criminal investigation or prosecution.

In addition, the Department pointed to Federal Rule of Evidence 501 (Fed. R. Evid. 501)[15] and Illinois Rule of Evidence 501 (Ill. R. Evid. 501, effective January 1, 2011).[16, 17] Citing *Kibort v. Westrom*, 371 Ill. App. 3d 247, 256 (2d Dist. 2007), and *FBI v. Abramson*, 456 U.S. 615, 621,

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[15]Federal Rule of Evidence 501 provides:

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

[16]Illinois Rule of Evidence 501 provides: "Except as otherwise required by the Constitution of the United States, the Constitution of Illinois, or provided by applicable statute or rule prescribed by the Supreme Court, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by Illinois courts in the light of reason and experience."

[17]Letter from Matthew J. Walters, Chief Assistant Corporation Counsel, Department of Law, City of Chicago, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (undated; transmitted via e-mail September 9, 2022), at 2.

102 S. Ct. 2054, 2059 (1982), the Department contended that these evidentiary rules prohibit disclosure of records pursuant to FOIA.[18]

In *Kibort*, an Illinois Appellate Court case involving a FOIA request for ballots and other election materials, the court concluded that while the Election Code[19] did not specifically state that disclosure of ballots was prohibited, the Code "unambiguously prohibited" disclosure by expressly directing election officials to seal the ballots and election materials in a specific manner that would be inconsistent with allowing the public to access the records under FOIA. *Kibort*, 371 Ill. App. 3d at 252-53. The court construed the language of section 7(1)(a) "to mean that records are exempt from disclosure under [FOIA] in instances where the plain language contained in a State or federal statute reveals that public access to records was not intended." *Kibort*, 371 Ill. App. 3d at 256.

Federal Rules of Evidence 408 and 501 and Illinois Rules of Evidence 408 and 501 govern the admissibility of evidence in court—they do not address the use or accessibility of information outside of that context. Thus, the Department's reliance on *Kibort* is misplaced. Similarly, the portion of the Supreme Court's decision in *Abramson* that the Department quoted in support of its argument that "[d]ecades of cases stand for the proposition that there is an underlying policy exempting materials from disclosure when 'legitimate governmental and private interests could be harmed by release of certain types of information,'" does not involve the interplay between rules of evidence and FOIA. Taken in context, the Court was merely referring to the existence of the enumerated Federal FOIA exemptions and analyzing one of those exemptions that is not relevant to this matter:

> The Freedom of Information Act sets forth a policy of broad disclosure of Government documents in order "to ensure an informed citizenry, vital to the functioning of a democratic society." [Citation.] Yet Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused. Here we are concerned with Exemption 7, which was intended to prevent premature disclosure of investigatory materials which might be used in a law enforcement action. *Abramson*, 456 U.S. at 621, 102 S. Ct. at 2059.

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[18]Letter from Matthew J. Walters, Chief Assistant Corporation Counsel, Department of Law, City of Chicago, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (undated; transmitted via e-mail September 9, 2022), at 2.

[19]10 ILCS 5/1-1 *et seq.* (West 2004).

The Department's response to this office, nevertheless, asserted that "[a]ll rules of evidence bar introduction of evidence of settlement negotiation outside of limited circumstances[,]" and "[n]one of those circumstances exist with respect to this document."[20] The Department cited a federal appellate court decision for the proposition "that a 'settlement privilege' exists barring any third-party production of the communications[ ]" concerning settlement negotiations.[21] In that case, a federal district court in Ohio had presided over settlement negotiations and directed the parties to keep those discussions confidential. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 978 (6th Cir. 2003). After the co-founder of one of the parties made statements in the press describing a settlement offer, a plaintiff who had filed suit against both parties in federal district court in Colorado intervened in the Ohio case, petitioning the court to vacate or modify the confidentiality order and allow discovery of statements made during the settlement talks to try to bolster his claims in the Colorado case. *Goodyear Tire & Rubber Co.*, 332 F.3d at 979. The district court denied the motion and the appellate court agreed, stating that "[t]he public policy favoring secret negotiations, combined with the inherent questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege should exist, and that the district court did not abuse its discretion in **refusing to allow discovery**." (Emphasis added.) *Goodyear Tire & Rubber Co.*, 332 F.3d at 981.

