

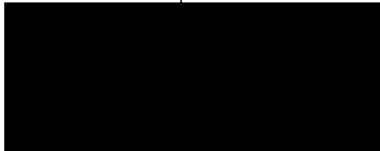


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 13, 2018

Via electronic mail



Via electronic mail

Mr. Alyx J. Parker
Meyer Capel
306 West Church Street
Champaign, Illinois 61820
aparker@meyercapel.com

RE: FOIA Request for Review – 2016 PAC 40605

Dear [REDACTED] and Mr. Parker:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2016)). For the reasons stated below, the Public Access Bureau concludes that the Champaign-Urbana Mass Transit District (District) improperly withheld certain portions of the records responsive to [REDACTED] February 1, 2016, FOIA request.

On that date, [REDACTED] submitted a FOIA request to the District seeking, among other things, the personnel file of the driver operating bus 1194 at approximately 1:37 pm on February 1, 2016. On February 12, 2016, the District denied [REDACTED] request for the personnel file pursuant to section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2014), as amended by Public Acts 99-298, effective August 6, 2015; 99-346, effective January 1, 2016). On March 6, 2016, this office received [REDACTED] Request for Review contesting the denial of his FOIA request.

On March 9, 2016, this office sent the District a copy of the Request for Review, and requested copies of the redacted and un-redacted responsive records, as well as a detailed

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explanation of the factual and legal bases for the asserted exemption. On March 18, 2016, the District furnished this office with the requested records and a written answer. On March 23, this office forwarded a copy of the District's answer to ██████████; he replied on April 1, 2016.

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 2014); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2014). 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)(b) of FOIA

Although not cited in the District's response to ██████████ FOIA request or to this office, section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2014)) exempts from disclosure "[p]rivate information, unless disclosure is required by another provision of this Act, a State or federal law or a court order." Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2014)) defines "private information" as:

[U]nique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.

The Attorney General has also held that a person's signature is a unique identifier that may be redacted as private information. *See, e.g., Ill. Att'y Gen. Pub. Acc. Op. No. 14-015*, issued November 25, 2014, at 11. The personnel records withheld by the District contain social security numbers, driver's license numbers, home addresses, personal telephone numbers, and signatures. Because all of those items constitute "private information" as defined by FOIA, the District did not improperly withhold that information from the responsive records pursuant to section 7(1)(b) of FOIA.

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Section 7(1)(c) of FOIA

The District asserted that the records contained in the employee's personnel file are exempt in their entirety pursuant to section 7(1)(c) of FOIA, which exempts from disclosure:

Personal information contained within public records, the disclosure of which would constitute ***a clearly unwarranted invasion of personal privacy***, unless the disclosure is consented to in writing by the individual subjects of the information. "Unwarranted invasion of personal privacy" means 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.*** (Emphasis added.)

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).

In its response to this office, the District relied upon an opinion letter issued by the Illinois Attorney General, Ill. Att'y Gen. Op. No. S-1484, issued April 14, 1980, and two Illinois Appellate Court opinions, *State Journal-Register v. University of Illinois Springfield*, 2013 IL App (4th) 120881, 994 N.E. 2d 705 (2013) and *Copley Press, Inc. v. Board of Education for Peoria School District No. 150*, 35 Ill. App. 3d 321 (2005), for its assertion that records contained within a personnel file are *per se* exempt as personal information under section 7(1)(c) of FOIA. However, the 1980 opinion and the opinion in *Copley Press* predated the significant revision of FOIA by the General Assembly in Public Act 96-542, effective January 1, 2010, which eliminated the *per se* exemption for information contained in employee's personnel files

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and added the current version of the personal privacy exemption in section 7(1)(c) of FOIA. Before January 1, 2010, the personal privacy exemption was found in section 7(1)(b) of FOIA (*see* 5 ILCS 140/7(1)(b) (West 2008)) and exempted from disclosure:

(b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of 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.*** Information exempted under this subsection (b) shall include but is not limited to:

* * *

(ii) ***personnel files*** and personal information maintained with respect to employees, appointees or elected officials of any public body or applicants for those positions[.]
(Emphasis added)

