



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

February 26, 2016

Via electronic mail

Mr. John O'Connor
The Associated Press
Statehouse Pressroom
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Via electronic mail

Ms. Abigail L. Rennolds
Freedom of Information Officer
Illinois Department of Revenue
101 West Jefferson Street, MC 6-595
Springfield, Illinois 62702
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RE: FOIA Request for Review – 2015 PAC 37067

Dear Mr. O'Connor and Ms. Rennolds:

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 Illinois Department of Revenue (Department) improperly denied Mr. John O'Connor's June 24, 2015, FOIA request.

On that date, Mr. O'Connor, on behalf of the Associated Press, submitted a narrowed FOIA request to the Department seeking copies of records concerning hiring or other employment matters that the Department's personnel/human resources chief or his or her top assistant received from Nancy Kimme, Judith McAnarney, Matt Magalis, and Jason Barclay between November 5, 2014, and the date of the request. On July 10, 2015, the Department provided a responsive record but denied all other records pursuant to 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 his request.

On August 27, 2015, this office sent a copy of the Request for Review to the

Mr. John O'Connor
Ms. Abigail L. Rennolds
February 26, 2016
Page 2

Department and requested copies of the records that were withheld for our confidential review, together with a detailed explanation of the applicability of sections 7(1)(f) and 7(1)(m). On September 15, 2015, the Department furnished the records and a written response in which it withdrew its assertion of section 7(1)(m) but reiterated that the records are exempt from disclosure pursuant to section 7(1)(f). Mr. O'Connor did not reply to that response.

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. That 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) ("[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.'" (citing *Dudman Communications v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987))).¹

The Department's response to this office asserted that the records in question are:

¹Because Illinois' FOIA statute is based on the federal FOIA statute, decisions construing the latter, while not controlling, may provide helpful and relevant precedents in construing the state Act. *Margolis v. Director, Ill. Department of Revenue*, 180 Ill. App. 3d 1084, 1087 (1989).

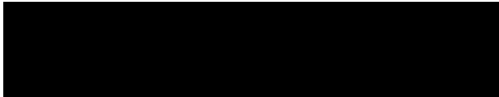
Mr. John O'Connor
Ms. Abigail L. Rennolds
February 26, 2016
Page 3

vital to the proper running of the state and deliberation on staffing are necessary to ensure that the Department continues to provide necessary services to the taxpayers of the State of Illinois. It is clear that Ms. McAnarney was working with the Department, discussing and deliberating on the most effective means of staffing and filling vacancies. These determinations are core functions of her position and the position of human resources staff of the Department. In order to effectively deliberate whether and how to staff a position, these employees must be able to honestly and openly communicate their opinions and concerns.²¹

We have reviewed the records in question, which mostly request and convey factual information concerning employees and logistical information concerning scheduling and recordkeeping. These records do not express opinions or recommendations. The Department has not demonstrated how disclosure of any of the information would discourage candid discussion or reveal the give and take of the deliberative process. Accordingly, we conclude that the Department has not sustained its burden of demonstrating that the records are exempt from disclosure pursuant to section 7(1)(f) of FOIA.³

In accordance with the conclusions expressed in this determination, we request that the Department furnish copies of the records in question to Mr. O'Connor. 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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²Letter from William Bryant, Acting Freedom of Information Officer, Illinois Department of Public Health, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau (September 9, 2015).

³Among other things, Mr. O'Connor's Request for Review contends that section 7(1)(f) does not apply because Ms. McAnarney, as an employee of the Office of the Illinois Comptroller, was not authorized to participate in deliberations about hiring in other State agencies. Because our determination that the records in question are not pre-decisional deliberative material is dispositive, we decline to address that argument.