



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

November 21, 2023

Via electronic mail



Via electronic mail

Mr. Ross McNeil
FOIA Officer
City of Urbana
400 South Vine Street
Urbana, Illinois 61801
remcneil@urbanaininois.us

RE: FOIA Request for Review – 2023 PAC 76460

Dear [REDACTED] and Mr. McNeil:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2022)).

On April 4, 2023, [REDACTED] submitted a FOIA request to the City of Urbana (City) seeking copies of "[a]ll records related to the recent announcement of Larry Boone as Police Chief Finalist[.]" including: (1) any job descriptions and requirements, (2) records submitted by Mr. Boone as part of his application, and (3) records furnished by any other party related to Mr. Boone's candidacy.¹ On April 20, 2023, the City provided a job description for the Chief of Police and a document prepared by Polihire, a firm hired by the City to assist in identifying candidates for the position. The City withheld the remaining responsive records pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(f) of FOIA.² On May 2, 2023, this office received [REDACTED] Request for Review challenging the partial denial. [REDACTED] asserted that the

¹E-mail from CheckCU.org to Ross McNeil (April 4, 2023).

²5 ILCS 140/7(1)(b), (1)(c), (1)(f) (West 2021 Supp.), as amended by Public Acts 102-752, effective January 1, 2023; 102-753, effective January 1, 2023; 102-776, effective January 1, 2023; 102-791, effective May 13, 2022; 102-1055, effective June 10, 2022.

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City did not provide any records related to Mr. Boone's candidacy, particularly any records that were gathered by Polihire during the search process. Those records would be responsive to parts two and three of his request.

On May 11, 2023, this office forwarded a copy of the Request for Review to the City and asked it to provide copies of the withheld records, together with a detailed explanation of the factual and legal bases for the applicability of the asserted exemptions. On June 5, 2023, this office received the requested materials. On June 7, 2023, this office forwarded a copy of the City's response to ██████████ he did not submit a reply.

DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2022); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body that withholds records "has the burden of proving by clear and convincing evidence" that the records are exempt from disclosure. 5 ILCS 140/1.2 (West 2022). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

Section 7(1)(c) of FOIA exempts from disclosure "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 7(1)(c) defines "unwarranted invasion of personal privacy" as the "disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy."

Police Chief Finalist's Application Materials

In his Request for Review, ██████████ argued that the City improperly denied his request for records pertaining to Mr. Boone's candidacy because Mr. Boone was publicly identified as the finalist for the police chief position and already a public figure. He further argued that there is a legitimate public interest in disclosure of information concerning the City's top pick for a high-level job. He asserted, in relevant part: "Larry Boone has been a public official for most, if not all, of his career. He has applied to a position of substantial public interest, his identity has been announced, and he has been declared the sole finalist for the position of Police Chief."³

³E-mail from ██████████ to Public Access Counselor Bartelt (May 2, 2023).

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In its response to this office, the City acknowledged it had publicly identified Mr. Boone as a police chief finalist after its April 3, 2023, Committee of the Whole meeting, but maintained it properly withheld Mr. Boone's application materials because it had not yet made a final hiring decision. The City asserted that its announcement "indicated that additional interviews with the applicant were ongoing[,]"⁴ and an official job offer had not been extended to Mr. Boone. The City contended it could still elect not to offer him the job or Mr. Boone could withdraw his name from consideration or decline the job if an offer was later made. The City noted that in previous determinations, the Public Access Bureau has concluded that pending or unsuccessful applications for public employment are exempt from disclosure pursuant to section 7(1)(c). Those determinations, however, are distinguishable from this matter.

