



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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November 22, 2024

Via electronic mail



Via electronic mail

Ms. Kate Exo
Legal Counsel, FOIA Officer
Illinois Department of Commerce & Economic Opportunity
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RE: FOIA Request for Review – 2024 PAC 80603; DCEO no. 2024-0019

Dear [REDACTED] and Ms. Exo:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2023 Supp.)). For the reasons stated below, the Public Access Bureau concludes that the Illinois Department of Commerce & Economic Opportunity (DCEO) has not improperly withheld records responsive to [REDACTED] February 9, 2024, FOIA request.

On that date, [REDACTED], [REDACTED], submitted a two-part FOIA request to DCEO regarding applications for the State-designated cultural districts program. [REDACTED] sought: "1) Uprising Theater's complete application along with its score as well as any notes taken relating to the application[,]" and "2) Completed applications and scores of all applicants who received a cultural district designation along with any notes

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taken relating to the applications."¹ On February 27, 2024, DCEO granted [REDACTED] request in part and denied his request in part. DCEO provided responsive application materials but stated that scoring materials for all applicants were exempt under section 7(1)(f) of FOIA,² and that it redacted signatures, tax identification numbers, and financial information pursuant to section 7(1)(b) of FOIA.³ DCEO also stated that "[t]he evaluation notes and internal communications regarding applicants are preliminary because they contain incomplete information and the impressions and recommendations of the Department staff regarding the formation of policy and Department action."⁴

On March 14, 2024, [REDACTED] submitted the above-referenced Request for Review contesting DCEO's partial denial of his request. [REDACTED] included three attachments about State-designated cultural districts, including the history of the bill that, as Public Act 102-628, effective January 1, 2022, authorized the State-designated cultural districts program,⁵ the language of that Act, and an October 2021 *Block Club Chicago* article about its enactment.⁶

On March 27, 2024, this office sent a copy of the Request for Review to DCEO and asked it to provide unredacted copies of the responsive records for this office's confidential review, as well as a detailed explanation of the factual and legal bases for the applicability of the asserted exemptions to these records. On April 5, 2024, DCEO provided [REDACTED] and this office with its written response. DCEO separately provided this office with unredacted copies of the withheld records. On April 8, 2024, this office notified [REDACTED] of his right to reply; he confirmed receipt that same day and provided a substantive reply on April 17, 2024.

¹E-mail from [REDACTED], to [DCEO] (February 9, 2024).

²5 ILCS 140/7(1)(f) (West 2022), as amended by Public Acts 103-154, effective June 30, 2023; 103-423, effective January 1, 2024; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023; 103-540, effective January 1, 2024; 103-554, effective January 1, 2024.

³5 ILCS 140/7(1)(b) (West 2022), as amended by Public Acts 103-154, effective June 30, 2023; 103-423, effective January 1, 2024; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023; 103-540, effective January 1, 2024; 103-554, effective January 1, 2024.

⁴Letter from Kate Exo, Legal Counsel, FOIA Officer, Department of Commerce and Economic Opportunity to [REDACTED] Uprising Theater (February 27, 2024).

⁵20 ILCS 605/605-1057 (West 2022).

⁶Mina Bloom, *Heart of Humboldt Park's Puerto Rican Community Will Become 'Puerto Rico Town' Under State Bill*, Block Club Chicago (October 15, 2021), <https://blockclubchicago.org/2021/10/15/heart-of-humboldt-parks-puerto-rican-community-will-become-puerto-rico-town-under-state-bill/>.

DETERMINATION

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

As an initial matter, the Public Access Counselor's authority to resolve disputes is limited to alleged violations of FOIA and the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2022)). *See* 15 ILCS 205/7(c)(3) (West 2022). FOIA governs the disclosure of existing public records; FOIA does not govern how awards are made under the State-designated cultural districts program. Thus, although [REDACTED] has set forth arguments about perceived unfairness and cronyism in the State-designated cultural district selection process in his communications with DCEO before he submitted the Request for Review, those claims are outside of this office's scope of review. Any inequities in the State-designated cultural district selection process do not impact whether the records DCEO withheld fall within the scope of the exemption that DCEO asserted to withhold the records, section 7(1)(f) of FOIA.

