



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 30, 2016

Via electronic mail

Ms. Lisa O'Halloran, DT CDS
Developmental Diagnostics
Evaluation Resource Group
lisa@ohalloranmail.com

Via electronic mail

Ms. Ellen Walsh
FOIA Officer
Elmhurst Community Unit School District 205
162 South York
Elmhurst, Illinois 60126
emwalsh@elmhurst205.org

Via electronic mail

Mr. Brian P. Crowley
Franczek Radelet
300 South Wacker Drive, Suite 3400
Chicago, Illinois 60606
bpc@franczek.com

RE: FOIA Request for Review – 2015 PAC 38873

Dear Ms. O'Halloran, Ms. Walsh, and Mr. Crowley:

This determination letter 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 that follow, the Public Access Bureau concludes that Elmhurst Community Unit School District 205 (School District) improperly denied Ms. Lisa O'Halloran's November 29, 2015, FOIA request.

On that date, Ms. O'Halloran submitted a FOIA request to the School District seeking copies of all of "Dr. Moyer's emails between September 15, 2015 and November 24,

Ms. Lisa O'Halloran
Ms. Ellen Walsh
Mr. Brian Crowley
June 30, 2016
Page 2

2015, concerning York High School Morning Announcements[.]"¹ On December 2, 2015, the School District denied the request in its entirety under sections 7(1)(c), and 7(1)(f) of FOIA (5 ILCS 140/7(1)(c), (1)(f) (West 2014), as amended by Public Acts 99-298, effective August 6, 2015). On December 2, 2015, this office received Ms. O'Halloran's Request for Review disputing the School District's response.

On December 10, 2015, this office forwarded a copy of Ms. O'Halloran's Request for Review to the School District and asked for copies of the withheld records and a detailed explanation of its factual and legal bases for the asserted FOIA exemptions. On January 7, 2016, counsel for the School District provided a written response together with copies of the responsive records for our confidential review. This response was forwarded to Ms. O'Halloran, who replied on January 15, 2016.

DETERMINATION

All public records in the possession or custody of a public body are "presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2014); see *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

The School District asserts that the responsive e-mails are exempt from disclosure under section 7(1)(f) of FOIA, which allows a public body to withhold:

Preliminary 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.

This exemption is intended to encourage government officials to openly and frankly discuss matters of governmental concern in order to make informed policy decisions. *Harwood v. McDonough*, 344 Ill. App. 3d 242, 248 (1st Dist. 2003); 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*

¹FOIA request from Lisa O'Halloran to Elmhurst Community Unit School District 205 (November 29, 2015).

Ms. Lisa O'Halloran
Ms. Ellen Walsh
Mr. Brian Crowley
June 30, 2016
Page 3

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." See also *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 13, 121 S. Ct. 1060, 1069 (2001) (communications with third parties that have independent interests and that stand to benefit from the public body's final decision cannot be characterized as intra-agency communications).

This office has reviewed the responsive records, which can be broadly categorized as e-mails between the School District Superintendent and the York Community High School's principal, and e-mails between the School District and a parent of one of the High School's students. In his response to this office, counsel for the School District argues that all of those e-mails may be withheld under section 7(1)(f), because "[a]ll of the emails include the individual parent's personal opinions and some include discussions between the Superintendent and the High School Principal where actions are formulated to address the concerns about the morning announcements."²

Most of the e-mails between the Superintendent and the Principal discuss the concerns expressed by the parent and how the School District should respond. Based on our review of the e-mails, these records are pre-decisional in nature and there is no indication that they were publicly cited or identified by the head of the School District. Therefore, we conclude that they were properly withheld pursuant to section 7(1)(f). However, two of the e-mails, dated October 20, 2015, reflect a final decision and therefore do not constitute pre-decisional deliberative material. Accordingly, the School District improperly withheld those e-mails pursuant to section 7(1)(f) of FOIA.

The e-mails exchanged between the School District and the parent, however, contain complaints and opinions relating to School District policy. The parent appears to have independent interests concerning the School District's policy. Thus, the e-mails exchanged between the School District and the parent do not constitute inter-agency or intra-agency deliberative communications. Accordingly, we conclude that the third-party e-mails are not exempt from disclosure under section 7(1)(f) of FOIA.

Section 7(1)(c) of FOIA

The School District also asserts that the responsive e-mails are exempt under section 7(1)(c) of FOIA, which permits a public body to withhold "[p]ersonal information

²Letter from Brian Crowley, Franczek Radelet, to Neil Olson, Assistant Attorney General, Public Access Bureau (January 7, 2016).