The Public Access Bureau's previous determinations concerned pending or unsuccessful applicants who had not already been publicly identified as seeking public employment. The rationale for those determinations is that disclosure of information that identifies individuals who unsuccessfully sought or currently are seeking a new job may negatively impact their current employment, which could chill them from applying in the first place and hamper a public body from attracting qualified applicants for open positions. Ill. Att'y Gen. PAC Req. Rev. Ltr. 52581, issued February 21, 2021. This office also reasoned that disclosure of information identifying individuals who unsuccessfully sought a position could cause embarrassment and dissuade applicants from applying in the future. Ill. Att'y Gen. PAC Req. Rev. Ltr. 59938, issued October 21, 2019. Those privacy concerns are not present in this matter because the City publicly identified Mr. Boone as a finalist for police chief before ██████████ submitted his request.

A public body's contention that the release of information would constitute an unwarranted invasion of personal privacy is evaluated on a case-by-case basis. *Chicago Journeymen Plumbers' Local Union 130, U.A. v. Department of Public Health*, 327 Ill. App. 3d 192, 196 (1st Dist. 2001). The phrase "clearly unwarranted invasion of personal privacy" evinces a strict standard to claim the exemption, and the burden is on the government agency having charge of the record to prove that standard has been met. *Schessler v. Department of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994). Illinois courts consider the following factors in determining whether disclosure of information would constitute an unwarranted invasion of personal privacy: "(1) the plaintiff's interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information." *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 3d 1, 13 (1st Dist. 2010).

⁴Letter from Ross McNeil, FOIA Officer, City of Urbana, to Teresa Lim, Supervising Attorney, Public Access Bureau, Office of the Attorney General (June 5, 2023), at 2.

Applying the first and second factors of the balancing test to Mr. Boone's application materials, [REDACTED] interest in disclosure is as a member of the public seeking to learn more about the City's top choice for police chief. [REDACTED] interest in disclosure is aligned with the public's interest in obtaining information concerning Mr. Boone's qualifications for the position. There is a compelling public interest in information that sheds light on the next potential police chief, who will have significant leadership authority and responsibilities as the head of the City's law enforcement branch.

Applying the third factor, the City emphasized that Mr. Boone had not yet been offer the job and thus "at this time the applicant is still afforded the privacy of a pending applicant."⁵ Mr. Boone's application materials included a letter of interest and resume. The City argued it "properly balanced the public's right to know with the privacy of a non-employee by providing significant information about both the hiring process and the final candidate while preserving the applicant's privacy to the extent possible."⁶

Lastly, applying the fourth factor, the City argued that there are alternative means to obtain relevant information about Mr. Boone's work history. In particular, the City noted that [REDACTED] could submit a FOIA request to Mr. Boone's current or previous public employers and seek records related to his work experiences.

Taking all these factors into account along with the specific contents of the records, the City did not demonstrate that disclosure of Mr. Boone's application materials would constitute a clearly unwarranted invasion of personal privacy. Although the City had not yet extended a job offer, Mr. Boone was not a mere pending applicant. The City had taken a step further by selecting and publicly identifying him as its top contender for Chief of Police. The City publicly announced this selection and subsequently arranged a meeting for members of the public to meet him in person. There is a significant public interest in information concerning the City's next potential police chief. That individual would be expected to assume substantial responsibilities overseeing the City's public safety and serve as a public figure for the police department. Although Mr. Boone's application materials contain personal information concerning his background, the information is presented in a favorable manner and does not appear to contain embarrassing or detailed information about highly personal matters, such as personal relationships or medical conditions. Instead, the information generally illustrates Mr. Boone's experience and qualifications to handle the public duties of a police chief. While [REDACTED]

⁵Letter from Ross McNeil, FOIA Officer, City of Urbana, to Teresa Lim, Supervising Attorney, Public Access Bureau, Office of the Attorney General (June 5, 2023), at 2.

⁶Letter from Ross McNeil, FOIA Officer, City of Urbana, to Teresa Lim, Supervising Attorney, Public Access Bureau, Office of the Attorney General (June 5, 2023), at 5.