Additionally, [REDACTED] noted in his reply to DCEO's response to this office that he "never requested nor planned to request 'signatures and tax identification from the requested information pursuant to Section 7(1)(b) of the Act[.]'"⁷ Furthermore, he stated he is "not interested, nor have I have ever been interested in 'private information' or 'unique identifiers.'"⁸ [REDACTED] thus conveyed that he does not contest the redactions DCEO made pursuant to section 7(1)(b) of FOIA.⁹ This office has reviewed the redacted application materials provided to [REDACTED]; it appears he has now been provided with copies of all of the requested

⁷E-mail from [REDACTED] to Katie Goldsmith (April 17, 2024).

⁸E-mail from [REDACTED] to Katie Goldsmith (April 17, 2024).

⁹Section 7(1)(b) of FOIA 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 2023 Supp.)) defines "private information" as "[u]nique identifiers, including" items such as "personal financial information."

applications.¹⁰ This determination letter therefore concerns whether section 7(1)(f) of FOIA applies to the withheld records: applicants' individual score sheets and the aggregate score sheet.

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." Section 7(1)(f) is equivalent in most respects to the "deliberative process" exemption in the Federal FOIA (5 U.S.C. § 552(b)(5) (2018)), which applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (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." (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.

In its response to this office, DCEO maintained that it properly withheld the requested applicants' score sheets because:

The score sheets meet both requirements described in *Fisher*. First, the score sheets are internal to the Department. They are completed by merit reviewers within the Department and are not shared externally. Second, they are predecisional and deliberative. The scoring sheets contain the initial impressions of the merit reviewer and their evaluation of the application materials in key categories chosen to identify the most successful applicants. The evaluations performed by the reviewers are then aggregated and recommendations are made based on the scoring of each of the applicants.^[11]

In reply, ██████████ argued that DCEO's analysis was incomplete because "[c]ourts must also balance four factors when determining whether any invasion of privacy is warranted by granting a FOIA request: (1) the plaintiff's interest in disclosure; (2) the public interest in disclosure; (3) the degree of the invasion of personal privacy; and (4) the availability

¹⁰In his April 17, 2024, reply, ██████████ again asked for the completed applications for Uprising Theater and the successful applicants. Based on this office's careful review of the application materials provided to ██████████ he was initially provided with all application materials, except for the application materials for The Springfield Project. On August 20, 2024, DCEO provided ██████████ and this office with a copy of The Springfield Project's redacted application.

¹¹Letter from Kate Exo, Legal Counsel, FOIA Officer, Department of Commerce and Economic Opportunity, to Katie Goldsmith, Assistant Attorney General, Public Access Bureau (April 5, 2024), at [2].

of any alternate means of obtaining the requested information."¹² [REDACTED] relied on a federal case, *Minnis v. United States Department of Agriculture*, 737 F.2d 784, 786 (9th Cir. 1984). That case interpreted a Federal FOIA provision, 5 U.S.C. § 552(B)(6), which exempts "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"¹³ The corresponding exemption in Illinois' FOIA is section 7(1)(c),¹⁴ which DCEO did not assert to withhold the responsive records. Unlike the section 7(1)(c) exemption, the section 7(1)(f) exemption does not involve weighing the public interest in disclosure; section 7(1)(f) exempts from disclosure inter- or intra-agency predecisional and deliberative records regardless of the extent of the public interest in disclosure. Therefore, the *Minnis* case is irrelevant to this matter and [REDACTED] claims with respect to the public interest in disclosure of the records do not impact the applicability of section 7(1)(f).

[REDACTED] also argued in his reply that "[o]ne of the ten designated cultural districts was announced to the public in October 2021 and DCEO therefore loses its exemption since a portion of the record was publicly cited and identified."¹⁵ As quoted above, a public body waives the applicability of section 7(1)(f) to a record or specific portion of a record if the record or specific portion is "publicly cited and identified by the head of the public body."¹⁶ In *Dumke v. City of Chicago*, 2013 IL App (1st) 121668, the Illinois Appellate Court considered whether a public statement by the mayor of the City of Chicago "publicly cited and identified" a record for purposes of section 7(1)(f). In explaining the meaning of "publicly cited and identified," the court found that the terms "cite" and "identify" have plain meanings:

"Cite" is defined as, "[t]o mention or bring forward as support, illustration, or proof." [Citation.] "Identify" means to "1 a: to cause to be or become identical b: to conceive as united (as in

¹²E-mail from [REDACTED], Executive Director, Uprising Theater, to Katie Goldsmith (April 17, 2024).

¹³*Minnis*, 737 F.2d at 786.

¹⁴ ILCS 140/7(1)(c) (West 2022), as amended by Public Acts 103-154, effective June 30, 2023; 103-423, effective January 1, 2024; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023; 103-540, effective January 1, 2024; 103-554, effective January 1, 2024 (exempting 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.").

