



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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August 24, 2016

Via electronic mail

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RE: FOIA Request for Review – 2016 PAC 42018

Dear Mr. Hardin and Ms. Knutte:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons discussed below, the Public Access Bureau concludes that the Office of the Illinois Attorney General (Attorney General's Office) conducted a reasonable search for records responsive to an April 11, 2016, FOIA request jointly submitted by the Energy & Environment Legal Institute (E & E Legal) and the Free Market Environmental Law Clinic (Law Clinic). The Public Access Bureau further concludes that the Attorney General's Office did not improperly withhold records that it asserted are exempt from disclosure under FOIA.

On April 11, 2016, E & E Legal and the Law Clinic submitted a FOIA request to the Attorney General's Office seeking various records including "all correspondence between the Illinois Attorney General, or the Office's Environmental Division Office, except secretarial/administrative and paralegal staff, and employees of the New York Attorney General's

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Office, dated from March 20, 2016 through March 30, 2016."¹ (Emphasis in original.) On May 2, 2016, the Attorney's General's Office denied that portion of the request pursuant to sections 7(1)(d)(i) and 7(1)(f) of FOIA (5 ILCS 140/7(1)(d)(i), (1)(f) (West 2015 Supp.)). On May 20, 2016, the Law Clinic submitted a Request for Review on behalf of itself and E & E Legal in which it claims that the cited exemptions are inapplicable and questions whether the Attorney General's Office conducted an adequate search for responsive records.

On June 1, 2016, the Public Access Bureau sent a copy of the Request for Review to the Attorney General's Office's FOIA Officer and requested: (1) copies of the records that were withheld under section 7(1)(d)(i) and 7(1)(f); (2) a detailed explanation of the factual and legal bases for the applicability of those exemptions; and (3) a description of the specific measures that were taken to search for responsive records. On June 17, 2016, the Attorney General's Office furnished those materials. On June 21, 2016, the Public Access Bureau sent the non-confidential portions of the Attorney General's Office's response to the Law Clinic; it did not reply.

ANALYSIS

FOIA requires a public body to conduct a "reasonable search tailored to the nature of a particular request." *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). A public body is not required to "search every record system[.]" but it "cannot limit its search to only one record system if there are others that are likely to turn up the requested information." *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The "adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *see also Lahr v. National Transportation Safety Board*, 569 F.3d 964, 988 (9th Cir. 2009) ("the failure to produce or identify a few isolated documents cannot by itself prove the searches inadequate.").

In its Request for Review, the Law Clinic asserted that the Attorney General's Office either improperly withheld non-exempt records or did not conduct an adequate search for responsive records. In support of its assertion that the search was inadequate, the Law Clinic referenced a copy of an e-mail invitation to a social event, dated March 25, 2016, that was sent by a member of the Office of the New York Attorney General to various individuals, including a member of the Attorney General's Office. The Law Clinic stated that the Attorney General's Office did not disclose that record in its May 2, 2016, response to the FOIA request. In its response to the Public Access Bureau, the Attorney General's Office stated that because it had not located that record in its initial search, it asked the Division Chief and Environmental Counsel of the Environmental Law and Asbestos Litigation Division to conduct a second search.

¹Letter from Craig E. Richardson, Executive Director, E & E Legal, and Christopher C. Horner, for the Free Market Environmental Law Clinic, to Illinois Attorney General's Office (April 11, 2016).

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The Attorney General's Office then provided the e-mail invitation and additional records to the Law Clinic in a supplemental response dated June 17, 2016, which was also provided to the Public Access Bureau. The disclosure of those records by the Attorney General's Office resolves the Law Clinic's complaint that the Attorney General's Office failed to provide the records in its May 2, 2016, response. See *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 782 (1st Dist. 1999) ("Once an agency produces all records related to a plaintiff's request, the merits of a plaintiff's claim for relief, in the form of production of information, becomes moot.")

With respect to the adequacy of its efforts to locate responsive records, the Attorney General's Office's response to the Public Access Bureau explained that it: (1) requested and obtained from its Human Resources Bureau a list of the names of all attorneys employed in the Environmental Law and Asbestos Litigation Division in March 2016; (2) requested that its Information Technology Bureau search the e-mail archives of those attorneys during the time frame referenced in the FOIA request for e-mails sent to or received from anyone with the Office of the New York Attorney General's domain (@ag.ny.gov); (3) notified the Bureau Chiefs of the Environmental Law Bureau in Springfield and Chicago of the request and that the search was being conducted by the Information Technology Bureau; (4) asked the Division Chief and Environmental Counsel of the Environmental Law and Asbestos Litigation Division as well as the Bureau Chiefs of the Environmental Law Bureaus in Springfield and Chicago and the Bureau Chief of the Environmental Crimes Bureau to search for responsive records; (5) obtained and reviewed records from the Information Technology Bureau and the Division Chief and Environmental Counsel of the Environmental Law and Asbestos Litigation Division, and provided non-exempt portions of the records to E & E Legal and the Law Clinic; the above-mentioned Bureau Chiefs did not locate responsive records.