In another case the Department cited, the court upheld an award of summary judgment, ruling that the trial judge did not err by refusing to take judicial notice of a settlement in a related lawsuit. The court stated that Federal Rule of Evidence 408 is intended to exclude settlement negotiations that are irrelevant to the merits of a case, adding that "[b]y preventing settlement negotiations from **being admitted as evidence**, full and open disclosure is encouraged, thereby furthering the policy toward settlement." (Emphasis added.) *United States v. Contra Costa County Water District*, 678 F.2d 90, 92 (9th Cir. 1982). The court held that Federal Rule of Evidence 408 prevented the use of the settlement "in this case." *Contra Costa County Water District*, 678 F.2d at 92.

The cases upon which the Department relies are inapposite to this matter because they concern the use of settlement communications in the limited context of judicial proceedings. None of the cases concern requests for information under FOIA or similar statutes governing the public's right to access government records. The Department's reliance on evidentiary rules to

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[20]Letter from Matthew J. Walters, Chief Assistant Corporation Counsel, Department of Law, City of Chicago, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (undated; transmitted via e-mail September 9, 2022), at 2.

[21]Letter from Matthew J. Walters, Chief Assistant Corporation Counsel, Department of Law, City of Chicago, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (undated; transmitted via e-mail September 9, 2022), at 2.

deny records under FOIA mischaracterizes the purpose of the rules. Evidentiary rules are intended to "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Ill. R. Evid. 102, effective January 1, 2011. With respect to Illinois Rule of Evidence 408 specifically, "[t]he reason settlement offers and negotiations are inadmissible is because their **use as evidence** may discourage litigants from making such offers in the first place, lest they be used against them **at trial**." (Emphasis added.) *King Koil Licensing Co. v. Harris*, 2017 IL App (1st) 161019, ¶77, 84 N.E.3d 457, 472 (2017); *see also NAACP Legal Defense & Educational Fund, Inc. v. U.S. Dep't of Justice*, 612 F. Supp. 1143, 1146 (D.D.C. 1985) ("Although the intent of [Federal Rule of Evidence] 408 is to foster settlement negotiations, the **sole means used to effectuate that end is a limitation on the admission of evidence** produced during settlement negotiations for the purpose of proving liability at trial. **It was never intended to be a broad discovery privilege**." (Emphasis added.)). Therefore, the rules the Department cited are intended to restrict a court or jury from considering evidence of settlement negotiations, or assertions made in the context of settlement negotiations, during a trial.

In contrast, FOIA is intended to provide the general public with access to public records to promote "the transparency and accountability of public bodies at all levels of government[,]" as "[i]t is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act." 5 ILCS 140/1 (West 2020). Evidentiary rules that may prohibit a trier of fact from considering certain evidence in the context of a court proceeding have no relevance to whether a record of the evidence may be disseminated to the public pursuant to FOIA. The Department has not cited, and this office has not identified, any authority in which a court has held that rules restricting the admissibility of evidence in court could be extended to provide a basis for denying records pursuant to FOIA.

**Section 7(1)(a) and Discovery Rules**

The Department's argument that discovery rules exempt the letter pursuant to section 7(1)(a) of FOIA is similarly misplaced. The Department's response to this office noted that Federal Rule of Civil Procedure 26(b)(1) provides that the scope of discovery generally is limited to matters that are not privileged and relevant to the claims and defenses of a party.[22] The Department cited *Wyatt v. Security Inn Food & Beverage, Inc.*, 819 F.2d 69, 71 (4th Cir. 1987). There, the appellate court held a trial judge had not improperly excluded, pursuant to Federal Rule of Evidence 408, details concerning settlements of prior lawsuits involving similar

[22]Letter from Matthew J. Walters, Chief Assistant Corporation Counsel, Department of Law, City of Chicago, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (undated; transmitted via e-mail September 9, 2022), at 2.