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██████████ could request information from other governmental entities that previously employed Mr. Boone, there is no indication that there are any alternative means to obtain the application materials he submitted to the City. Under these circumstances, the City did not demonstrate by clear and convincing evidence that the privacy rights of Mr. Boone outweigh the legitimate public interest in disclosure of his application materials. Accordingly, this office concludes that the City did not sustain its burden of showing that Mr. Boone's application materials fall within the scope of section 7(1)(c).

Records Concerning Selection and Interview Process

The City asserted it did not possess records responsive to part three of ██████████ request at the time of his submission. The City explained that neither the City nor Polihire received any records from references or other third parties on behalf of Mr. Boone. The City further asserted that a number of records related to Mr. Boone's candidacy "were created after the date of the FOIA request[.]"⁷ Additionally, the City stated it withheld "transitory email communications between Polihire and the City regarding the hiring process and which also include attachments regarding the applicants."⁸ The City contended that those e-mails were not responsive to the request and, even if they were, fell within the scope of section 7(1)(c). The City provided this office with copies of these records to illustrate its ongoing selection and interview process.

This office's review of the records confirmed that a portion of the City's records pertaining to Mr. Boone's candidacy and interview process were prepared after the submission of ██████████ request. Records that do not exist at the time of a request are not responsive to the request. *Walker v. Bruscato*, 2019 IL App (2d) 170775 ¶ 45 ("A request for records not yet created is invalid."); *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 25707, issued August 30, 2013, at 2. ("public body is not obligated to respond to a FOIA request by furnishing records created after the submission of a request; such records are outside the scope of the request."). Accordingly, the City did not improperly withhold those records.

The "transitory email communications," however, are dated before the submission of the request. Although these e-mails do not focus solely on Mr. Boone and also contain information regarding other candidates, the e-mails nonetheless pertain to the City's selection of Mr. Boone out of the applicant pool and thus are responsive to the request. Based on this office's review, two of the e-mails show Polihire transmitting candidate information to the City. The

⁷Letter from Ross McNeil, FOIA Officer, City of Urbana, to Teresa Lim, Supervising Attorney, Public Access Bureau, Office of the Attorney General (June 5, 2023), at 4.

⁸Letter from Ross McNeil, FOIA Officer, City of Urbana, to Teresa Lim, Supervising Attorney, Public Access Bureau, Office of the Attorney General (June 5, 2023), at 4.

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candidates included Mr. Boone and certain other individuals. With the exception of one e-mail attachment containing Mr. Boone's application, the remaining parts of those two e-mails pertain to the other candidates. Disclosure of information concerning those unsuccessful candidates, including their applications, would constitute an unwarranted invasion of personal privacy. As discussed above, disclosure of records identifying unsuccessful applicants could cause embarrassment, interfere with the applicants' existing employment, and hamper public bodies from attracting qualified applicants for open positions. With respect to the remaining two e-mails, this office's review determined that they do not disclose details of any of the candidates' applications or personally-identifying information; they also do not reveal any deliberations regarding them. Instead, the e-mails contain general status updates about the selection process. The City did not demonstrate that these communications are highly personal in nature or that their disclosure would constitute a clearly unwarranted invasion of personal privacy. Accordingly, this office concludes that the City did not show by clear and convincing evidence that those two transitory e-mails are exempt from disclosure pursuant to section 7(1)(c).

This office requests that the City provide [REDACTED] with a copy of Mr. Boone's application materials, subject to permissible redactions under section 7(1)(b) of FOIA.⁹ This office also requests that the City provide copies of the last two e-mail chains that were provided for this office's confidential review. The City may redact parts of the e-mail chains that do not pertain to the police chief selection process.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at the Chicago address listed on the first page of this letter.

Very truly yours,

[REDACTED]
TERESA LIM
Supervising Attorney
Public Access Bureau

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⁹5 ILCS 140/7(1)(b) (West 2022), as amended by Public Act 103-154, effective June 30, 2023; 103-462, effective August 4, 2023.