¹⁵E-mail from [REDACTED], Executive Director, Uprising Theater, to Katie Goldsmith (April 17, 2024).

¹⁶FOIA defines "head of the public body" as "the president, mayor, chairman, presiding officer, director, superintendent, manager, supervisor or individual otherwise holding primary executive and administrative authority for the public body, or such person's duly authorized designee." 5 ILCS 140/2(e) (West 2023 Supp.).

spirit, outlook, or principle) <groups that are *identified* with conservation> 2 a: to establish the identity of b: to determine the taxonomic position of (a biological specimen) "establish the identity of: show or prove the sameness of." [Citation.] (Emphasis in original.) *Dumke*, 2013 IL App (1st) 121668, ¶ 20.

The court concluded that the mayor publicly cited and identified a study about police department staffing levels by describing the study and its purpose during a press conference and by explaining that the police department would be increasing staffing levels as a result of the study. *Dumke*, 2013 IL App (1st) 121668, ¶ 24.

In contrast, ██████████ did not provide any evidence in support of the argument that the head of DCEO cited and identified the records that DCEO withheld in response to his request. The *Block Club Chicago* article ██████████ referenced in his Request for Review describes how Governor Pritzker was joined by State and city legislators at a news conference to celebrate the passage of the bill creating State-designated cultural districts.¹⁷ At the time of that October 2021 press conference, the scoring records and notes ██████████ requested did not exist because applications for the program were not made available until September 22, 2023.¹⁸ Those records could not have been cited and identified within the meaning of section 7(1)(f) when they did not yet exist. While the article quotes Governor Pritzker as supporting the State-designated cultural districts program, the article is devoid of any suggestion that Governor Pritzker identified any existing evaluation materials for the program or brought forward any such materials as support, illustration, or proof or any matter. The article does not indicate that the director of DCEO was in attendance at that October 2021 event. Absent any facts indicating that the head of DCEO publicly cited and identified the specific evaluative records at issue in this matter, there is no basis from which this office could conclude that the section 7(1)(f) FOIA exemption was waived.

This office's review of the withheld applicants' score sheets confirmed that the score sheets consist of scoring information that reflects DCEO employees' intra-agency opinions about the applications for State-designated cultural districts. DCEO advised that the scoring information in these records is predecisional and deliberative because the reviewers' opinions were later aggregated to derive final scores. The Public Access Bureau has previously determined that internal evaluator scores that a public body uses to assess bids constitute predecisional and deliberative material within the scope of 7(1)(f) of FOIA. Ill. Att'y Gen. PAC.

¹⁷Mina Bloom, *Heart of Humboldt Park's Puerto Rican Community Will Become 'Puerto Rico Town' Under State Bill*, Block Club Chicago (October 15, 2021), <https://blockclubchicago.org/2021/10/15/heart-of-humboldt-parks-puerto-rican-community-will-become-puerto-rico-town-under-state-bill/>.

¹⁸*Illinois State-Designated Cultural Districts*, Illinois Department of Commerce & Economic Opportunity, <https://dceo.illinois.gov/omee/state-cultural-districts-nodo.html> ("Governor Pritzker's administration on September 22, 2023, launched the application to apply to become a State-Designated Cultural District in Illinois.").

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Req. Rev. Ltr. 23527, issued August 20, 2013, at 2. Although portions of the records at issue in this matter consist of factual information, disclosure of those facts would reveal DCEO's process of formulating action concerning the applications. Accordingly, this office concludes that the withheld applicants' score sheets are exempt pursuant to section 7(1)(f) of FOIA.

DCEO has also provided this office with a copy of the withheld aggregate score sheet referenced in its response. DCEO stated that the aggregate score sheet "would assist in the determination of the recipients of the cultural districts designation."¹⁹ In response to this office's request for clarification, DCEO explained that the scores strongly influence the selection process, but DCEO has discretion to consider certain other criteria in cultural district designations. Because the scores are not dispositive of the outcome, they constitute predecisional deliberative material rather than final decisions. Accordingly, this office concludes that DCEO did not improperly withhold those scores under section 7(1)(f) of FOIA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter closes this file. Please contact me at katherine.goldsmith@ilag.gov if you have any questions.

Very truly yours,

[REDACTED]

KATIE GOLDSMITH
Assistant Attorney General
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¹⁹E-mail from Kate Exo, Legal Counsel, FOIA Officer, Illinois Department of Commerce & Economic Opportunity, to [Katie] Goldsmith (August 20, 2024).