underlying allegations because the evidence "was minimally if at all relevant," and potentially could have confused the jury. *Wyatt*, 819 F.2d at 71. Based on *Wyatt*, the Department argued that because settlement negotiations often involve accepting disputed facts as true for the limited purpose of reaching a settlement, the disclosure of those "'facts'" outside of the settlement negotiation context would be "highly misleading."[23] As discussed above, to the extent that courts have recognized a limited "settlement privilege" that renders settlement communications inadmissible as evidence in court, that privilege does not extend to FOIA to exempt records from disclosure. *Wyatt* did not specifically address Federal Rule of Civil of Procedure 26(b)(1) and the Department has not demonstrated how that rule provides a basis for denying the letter Mr. Pratt requested.[24]

Indeed, federal courts have determined that the Federal FOIA statute[25] and discovery are separate means for obtaining information with different standards and purposes.[26] In *Hoover v. U.S. Dep't of the Interior*, 611 F.2d 1132, 1137 (5th Cir. 1980), a federal appeals court reversed the trial court's decision to dismiss a lawsuit challenging the denial of a request under FOIA for a property appraisal report. Because the report related to a pending condemnation lawsuit, the trial court had "held that the request for the report should be considered in that action through normal discovery procedures." *Hoover*, 611 F.2d at 1136. The appeals court disagreed, emphasizing that the issue of whether the public has a right to access records under FOIA is distinct from whether a litigant may obtain records through discovery:

> The question of discoverability presented in the condemnation action is not related to the rights of general public access under the FOIA to agency documents. * * * The appellant landowner's right under the FOIA, where he is in effect asserting

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[23]Letter from Matthew J. Walters, Chief Assistant Corporation Counsel, Department of Law, City of Chicago, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (undated; transmitted via e-mail September 9, 2022), at 2.

[24]The *Wyatt* court did not analyze whether Federal Rule of Evidence 408 is applicable to FOIA or even find that it is a blanket prohibition on disclosure of settlement communications in all court proceedings. The court stated that Federal Rule of Evidence 408 "need not prevent a litigant from offering such evidence when he does not seek to show the validity or invalidity of the compromised claim." *Wyatt*, 819 F.2d at 71. Indeed, the plain language of the rule only restricts the admissibility of evidence of settlement negotiations when it is offered "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction[.]"

[25]5 U.S.C. § 552 *et seq.* (2018).

[26]Because Illinois' FOIA statute is based on the Federal FOIA statute, decisions construing the latter, while not controlling, may provide helpful and relevant precedents in construing the state Act. *Margolis v. Director, Ill. Dep't of Revenue*, 180 Ill. App. 3d 1084, 1087 (1st Dist. 1989).

> the rights of the public to obtain such appraisals, is inherently different than his particularized status as the landowner in the condemnation proceeding. He is entitled to vindicate his public rights in the instant FOIA suit in accordance with the requirements of the FOIA. *Hoover*, 611 F. 2d at 1137.

*See also Playboy Enterprises, Inc. v. U.S. Dep't of Justice*, 677 F.2d 931, 936 (D.C. Cir. 1982) ("[T]he issues in discovery proceedings and the issues in the context of a FOIA action are quite different. That for one reason or another a document may be exempt from discovery does not mean that it will be exempt from a demand under FOIA.").

The Department also claimed disclosure of the letter is prohibited by Illinois Supreme Court Rule 201(b) (Ill. S. Ct. R. 201(b), effective July 1, 2014; corrected *nunc pro tunc* May 29, 2014), which corresponds to Federal Rule of Civil Procedure 26(b)(1). Illinois Supreme Court Rule 201(b) provides, in relevant part: "Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party[.]"

