

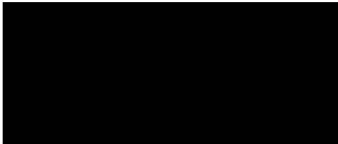


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

February 28, 2022

Via electronic mail



Via electronic mail

Ms. Barb Smith
FOIA Officer
Illinois Department of Transportation
Office of the Chief Counsel, Room 317
2300 South Dirksen Parkway
Springfield, Illinois 62765
barbara.j.smith2@illinois.gov

RE: FOIA Request for Review – 2018 PAC 56109; IDOT FOIA No.: 18-0818

Dear [REDACTED] and Ms. Smith:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2020)).

On December 14, 2018, the Public Access Bureau received a Request for Review from [REDACTED] challenging the response by the Illinois Department of Transportation (IDOT) to his October 25, 2018, FOIA request. [REDACTED] request sought copies of certain records provided to IDOT's then-Director, Beth McCluskey, concerning alleged workplace harassment or discrimination within the South Central Illinois Mass Transit District (Transit District). In his FOIA request, [REDACTED] stated that the harassment allegation prompted Ms. McCluskey to send a letter, dated October 12, 2018, to members of the Transit District's Board of Trustees (Board). [REDACTED] was a member of the Board at the time. On October 30, 2018, IDOT denied the request pursuant to sections 7(1)(d)(iii) and 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)(d)(iii), (1)(d)(iv) (West 2018)), stating the requested information "consists of a

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complaint related to a public body that is in the process of investigation."¹ On December 18, 2018, this office requested that IDOT provide un-redacted copies of the withheld records for this office's confidential review, together with a detailed legal and factual explanation of its basis for asserting the above-referenced exemptions. On December 28, 2018, IDOT provided those materials. In its written answer, IDOT asserted the withheld record was also exempt under section 7(1)(d)(ii) of FOIA 5 ILCS 140/7(1)(d)(ii) (West 2018)). On January 6, 2019, ██████████ ██████████ replied, maintaining that IDOT improperly denied his request and that no investigation was being conducted.

Under FOIA, "[a]ll 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 2018); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). Any public body that denies a record "has the burden of proving by clear and convincing evidence" that the record is exempt from disclosure. 5 ILCS 140/1.2 (West 2018). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997). "To meet its burden * * *, the public body must provide a detailed justification for its claim of exemption, addressing the requested records specifically and in a manner allowing for adequate adversarial testing." *Rockford Police Benevolent & Protective Ass'n v. Morrissey*, 398 Ill. App. 3d 145, 150 (2nd Dist. 2010). Bare assertions without a detailed rationale do not satisfy a public body's burden of explaining how exemptions are applicable. *See Rockford Police Benevolent & Protective Ass'n*, 398 Ill. App. 3d at 151 (citing *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 464 (2003)).

Sections 7(1)(d)(ii), 7(1)(d)(iii), and 7(1)(d)(iv) of FOIA exempt from disclosure:

(d) Records in the possession of any public body created **in the course of administrative enforcement proceedings**, and any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would:

* * *

(ii) interfere with active administrative enforcement proceedings conducted by the public body that is the recipient of the request

(iii) create a substantial likelihood that a person will be deprived of a fair trial or impartial hearing; [or]

¹E-mail from Barb Smith, FOIA Officer, Illinois Department of Transportation, to ██████████ (October 30, 2018).

(iv) unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies[.] (Emphasis added.)

In construing a statute, the primary objective is to ascertain and give effect to the intent of the General Assembly. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). "[T]he surest and most reliable indicator of" legislative intent "is the statutory language itself, given its plain and ordinary meaning." *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, ¶24, 77 N.E.3d 625, 630 (2017).

IDOT's response to this office stated that it was conducting an ongoing investigation into the allegations in the letter that ██████████ sought. IDOT also stated it had received media inquiries related to the underlying workplace allegations, and that IDOT's attorney advised it to withhold the responsive record "due to the sensitive nature of the requests" and asserted that the release of the letter could "potentially cause detrimental outcomes to the accuser and/or the accused."²

The plain language of section 7(1)(d) provides that records fall within the scope of this provision, under certain circumstances, when the public body maintaining the records is a law enforcement agency or, for other types of public bodies, when the records were created during the course of an administrative enforcement proceeding.

With respect to the first prerequisite, IDOT is not a "law enforcement" agency within the context of section 7(1)(d) of FOIA. Instead, IDOT is tasked with, among other things, the responsibility for the planning, funding, construction, operation, and maintenance of Illinois' transportation network. *See* 20 ILCS 2705/2705-10 (West 2020). Therefore, IDOT has not established that the responsive record is possessed by a law enforcement agency for law enforcement purposes.

Further, based on this office's confidential review, the record in question was not created in the course of an administrative enforcement proceeding. Even assuming IDOT's assertion that conducting an investigation into the underlying workplace allegations could be construed as an administrative enforcement proceeding, the scope of section 7(1)(d) is limited to records generated **during** the proceedings; it does not encompass records such as the underlying

²E-mail from Barb Smith, FOIA Officer, Illinois Department of Transportation, to [Shannon] Barnaby (December 28, 2018).

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complaints that were created before the commencement of administrative enforcement proceedings. [REDACTED] request sought records that may have initiated IDOT's investigation, not any records that may have been generated during that investigation. Therefore, this office concludes that IDOT has not sustained its burden of demonstrating that the responsive letter is exempt from disclosure pursuant to sections 7(1)(d)(ii), 7(1)(d)(iii), or 7(1)(d)(iv) of FOIA. Accordingly, this office requests that IDOT provide [REDACTED] with a copy of the responsive letter.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, my e-mail address is Shannon.Barnaby@ilag.gov.

Very truly yours,

[REDACTED]
SHANNON BARNABY
Assistant Attorney General
Public Access Bureau

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