



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

November 19, 2024

Via electronic mail

[REDACTED]

Via electronic mail

Mr. Kyle J. Catalano
FOIA Officer
Division of Transportation
Will County
16841 West Laraway Road
Joliet, Illinois 60433
WCDOTFOIA@willcountyillinois.com

RE: FOIA Request for Review – 2024 PAC 83108

Dear [REDACTED] and Mr. Catalano:

This determination letter is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA).¹ For the reasons that follow, the Public Access Bureau concludes that the response by the Will County Division of Transportation (Division) to [REDACTED] [REDACTED] August 14, 2024, FOIA request violated the requirements of FOIA.

On that date, [REDACTED] submitted a FOIA request to the Division seeking, in relevant part, "[a]ll correspondences/communications/emails between [the Division] & K-Five that resulted in the scheduling and coordination of curb/gutter removal & replacement in front of [specified address]."² On August 20, 2024, the Division partially denied [REDACTED] request

¹5 ILCS 140/9.5(f) (West 2023 Supp.).

²E-mail from [REDACTED] to Kyle Catalano (August 14, 2024).

500 South 2nd Street
Springfield, Illinois 62701
(217) 782-1090 • Fax: (217) 782-7046

115 South LaSalle Street
Chicago, Illinois 60603
(312) 814-3000 • Fax: (312) 814-3806

1745 Innovation Drive, Suite C
Carbondale, Illinois 62903
(618) 529-6400 • Fax: (618) 529-6416

Individuals with hearing or speech disabilities can reach us by using the 7-1-1 relay service.

www.IllinoisAttorneyGeneral.gov

pursuant to section 7(1)(f) of FOIA.³ On September 25, 2024, this office received [REDACTED] completed Request for Review challenging the Division's denial. Specifically, [REDACTED] alleges that one e-mail was improperly redacted.

On October 1, 2024, this office sent a copy of the Request for Review to the Division and asked it to provide unredacted copies of the responsive records for this office's confidential review, together with a detailed explanation of the legal and factual bases for the FOIA exemptions it asserted. On October 3, 2024, the Division provided a response and the withheld record. On October 8, 2024, this office forwarded a copy of the Division's response to [REDACTED] with an opportunity to reply; she replied later the same day.

DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2022). 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." 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 v. McDonough*, 344 Ill. App. 3d 242, 248 (2003). "The government is entitled to withhold documents that reflect the agency's give-and-take leading up to its final decisions." *Chicago Tribune Co. v. Cook County Assessor's Office*, 2018 IL App (1st) 170455, ¶ 29.

Section 7(1)(f) of FOIA also extends 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 *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001))). 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."

³5 ILCS 140/7(1)(f) (West 2023 Supp.), as amended by Public Act 103-605, effective July 1, 2024.

Fisher, 2021 IL App (1st) 200225, ¶ 20 (citing *Harwood*, 344 Ill. App. 3d at 248), *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 26456, issued December 31, 2013, at 3 (general contractor's proposal to a municipality outlining certain options for a parking deck was not exempt from disclosure under section 7(1)(f) because the contractor had its own financial interests in the multimillion-dollar project).

In its response to this office, the Division explained that an employee from K-Five Construction Company sent the withheld e-mail to a Division employee. The Division argued that the K-Five employee's e-mail is exempt because the individual "expressed his opinion about ongoing construction activities."⁴ In her reply, ██████████ stated the individual "is not a government worker—he is a construction project manager for K-five construction."⁵ ██████████ further noted that the construction company "was awarded (and completed) [a contract with the Division] for the construction work noted in the email."⁶

This office's review of the disclosed and redacted e-mails indicates that in the context of the relevant e-mails, the interests of the Division and K-Five are not aligned. The unredacted e-mails disclosed to ██████████ reflect that the Division asked K-Five to consider returning to the area of ██████████ driveway to perform additional roadwork to improve drainage concerns. K-Five stated that "once scheduled, we will perform removals and replacements as directed by the County (Steve). We will require a sign off from the County, that subsequent to these revisions, K5 will have no more liability and or responsibility to perform any additional work in and around this property. It is with this understanding, that we will proceed."⁷ Rather than a deliberation between a public body and its consultant as to the public body's next steps, the e-mail chain reflects the back and forth between a contractor and the Division trying to come to a mutual agreement, with both entities seeking to protect their own interests. Because the construction company's interests do not represent the interests of the Division in this instance, the section 7(1)(f) exemption does not apply. Accordingly, the Division's response to ██████████ August 14, 2024, FOIA request violated FOIA. This office requests the Division provide ██████████ with an unredacted version of the responsive record.

⁴E-mail from ██████████ to Victoria Frazier (October 8, 2024).

⁵E-mail from ██████████ to [Victoria Frazier] (October 8, 2024).

⁶E-mail from ██████████ to [Victoria Frazier] (October 8, 2024).

⁷E-mail from Bill [Jennings] to Brian [Gieseke] (August 5, 2024).

[REDACTED]
Mr. Kyle Catalano
November 19, 2024
Page 4

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have any questions, please contact me at victoria.frazier@ilag.gov. Thank you.

Very truly yours,

[REDACTED]
VICTORIA FRAZIER
Assistant Attorney General
Public Access Bureau

83108 f 71f improper co