As with Federal Rule of Civil Procedure 26(b)(1), Illinois Supreme Court Rule 201(b) is inapplicable to the requirements of FOIA. The question of whether a record is relevant to the subject matter of a pending court proceeding has no bearing on whether the public or a member of the media such as Mr. Pratt is entitled to obtain the same record under FOIA. *See Playboy Enterprises, Inc.*, 677 F.2d at 936. The Department has not identified any court decision or other authority that determined Illinois Supreme Court Rule 201(b) provides a valid basis for denying a FOIA request. The Attorney General has issued a binding opinion, which concluded that "Illinois Supreme Court rules governing discovery do not restrict parties to litigation from accessing records through FOIA." Ill. Att'y Gen. Pub. Acc. Op. No. 13-017, issued November 12, 2013, at 7. The binding opinion noted[27] that Supreme Court Rule 201(a) provided that "[d]uplication of discovery methods to obtain the same information should be avoided."[28] The committee comments to the rule indicate that it was intended to prevent the use of redundant and unnecessary discovery methods:

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[27]Ill. Att'y Gen. Pub. Acc. Op. No. 13-017, at 7.

[28]Ill. S. Ct. R. 201(a), effective July 1, 2002. That sentence of the rule has since been amended to state: "Duplication of discovery methods to obtain the same information and discovery requests that are disproportionate in terms of burden or expense should be avoided." Ill. S. Ct. R. 201(a), effective July 1, 2014; corrected *nunc pro tunc* May 29, 2014.

> The committee considered and discarded a provision requiring leave of court before a party could request by one discovery method information already obtained through another. The committee concluded that there are circumstances in which it is justifiable to require answers to the same or related questions by different types of discovery procedures but felt strongly that the rules should discourage time-wasting repetition; hence the provision that duplication should be avoided. Ill. S. Ct. R. 201(a), Committee Comments (revised June 1, 1995).

Illinois Supreme Court Rule 201(a) is not applicable to FOIA because "[o]btaining public documents pursuant to FOIA is not among the specific 'discovery methods' set out in Supreme Court Rule 201(a)." Ill. Att'y Gen. Pub. Acc. Op. No. 13-017, at 8.

In addition, it is notable that FOIA contains a specific and narrowly drawn exemption for certain records that are not subject to discovery. Section 7(1)(m) of FOIA[29] exempts from disclosure:

> Communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies.

This exemption illustrates that the materials excluded from discovery that the General Assembly intended to permit public bodies to withhold under FOIA are limited to privileged communications with attorneys and auditors who represent public bodies, attorney work product, and records concerning internal audits. If the General Assembly had intended to permit public bodies to deny FOIA requests for settlement communications with third parties, it would have done so expressly by including such communications in section 7(1)(m) or by creating a separate exemption. It did not, and FOIA cannot be read to include restrictions on disclosure based on evidentiary rules or discovery rules that have not been incorporated into the exemptions in

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[29]5 ILCS 140/7(1)(m) (West 2021 Supp.), as amended by Public Acts 102-791, effective May 13, 2022; 102-1055, effective June 10, 2022.

section 7 of the Act.[30] *See Hayashi v. Illinois Dep't of Financial & Professional Regulation*, 2014 IL 116023, ¶16, 25 N.E.3d 570, 576 (2014) ("Where the language" of a statute "is clear and unambiguous," a reviewing body "may not depart from the plain language by reading into the statute exceptions, limitations, or conditions that the legislature did not express.").

For the reasons stated above, this office concludes that the Department has not sustained its burden of proving by clear and convincing that the letter Mr. Pratt requested is exempt from disclosure pursuant to section 7(1)(a) of FOIA based on the evidentiary rules and discovery rules the Department cited.

**Section 7(1)(f) of FOIA**

Section 7(1)(f) of FOIA exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body." The section 7(1)(f) exemption is generally equivalent to the deliberative process exemption in the Federal FOIA.[31] *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). The exemption is "intended to protect the communications process and encourage frank and open discussion **among agency employees** before a final decision is made." (Emphasis added.) *Harwood*, 344 Ill. App. 3d at 248. "In order to be exempt under this provision, the responsive materials must be both (1) inter or intra agency and (2) predecisional and deliberative." *Fisher v. Office of the Illinois Attorney General*, 2021 IL App (1st) 200225, ¶19, 195 N.E.3d 719, __ (2021).

