



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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November 22, 2024

Via electronic mail

Mr. Tom Kacich
The News-Gazette
kacich@news-gazette.media

Via electronic mail

Ms. Adrienne Nazon
Vice President, External Relations and Communications
Chief Records Officer
University of Illinois System
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RE: FOIA Request for Review – 2024 PAC 80318

Dear Mr. Kacich and Ms. Nazon:

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.)).

On January 31, 2024, Mr. Tom Kacich submitted a FOIA request to the University of Illinois seeking "copies of all correspondence between University of Illinois athletic department representatives and the Illini Guardians NIL group between the dates Jan. 1, 2023, and Aug. 31, 2023."¹ On February 21, 2024, the University provided responsive e-mails but redacted some information pursuant to sections 7(1)(b), 7(1)(f), and 7(1)(o) of FOIA.² On

¹E-mail from Tom Kacich, The News-Gazette, to University of Illinois FOIA (January 31, 2024).

²5 ILCS 140/7(1)(b), (1)(f), (1)(o) (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.

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February 27, 2024, this office received Mr. Kacich's complete Request for Review challenging the redactions.

On March 5, 2024, this office forwarded a copy of the Request for Review to the University and asked it to provide unredacted copies of the records, together with a detailed explanation of the factual and legal bases for the applicability of the asserted exemptions. On March 14, 2024, this office received the requested materials, which included both a complete version of its written response for this office's confidential review and a redacted version for this office to forward to Mr. Kacich.³ On March 18, 2024, this office forwarded a copy of the University's redacted response to Mr. Kacich; he did not submit a 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 2022); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body that redacts records "has the burden of proving by clear and convincing evidence" that the redacted information is exempt from disclosure. 5 ILCS 140/1.2 (West 2022). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

Section 7(1)(b) of FOIA

Section 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 2022)) defines "private information" as:

unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, **home or personal telephone numbers**, and **personal email addresses**. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person. (Emphasis added.)

In its partial denial e-mail to Mr. Kacich, the University stated that it redacted some information pursuant to section 7(1)(b), such as "personal email addresses, personal

³See 5 ILCS 140/9.5(d) (West 2022), as amended by Public Act 103-069, effective January 1, 2024 ("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.").

telephone numbers and passcodes."⁴ This office's review of an unredacted copy of the records confirmed that the University redacted the personal e-mail addresses and cell phone numbers of certain individuals. Because personal e-mail addresses and personal telephone numbers are "private information" as the term is defined in section 2(c-5), the University did not improperly redact those details pursuant to section 7(1)(b) of FOIA.

Although the University did not cite section 7(1)(c) of FOIA,⁵ that exemption is also relevant because it exempts from disclosure "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 7(1)(c) defines "unwarranted invasion of personal privacy" 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."

This office's review determined that the University also redacted one line in an e-mail (page 40 of the records) pertaining to an individual. The information is highly personal in nature, and the subject's right to privacy outweighs the public interest in the information. Further, the information does not concern public business. Accordingly, the University did not improperly redact the specified line pursuant to section 7(1)(c).

Section 7(1)(f) of FOIA

Section 7(1)(f) of FOIA exempts from inspection and copying "[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 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." *Harwood*, 344 Ill. App. 3d at 248. "[P]urely factual material" is not exempt from disclosure under section 7(1)(f) unless the factual material is "inextricably intertwined" with predecisional deliberative discussions. *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶36, 980 N.E.2d 733, 743 (2012) (quoting *Enviro Tech International, Inc. v. United States Environmental Protection Agency*, 371 F.3d 370, 374-75 (7th Cir. 2004)).

⁴Letter from Kirsten Ruby, Director of External Relations and Communications and Chief Records Officer, University of Illinois, to Teresa Lim, Supervising Attorney, Public Access Bureau, Illinois Attorney General's Office (March 13, 2024), at 2.

⁵5 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.

