



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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June 13, 2025

Via electronic mail

Mr. John Volk
Research Associate
State of Local News Project
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Via electronic mail

Mr. Tom Seymour
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Illinois Department of Commerce and
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555 West Monroe Street, 12th Floor
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RE: FOIA Request for Review – 2025 PAC 85453; DCEO No. 2025-0027

Dear Mr. Volk and Mr. Seymour:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2024)). For the reasons that follow, the Public Access Bureau concludes that the Illinois Department of Commerce and Economic Opportunity (DCEO) improperly withheld the records responsive to Mr. John Volk's February 18, 2025, FOIA request.

On that date, Mr. Volk submitted a FOIA request to DCEO seeking copies of the applications for the Local Journalism Sustainability Tax Incentive Program for nine listed entities, including attachments to the applications. In his request, Mr. Volk noted that DCEO had denied two previous FOIA requests for the same records because it asserted that the applications were not yet approved.

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On February 25, 2025, DCEO denied the request pursuant to section 7(1)(f) of FOIA.¹ DCEO stated that it denied the request "because the applications submitted are still under review."² Additionally, DCEO argued:

The records in question are preliminary because they contain incomplete information and the impressions and recommendations of the Department and its attorneys. Disclosure of these records, at this time, would therefore reveal the Department's predecisional deliberative process involved in the creation and enforcement of its policies and would undermine the ability to discuss policy as it is being formed.^[3]

On February 26, 2025, Mr. Volk submitted the above-referenced Request for Review contesting the denial of his request. Mr. Volk stated: "I'm unclear how those private deliberations would be disclosed by sharing documents the Department received from non-government organizations."⁴

On March 3, 2025, this office forwarded a copy of the Request for Review to DCEO and asked it to provide an unredacted copy of the withheld records for this office's confidential review, as well as a detailed explanation of the factual and legal bases for the applicability of section 7(1)(f) of FOIA to the records.

On March 11, 2025, DCEO provided this office with copies of responsive records as well as its written response. On March 12, 2025, this office forwarded a copy of DCEO's written response to Mr. Volk and notified him of his opportunity to reply; he replied on March 19, 2025.

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 2024); *see also Southern Illinoisan v.*

¹5 ILCS 140/7(1)(f) (West 2023 Supp.), as amended by Public Acts 103-605, effective July 1, 2024; 103-865, effective January 1, 2025.

²Letter from Tom Seymour, Legal Counsel, Department of Commerce and Economic Opportunity, to John Volk (February 25, 2025), at [1].

³Letter from Tom Seymour, Legal Counsel, Department of Commerce and Economic Opportunity, to John Volk (February 25, 2025), at [1].

⁴E-mail from John Volk, Research Associate, State of Local News Project, Northwestern University, Medill School, to Public Access [Bureau] (February 26, 2025).

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Illinois Department of Public Health, 218 Ill. 2d 390, 415 (2006). A public body that withholds records "has the burden of proving by clear and convincing evidence" that the records are exempt from disclosure. 5 ILCS 140/1.2 (West 2024). 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)(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 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." (Emphasis added.) *Harwood*, 344 Ill. App. 3d at 248. "[I]n order to be exempt under this provision, the responsive materials must be both (1) *inter or intra agency* and (2) predecisional and deliberative." (Emphasis added.) *Fisher v. Office of the Illinois Attorney General*, 2021 IL App (1st) 200225, ¶ 19; *see also Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (source of a record "must be a Government agency[]" to be exempt under the Federal FOIA deliberative process exemption (5 U.S.C. § 552(b)(5) (2018)). The section 7(1)(f) exemption encompasses "communications between government agencies and outside consultants whose analyses and recommendations 'played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done.'" *Harwood*, 344 Ill. App. 3d at 248 (quoting *Klamath*, 532 U.S. at 10 (exemption extends to third party only when "the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it.")).