"Inter" is defined as "[a]mong; between[,]"[32] while "intra" is defined as "[i]n; near; within."[33] Thus, communications must be exchanged among or between public bodies or occur internally within a public body to meet the threshold requirement of section 7(1)(f). *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8, 121 S. Ct. 1060, 1065 (2001) (source of a record "must be a Government agency[ ]" to be exempt under the deliberative process exemption in Federal FOIA). Records prepared by an outside consultant may be

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[30]5 ILCS 140/7 (West 2021 Supp.), as amended by Public Acts 102-791, effective May 13, 2022; 102-1055, effective June 10, 2022.

[31]5 U.S.C. §552(b)(5) (2018) (exempting from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency[.]").

[32]Black's Law Dictionary 728 (5th ed. 1979).

[33]Black's Law Dictionary 738 (5th ed. 1979).

considered "intra-agency" records if the consultant "played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done[,]" and "the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it." *Klamath Water Users Protective Ass'n*, 532 U.S. at 10-11, 121 S. Ct. at 1066-67.

Citing *Murphy v. Tennessee Valley Authority*, 571 F. Supp. 502, 506 (D.C. Cir. 1983), the Department's response to this office contends section 7(1)(f) applies to the letter Mr. Pratt is seeking because "[c]ourts have consistently agreed that settlement negotiations should generally be exempt from disclosure to 'favor compromise over confrontation.'"[34] In *Murphy*, the court held that the deliberative process exemption in Federal FOIA applied to "intra-agency memoranda" drafted by staff members and attorneys for a corporation owned by the Federal government which contained "evaluations, recommendations, proposals, and suggestions concerning" the process of reaching a settlement agreement. *Murphy*, 571 F. Supp. at 505. The court explained that the "ability to function as an independent corporate entity, which inevitably includes negotiating and settling contract claims, would be seriously undermined if the internal documents **reflecting its employees' thought processes** were subject to disclosure." (Emphasis added.) *Murphy*, 571 F. Supp. at 506.

The records and reasoning in *Murphy* are readily distinguishable from this matter. The letter that the Department withheld under section 7(1)(f) does not reveal the Department's internal decision-making process or its employees' thought processes concerning a potential settlement. It was submitted by a private attorney on behalf of his clients. Because the letter derives from a third party with independent interests, it is not an inter-agency or intra-agency communication, or pre-decisional deliberative material within the scope of section 7(1)(f).

The Department also maintains that the letter is exempt from disclosure under section 7(1)(f) because the Federal FOIA deliberative process exemption "is designed to incorporate virtually all civil discovery privileges in the FOIA context."[35] In the case the Department cited for this proposition, *Martin v. Office of Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181, 1187 (D.C. Cir. 1987), the court ruled that witness statements prepared at the request of a government attorney and interview notes prepared by a government attorney were exempt under the plain language of the Federal FOIA deliberative process

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[34]Letter from Matthew J. Walters, Chief Assistant Corporation Counsel, Department of Law, City of Chicago, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (undated; transmitted via e-mail September 9, 2022), at 3.

[35]Letter from Matthew J. Walters, Chief Assistant Corporation Counsel, Department of Law, City of Chicago, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (undated; transmitted via e-mail September 9, 2022), at 2.

exemption, even to the extent that they contained factual material rather than deliberative material. Because the records were attorney work product that "would not 'normally' and 'routinely' be released in civil discovery[,]" the court held that they were exempt from disclosure under FOIA. *Martin*, 819 F.2d at 1187.

The Department also cited two United States Supreme Court decisions for the assertion that section 7(1)(f) exempts all materials that could not be obtained in civil discovery, regardless of their origin. In *FTC v. Grolier, Inc.*, 462 U.S. 19, 27, 103 S. Ct. 2209, 2214 (1983), the Court held that records of attorney work product withheld by a Federal agency were "not 'routinely' or 'normally' available to parties in litigation and hence are exempt" under the Federal FOIA deliberative process exemption. The Department pointed to a portion of a concurrence in which Justice Brennan stated that litigants, including government agencies, "have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes." *Grolier, Inc.*, 462 U.S. at 31, 103 S. Ct. at 2216 (Brennan, J., concurring). Justice Brennan made this statement in the context of critiquing the notion that attorney work product no longer merits protection after the litigation and any other relevant litigation has concluded. *Grolier, Inc.*, 462 U.S. at 31, 103 S. Ct. at 2216 (Brennan, J., concurring). Justice Brennan further stated that "[i]f a document is work product under [Federal] Rule [of Civil Procedure 26(b)(3)], and if it is an **'inter-agency or intra-agency [memorandum] or [letter]'** under the Exemption, it is absolutely exempt." (Emphasis added.) *Grolier, Inc.*, 462 U.S. at 32, 103 S. Ct. at 2217 (Brennan, J., concurring).

