



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

Lisa Madigan  
ATTORNEY GENERAL

November 23, 2015



Ms. Beth Prager  
Assistant State's Attorney  
Lake County State's Attorney's Office  
Lake County Building  
18 North County Street  
Waukegan, Illinois 60085

RE: FOIA Request for Review – 2015 PAC 36450

Dear [REDACTED] and Ms. Prager:

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 below, the Public Access Bureau concludes that the Lake County State's Attorney's Office (State's Attorney's Office) improperly denied [REDACTED] June 29, 2015, FOIA request.

On that date, [REDACTED] submitted a FOIA request to the State's Attorney's Office seeking copies of all correspondence between Mr. Marc Hansen and Mr. Barry Bolek from 2009 to the date of the request pertaining to any formal or informal investigation into the financial management of Township School District 113 (School District). On July 6, 2015, the State's Attorney's Office provided certain records but withheld other records citing sections 7(1)(f) and 7(1)(m) of FOIA (5 ILCS 140/7(1)(f), (1)(m) (West 2014)). In her Request for Review, [REDACTED] complained that the State's Attorney's Office did not disclose e-mails between Mr. Bolek and Mr. Hansen.

On July 31, 2015, this office sent a copy of the Request for Review to the State's Attorney's Office and asked it to furnish for our confidential review copies of any e-mails between Mr. Hansen and Mr. Bolek that were withheld together with a detailed explanation for the applicability of the section 7(1)(f) and 7(1)(m) exemptions. The State's Attorney provided

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those materials on August 6, 2015. In her reply, ██████████ asserted that neither exemption applies to the requested e-mails.

### 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

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 records in question were exchanged by Mr. Bolek, the District's Assistant Superintendent for Finance, and Mr. Hansen, an investigator for the State's Attorney's Office. As stated in ██████████ FOIA request, the records in question pertain to an investigation of the financial management of the School District. The State's Attorney's Office characterized the records as containing "questions and comments revealing the theories and thought processes relating to a potential criminal prosecution."<sup>1</sup> In support of its assertion that the e-mails fall within the scope of section 7(1)(f), the State's Attorney's Office cited *Harwood*, 344 Ill. App. 3d at 248 (report prepared for a public body by a consultant with no independent interests was properly withheld under section 7(1)(f)) and *The State Journal-Register v. University of Illinois-Springfield*, 2013 IL App (4th) 120881, ¶¶ 26-28, 994 N.E.2d 705, 713-14 (2013) (e-mail strings containing staff opinions and general information concerning the University's investigative process and scheduling of meetings were properly withheld under section 7(1)(f)).

Those cases are inapposite. The e-mails at issue in this matter are not a public

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<sup>1</sup>Letter from Beth Prager, Assistant State's Attorney, Lake County State's Attorney's Office, to Steve Silverman, Assistant Attorney General (August 6, 2015).

body's internal communications such as those analyzed by the court in the cited portions of *State Journal-Register*, nor are they communications between a public body and its paid consultant, as in *Harwood*. Rather, the e-mails were exchanged by an investigator for the State's Attorney's Office and a School District official during the State's Attorney's Office's investigation into the District's finances. Further, based on our confidential review of the e-mails, they consist of exchanges in which factual information is requested and furnished. Although this factual information may have been used by the State's Attorney's Office in its subsequent deliberations about whether to file criminal charges, the e-mails do not constitute predecisional and deliberative material or reveal the nature of any deliberations. The Illinois Appellate Court has held that it "is well settled that '[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 *Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125, 131 (D.C. Cir. 2005) ("the deliberative process privilege does not protect purely factual material contained in privileged documents if the disclosure of such information would not reveal the nature of the deliberations."). Accordingly, we conclude that the State's Attorney's Office has not sustained its burden of demonstrating that the e-mails are exempt from disclosure pursuant to section 7(1)(f) of FOIA.

### Section 7(1)(m) of FOIA

Section 7(1)(m) of FOIA 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[.]

Citing Illinois Supreme Court Rule 412(j)(i),<sup>2</sup> The State's Attorney's Office asserts that section 7(1)(m) exempts the withheld e-mails from disclosure pursuant to the "work product" doctrine. The parameters of "work product" are set out in Illinois Supreme Court Rule 201(b)(2), which provides that material prepared "by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Attorney work product is limited to records that "reveal the shaping process by which the attorney has arranged the available evidence" for trial. *Monier v. Chamberlain*, 35 Ill. 2d 351, 359-60 (1966). In contrast, the e-mails at issue in this matter do

<sup>2</sup>The Rule provides "Disclosure under this rule and Rule 413 shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the State or members of its legal or investigative staffs, or of defense counsel or his staff."

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not contain any findings or recommendations related to legal advice, much less theories, mental impressions, or litigation plans. The e-mails merely request and furnish factual information. Because these e-mails do not reveal any theories, mental impressions, or litigation plans, they are not "work product." Accordingly, we conclude that the State's Attorney's Office has not sustained its burden of demonstrating that the e-mails are exempt from disclosure pursuant to section 7(1)(m) of FOIA.

In accordance with the conclusions expressed in this determination, we request that the State's Attorney's Office provide copies of the e-mails to [REDACTED]. 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,

[REDACTED]  
STEVE SILVERMAN  
Assistant Bureau Chief  
Public Access Bureau

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