In its response to this office, DCEO argued that *Harwood* supports its denial because the court determined that a final report the public body relied upon in a decision-making process was considered preliminary for purposes of section 7(1)(f). While *Harwood* does stand for the proposition that a finalized document may be withheld under section 7(1)(f) if it is a deliberative record generated to inform a public body's decision-making process, the *Harwood* court's conclusion that the report was exempt hinged on the fact that it was prepared by a consultant which represented the public body's interests rather than any interests of its own or of other clients. *Harwood*, 344 Ill. App. 3d at 248. Here, in contrast, the tax credit applicants submitted applications to advance their own interests, rather than just to serve the interests of DCEO.

DCEO further argued that section 7(1)(f) of FOIA applies to the withheld records for the following reasons:

[T]he middle clause of the first sentence of section 7(1)(f)- "in which opinions are expressed, or policies or actions formulated" indicates the legislature intended to protect the competitive process involved in contracting with public bodies. Similarly, this request is preliminary because responsive documents contain incomplete information. Complete information is required formulate policy and take action.

* * * Part of the inter-and intra- agency deliberative process involves requesting follow up or additional information in order to determine whether the Application should be approved or denied. Until all the Department's questions are answered, the decision could tip in either direction toward denial or approval. Depending on the Applicant's response to these deliberative questions, the Applicant's submitted documents may change from their initial submission. Therefore, the application materials are not final, until the Department has made a decision on whether to approve or deny the Application. Up until that point, the application is pre-decisional and inter- and intra- agency deliberative material.^[5]

DCEO provided several examples of additional follow-up with applicants that may be needed and contended that determining the extent to which an application must be supplemented is itself a deliberative process. Although DCEO's review of applications for completeness and other issues may be a deliberative process and records it generates and circulates internally during that process may fall under section 7(1)(f), the issue in this matter is whether the third-party applications themselves are inter- or intra-agency predecisional and deliberative records.

In reply, Mr. Volk contended that "[t]here should be no opinions expressed, nor policies or actions formulated within these standard documents submitted from private entities."⁶ He also argued that "[t]he core documents I am requesting are not documents prepared by the State of Illinois but are documents prepared by private entities in the possession of the State."⁷

⁵Letter from Tom Seymour, Legal Counsel/FOIA Officer, Department of Commerce and Economic Opportunity, to [Katie] Goldsmith, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (March 11, 2025), at [2].

⁶Letter from John Volk, Research Associate, State of Local News Project, Northwestern University, Medill School, to Katie Goldsmith, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (March 19, 2025), at [1].

⁷Letter from John Volk, Research Associate, State of Local News Project, Northwestern University, Medill School, to Katie Goldsmith, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (March 19, 2025), at [1].

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The responsive records are plainly materials submitted to DCEO by a third-party corporation to seek a tax incentive. While the agency's review and consideration of the application materials is an intra-agency decision-making process to select awardees, tax incentive applicants do not participate in that joint decision-making process with DCEO because they represent independent interests and stand to benefit from DCEO's decision on their application. *See, for example*, Ill. Att'y Gen. Pub. Acc. Op. No. 21-004, issued May 24, 2021, at 6 (binding opinion concluding that communications between a private business owner applying for a zoning variance and a city were not inter- or intra-agency communications within the scope of section 7(1)(f)). Regardless of whether DCEO has made a final decision on the applications, materials submitted by applicants do not constitute inter- or intra-agency predecisional deliberative materials. Accordingly, DCEO improperly withheld these records pursuant to section 7(1)(f) of FOIA.

Nonetheless, and although DCEO did not cite this provision, the program terms and conditions of the Local Journalism Sustainability Act (35 ILCS 18/40-25 (West 2024)) provide:

Any documentary materials or data made available or received from an applicant by any agent or employee of the Department are confidential and are not public records to the extent that the materials or data consist of commercial or financial information regarding the operation of, or the production of, the applicant or recipient of any tax credit award under this Act.

Because that provision provides that the "commercial or financial information regarding the operation of, or the production of, the applicant[]" is confidential, that information is exempt from disclosure pursuant to section 7(1)(a) of FOIA.⁸ This office requests that DCEO disclose the responsive records with such information redacted.

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 katherine.goldsmith@ilag.gov.

Very truly yours,



KATIE GOLDSMITH
Assistant Attorney General
Public Access Bureau

⁸5 ILCS 140/7(1)(a) (West 2024) (exempting from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.").

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