



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 31, 2016

Via electronic mail

Mr. John O'Connor (will receive letter only)
The Associated Press
Statehouse Pressroom
Springfield, Illinois 62706
joconnor@ap.org

Via electronic mail

Ms. Christina McClermon
Associate General Counsel/FOIA Officer
Office of Governor Bruce Rauner
100 West Randolph, Suite 16-100
Chicago, Illinois 60601
Christina.mccclernon@illinois.gov

RE: FOIA Request for Review – 2015 PAC 36017

Dear Mr. O'Connor and Ms. McClermon:

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 stated below, the Public Access Bureau concludes that the Office of the Illinois Governor (Governor's Office) improperly denied portions of Mr. John O'Connor's May 22, 2015, FOIA request.

On that date, Mr. O'Connor, on behalf of the Associated Press, submitted a FOIA request to the Governor's Office seeking copies of all correspondence, between May 1, 2015, and the date of the request, exchanged by the Governor's Office and former Illinois Department of Corrections Director Donald Stolworthy. On June 8, 2015, the Governor's Office provided certain records but withheld others citing sections 7(1)(f) and 7(1)(m) of FOIA (5 ILCS 140/7(1)(f), (1)(m) (West 2014)). Mr. O'Connor's Request for Review disputes the denial of the records that the Governor's Office withheld.

On July 6, 2015, this office sent a copy of the Request for Review to the

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Governor's Office and requested copies of the records that were withheld for our confidential review, together with a detailed explanation for the applicability of sections 7(1)(f) and 7(1)(m). The Governor's Office furnished those materials on July 27, 2015, adding that some of the records are exempt from disclosure pursuant to section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2014)), as well. The Governor's Office also provided a confidential response in which it provided additional information concerning the records and the applicability of the asserted exemptions. A copy of the non-confidential response was sent to Mr. O'Connor, who did not reply.

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). 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." *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. The deliberative process exemption "typically does not justify the withholding of purely factual material." *Enviro Tech Intern., Inc. v. United States Environmental Protection Agency*, 371 F.3d 370, 374 (7th Cir. 2004). Rather, "[o]nly those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." *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); see also *Chemical Weapons Working Group v. U.S. E.P.A.*, 185 F.R.D. 1, 3 (D.C. Cir 1999), quoting *Dudman Communications v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("[T]he critical question is whether 'disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'").

We have reviewed the records in question, which consist in large part of inter-agency and intra-agency e-mails that express opinions and recommendations in the process of formulating various actions. Such records are pre-decisional in nature, and there is no indication

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that they were publicly cited or identified by the head of any public body. Accordingly, we conclude that the Governor's Office has sustained its burden of demonstrating that those records are exempt from disclosure pursuant to section 7(1)(f) of FOIA. Because that determination is dispositive, we decline to address the Governor's Office's assertion that those records are exempt from disclosure pursuant to section 7(1)(m) of FOIA.

However, the Governor's Office also withheld several e-mails and attachments that contain strictly factual information. These include certain facts related to upcoming meetings and an update concerning a legal matter which identifies actions taken by IDOC and related statistics and other facts. The Governor's Office has not demonstrated how these records reflect the give and take of any deliberative process. In addition, the withheld records include discrete e-mails that were sent to third parties and, therefore, do not constitute inter-agency or intra-agency communication. Accordingly, we conclude that the Governor's Office improperly withheld those records pursuant to section 7(1)(f) of FOIA.

Section 7(1)(m) of FOIA

Based on the confidential response provided to this office, it appears that the Governor's Office also withheld the update concerning a legal matter pursuant to section 7(1)(m), which exempts from disclosure:

Communications between a public body and an attorney
* * * representing the public body that would not be subject to
discovery in litigation, and materials prepared or compiled by or
for a public body in anticipation of a criminal, civil or
administrative proceeding upon the request of an attorney advising
the public body[.]

Communications protected by the attorney-client privilege are within the scope of section 7(1)(m). *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 201 (1st Dist. 1997). A party asserting that a communication to an attorney is protected by the attorney-client privilege must show that: "(1) a statement originated in confidence that it would not be disclosed; (2) it was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and (3) it remained confidential." *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 228 (2nd Dist. 2006); *see also Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 327 (N.D. Cal. 1985) ("The proponent of the privilege carries the burden of establishing all elements of the privilege, including confidentiality, which is not presumed"); *In re General Instrument Corp. Securities Litigation*, 190 F.R.D. 527, 531 (N.D. Ill., 2000), quoting *U.S. v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) ("To be privileged, the documents must not only exhibit attorney involvement, **but must involve 'a legal adviser acting in his capacity as such.'**") (Emphasis added.). The

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Illinois Supreme Court has declared: "[I]n light of the public policy favoring open and accessible government documents, the attorney-client exemption * * * is to be construed and applied narrowly." *Illinois Education Ass'n v. Illinois State Board Of Education*, 204 Ill. 2d 456, 470 (2003). A public body that withholds records under section 7(1)(m) "can meet its burden only by providing some *objective* indicia that the exemption is applicable under the circumstances." (Emphasis in original.) *Illinois Education Ass'n*, 204 Ill. 2d at 470.

Notably, the update on the legal matter is not marked as confidential. Moreover, it conveys factual information rather than legal advice. The Governor's Office has not provided objective indicia from which this office could determine that the update constitutes a privileged attorney-client communication. Accordingly, this office concludes that the Governor's Office has not sustained its burden of demonstrating that the update is exempt from disclosure pursuant to section 7(1)(m) of FOIA.

Section 7(1)(c) of FOIA

Lastly, the Governor's Office withheld e-mails concerning a personal matter pursuant to section 7(1)(c) of FOIA, which exempts information the disclosure of which would constitute an unwarranted invasion of personal privacy. We agree that these e-mails, which are unrelated to the public duties of the individual whom it concerns, are highly personal in nature, and that the individual's right to privacy outweighs any public interest in disclosure.¹ Accordingly, we conclude that the Governor's Office has sustained its burden of demonstrating that those e-mails are exempt from disclosure pursuant to section 7(1)(c) of FOIA.

In accordance with the conclusions expressed in this determination, we request that the Governor's Office furnish copies of the non-exempt records referenced herein to Mr. O'Connor. Such records will be specifically identified to the Governor's Office in an attachment with this determination.

¹Section 7(1)(c) defines "[u]nwarranted 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. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy."

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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. This letter serves to close this file.

Very truly yours,



STEVE SILVERMAN
Assistant Bureau Chief
Public Access Bureau

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