The other Supreme Court decision, *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 798, 104 S. Ct. 1488, 1492 (1984), reversed an appellate court decision that confidential statements made to government safety investigators for the United States Air Force were not protected by the Federal FOIA deliberative process exemption because the legislative history of the exemption did not encompass "the *Machin* civil discovery privilege[36] for official Government information." *Weber Aircraft Corp.*, 465 U.S. at 798, 104 S. Ct. at 1492. The Court stated that "respondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery." *Weber Aircraft Corp.*, 465 U.S. at 798, 104 S. Ct. at 1492. Still, the Court decided the case based on the plain language of the exemption: "The statements of the two witnesses are unquestionably **'intra-agency memorandums or letters'** and, since the *Machin* privilege normally protects them from discovery in civil litigation, they 'would not be available by law to a party other than [the Air Force] in litigation with [the Air Force].'" (Emphasis added.) *Weber Aircraft Corp.*, 465 U.S. at 798, 104 S. Ct. at 1492.

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[36]The *Machin* privilege applies to information for investigations obtained from private parties through promises of confidentiality. *Machin v. Zuckert*, 316 F.2d 336, 339 (D.C. Cir. 1963), cert. denied, 375 U.S. 896.

Again, the cases the Department cited are inapposite to this matter. The attorney work product in *Grolier* and the witness statements provided to government agencies confidentially in *Weber Aircraft Corp.,* were determined to be "intra-agency" material and therefore met the threshold requirement to qualify for the Federal FOIA deliberative process exemption. Contrary to the Department's apparent assertion that these cases establish that all materials that could not be obtained in civil discovery are exempt from disclosure under section 7(1)(f) of FOIA, only inter-agency and intra-agency records fall within the scope of the exemption. *Fisher*, 2021 IL App (1st) 200225, ¶19, 195 N.E.3d at __; *see also Klamath Water Users Protective Ass'n*, 532 U.S. at 8, 121 S. Ct. at 1066 ("the first condition of [the Federal FOIA deliberative process exemption] is no less important than the second; the communication must be 'inter-agency or intra-agency.'").

The letter Mr. Pratt requested was not prepared by the Department or by any other public body. It was not submitted by a consultant for the Department. It does not consist of information that the Department obtained from a private party through a guarantee of confidentiality. Instead, the letter was prepared by a private attorney on behalf of clients with interests in the subject of the letter that are independent from the Department's interests. Because such a record is not an inter-agency or intra-agency communication that reveals the Department's pre-decisional deliberative process, this office concludes that the Department has not sustained its burden of proving that the letter is exempt from disclosure pursuant to section 7(1)(f) of FOIA.

## FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the information submitted, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On October 26, 2021, Mr. Pratt, on behalf of the *Chicago Tribune*, submitted a FOIA request to the City of Chicago Department of Law seeking copies of certain e-mails.

2) On November 9, 2021, the Department provided copies of records but withheld a letter submitted by a private attorney on behalf of clients pursuant to section 7(1)(a) of FOIA. The Department asserted that evidentiary rules prohibited disclosure of the record because it concerned settlement negotiations.

3) On November 11, 2021, Mr. Pratt submitted a Request for Review contesting the denial. The Public Access Bureau assigned that matter the file number 2022 PAC 72362.

4) On July 22, 2022, the Public Access Bureau issued a non-binding determination which concluded that the Department improperly denied the letter and requested that it provide Mr. Pratt with a copy.

5) On August 26, 2022, the Department informed this office that it would not comply with the Public Access Bureau's determination.

