



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

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February 13, 2024

Via electronic mail

Mr. Gar Chung
Financial Investment News
15 West 26th Street, 4th Floor
New York, New York 10010
gchung@fin-news.com

Via electronic mail

Ms. Margaret M. Fahrenbach
Legal Advisor
Cook County Pension Fund
70 West Madison Street, Suite 1925
Chicago, Illinois 60602
mfahrenbach@countypension.com

RE: FOIA Request for Review – 2023 PAC 76974

Dear Mr. Chung and Ms. Fahrenbach:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2022), as amended by Public Act 103-069, effective January 1, 2024). For the reasons stated below, the Public Access Bureau concludes

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that the Cook County Pension Fund (Fund) did not improperly redact certain portions of a record responsive to Mr. Gar Chung's May 25, 2023, FOIA request.

On that date, Mr. Chung submitted a FOIA request to the Fund on behalf of *Financial Investment News* seeking electronic copies of six records. On June 16, 2023, the Fund provided Mr. Chung with redacted copies of certain records and stated that some unidentified records were exempt or not subject to disclosure pursuant to sections 7(1)(f) and 7(1)(g) of FOIA.¹ On June 26, 2023, Mr. Chung submitted the above-referenced Request for Review disputing the Fund's denial of his request. On June 27, 2023, in e-mail correspondence with an Assistant Attorney General (AAG) from the Public Access Bureau, Mr. Chung clarified that he was seeking review of only the Real Estate Strategic Plan from the May 23, 2023, Investment Committee meeting. Mr. Chung contended:

I requested an investment report from the fund's consultant Callan that was presented and discussed in an open forum, in this case at their investment committee meeting in May.

The report I received was heavily redacted, and fund explained that it was "because they contain recommendations in which opinions were expressed regarding action that might be considered."

I believe they are wrong since this report was openly and publicly discussed at their meeting that was open to the public.^[2]

On that same date, this office sent a copy of the Request for Review to the Fund and asked for an unredacted copy of the Real Estate Strategic Plan for our confidential review, together with a detailed explanation of the factual and legal bases for the applicability of the asserted exemptions. This office also asked the Fund to address the extent to which the record was publicly cited and identified by the head of the public body at a meeting.

On July 7, 2023, the Fund provided this office with an unredacted copy of the Real Estate Strategic Plan and its written response. On July 10, 2023, this office forwarded a copy of the Fund's written response to Mr. Chung; he submitted a reply that same morning. On August 25, 2023, the Fund provided the AAG with a copy of the approved meeting minutes for the Investment Committee's May 23, 2023, meeting.

¹5 ILCS 140/7(1)(f), (1)(g) (West 2022).

²E-mail from Gar Chung, Financial Investment News, to Public Access Counselor (June 16, 2023).

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).

In its response to this office, the Fund asserted that the records were exempt pursuant to section 7(1)(f) of FOIA only. Section 7(1)(f) 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 "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 (2003). Section 7(1)(f) can apply to consultant reports when the consultant represents the interest of the public body, rather than any interest of its own. *Harwood*, 344 Ill. App. 3d at 248.

In its response to this office, the Fund maintained that its partial denial was proper because:

The Record was prepared by Callan, LLC, the Fund's Investment Consultant, and was made available to the trustees at the time of the Investment Committee meeting on May 23, 2023. The information redacted from the Record were recommendations and opinions from the Investment Consultant to the trustees regarding possible real estate investments and strategies, which are exempt from disclosure pursuant to Section 7(1)(f) of the Act, 5 ILCS 140/7(1)(f). Upon review of the redacted materials, the Fund agrees that objections to certain redactions made on page 17 and pages 19-20 are valid because the Investment Committee discussed the proposed commitments for 2023 and recommended that the Retirement Board adopt some of the recommendations made by the Investment Consultant. The Fund has provided alternative redactions for page 17 and pages 19-20 as Exhibit A to this response.

Otherwise, the Investment Committee did not discuss or take any action regarding the recommendations made in the Record during the meeting. The Executive Director of the Fund, Mr. Brent Lewandowski is the head of the public body and he has not publicly cited or identified the Record.^[3]

In reply, Mr. Chung argued that "the investment committee did discuss the recommendation in open session, and therefore the document shouldn't be redacted."⁴

The approved minutes from the Investment Committee meeting held on May 23, 2023, state, in relevant part, as follows:

2. Real Estate Strategic Plan and Performance Review

Ms. Barbara Bernard of Callan LLC stated that, in general, real estate investments had negative appreciation values and that interest rates were up. The office property segment of this asset class was particularly challenged. She presented a summary of the allocations for the County Fund's real estate portfolio and the investment positions as of December 31, 2022, for Core, Non-Core and REIT investments. The total real estate portfolio exceeds the 9% target for this asset class, but is within the policy range. The portfolio is in line with the stated limits for Core, Non-Core and REIT investment target allocations. The Core investments and non-Core investments out-performed their benchmarks over the trailing one, three, five and ten years. The REITs collectively underperformed the benchmark by -280 basis points in the last year, but out-performed the benchmark across the three year period by 73 basis points and outperformed the benchmark for the five year period by 50 basis points. It was discussed that the REITS could be used as a source for funding possible RFPs for Core investments and Non-Core Investments.

It was moved by Trustee Reed and seconded by Trustee Pray, that the Committee recommend that the Board approve the release of a Request for Proposal ("RFP") for investment in a Core real estate fund for the County Fund with a mandate of an

³Letter from Margaret M. Fahrenbach, Legal Department, to Katie Goldsmith, Assistant Attorney General, Public Access Bureau (July 7, 2023), at 1.

