

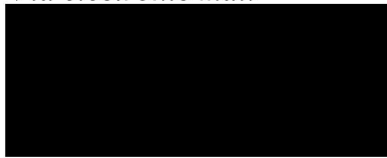


OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

KWAME RAOUL  
ATTORNEY GENERAL

September 9, 2021

*Via electronic mail*



*Via electronic mail*

Ms. Sarah Gallagher  
Attorney  
Village of Schiller Park  
Montana & Welch, LLC  
192 North York Street  
Elmhurst, Illinois 60126  
sgallagher@montanawelch.com

RE: FOIA Request for Review – 2020 PAC 65404

Dear [REDACTED] and Ms. Gallagher:

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 that follow, the Public Access Bureau has determined that the Village of Schiller Park (Village) did not improperly respond to [REDACTED] September 15, 2020, FOIA request.

On that date, [REDACTED] submitted a FOIA request to the Village seeking a copy of the study conducted by McGrath Consulting Group, Inc. (McGrath) regarding the Schiller Park Fire Department (Fire Department), including the submitted draft and any subsequent or final drafts. On September 29, 2020, the Village denied [REDACTED] request under section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2019 Supp.)). The Village stated that the report had not yet been shared with or implemented by the Village's Board of Trustees (Board), nor had it

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been publicly cited and identified by the Village President. On October 23, 2020, ██████████ submitted the above-referenced Request for Review disputing the Village's denial. ██████████ stated that according to a bill for the study, a draft and then final version had been delivered, paid for, and approved by the Board. He argued that the Board's approval of the bill for the final version of the study in open session constituted publicly citing and identifying the study for purposes of the exception to the section 7(1)(f) exemption, and he questioned the extent to which any responsive records could still be considered to be drafts.

On November 5, 2020, this office sent a copy of ██████████ Request for Review to the Village and asked it to provide unredacted copies of the withheld records for this office's confidential review and a detailed written explanation of the legal and factual basis for the applicability of the section 7(1)(f) exemption. On November 17, 2020, this office received those materials, including both a confidential and a non-confidential response letter,<sup>1</sup> copies of three drafts of the "Audit of Efficiency and Effectiveness of the Schiller Park Fire Department" (Fire Study), and a copy of the final Fire Study. On November 19, 2020, this office forwarded a copy of the Village's non-confidential response letter to ██████████. On November 21, 2020, this office received ██████████ 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 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).

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 is equivalent in most respects to the deliberative process exemption in the Federal FOIA (5 U.S.C. §552(b)(5) (2020)), which applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). The exemption 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.

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<sup>1</sup>See 5 ILCS 140/9.5(d) (West 2018) ("The Public Access Counselor shall forward a copy of the answer to the person submitting the request for review, with any alleged confidential information to which the request pertains redacted from the copy.").

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Further, courts have determined that the section 7(1)(f) exemption may include consultants' reports: "The pivotal fact that remains constant in each case in which the [section 7(1)(f)] exemption has been extended to consultants' documents is that 'the consultant does not represent an interest of its own, or the interest of any other client, when it advised the agency that hires it.'" *Harwood*, 344 Ill. App. 3d at 248 (quoting *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11, 121 S. Ct. 1060, 1067 (2001)). In *Harwood*, the court further clarified that the word "preliminary" in section 7(1)(f) does not refer to "the posture of the particular document sought to be disclosed"; rather, "preliminary" refers to "predecisional intra-agency communications." *Harwood*, 344 Ill. App. 3d at 247-48. The court concluded that a finished report prepared for a public body by a consultant could be withheld because the consultant represented only the public body's interests and the finished report "was nonetheless a 'preliminary' document in relationship to the eventual and 'final' decision made by" the public body. *Harwood*, 344 Ill. App. 3d at 248.