6) Meanwhile, on August 16, 2022, Mr. Pratt had submitted another FOIA request to the Department, this time seeking copies of any records this office determined to have been improperly withheld in 2022 PAC 72362.

7) On August 22, 2022, the Department again denied the letter at issue in 2022 PAC 72362 pursuant to section 7(1)(a) of FOIA.

8) On August 23, 2022, Mr. Pratt submitted this Request for Review (2022 PAC 73136) disputing the denial of his request. The Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2020)).

9) On August 26, 2022, this office sent a copy of the Request for Review to the Department and asked it to provide a detailed explanation of the factual and legal bases for the applicability of section 7(1)(a) to the letter.

10) On September 9, 2022, the Department submitted a response asserting that the record at issue is exempt from disclosure pursuant to section 7(1)(a) as well as section 7(1)(f).

11) On September 16, 2022, this office sent a copy of that response to Mr. Pratt. He replied on September 27, 2022.

12) On October 19, 2022, this office extended the time within which to issue a binding opinion by 30 business days, to December 7, 2022. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

13) The Department's denial of Mr. Pratt's request is based on the premise that the letter in question documents privileged settlement negotiations and is prohibited from being disclosed by evidentiary and discovery rules. The letter, however, does not propose or demand a settlement that would resolve the matter or request that the Department engage in negotiations concerning a possible settlement. Thus, the Department has not demonstrated that the record

reflects settlement negotiations encompassed by the evidentiary and discovery rules that the Department claims are applicable.

14) Even if the letter could be construed to be part of a settlement negotiation, it is not exempt under the exemptions the Department asserted.

15) Section 7(1)(a) of FOIA exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law."

16) Federal Rule of Evidence 408, Federal Rule of Evidence 501, Illinois Rule of Evidence 408, Illinois Rule of Evidence 501, Federal Rule of Civil Procedure 26(b), and Illinois Supreme Court Rule 201(b) are judicial rules governing discovery and the admission of evidence in court proceedings.

17) Restrictions on the discovery of information and the admissibility of evidence in court proceedings are inapplicable to the public's statutory right to obtain information pursuant to FOIA. Such rules do not provide a basis for denying records under section 7(1)(a).

18) Section 7(1)(f) of FOIA exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body."

19) To be exempt under section 7(1)(f), a record must be 1) intra-agency or inter-agency and 2) pre-decisional and deliberative.

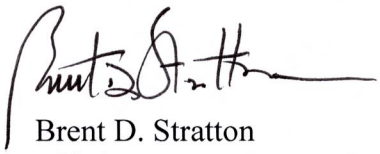
20) The letter that the Department withheld was prepared by a private attorney on behalf of clients with interests that are independent from the Department's interests. Because the letter is not an intra-agency or inter-agency communication, or a predecisional and deliberative record, it is not exempt from disclosure pursuant to section 7(1)(f) of FOIA.

Therefore, it is the opinion of the Attorney General that the City of Chicago Department of Law violated the requirements of FOIA by denying Mr. Gregory Pratt's August 16, 2022, Freedom of Information Act request. Accordingly, the Department is hereby directed to take immediate and appropriate action to comply with this opinion by providing Mr. Pratt with a copy of the responsive letter.

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2020). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review with the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois, Mr. Gregory Pratt, and the *Chicago Tribune* as defendants. *See* 5 ILCS 140/11.5 (West 2020).

Sincerely,

KWAME RAOUL
ATTORNEY GENERAL

By: 

Brent D. Stratton
Chief Deputy Attorney General

cc: Mr. Matthew J. Walters
Chief Assistant Corporation Counsel
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**CERTIFICATE OF SERVICE**

Steve Silverman, Bureau Chief, Public Access Bureau, hereby certifies that he has served a copy of the foregoing Binding Opinion (Public Access Opinion 22-013) upon:

Mr. Gregory Pratt
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Ms. Anna Lentsch
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by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Chicago, Illinois on November 22, 2022.

Steve Silverman
Bureau Chief

Steve Silverman
Bureau Chief
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