By eliminating the previous version of section 7(1)(b) and adding the current version of section 7(1)(c), the General Assembly "replaced the *per se* exemptions with a balancing test requiring a public body to balance the privacy rights of an employee and the interests of the public in obtaining information concerning the employee." Ill. Att'y Gen. Pub. Acc. Op. No. 14-015, issued November 25, 2014, at 5. As part of that balancing, the General Assembly specifically stated that information that bears on the public duties of public employees is not considered an invasion of personal privacy. The Attorney General has concluded that "there is a compelling public interest in disclosure of a public employee's credentials to enable the public to assess the employee's qualifications to perform his or her public duties." Ill. Att'y Gen. Pub. Acc. Op. No. 14-015, issued November 25, 2014, at 6. Because employment applications, résumés, employment history, and other records of the employee's qualifications for the position bear on the employee's public duties, the Attorney General has determined that such records are not exempt from disclosure under the plain language of section 7(1)(c) of FOIA. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 14-015, issued November 25, 2014, at 8. Accordingly, this office concludes that the District improperly withheld the employee's job application, résumé, employment history information, and other records concerning his qualifications for employment and promotion under section 7(1)(c) of FOIA.

In addition to job application information, the District also withheld a copy of the employee's driver's license under section 7(1)(c) of FOIA. As described in ██████████ FOIA

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request, the employee is the operator of a bus for the District. Because the employee is responsible for operating a vehicle as part of his public duties for the District, information concerning whether the employee possessed a non-expired driver's license and the class of license bears on his public duties and therefore is not exempt under section 7(1)(c). However, the employee's birth date is exempt from disclosure pursuant to section 7(1)(c),¹ and "private information" listed in the license, such as the employee's license number and home may be redacted under section 7(1)(b) of FOIA.

The District also withheld information relating to the employee's attendance at work. The Public Access Bureau has consistently determined that records that detail a public employee's attendance or absences from work are a matter of substantial public interest and directly relate to the employee's public duties. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 46310, issued October 23, 2017, at 2; Ill. Att'y Gen. PAC Req. Rev. Ltr. 19343, issued October 30, 2012, at 3-4. Because the presence or absence of the employee has a direct impact on the operations of the District's transportation services and because information that bears on the public duties of public employees is not considered personal information, this office concludes that the District improperly withheld attendance information under section 7(1)(c) of FOIA.

In connection with the employee's attendance, the District also withheld information concerning the employee's accrued time off under 7(1)(c). In its response to this office, the District cited the holding in *State Journal-Register*, 2013 IL App (4th) 120881, ¶41; 994 N.E.2d 705, 716 (2013):

In this case, the information sought by the Journal includes documents reflecting the coaches' compensation for accrued vacation and sick time, employee status, and other related documents. The Journal interprets [*Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396 (2009)] too broadly, inferring any document within a personnel file can be subject to disclosure as bearing on the "public duties" of the employees. A closer reading of *Stern* shows the case was limited to the disclosure of employment contracts, as those contracts set forth the duties of public employees and the compensation paid from public funds. We find the present case more analogous to [*Copley Press, Inc. v. Board of Educ. for Peoria Sch. Dist. No. 150*, 359 Ill. App. 3d 321 (3d Dist. 2005)]. We fail to see how the coaches' election for the disbursement of accrued vacation, sick

¹The Attorney General has issued a binding opinion concluding that disclosure of an individual's date of birth would constitute an unwarranted invasion of personal privacy. Ill. Att'y Gen. Pub. Acc. Op. No. 16-009, issued November 7, 2016, at 9.

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leave, and related documents have any bearing on their alleged misdeeds or public duties. Instead, we conclude this information is of a highly personal nature, contained appropriately in a personnel file, and exempt from disclosure.

In *Copley*, cited by the *State Journal-Register* opinion, the court held that the requested performance evaluations and letter explaining the reasons for a superintendent's dismissal were the types of documents expected to be found in a personnel file and thus *per se* exempt under the then-existing exemption for records in a "personnel file." *Copley*, 359 Ill. App. 3d at 324-25 (interpreting 5 ILCS 140/7(1)(b)(ii) (West 2002)). As discussed above, FOIA was amended in 2010 to strike the "personnel file" subsection of the personal privacy exemption. See Public Act 96-542, effective January 1, 2010. At the time of *State Journal-Register* opinion, the placement of records in a personnel file was irrelevant to a determination of whether they were exempt from disclosure under section 7(1)(c). Further, section 2.5 of FOIA (5 ILCS 140/2.5 (West 2014)) provides that "[a]ll records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public." Accordingly, this office has concluded that *State Journal-Register* is not controlling on the question of whether an employee's accrued time off is subject to disclosure under FOIA. Ill. Att'y Gen. PAC Req. Rev. Ltr. 47124, issued May 30, 2017, at 4-5. Because a public employee's accrued time off is paid time for when the employee is not present at work and because it is part of an employee's total compensation package provided by the public body, it relates to the use of public funds, and disclosure of such public compensation is in the public interest:

There is * * * a significant legitimate public interest in disclosure of the amount of compensation paid to public employees for the performance of public duties. * * * As government employees, paid with public funds, these employees have no reasonable expectation of privacy in the amount of compensation they receive. And even if they do have an expectation of privacy in the amount of their compensation, it does not outweigh the public's legitimate interest in knowing how public funds are expended. Ill. Att'y Gen. Pub. Acc. Op. No. 16-012, issued December 21, 2016, at 7.