The section 7(1)(f) exemption has been interpreted as extending to communications between a public body and a third-party consultant when the third party's "analyses and recommendations 'played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done.'" *Fisher v. Office of the Illinois Attorney General*, 2021 IL App (1st) 200225, ¶ 20 (quoting *Harwood*, 344 Ill. App. 3d at 248). In determining whether third-party communications fall within the scope of the deliberative process exemption, courts look "to whether the third party 'functioned 'enough like' [the agency's] own personnel'; 'worked side-by-side' with the agency to address the same 'fundamental concern'; or were 'on the same team.'" *New York Times Co. v. United States DOJ*, 2021 U.S. Dist. LEXIS 20776, at *51 (S.D.N.Y. Feb. 3, 2021) (quoting *Fox News Network, LLC v. U.S. Department of Treasury*, 739 F. Supp. 2d 515, 540 (S.D.N.Y. 2010) (quoting *Klamath*, 532 U.S. at 12)). For communications with a third party to qualify under the 7(1)(f) exemption, the third-party "may not represent independent interests of its own apart from those of the agency." *Fisher*, 2021 IL App (1st) 200225, ¶ 20 (citing *Harwood*, 344 Ill. App. 3d at 248).

The University's response to this office asserted that parts of the provided e-mails contained "drafts and pre-decisional communications containing deliberative opinions, recommendations, and notes."⁶ In the confidential portion of its response, the University addressed in further detail the nature of those communications and the applicability of the section 7(1)(f) exemption to those parts.

As noted above, Mr. Kacich's request sought communications between the University's athletics department and the Illini Guardians NIL group from the past year up to August 31, 2023. According to an August 24, 2023, statement from the University's athletics division, Illini Guardians was a third-party entity formed in response to legal and policy changes governing the use of name, image, and likeness (NIL) of student athletes.⁷ The Illini Guardians began a wind down of its operations to make way for a new third-party entity, ICON Collective (ICON):

The Division of Intercollegiate Athletics (DIA) announced Thursday that ICON Collective (ICON) will become the sole preferred third-party entity supporting Fighting Illini student-athletes in their name, image and likeness (NIL) endeavors. Illini Guardians, meanwhile, intends to wind down operations. ICON previously worked alongside Illini Guardians, as both groups

⁶Letter from Kirsten Ruby, Director of External Relations and Communications and Chief Records Officer, University of Illinois, to Teresa Lim, Supervising Attorney, Public Access Bureau, Illinois Attorney General's Office (March 13, 2024), at 2.

⁷ University of Illinois Athletics, *ICON to Become Preferred NIL Collective; Illini Guardians to Wind Down Operations* (August 24, 2023), <https://fightingillini.com/news/2023/8/24/general-icon-to-become-preferred-nil-collective-illini-guardians-to-wind-down-operations.aspx>.

facilitated community-focused NIL activities exclusively for Fighting Illini student-athletes. * * * Illini Guardians will end its subscription service and redirect its resources and support to ICON in furtherance of their shared mission.^[8]

Illini Guardians was registered as a not-for-profit corporation with the Office of the Illinois Secretary of State before dissolving in May 2024.⁹

Based on this office's review, the records at issue relate to the period of time in which Illini Guardians was preparing to wind down its operations. The redacted e-mails include communications between University staff and representatives from Illini Guardians and ICON. These e-mails do not constitute "inter- and intra-agency" material and, therefore, the University must show that Illini Guardians and ICON were acting in a consultant capacity to the University and did "not represent independent interests of its own apart from those of the agency." *Fisher*, 2021 IL App (1st) 200225, ¶ 20 (citing *Harwood*, 344 Ill. App. 3d at 248).

According to another statement from the University's athletics division, ICON was officially launched in March 2023, and its "core function is to secure charitable contributions and offer meaningful NIL partnerships to Fighting Illini student-athletes for their participation in community service initiatives in and around Champaign-Urbana and, in some cases, well beyond."¹⁰ The statement further explained that:

Meaningful updates to NIL guidance issued by the NCAA in October 2022 required college athletics programs to alter their approach in the NIL space, making strong day-to-day leadership and direction in collectives imperative to NIL success. The guidelines limited athletics department involvement in NIL, putting more weight and responsibility on third-party collectives. * * * During the first several months of its existence, ICON

⁸University of Illinois Athletics, *ICON to Become Preferred NIL Collective; Illini Guardians to Wind Down Operations* (August 24, 2023), <https://fightingillini.com/news/2023/8/24/general-icon-to-become-preferred-nil-collective-illini-guardians-to-wind-down-operations.aspx>.

⁹Office of the Illinois Secretary of State, Business Entity Search, <https://apps.ilsos.gov/businessentitysearch/businessentitysearch> (last visited November 22, 2024).