⁴E-mail from Gar Chung to [Katie] Goldsmith (July 10, 2023).

estimated \$110M as presented and recommended by the Fund's Investment Consultant, Callan LLC.^{5]}

The minutes also reflect a subsequent roll call vote for approval of a release of an RFP for investment in a Non-Core real estate fund for an estimated sixty million dollars.⁶ The minutes then state that the Callan, LLC (Callan) representative presented a summary of the real estate portfolio for the Forest Fund and indicate that a brief discussion was had before the Investment Committee began to discuss a different topic.⁷

This office's review and comparison of the redacted and unredacted Real Estate Strategic Plan confirms that the redacted portions reveal opinions and recommendations of Callan related to real estate investments and strategies considered by the Investment Committee during its meeting. Although the Fund did not directly create the record, it is nevertheless an inter-agency record of the Fund because Callan prepared it as a consultant rather than for its own independent interests. The meeting minutes reflect that the Investment Committee considered the Real Estate Strategic Plan as part of the broad decision-making process concerning future investments at the meeting. Therefore, because the Real Estate Strategic Plan contains opinions and recommendations upon which the Investment Committee relied to formulate decisions, the redacted portions constitute "predecisional or deliberative material" that fall within the scope of section 7(1)(f) of FOIA.

Mr. Chung contends that the Fund waived the ability to withhold the Real Estate Strategic Plan under section 7(1)(f) because the Investment Committee discussed the record at a public meeting. As explained above, a public body waives the applicability of section 7(1)(f) if a record or portion of a record is "publicly cited and identified by the head of the public body."⁸ 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). The plaintiff alleged that then-Mayor Richard Daley

⁵Investment Committee, Retirement Board of the County Employees' and Officers' Annuity and Benefit Fund of Cook County and Ex Officio for the Forest Preserve District Employees' Annuity and Benefit Fund of Cook County, May 23, 2023, Minutes 1-2.

⁶Investment Committee, Retirement Board of the County Employees' and Officers' Annuity and Benefit Fund of Cook County and Ex Officio for the Forest Preserve District Employees' Annuity and Benefit Fund of Cook County, May 23, 2023, Minutes 2.

⁷Investment Committee, Retirement Board of the County Employees' and Officers' Annuity and Benefit Fund of Cook County and Ex Officio for the Forest Preserve District Employees' Annuity and Benefit Fund of Cook County, May 23, 2023, Minutes 2.

⁸FOIA 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 2022).

waived the section 7(1)(f) exemption with respect to a study prepared for the Chicago Police Department by an outside consulting firm when he referred to the study during a press conference and in an ensuing press release. *Dumke*, 2013 IL App (1st) 121668, ¶¶ 16-17. At the outset, the court noted that "[s]ection 7(1)(f) does not provide any guidance on how much or how little needs to be said or done to constitute an effective waiver. The parties have not advanced or presented any legislative history or citation to any legal authority, nor has our research found any, that assists us in determining what minimum conduct amounts to public citation and identification." *Dumke*, 2013 IL App (1st) 121668, ¶ 18. In the absence of authority, the court turned to the plain language of section 7(1)(f) and found it to be unambiguous:

Both "cite" and "identify" have a plain and ordinary meaning, as well as a common understanding. "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 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.

Employing those definitions, the court determined:

The mayor cited and identified the report as a "management study requested by Superintendent Weis earlier this year" and its purpose as "the study of police administration staffing." He cited the report and he identified it as support for his reorganization plan. Specifically, he stated that Superintendent Weis requested the management study, and as a result of the study, 130 more police officers would be on the streets keeping the city safe. * * * The mayor identified the individuals and businesses that conducted the study and issued the resulting report. He stated that "the study of police administration staffing" began in 2010 and was conducted *pro bono* by the Civic Consulting Alliance with the assistance of Ryan Faye. Mayor Daley also stated that A.T. Kearney helped with various parts of the review. Mayor Daley not only identified the study and the key players, but personally thanked them. The mayor also indicated that the report "offers many findings and ways that the department will improve its management." There is no question that the mayor cited and identified the report in public given that it occurred during a press

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conference that was later available on the mayor's YouTube page, a summary of which was released in printed form. *Dumke*, 2013 IL App (1st) 121668, ¶ 24.

The court went on to conclude that because the mayor commended the authors of the management study and directly referred to the management study to support the reorganization plan, the section 7(1)(f) exemption was waived. *Dumke*, 2013 IL App (1st) 121668, ¶ 28.

The facts of Mr. Gar's Request for Review appear starkly different from the facts in *Dumke*. Based on a review of the May 23, 2023, meeting minutes, it does not appear that any conceivable head of the public body—whether Executive Director Lewandowski, Investment Committee Chairman Kevin Ochalla, or Fund Board of Trustees Chairman Patrick J. McFadden—cited and identified the Real Estate Strategic Plan in open session. It appears that a Callan representative introduced and led the discussion of the Real Estate Strategic Plan. In the absence of other evidence, such as an audio recording for the meeting, there is no indication that the head of the Fund publicly cited and identified the Real Estate Strategic Plan. Therefore, the redacted portions of the Real Estate Strategic Plan are exempt from disclosure for the reasons discussed above.⁹

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,



KATIE GOLDSMITH
Assistant Attorney General
Public Access Bureau

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⁹This office notes that the Fund indicated in its response to this office that it had prepared a less redacted version for disclosure of certain pages of the Real Estate Strategic Plan because "the Investment Committee discussed the proposed commitments for 2023 and recommended that the Retirement Board adopt some of the recommendations[.]" Letter from Margaret M. Fahrenbach, Legal Department, to Katie Goldsmith, Assistant Attorney General, Public Access Bureau (July 7, 2023), at 1. However, per the reasoning included in this determination letter, the Fund may properly redact those pages in accordance with section 7(1)(f) of FOIA as already provided to Mr. Chung in response to his FOIA request if it so chooses.