



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 8, 2016

Via electronic mail

Mr. Don Moseley
Producer, WMAQ-TV
Dmose92480@aol.com

Via electronic mail

Ms. Amber Achilles Ritter
Chief Assistant Corporation Counsel
Department of Law
City of Chicago
121 North LaSalle Street, Suite 600
Chicago, Illinois 60602-2580
Amber.ritter@cityofchicago.org

RE: FOIA Request for Review – 2016 PAC 39684

Dear Mr. Moseley and Ms. Ritter:

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 discussed below, the Public Access Bureau concludes that the City of Chicago Department of Law (Department) improperly withheld an e-mail responsive to Mr. Don Moseley's December 16, 2015, FOIA request.

On that date, Mr. Moseley, on behalf of WMAQ-TV, submitted a FOIA request to the Department seeking copies of records of communications between Mr. Thomas Platt and Mr. Stephen Patton, both of whom are attorneys in the Department, from January 20, 2015, and January 21, 2015. On December 30, 2015, the Department provided responsive records but redacted or withheld certain information pursuant to sections 7(1)(b), 7(1)(c), 7(1)(d)(iv), 7(1)(f), and 7(1)(m) of FOIA (5 ILCS 140/7(1)(b), (1)(c), (1)(d)(iv), 1(f), (1)(m) (West 2014), as amended by Public Acts 99-298, effective August 6, 2015). Mr. Moseley's Request for Review disputes only the redaction of the text of one e-mail that was exchanged between Mr. Platt and Mr. Patton and later forwarded to two of their clients. The parties to the communication and the

Mr. Don Moseley
Ms. Amber Achilles Ritter
April 8, 2016
Page 2

subject line of the e-mail – "Fatal shooting on video, 4000 S. Pulaski" were disclosed to Mr. Moseley.¹

On February 2, 2016, this office forwarded a copy of the Request for Review to the Department and asked it to provide a copy of the withheld e-mail and a detailed explanation of the factual and legal bases for the exemption under which the e-mail was withheld. On March 4, 2016, the Department furnished a copy of the e-mail and a written response asserting that the e-mail is exempt from disclosure pursuant to section 7(1)(m) of FOIA; counsel for Mr. Moseley replied on March 14, 2016.

DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying[.]" (5 ILCS 140/1.2 (West 2014)), and exemptions to disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois Univ.*, 176 Ill. 2d 401, 408 (1997); *see also* 5 ILCS 140/1 (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)(m) of FOIA exempts from disclosure:

Communications between a public body and an attorney or auditor 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***, and materials prepared or compiled with respect to internal audits of public bodies. (Emphasis added.)

The Department's response to this office asserted that the e-mail in question is an attorney-client privileged communication and attorney work product. The Public Access Bureau has previously determined that the section 7(1)(m) exemption encompasses both privileged attorney-client communications and work product. Ill. Att'y Gen. PAC Req. Rev. Ltr. 28304, issued February 26, 2016. These are "separate and distinct protections" that must be addressed separately. *Waste Management, Inc. v. International Surplus Lines Insurance, Co.*, 144 Ill. 2d 178, 189 (1991).

¹E-mail from Thomas Platt to Stephen Patton, James Dunn, Jane Notz, and Liza Franklin (January 20, 2015).

Mr. Don Moseley
Ms. Amber Achilles Ritter
April 8, 2016
Page 3

Work Product

The parameters of this doctrine are set forth 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 which "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, "[a]ny relevant material generated in preparation for trial which does not disclose 'conceptual data' is freely discoverable under Rule 201(b)(2)." *Holland v. Schwan's Home Services, Inc.*, 2013 IL App (5th) 110560, ¶205, 992 N.E.2d 43, 86 (2013), quoting *Waste Management, Inc.*, 144 Ill. 2d at 196; see also *Mau v. North American Asbestos, Corp.*, 156 Ill. App. 3d 926, 928-29 (4th Dist. 1987) (rejecting an attorney's argument that a list of witnesses for trial is work product that reveals litigation strategy).

The Department's response to this office stated:

Here, attorney Tom Platt, who serves as Deputy Corporation Counsel of the Law Department's Federal Civil Rights Litigation Division, was communicating with Corporation Counsel Steve Patton regarding the litigation posture and strategy for two matters – one which had already been filed in federal court, and the other which he anticipated being filed. This communication plainly falls into the definition of work product, in that it was prepared in anticipation and preparation for litigation and trial, and that it indicates litigation strategy. Therefore, this exchange constitutes work-product, and was properly redacted under Section 7(1)(m) of FOIA.^{12]}

In her reply to that response, counsel for Mr. Moseley asserted that the Department's "response provides almost no evidence to support its invocation of the work product privilege, let alone objective facts establishing a substantial and significant threat of litigation."³

²Letter from Amber Achilles Ritter, Chief Assistant Corporation Counsel, Legal Information, Investigations & Prosecution Division, City of Chicago Department of Law, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau, Office of the Attorney General (March 4, 2016), at 4.