¹⁰University of Illinois Athletics, *ICON Collective Launches to Provide NIL Opportunities to Illinois Student-Athletes* (March 2, 2023), <https://fightingillini.com/news/2023/3/2/general-icon-collective-launches-to-provide-nil-opportunities-to-illinois-student-athletes.aspx>.

Collective has offered more than \$1.5 million in contracts to Illinois student-athletes.^[11]

On September 5, 2024, this office asked for additional information from the University about its relationship to Illini Guardians and ICON, including whether the University had any contract with ICON. In response, the University confirmed that ICON was formed by non-University personnel for the primary purpose of supporting NIL activities for student-athletes and does not have direct contracts with the University to support student-athletes. The University explained that Illini Guardians was similarly headed by a group of non-University personnel, but on a volunteer basis.

Based on the available information, this office is unable to determine that ICON and Illini Guardians were acting solely in a consultant capacity to the University. While ICON and Illini Guardians appeared to work collaboratively with the University for purposes of consolidating NIL activities with one entity, ICON had independent interests of its own as the group that would become the sole entity to support student-athletes in NIL activities. Both ICON and Illini Guardians were formed to support the interests of student-athletes. The University did not illustrate how its interests were in complete alignment with the interests of student-athletes, who may now individually "earn compensation, commensurate with market value, for the use of the name, image, likeness, or voice of the student-athlete while enrolled at a postsecondary educational institution and obtain and retain an agent for any matter or activity relating to such compensation." 110 ILCS 190/10 (West 2022). Indeed, the University's previous statement on ICON noted that NCAA guidelines limit the involvement of the athletics department in NIL activities. Under these circumstances, this office concludes that the University did not demonstrate by clear and convincing evidence that the e-mails involving ICON and Illini Guardians are exempt from disclosure pursuant to section 7(1)(f).

This office requests that the University provide unredacted copies of the e-mails reflecting communications between University personnel and representatives of Illini Guardians and ICON.

Section 7(1)(o) of FOIA

Section 7(1)(o) exempts from disclosure:

Administrative or technical information associated with automated data processing operations, including but not limited to

¹¹University of Illinois Athletics, *ICON Collective Launches to Provide NIL Opportunities to Illinois Student-Athletes* (March 2, 2023), <https://fightingillini.com/news/2023/3/2/general-icon-collective-launches-to-provide-nil-opportunities-to-illinois-student-athletes.aspx>.

software, operating protocols, computer program abstracts, file layouts, source listings, object modules, load modules, user guides, documentation pertaining to all logical and physical design of computerized systems, employee manuals, and any other information that, if disclosed, would jeopardize the security of the system or its data or the security of materials exempt under this Section.

The Illinois Appellate Court has explained that to meet its burden under section 7(1)(o), a public body "must demonstrate by clear and convincing evidence more than the *possibility* of a threat to the security" of the computer system. (Emphasis in original.) *Chapman v. Chicago Department of Finance*, 2022 IL App (1st) 200547, ¶ 36.

The University asserted that the redacted information "includes internal meeting hyperlinks."¹² The Public Access Bureau has previously rejected a public body's conclusory argument that disclosure of a screen shot of its e-mail vault would make its e-mail system vulnerable to hacking. Ill. Att'y Gen. PAC Req. Rev. Ltr. 35815, at 3, issued September 10, 2018; *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 42825, at 3, issued July 26, 2016 (finding that public body had not met its burden under section 7(1)(o) where it was not clear how disclosing the entry and exit data for an individual would jeopardize the security system software). In this matter, the University's response lacks any explanation illustrating how a meeting link, particularly for a past meeting, would pose a security risk to any system if disclosed. Absent any details or evidence to show that there was more than a possibility of a security threat, the University improperly redacted the records pursuant to section 7(1)(o). This office requests that the University provide an unredacted copy of page 1 of the records.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at the Chicago address listed on the first page of this letter.

Very truly yours,



TERESA LIM
Supervising Attorney
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¹²Letter from Kirsten Ruby, Director of External Relations and Communications and Chief Records Officer, University of Illinois, to Teresa Lim, Supervising Attorney, Public Access Bureau, Illinois Attorney General's Office (March 13, 2024), at 2.