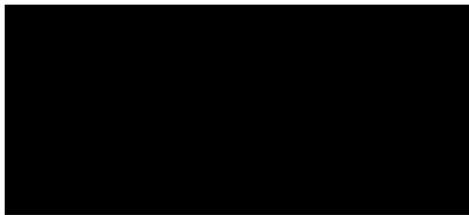


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 25, 2015



Via electronic mail
Mr. Floyd L. Allsop
FOIA Officer
City of Monticello
210 North Hamilton
Monticello, Illinois 61856
foia@cityofmonticello.net

RE: FOIA Request for Review – 2015 PAC 36740

Dear [REDACTED] and Mr. Allsop:

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 that follow, the Public Access Bureau concludes that City of Monticello (City) did not improperly withhold records in violation of FOIA.

On July 15, 2015, [REDACTED] submitted a FOIA request to the City, which included a request for "[t]he most current plans and specs for the proposed WWTP [waste water treatment plant]."¹ On July 22, 2015 and July 29, 2015, the City produced records responsive to [REDACTED] request. After [REDACTED] inquired further about the project specifications, the City denied the part of the request relating to the specifications under section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2014)), on August 4, 2015. On August 6, 2015, [REDACTED] submitted this Request for Review, asserting that "[t]he preliminary exemption does not apply because the documents I requested have been publicly cited in city council meetings"

¹E-mail from [REDACTED] to Terry Summers, City of Monticello (July 15, 2015).

██████████
Mr. Floyd L. Allsop
September 25, 2015
Page 2

and "[t]he city engineer publicly said in a city council meeting that the requested plans and specifications were done."²

On August 17, 2015, we forwarded a copy of the Request for Review to the City and requested the withheld responsive records for our confidential review together with a detailed explanation of the factual and legal bases for the assertion of section 7(1)(f) of FOIA. The City responded with an explanation and the requested records. The City stated:

The City of Monticello is currently working with Fehr-Graham, an Engineering and Environmental firm, to complete a plan for Waste Water Treatment Plant Improvements. Fehr-Graham has provided the City with contract documents and specifications in relation to this plan. * * * These documents are "complete" in the sense they have been provided to City staff for review, but they remain a work in progress until City Council reviews them and makes a determination of the direction this project will go. As of this date these plans have not been provided to nor reviewed by City Council. They have been reviewed only by City staff in formulating plans for the project under consideration.³

Our office forwarded the City's response to ██████████ on September 11, 2015, and he replied on September 14, 2015. ██████████ contended that the specifications were discussed at the July 13, 2015, City Council meeting, and therefore were not exempt under section 7(1)(f) because they had been "publicly cited and identified by the head of the public body." During a telephone conversation with an Assistant Attorney General from the Public Access Bureau on September 21, 2015, a representative of the City further explained that Fehr-Graham is working with the City as a consulting engineer to design a new treatment plant, and the City continues to consider how to move forward with the project.

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 2014). FOIA requires that "each public body shall make available to any person

²E-mail from ██████████ to Public Access Bureau (August 6, 2015).

³Letter from Floyd L. Allsop, Superintendent of City Services, City of Monticello, to Neil P. Olson, Assistant Attorney General, Public Access Bureau (August 24, 2015).

Mr. Floyd L. Allsop
September 25, 2015
Page 3

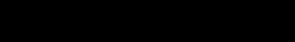
for inspection and copying all public records, except as otherwise provided in Section 7 of this Act." 5 ILCS 140/3(a) (West 2014)).

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 applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). The exemption also has been interpreted as extending to communications between a public body and a consultant when "the consultant does not represent an interest of its own, or the interest of any other client, when it advises the [public body] that hires it." *Harwood*, 344 Ill. App. 3d at 248 (quoting *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11, 121 S. Ct. 1060, 1067 (2001)). 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*, 344 Ill. App. 3d at 248.

We have reviewed the withheld records provided for our confidential review, which were produced by Fehr-Graham, entitled "Contract Documents and Specifications for City of Monticello Wastewater Treatment Improvements," and marked as a "review copy." The City has described these records as part of the City's deliberative process in which its engineering consultant advised the City on the options for making improvements to the wastewater treatment plant. Although the records were prepared by the consultant, the consultant has not been retained as a construction contractor to perform any improvements. Therefore, the consultant appears to have been representing the City's interests, rather than just its own interests or the interests of other clients. In sum, these records reflect the process of intra-agency deliberation that is preliminary to any final decision concerning the wastewater treatment plant. Accordingly, we conclude that the withheld records fall within the scope of section 7(1)(f) of FOIA.

however, asserts that the section 7(1)(f) exemption is inapplicable because the records were "publicly cited and identified by the head of the public body." He points to the public discussion about the project at the July 13, 2015, City Council meeting, as citing and identifying the withheld documents. See Monticello City Council, Agenda Item 9e (July 13, 2015) ("Waste Water Treatment Plant Design Discussion (Past, Present & Future) – City Supt. F. Allsop, Engineer Andy Kieser (Fehr Graham)").


Under FOIA, the "[h]ead of the public body" means the president, mayor, chairman, presiding officer, director, superintendent, manager, supervisor or individual otherwise holding primary executive and administrative authority for the public body, or such person's duly authorized designee." 5 ILCS 140/2(e) (West 2014). The Mayor holds the primary executive


Mr. Floyd L. Allsop
September 25, 2015
Page 4

authority for the City. *See* Monticello Code of Ordinances § 31.15 (approved December 9, 2013) ("There is hereby created the Office of the Mayor, who shall be the chief executive officer of the city.") However, the City states in its August 24, 2015, response that the withheld records had not been provided to or reviewed by the City Council. In addition, we have reviewed the minutes from the July 13, 2015, meeting and the video of that meeting available on the City website. Our review confirms that the discussion was led by the City superintendent and a representative of Fehr-Graham, and that the Mayor did not cite or identify the withheld records. Therefore, the available information does not support the assertion that the records were publicly cited or identified by the head of the public body. Accordingly, we conclude that the City did not improperly withhold the records pursuant to section 7(1)(f) of FOIA.

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 (217) 782-9078 or nolson@atg.state.il.us.

Very truly yours,


NEIL P. OLSON
Assistant Attorney General
Public Access Bureau

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