



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

June 24, 2024

Via electronic mail

[REDACTED]

Via electronic mail

Ms. Christina McClernon
Associate Corporate and Compliance Counsel
Legal Department
Illinois Housing Development Authority
111 East Wacker Drive, Suite 1000
Chicago, Illinois 60601
CMcClernon@ihda.org

RE: FOIA Request for Review – 2024 PAC 79594; IHDA No.: 2023-271

Dear [REDACTED] and Ms. McClernon:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA).¹ For the reasons explained below, the Public Access Counselor concludes that the Illinois Housing Development Authority (Authority) did not violate FOIA by withholding the records responsive to [REDACTED] December 21, 2023, FOIA request.

On that date, [REDACTED] submitted a FOIA request to the Authority seeking:

2024 PPA [Preliminary Project Assessment] submission for
PID 12154 Taft and Exmoor, Glen Ellyn. Full Circle
Communities, Inc

¹5 ILCS 140/9.5(f) (West 2022), as amended by Public Act 103-069, effective January 1, 2024.

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Want: PPA workbook (excel application) all elevations, all transmittal cover letters, all proformas, any and all letters or other forms authorizing Full Circle to apply concerning this site.^[2]

Later that day, the Authority denied the request in its entirety stating "this project was submitted in the recent 2024 PPA round. It is under review at this point and not available for a FOIA."³ On January 8, 2024, this office received the document necessary to complete ██████████ Request for Review disputing the Authority's denial of his request.

On January 17, 2024, the Public Access Bureau forwarded a copy of the Request for Review to the Authority and requested unredacted copies of the responsive records for this office's confidential review. This office also asked the Authority to provide a written explanation that identified the relevant section 7 exemptions⁴ that the Authority relied upon to deny ██████████ FOIA along with a detailed legal and factual basis for the application of the exemptions. On January 26, 2024, the Authority provided those materials, asserting that the responsive document was properly withheld under sections 7(1)(f), 7(1)(h), and 7(1)(i) of FOIA.⁵ On that same date, this office forwarded a copy of the Authority's written answer to ██████████ and notified him of his opportunity to reply to that response. On January 30, 2024, ██████████ replied by maintaining that the records were improperly withheld.

DETERMINATION

Under FOIA, 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 2022); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). 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 2022).

Section 7(1)(h) of FOIA exempts from disclosure:

²FOIA portal message from ██████████ to Illinois Housing Development Authority FOIA (December 21, 2023).

³Letter from Sharon Hunley, FOIA Officer, Illinois Housing Development Authority, to ██████████ (December 21, 2023).

⁴5 ILCS 140/7 (West 2022), as amended by Public Acts 103-154, effective June 30, 2023; 103-423, effective January 1, 2024; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023; 103-540, effective January 1, 2024; 103-554, effective January 1, 2024.

⁵5 ILCS 140/7(1)(f), (1)(h), (1)(i) (West 2022), as amended by Public Acts 103-154, effective June 30, 2023; 103-423, effective January 1, 2024; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023; 103-540, effective January 1, 2024; 103-554, effective January 1, 2024.

Proposals and bids for any contract, grant, or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person proposing to enter into a contractor agreement with the body, **until an award or final selection is made**. Information prepared by or for the body in preparation of a bid solicitation shall be exempt until an award or final selection is made. (Emphasis added.)

When construing the meaning of a statutory provision, the primary objective is to ascertain the intent of the legislature. *See DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). "The plain language of the statute is the best indication of that intent, and if that language is clear and unambiguous, it must be given effect." *People v. Rinehart*, 2012 IL 111719, ¶ 24. The plain language of section 7(1)(h) includes, but is not limited to, information that would frustrate procurement or give an advantage to an applicant for a contractor agreement with a public body. The scope of the exemption broadly encompasses "proposals and bids for any contract, grant, or agreement * * * until an award or final selection is made."