³Letter from Amanda M. Leith, Senior Counsel, NBCUniversal News Group, NBCUniversal Media, LLC, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau, Office of the Attorney General (March 14, 2016), at 2.

Mr. Don Moseley
Ms. Amber Achilles Ritter
April 8, 2016
Page 4

This office has reviewed the e-mail at issue, in which the City's Deputy Corporation Counsel provides information on the status of two legal matters. Even assuming that the e-mail was prepared in anticipation of litigation, the information that it conveys is strictly factual. The e-mail is devoid of any theories, mental impressions, or litigation plans. It is merely a status update. Because the e-mail does not disclose any conceptual data or reveal the shaping process of arranging evidence for trial, we conclude that the Department has not sustained its burden of demonstrating that it is exempt from disclosure as work product pursuant to section 7(1)(m).

Attorney-Client Privilege

A party asserting that a confidential communication 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.'").

The section 7(1)(m) exemption must be narrowly construed to promote transparency "notwithstanding the countervailing policy favoring confidentiality between attorneys and clients." *Ill. Education Association v. Ill. State Board of Education*, 204 Ill. 2d 456, 470 (2003). A public body that withholds records under section 7(1)(m) must provide a supporting factual basis for the application of the exemption:

[I]n meeting its burden, the public body may not simply treat the words "attorney-client privilege" or "legal advice" as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue. Rather, the public body can meet its burden only by providing some *objective* indicia that the exemption is applicable under the circumstances. (Emphasis in original.) *Ill. Education Association*, 204 Ill. 2d at 470.

The Department's response to this office asserted that the attorney who received the e-mail in question forwarded it to clients of the Department "in order to advise them of the posture and upcoming events expected in the two matters discussed. As a result, the forwarding of this communication falls squarely in the definition of an attorney-client privileged

Mr. Don Moseley
Ms. Amber Achilles Ritter
April 8, 2016
Page 5

communication[.]”⁴ Counsel for Mr. Moseley replied that the Department failed to demonstrate that the clients sought legal advice or explain why the information in the e-mail was provided to them.

Applying Illinois law, a federal district court concluded in *Dawson v. New York Life Ins. Co.*, 901 F. Supp. 1362, 1367 (N.D. Ill. 1995), that facts communicated by a corporation's attorneys to the corporation's employees were not protected by the attorney-client privilege because the attorneys were acting "more as 'courier[s] of factual information,' rather than 'legal advisers.'" The court further explained that "common sense tells us that there is a difference between merely providing legal information and providing legal 'advice.' Here, the attorneys were simply called upon to provide factual information to the * * * employees at issue. The attorneys' purpose was not to instruct the employees on the proper use of this information." *Dawson*, 901 F. Supp. at 1367; see also *Digital Vending Services International, Inc. v. University of Phoenix, Inc.*, No. 2:09-CV-555, 2013 WL 1560212, at *6 (E.D. Va., 2013) (e-mails discussing status of preparation for oral arguments in federal court are "simply status updates and no legal advice is given by counsel. Therefore, these communications are not privileged."); *Elder Care Providers of Indiana, Inc. v. Home Instead, Inc.*, No. 114-CV-01894SEBMJD, 2016 WL 881176, at *4 (S.D. Ind. Mar. 8, 2016); (e-mail asking an attorney how to respond to a request for a status update is not privileged because it did not seek legal advice).

Although the e-mail in question is marked as confidential, it is merely a status update that contains strictly factual information about two matters. It does not convey any legal advice. The forwarding of this e-mail to the Department's clients with a message that simply states "FYI",⁵ which was disclosed to Mr. Moseley, does not transform this e-mail into a privileged attorney-client communication. Because the e-mail in question provides only factual information rather than legal advice, this office concludes that the Department has not sustained its burden of demonstrating that it is exempt from disclosure pursuant to section 7(1)(m) as a privileged attorney-client communication.

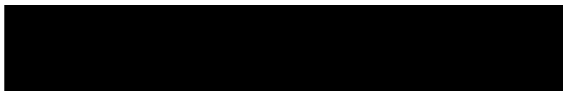
⁴Letter from Amber Achilles Ritter, Chief Assistant Corporation Counsel, Legal Information, Investigations & Prosecution Division, City of Chicago Department of Law, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau, Office of the Attorney General (March 4, 2016), at 4.

⁵E-mail from Stephen Patton to [REDACTED] and [REDACTED] (January 20, 2015).

Mr. Don Moseley
Ms. Amber Achilles Ritter
April 8, 2016
Page 6

In accordance with the conclusions expressed above, this office requests that the Department furnish a copy of the e-mail at issue to Mr. Moseley. 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

39684 f 71m improper mun