

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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March 23, 2022

Via electronic mail
Mr. Gregory Pratt
Chicago Tribune
gpratt@chicagotribune.com

Via electronic mail
Mr. Tom Skelton
FOIA Officer
City of Chicago Mayor's Office
121 North LaSalle Street, Suite 500
Chicago, Illinois 60602
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RE: FOIA Request for Review – 2022 PAC 69562

Dear Mr. Pratt and Mr. Skelton:

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)). For the reasons explained below, the Public Access Bureau concludes that while most of the information the City of Chicago Mayor's Office (Mayor's Office) redacted in response to a FOIA request from Mr. Gregory Pratt is exempt from disclosure, the Mayor's Office improperly redacted certain discrete information.

On September 7, 2021, Mr. Pratt submitted a FOIA request to the Mayor's Office on behalf of the *Chicago Tribune* seeking copies of text messages between Mayor Lori Lightfoot and various named officials and other prominent persons in August 2021. On December 20, 2021, the Mayor's Office completed its response, providing Mr. Pratt with copies of certain responsive records but denying the request in part pursuant to sections 7(1)(c) and 7(1)(f) of

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FOIA.¹ On January 24, 2022, Mr. Pratt submitted the above-referenced Request for Review contesting the partial denial as to around 90 of the text message exchanges.²

On January 26, 2022, this office sent a copy of the Request for Review to the Mayor's Office and asked it to provide this office with unredacted copies of the disputed e-mail threads for this office's confidential review. This office also requested a detailed written explanation of the legal and factual bases for redacting or withholding information from those threads. On February 14, 2022, the Mayor's Office furnished those materials. On February 16, 2022, Mr. Pratt submitted a reply.

ANALYSIS

"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 2020); *see also Southern Illinoisan v. Illinois Dep't 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 2020).

Public Records

Section 2(c) of FOIA defines "public records" as:

all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.

In accordance with this definition, the court in *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶38, 992 N.E.2d 629, 638 (2013) stated that "to qualify as a 'public record' under FOIA, a communication must (1) 'pertain[] to the transaction of public business' and have either been (2) prepared by, (3) prepared for, (4) used by (5) received by, (6) possessed by, or (7)

¹5 ILCS 140/7(1)(c), (1)(f) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558, effective August 20, 2021.

²Mr. Pratt enumerated the text messages he contested, but did not designate a thread with number eight, and some of the separately-enumerated text messages are found within the same threads.

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controlled by a public body." A record pertains to the transaction of public business when it "pertain[s] to 'business or community interests as opposed to private affairs.' Indeed, FOIA is not concerned with an individual's private affairs." *City of Champaign*, 2013 IL App (4th) 120662, ¶31, 992 N.E.2d at 637 (internal citation omitted).

The Mayor's Office asserted that most of the disputed text messages are not public records subject to disclosure pursuant to FOIA because "they do not pertain to the transaction of public business, nor were they prepared by, prepared for, used by, received by, possessed by, or controlled by a public body."³ The Mayor's Office argued that the text messages are personal exchanges that "do not have any nexus to the transaction of public business."⁴ The Mayor's Office further claimed:

Messages from Mayor Lightfoot's personal phone are unlike those from a city-issued device. * * * These messages are the private exchanges between Mayor Lightfoot and the various officials. There is no presumption that the messages should be disclosed just because the sender or recipient happens to be a public official.^[5]

In his reply, Mr. Pratt confirmed that he is "only seeking records related to public business and the mayor's official capacity."⁶ Still, he disputed the argument that messages on Mayor Lightfoot's personal device should be subject to a higher standard for disclosure:

Most of the texts here, if not all of them, come from her personal device, but that doesn't mean the bar should in some way be higher. It's long-settled case law that it doesn't matter the device used, just the content generated.

The fact is, Mayor Lightfoot uses her personal device to conduct public business. She does that extensively. Per records the city has released, I think the majority of city aldermen use Mayor

³Letter from Tom Skelton, FOIA Officer – Office of the Mayor, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (February 14, 2022), at [3].

⁴Letter from Tom Skelton, FOIA Officer – Office of the Mayor, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (February 14, 2022), at [3].