In its non-confidential response in this matter, the Village argued that the Fire Study is similar to the report requested in *Harwood* because even though it is a final version, it still serves as a "preliminary document in relationship to the eventual and final decision that will be made by the Village with respect to the service of its Fire Department."<sup>2</sup> The Village also asserted that McGrath did not represent its own interests or the interest of any other client when it created the Fire Study for the Village. Finally, the Village argued that while its invoices for the Fire Study were approved by the Board, this approval did not constitute publicly citing and identifying the Fire Study for purposes of section 7(1)(f).

In his reply, ██████████ argued that the Village failed to prove that it was still considering the Fire Study in the process of making its final decision. ██████████ indicated that he believed the finalization of the Fire Study means it must be disclosed, contending: "The fact is that this is the final report and it was not favorable to an agenda and it is being kept hidden from the public."<sup>3</sup>

This office's review of the draft versions of the Fire Study confirmed that they were prepared to assist the Village in making a decision regarding its Fire Department. The draft versions are exempt under the plain language of section 7(1)(f), because they are deliberative preliminary drafts in which opinions are expressed or policies and actions are formulated. Furthermore, while the final version of the Fire Study contains certain factual information about the Fire Department, the factual information is inextricably intertwined with the deliberative content. As was the case with the consultant report in *Harwood*, the Fire Study is a finished

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<sup>2</sup>Letter from Sarah M. Gallagher, [Village of Schiller Park] Attorney, to Jane Sternecky, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (November 17, 2020).

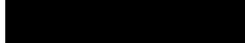
<sup>3</sup>E-mail from ██████████ to Public Access [Bureau] (November 21, 2020).

document that nonetheless falls within the scope of section 7(1)(f) because it was created as part of the deliberative process for deciding whether to make certain changes to the Fire Department. The Village stated that it had not yet decided how it would use or implement the Fire Study, but even if it did make changes to the Fire Department based on the information set forth in the Fire Study, section 7(1)(f) still applies to the document to protect the Board's deliberative process. The exemption covers pre-decisional deliberative material even after a final decision concerning the matter they address has been made.

As to ██████████ allegation that the Village waived the applicability of section 7(1)(f) when the Board referenced the Fire Study in approving invoices for the project, the Illinois Appellate Court in *Dumke v. City of Chicago*, 2013 IL App (1st) 121668, 994 N.E.2d 573 (2013), explained that the language "publicly cited and identified" in section 7(1)(f) pertains to circumstances in which the head of a public body publicly refers to a particular study or other record to support, illustrate, or prove the merits of a policy approach or course of action taken by the public body. *Dumke*, 2013 IL App (1st) 121668, ¶¶20-24, 994 N.E.2d at 580-82 (concluding that mayor waived exemption when he publicly described a study and explained that it brought about policy changes such as putting more police officers on the street). In its response, the Village denied waiving the section 7(1)(f) exemption because the head of the public body—Village President Nick Caiafa—did not publicly cite or identify the final version of the Fire Study.<sup>4</sup> The Village explained that in June 2019, the Board authorized Village Manager Dave Strahl to use up to \$35,000 of funds for the preparation of a report by a consulting firm, and he then oversaw approval and payment of the three invoices for the Fire Study. Even if Mr. Strahl qualified as the "head of the public body," this office has received no information indicating that he publicly remarked on the substance of the Fire Study to support any course of action. Approving invoices does not constitute publicly citing and identifying a record. This office also received no information indicating that Village President Caiafa publicly cited and identified the Fire Study. Therefore, this office concludes that the Village did not waive the applicability of section 7(1)(f), and that the Village did not improperly withhold the draft or final copies of the Fire Study pursuant to that exemption.


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<sup>4</sup>FOIA 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."

  
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The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, you may contact me by mail at the Chicago address listed on the first page of this letter or by e-mail at [jane.sternecky@ilag.gov](mailto:jane.sternecky@ilag.gov). This letter serves to close this file.

Very truly yours,

  
JANE STERNECKY  
Assistant Attorney General  
Public Access Bureau

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cc: *Via electronic mail*  
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Village of Schiller Park  
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