Accordingly, the District has not sustained its burden of demonstrating by clear and convincing evidence that the disclosure of the employee's accrued time off would constitute a "clearly unwarranted invasion of personal privacy" as required by section 7(1)(c) of FOIA. Likewise, payroll and wage information is unquestionably related to the use of public funds and is not exempt under section 7(1)(c) of FOIA.

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In contrast, the Public Access Bureau has previously determined that the names of emergency contacts are personal information that may be redacted under section 7(1)(c). *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 47124, issued May 30, 2017, at 3. Thus, the District may redact the employee's emergency contact information. However, the District has not sustained its burden of demonstrating by clear and convincing evidence that the employee's place of birth is exempt from disclosure under section 7(1)(c) of FOIA.

Sections 7(1)(f) and 7.5(q) of FOIA

In its response to this office, the District stated that it had withheld performance evaluations and training records contained in the employee's personnel file under section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2014), as amended by Public Acts 99-298, effective August 6, 2015; 99-346, effective January 1, 2016).

Before addressing the training records, this office notes that performance evaluations are exempt from disclosure under section 7.5(q) of FOIA (5 ILCS 140/7.5(q) (West 2014), as amended by Public Act 99-298, effective August 6, 2015) and section 11 of the Personnel Record Review Act (PRRA) (820 ILCS 40/11 (West 2014)). Section 7.5(q) of FOIA exempts from disclosure "[i]nformation prohibited from being disclosed by the Personnel Records Review Act." Section 11 of the PRRA provides: "This Act shall not be construed to diminish a right of access to records already otherwise provided by law, ***provided that disclosure of performance evaluations under the Freedom of Information Act shall be prohibited.***" (Emphasis added.) Because section 11 of the PRRA prohibits the disclosure of performance evaluations, the District did not improperly withhold those records pursuant to section 7.5(q) of FOIA.

With respect to the training records, section 7(1)(f) of FOIA exempts "[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 applies to "inter- and intra-agency predecisional and deliberative material" and is "intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 248 (1st Dist. 2003); *see also Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶24, 7 N.E.3d 741, 748 (2014) ("Only those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." (quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010))). Section 7(1)(f) does not exempt from disclosure purely factual material. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 13-015, issued September 24, 2013, at 7.

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The District stated that the training records are "considered preliminary, pre-decisional, and/or deliberative records in which opinions are expressed, or policies or actions are formulated[.]"² The District's explanation of how the training records constitute pre-decisional or deliberative material is conclusory. Further, this office reviewed the withheld training records which consist of a training schedule and training outline that contain dates, times, instructor names, and routes. This information is entirely factual and does not contain any opinions or recommendations of the training instructors. Accordingly, this office concludes that the District has not sustained its burden of demonstrating by clear and convincing evidence that the withheld training records are exempt under section 7(1)(f) of FOIA.

The District also stated that it had withheld a variety of documents that were not exempt under an exemption in FOIA. Specifically, the District stated it withheld compliments for the employee, letters designating the employee as an "Outstanding Operator" by the District, an employment contract, a receipt for the employee handbook, and change fund audit forms. Because the District has not provided ██████████ with copies of those records and because the District acknowledged that no exemption in FOIA permitted it to withhold those records, this office concludes that the District improperly withheld those records as well.

In accordance with the conclusions expressed in this letter, this office requests that the District disclose additional information contained in the employee's personnel file, subject to the redaction of social security numbers, driver's license numbers, dates of birth, names of parents, home addresses, personal telephone numbers, emergency contact information, and performance evaluations. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. Please contact me at (217) 782-9054, mhartman@atg.state.il.us, or the Springfield address at the bottom of the first page if you have questions. This letter serves to close this file.

Very truly yours,

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MATT HARTMAN
Assistant Attorney General
Public Access Bureau

40605 71b 71c proper improper 71f improper 75q proper reg auth

²Letter from Alyx J. Parker, Ansel Law, to Matt Hartman, [Assistant] Attorney General, Public Access Bureau (March 18, 2016), at 3.