⁵Letter from Tom Skelton, FOIA Officer – Office of the Mayor, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (February 14, 2022), at [3].

⁶E-mail from Gregory Royal Pratt to Joshua Jones (February 16, 2022).

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Lightfoot's personal phone to contact her and she uses it to contact them. (It may even be the vast majority.) Gov. Pritzker uses it, too, as do State's Attorney Kim Foxx, Speaker Welch and many many others. (Every time Mayor Lightfoot has contacted me about news stories, she has used the personal device as well.)^[7]

This office's review confirmed that most of the redacted messages do not pertain to the transaction of public business. Instead, these messages either pertain to political matters that are distinct from transacting public business (19, 20, 91) or aspects of peoples' personal lives that constitute private affairs (examples include 17, 24, 25, 30, 61, 71). Many of these text messages also fall within the scope of section 7(1)(c), as discussed further below. Whether Mayor Lightfoot's personal phone was used to transmit these messages has no bearing, however, on whether they constitute public records. It is well settled that any text messages sent by the City's mayor pertaining to the transaction of public business are subject to disclosure, regardless of the device used. *Better Gov't Ass'n v. City of Chicago Office of Mayor*, 2020 IL App (1st) 190038, ¶19, 169 N.E.3d 1066, 1073 (2020).

Section 7(1)(c) of FOIA

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, unless the disclosure is consented to in writing by the individual subjects of the information." An "unwarranted invasion of personal privacy" is defined 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." Moreover, "[t]he disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy." The General Assembly's use of the term "clearly" in the phrase "clearly unwarranted invasion of personal privacy" evinces a strict standard to claim the exemption. *Schessler v. Dep't of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994).

In support of the applicability of section 7(1)(c), the Mayor's Office argued:

Many of these text messages address health matters and family matters of these figures. The public's interest in disclosure of these records is very low as the records address matters that are commonly considered a matter of personal privacy. Someone's health and the health of their family is a matter of personal privacy

⁷E-mail from Gregory Royal Pratt to Joshua Jones (February 16, 2022).

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regardless of whether they are a public figure. Many of these text messages are simply personal remarks and greetings between Mayor Lightfoot and these local figures. Again, there is very little public interest in disclosure of these records. Additionally, since these records come from Mayor Lightfoot's personal cell phone, there would be a high degree of invasion of personal privacy to disclose these records.^[8]

The Mayor's Office also asserted that Mr. Pratt's speculations about the redacted content were incorrect, addressing several particular e-mail threads.

In his reply, Mr. Pratt confirmed that he was not seeking health information about anyone. Mr. Pratt questioned, however, whether Mayor Lightfoot may view text messages about nominally personal matters, such as a birthday celebration, to be "an extension of her job as mayor[,] as "they're communicating about an event that really is a city function for her and that she's being invited to because she's mayor."⁹ Additionally, he stated:

I do also have concerns about the mayor's office redacting personal greetings and well wishes. For instance, I think they redact "happy birthday" sometimes, and that's kind of silly, since the mayor isn't shy about her birthday and so I don't really see the unwarranted invasion of personal privacy there from someone wishing her a happy birthday. I also think they redact stuff like Merry Christmas or Happy Thanksgiving at times. For the purposes of this FOIA request for review I will say that I don't care in these instances about those redactions – but I will say it's bizarre to me that the city wastes valuable time and energy making them, since its redactability is dubious and it probably casts doubt on a lot of genuinely harmless messages, leading us to this time-intensive exercise.^[10]

This office's review confirmed that much of the redacted information concerns personal health issues, condolences, holiday greetings, vacation plans, and other matters that would intrude on the parties' personal lives if disclosed. The redacted messages that consist of

⁸Letter from Tom Skelton, FOIA Officer – Office of the Mayor, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (February 14, 2022), at 2.

⁹E-mail from Gregory Royal Pratt to Joshua Jones (February 16, 2022).

¹⁰E-mail from Gregory Royal Pratt to Joshua Jones (February 16, 2022).

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purely personal content are exempt from disclosure under section 7(1)(c); examples include items 2, 4, 12, 21, 34, 47, 69, 75, 79, and 86.