Ms. Lisa O'Halloran
Ms. Ellen Walsh
Mr. Brian Crowley
June 30, 2016
Page 4

contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." "Unwarranted invasion of personal privacy" is defined in section 7(1)(c) 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." The Illinois Supreme Court has held that if a record can be redacted to prevent identification of the subjects of records containing highly personal information, the remaining portion of those records are not exempt from disclosure pursuant to section 7(1)(c) of FOIA. *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 381 (1989).

In its response, counsel for the School District states:

Specifically, the emails contain deeply held personal beliefs of the individual parent. While the parent did share these opinions with the Superintendent, there is no indication that the parent intended that the School District would share the emails with the community at large. The emails discuss controversial matters where there are differing and strongly held opinions. * * * Moreover, redacting the parent's name from the emails is not sufficient as the emails include personally identifiable information where individuals acquainted with the author may still be able to identify the author.³

Ms. O'Halloran argues that the parent's privacy interest in this matter is outweighed by the "legitimate public interest in obtaining information that bears on the policy that regulates school announcements[.]" specifically "in communications shared with and among public employees and officials in efforts to influence and shape policy[.]"⁴

In *State Journal-Register v. University of Illinois Springfield*, the Appellate Court of Illinois, Fourth District, examined whether the University of Illinois Springfield properly withheld documents relating to the resignation of university coaches, including an e-mail string relating to a student complaint and correspondence from the parent of an affected student. In determining whether these records were properly withheld under section 7(1)(c) of FOIA, the court stated:

³Letter from Brian Crowley, Franczek Radelet, to Neil Olson, Assistant Attorney General, Public Access Bureau (January 7, 2016).

⁴Letter from Lisa O'Halloran, DT CDS, Developmental Diagnostics, Evaluation Resource Group, to Neil Olson, Assistant Attorney General, Public Access Bureau (January 15, 2016).

Ms. Lisa O'Halloran
Ms. Ellen Walsh
Mr. Brian Crowley
June 30, 2016
Page 5

With respect to the two sets of e-mail correspondence, in balancing the *Lieber* factors, the Journal and public have an interest in the opinions of students and the parents of students with regard to the resignation of the coaches[.] * * * Conversely, the individuals who composed each correspondence have a privacy interest in being able to privately express their opinions and concerns to UIS. * * *

* * * The question then becomes whether redaction of the correspondence, consistent with section 7(1) of FOIA, would remedy any personal privacy concerns.⁵

Ultimately, the court determined that the correspondence from the parent of the UIS student was exempt from disclosure in its entirety, as "redaction is not a potential remedy because the affected student could easily be identified through the context of the letter[.]" and that the UIS student's complaint must be disclosed, as "redaction would adequately protect the privacy interests because nothing in the content of the e-mail, other than the student's name, identifies the student." *State Journal-Register* 994 N.E. 2d at 720.

Similarly, the e-mails between the School District and the parent contain highly personal opinions of a parent concerning School District policy. There is a significant and legitimate public interest in the disclosure of information concerning the School's District's policy. However, information identifying the parent as the author of those opinions is highly personal by its very nature; the parent's right to privacy outweighs any legitimate public interest in disclosure of the parent's identity. The School District asserts that redacting identifying information from the e-mails is not possible, as "the parent's personal information is too interwoven with her opinions in the emails."⁶ This assertion is vague and largely conclusory. Neither the personal opinions nor any other information in the e-mails except for the author's name, contact information, and references to her children are specific or unique enough to identify the author of the e-mails. Thus, the School District has not sustained its burden of demonstrating by clear and convincing evidence that the e-mails between the School District and the parent are exempt in their entirety under section 7(1)(c).

⁵*State Journal-Register v. University of Illinois Springfield*, 994 N.E.2d 705, 720 (4th Dist. 2013)

⁶Letter from Brian Crowley, Franczek Radelet, to Neil Olson, Assistant Attorney General, Public Access Bureau (January 7, 2016).

Ms. Lisa O'Halloran
Ms. Ellen Walsh
Mr. Brian Crowley
June 30, 2016
Page 6

Based on the conclusions expressed in this letter, we request that the School District release the non-exempt e-mails to ~~Ms.~~ O'Halloran with redactions, pursuant to section 7(1)(c), of the parent's name and contact information, and specific references to the parent's children.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. Please contact me at (217) 782-1699 if you have questions or would like to discuss this matter. This letter serves to close this matter.

Very truly yours,

A large black rectangular redaction box covering the signature of Benjamin Reed.

BENJAMIN REED
Assistant Attorney General
Public Access Bureau

38873 f 71c proper improper 71f proper improper sd