The measures taken appear to be reasonably calculated to locate all records responsive to the request. Further, apart from a portion of an e-mail that was redacted pursuant to section 7(1)(f) and a copy of a final version of a brief filed with a federal appellate court which is a matter of public record in that case, most of the additional records that were provided in the Attorney General's Office's supplemental response to the request primarily relate to scheduling and other logistical matters rather than substantive communications concerning public business. The omission of these records from the initial response to the FOIA request did not render the Attorney General's Office's search inadequate. Rather, the available information indicates that the Attorney General's Office consulted the relevant staff members and searched the recordkeeping systems that were likely to contain responsive records. Accordingly, this office concludes that the Attorney General's Office conducted an adequate search for records responsive to the Law Clinic's April 11, 2016, FOIA request.

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Redacted and Withheld Records

"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 2014); *see also Southern Illinoisan v. Illinois Dept. 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 2014).

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 to the deliberative process exemption in the Federal FOIA (5 U.S.C. §552(b)(5) (2012)), which applies to "*inter- and intra-agency* predecisional and deliberative material." (Emphasis added.) *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; *see also Kalven v. City of Chicago*, 2013 IL App (1st) 121846, ¶24, 7 N.E.3d 741, 748 (2013), quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010) ("Only those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld.").

The response of the Attorney General's Office's FOIA officer to the Public Access Bureau described the records withheld pursuant to sections 7(1)(d)(i) and 7(1)(f) as follows:

(1) A handout and related records provided to attendees of a March 29, 2016, meeting of several Attorneys General and Attorneys General staff and others who "were invited to provide analysis [of] various environmental issues. All of the attendees were invited to the meeting for participating in a confidential strategy and briefing session related to possible investigations and legal actions that could be taken with regard to identified environmental issues."

(2) E-mail exchanges involving the offices of several state Attorneys General, the District of Columbia, and local governmental entities that "joined together to file a brief in support of the Respondents in" a case pending before a federal appeals court.

(3) E-mails exchanged by members of the Attorney General's Office and the Office of the New York Attorney general concerning the above-referenced March 29, 2016, meeting or filing of the brief which "discuss the logistics of the meeting as they relate to specified substantive areas of law, and solicit information related to specific environmental issues contemplated or taken by the participating offices, and contain draft records shared with the stakeholders."

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(4) Draft agreements exchanged by the Attorney General's Office and "other government agencies, including a draft common interest agreement applicable to the above referenced multistate working group's activities with respect to investigating and prosecuting various environmental issues and a draft brief related to" the case pending before the federal appeals court.²

The Attorney General's Office asserted that the handout and related records provided to the attendees of the March 29, 2016, meeting are "exempt under the rationale that public bodies must be able to evaluate information internally, as well as with other government agencies that may be similarly affected by the information, to explore possible courses of action confidentially before making final determinations that should be shared with the public."³ The Attorney General's Office provided the Public Access Bureau with additional confidential information that we are prohibited from disclosing in this determination. *See* 5 ILCS 140/9.5(d) (West 2014).

Based on this office's review, the withheld records related to the March 29, 2016, meeting include records expressing opinions and recommendations which constitute inter-agency pre-decisional communications within the scope of section 7(1)(f). Certain other materials that identify factual information such as topics of discussion also are predecisional and deliberative in nature because disclosure would provide insight into matters under consideration at the meeting. *See Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 90 F. Supp. 2d 9, 14 (D.D.C. 2000) ("proposed meeting agendas that are replete with outstanding issues and questions to be considered" in connection with trade missions were exempt from disclosure under the deliberative process exemption in Federal FOIA⁴); *Missouri Coalition v. Environment v. United States Army Corps of Engineers*, No. 4:05CV02039FRB, 2007 WL 869487, at *7 (E.D. Mo. Mar. 20, 2007) (federal district court agreed with federal agency's assertion that agenda and minutes of task force meetings were exempt from disclosure under the federal deliberative process exemption because they "evidence the issues the [task force] considered worthy of discussion, and as such evidence the thought processes and issues of the [task force] members.")

The remaining records that were withheld consist of preliminary drafts or e-mails

²Letter from Caitlin Q. Knutte, Assistant Attorney General, FOIA Officer, Office of the Attorney General, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (June 17, 2016), at 4-7, 9.

³Letter from Caitlin Q. Knutte, Assistant Attorney General, FOIA Officer, Office of the Attorney General, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (June 17, 2016), at 5.

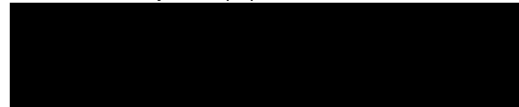
⁴The deliberative process exemption in Federal FOIA applies to "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested[.]"

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that reflect opinions, recommendations, or otherwise provide insight into the process used by the Attorney General's Office and one or more governmental entities to jointly formulate actions. Such records are pre-decisional in nature, and there is no indication that any of those records or the records related to the March 29, 2016, meeting were publicly cited or identified by the Attorney General. Accordingly, the Public Access Bureau concludes that the Attorney General's Office has sustained its burden of demonstrating that the records at issue are exempt from disclosure pursuant to section 7(1)(f) of FOIA. Because that determination is dispositive, we decline to address the applicability of section 7(1)(d)(i) of FOIA.

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, please contact me at (312) 814-6756.

Very truly yours,



STEVE SILVERMAN
Bureau Chief
Public Access Bureau

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