In contrast to the responsive messages that solely relate to highly personal information such as a medical diagnosis, however, some of the redactions also concern the nature of the parties' professional relationships with Mayor Lightfoot. Unlike messages that just involve personal friendships, messages concerning working with Mayor Lightfoot in her official capacity bear on the correspondents' public duties. The Mayor's Office redacted discrete information from items including 32, 33, 39, 45, 66, 72, and 83 that cannot be considered highly personal because the information pertains to public business of the Office of the Mayor. With respect to some of the messages, there is no FOIA exemption for jokes pertaining to public duties and public business; the scope of section 7(1)(c) specifically excludes information that bears on the public duties of public officials, and the notion that a remark was made in a jest does not somehow place the record of the communication beyond FOIA's disclosure requirements when it relates to the Mayor's official capacity. Accordingly, although the Mayor's Office demonstrated that a significant portion of the responsive text messages is exempt from disclosure under section 7(1)(c), the Mayor's Office did not meet the strict standard of proving by clear and convincing evidence that all of the messages it claims to be exempt under section 7(1)(c) fall within the scope of the exemption.

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 applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). Section 7(1)(f) is "intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." *Harwood*, 344 Ill. App. 3d at 248. "In order to qualify for the deliberative process exemption, a document must be both predecisional in the sense that it is actually antecedent to the adoption of an agency policy, and deliberative in the sense that it is actually related to the process by which policies are formulated." *Chicago Tribune Co. v. Cook County Assessor's Office*, 2018 IL App (1st) 170455, ¶128, 109 N.E.3d 872, 880 (2018).

In its response to this office, the Mayor's Office stated that in limited instances, it redacted information pursuant to section 7(1)(f). The Mayor's Office stated that the Public Access Bureau had previously determined that the same types of records, in which the mayor and an alderman confer to formulate action, are exempt from disclosure. Ill. Att'y Gen. PAC Req.

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Rev. Ltr. 65053, issued February 17, 2021, at 4 ("Intra-agency communications that reflect the process of formulating action are exempt from disclosure under section 7(1)(f) of FOIA."). The Mayor's Office stated:

The text messages here concern the formulation of governmental actions that impact the Mayor's Office and City Council. Specifically, Text Exchange #13 is about the Executive Powers ordinance that the City Council passed during the beginning of the COVID-19 Pandemic and includes information regarding a third-party's health matters. Text Exchange #23 is about a then pending City Council ordinance. The text messages were part of the formulating of these ordinances and were about governmental actions that concern both the Mayor and City Council. They were thus an intra-agency communication that reflect the process of formulating governmental actions.^[11]

In his reply, Mr. Pratt reiterated his skepticism that all of the redactions under section 7(1)(f) are proper based on past FOIA disputes with the Mayor's Office.

This office's review confirmed that item 23 consists of a predecisional and deliberative exchange within the scope of section 7(1)(f). As the Mayor's Office asserted, this correspondence is akin to the correspondence between an alderman and the Mayor that this office determined to be exempt in Ill. Att'y Gen. PAC Req. Rev. Ltr. 65053. The redacted information in item 13 is also predecisional and deliberative in its entirety. The Mayor's Office acknowledged that these messages contain discussion concerning an ordinance that had already passed but there is a forward-looking component that is inextricably intertwined with the discussion of the approved ordinance. Disclosure of the redacted information would provide insight into the Mayor's Office's process of formulating future action. Accordingly, this office concludes that the Mayor's Office sustained its burden of proving by clear and convincing evidence that the information it redacted pursuant to section 7(1)(f) is exempt from disclosure in its entirety.

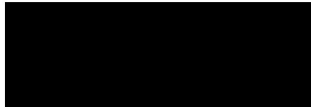
In accordance with these conclusions, this office requests that the Mayor's Office issue a revised response to Mr. Pratt's request, disclosing the information this office identified as non-exempt above.

¹¹Letter from Tom Skelton, FOIA Officer – Office of the Mayor, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (February 14, 2022), at [4].

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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 questions, please contact me at joshua.jones@ilag.gov.

Very truly yours,



JOSHUA M. JONES
Deputy Bureau Chief
Public Access Bureau

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