In its response to this office, the Authority asserted that the requested Preliminary Project Assessment is a constituent part of a proposal for tax credits for a housing development. The Authority explained:

The Low Income Housing Tax Credit ("Tax Credits") program is a federal program created to promote the development of affordable housing for low-income individuals and families. The Authority is the allocating agency for Tax Credits for the program in Illinois. * * *

All projects planning to apply to the Authority for an allocation of Tax Credits must first submit a Preliminary Project Assessment ("PPA") to the Authority prior to submitting an application. Applicants must include required documentation in the PPA, which includes the project concept, location, financing assumptions and information about the development team. * * *

The Authority may approve, conditionally approve, or deny a PPA. Only after an approval may a sponsor move on to submit an application for Tax Credits for their project. * * *

* * *

The PPA sought by the instant Request is still pending a decision by the Authority.^[6]

The response added that if the Preliminary Project Assessment and subsequent application are approved, the applicant is required to enter into an extended use agreement governing the award of the tax credit. The Authority asserted that "each PPA is the first step in a competitive bid for these limited resources."⁷ The Authority stated that a proposed project is not awarded tax credits until the Illinois Housing Development Board of Members (Board) reviews and votes to approve an award for project, which had not occurred at the time the Authority received ██████████ FOIA request. The Authority indicated that the Board's decisions related to a Preliminary Project Assessment are made public once the Board has taken a final vote on the matter.

This office's confidential review of the responsive record confirmed that the information falls within the scope of section 7(1)(h). The Preliminary Project Assessment was submitted as part of the process for seeking approval from the Board for an award of tax credits and entering into an agreement governing the use of tax credits. It is undisputed that no award or final selection related to the project had been made at the time of the Authority's denial. ██████████ argued that disclosure of the requested information would not give any individual an advantage because the application deadline had passed. The plain language of section 7(1)(h) is not so restrictive. The Authority was not required to demonstrate that disclosure would frustrate the proposal process or give an advantage to any party to withhold the records; the clause "including information which if it were disclosed would frustrate procurement or give an advantage to any person proposing to enter into a contractor agreement with the body" may encompass additional procurement-related records, on top of the exempt "[p]roposals and bids for any contract, grant, or agreement," and the exempt "[i]nformation prepared by or for the body in preparation of a bid solicitation." *See, for example*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 73332, issued October 21, 2021, at 2 ("The General Assembly's use of the word 'including' rather than a limiting term such as 'only' indicates that information which may frustrate procurement is not the only type of information that section 7(1)(h) is intended to encompass. In other words, the scope of the exemption includes—but is not limited to—this type of information.").

Further, ██████████ argued that the requested PPA should be disclosed because the Authority already publicly disclosed a notice regarding the 2024 PPA submissions, which included the names of proposed developments and the entities who submitted proposals, including the company named in his FOIA request. There is no indication, however, that the

⁶Letter from Christina McClernon, Associate Corporate and Compliance Counsel, [Illinois Housing Development Authority], to Shannon Barnaby, Senior Assistant Attorney General, Public Access Counselor, Office of the Attorney General (January 26, 2024), at 1-2.

⁷Letter from Christina McClernon, Associate Corporate and Compliance Counsel, [Illinois Housing Development Authority], to Shannon Barnaby, Senior Assistant Attorney General, Public Access Counselor, Office of the Attorney General (January 26, 2024), at 2.

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withheld record itself was disclosed. Moreover, section 7(1)(h) does not require the identities of individuals who submit proposals be kept confidential for the exemption to apply. Accordingly, this office concludes that the Authority did not improperly withhold the record pursuant to section 7(1)(h) of FOIA.

Although that exemption is applicable, this office notes that the Authority's December 21, 2023, denial of [REDACTED] request failed to identify the exemption or provide most of the information required by section 9(a) of FOIA (5 ILCS 140/9(a) (West 2022)) below:

Each public body denying a request for public records shall notify the requester in writing of the decision to deny the request, the reasons for the denial, including a detailed factual basis for the application of any exemption claimed, and the names and titles or positions of each person responsible for the denial. Each notice of denial by a public body shall also inform such person of the right to review by the Public Access Counselor and provide the address and phone number for the Public Access Counselor. Each notice of denial shall inform such person of his right to judicial review under Section 11 of this Act.

The Authority should be mindful of its statutory obligation to fully comply with these mandatory requirements when issuing denials of FOIA requests.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any FOIA questions, my e-mail address is Shannon.Barnaby@ilag.gov.

Very truly yours,

[REDACTED]
SHANNON BARNABY
Senior Assistant Attorney General
Public Access Bureau

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