



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 31, 2016

Via electronic mail

Mr. Kirk Allen
P.O. Box 593

████████████████████
Kirk@illinoisleaks.com

Via electronic mail

Mr. Timothy D. Elliot
Rathje Woodward LLC
300 East Roosevelt Road, Suite 300
Wheaton, Illinois 60187
telliott@rathjewoodward.com

RE: FOIA Request for Review – 2015 PAC 38669

Dear Mr. Allen and Mr. Elliot:

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 College of DuPage (College) did not improperly withhold an internal audit report in response to Mr. Kirk Allen's November 6, 2015, FOIA request.

On that date, Mr. Allen submitted a FOIA request to the College, which included a request for a "[c]opy of the Internal Audit regarding Hericane Graphics most recent contract found to have been in violation of the timeline requirements."¹ On November 13, 2015, the College denied that part of the request under section 7(1)(m) of FOIA (5 ILCS 140/7(1)(m) (West 2014), as amended by Public Act 99-298, effective August 6, 2015). In his Request for Review, Mr. Allen alleged that because the College had previously furnished a copy of the audit to the Higher Learning Commission (Commission), it violated section 3(a) of FOIA (5 ILCS 140/3(a) (West 2014)) by improperly granting the Commission an exclusive right to access that public record.

¹E-mail from Kirk Allen to Barbara Mitchell, College of DuPage (November 6, 2015).

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On November 25, 2015, we forwarded a copy of the Request for Review to the College and requested that the College provide us with a copy of the withheld responsive record for our confidential review, as well as a detailed explanation of the factual and legal bases for the assertion of section 7(1)(m) of FOIA. We also asked the College to address Mr. Allen's contention that the College granted the Commission an exclusive right to the record at issue and whether the disclosure to the Commission waived any privilege or protection afforded to the audit report.

On December 9, 2015, the College provided the withheld record for our review together with a written response, which included an affidavit from its Director of Internal Audit regarding the preparation of the record and an affidavit from its Vice President for Planning and Institutional Effectiveness regarding the Commission's accreditation process. The College provided a redacted response for forwarding to Mr. Allen. We forwarded the redacted response to Mr. Allen on December 22, 2015; he replied on December 26, 2015.

Section 7(1)(m) of FOIA

Section 7(1)(m) of FOIA permits a public body to withhold:

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 College described the preparation of the record by its Director of Internal Audit and we have reviewed its contents, which an internal auditor compiled during a review of a process used by the College. Mr. Allen does not contend that the record does not fall within the scope of section 7(1)(m), but rather states that while he "agree[s] with the *basic* assertion pertaining to internal audits not being subject to FOIA," the circumstances of the record's disclosure to the Commission make it subject to disclosure under FOIA.² Accordingly, we conclude that the record is within the scope of section 7(1)(m), and turn to Mr. Allen's allegation that the College violated section 3(a) of FOIA by granting the Commission an exclusive right to access the record.

²E-mail from Kirk Allen to Kathleen Jedlicka, [Public Access Bureau] (December 26, 2015).

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Section 3(a) of FOIA

Section 3(a) of FOIA provides:

Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act. *Notwithstanding any other law, a public body may not grant to any person or entity, whether by contract, license, or otherwise, the exclusive right to access and disseminate any public record as defined in this Act.* (Emphasis added.)

Mr. Allen contends that when the College provided the record at issue to the Commission as part of the College's accreditation process, it granted the Commission "the exclusive right to access and disseminate any public record." In its response and through the affidavit of the Vice President for Planning and Institutional Effectiveness, the College explained that its disclosure of the internal audit record to the Commission was effectively compulsory under the Commission's process for determining the College's accreditation status, and that it took steps to maintain the confidentiality of the record by allowing the Commission's accreditation team to review internal audit reports only while on campus.

With respect to the second sentence of section 3(a), the College argues that statutory language regarding "the exclusive right to access and disseminate any public record" is conjunctive, not disjunctive, and must involve the grant of the right to "access *and* disseminate." (Emphasis added.) This office agrees, and moreover observes that in the context of the entire section 3(a), which concerns the duties of public bodies to make public records available for inspection and copying, the second sentence of section 3(a) describes the impermissible delegation of those duties to a third party by granting an exclusive right to access and disseminate public records. Based on the available information, while the College provided the Commission with limited access to the record in question,³ the College did not improperly delegate its duties under FOIA by providing the Commission with any right to disseminate this internal audit record, not to mention an exclusive right to do so. Accordingly, we conclude that the College did not violate section 3(a) of FOIA.⁴

³Mr. Allen cites a statement in a November 11, 2015, letter from the Acting Interim College President to the Commission as evidence that the Commission had physical control of a copy of the internal audit report, and that allegedly conflicts with the College's description of the access to the records. We need not resolve this dispute because it is undisputed that the Commission had access to the record at issue.

⁴In his reply to this office, Mr. Allen asserts that his argument is solely premised on section 3(a). However, he also appears to contend that the College waived its right to assert the 7(1)(m) exemption by providing

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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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the internal audit report to the Commission. "The waiver rule must not be mechanically applied whenever there is disclosure of information, but, rather, requires consideration of the circumstances related to the disclosure, including the purpose and extent of the disclosure as well as the confidentiality surrounding the disclosure." *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill App. 3d 188, 202, 808 N.E.2d 56, 67 (1st Dist. 2004).

As described above, the College has asserted that disclosure of the record to the Commission was effectively compulsory as part of the accreditation process and that it took steps to protect the confidentiality of the record. Mr. Allen maintains that information from the internal audit report has been made public through the Commission's accreditation report, but does not describe any voluntary disclosure of the internal audit report itself by the College, such as in response to another FOIA request. In terms of disclosure of any information by the College, the November 11, 2015, letter from the Acting Interim College President to the Commission was a limited and discretionary disclosure of general information, namely that "aspects of the RFP process did not appear to be in compliance with the College's procedures so [the internal auditor] advised [the former president] get a legal opinion as to whether the College should have accepted the proposal." *See, e.g., American Civil Liberties Union v. Department of Defense* 752 F. Supp. 2d 361, 372 (S.D.N.Y. 2010) ("discretionary decision to release a limited set of information does not waive FOIA protection for similar information that is not discretionarily released"). Accordingly, based on these circumstances, we also conclude there was no waiver.

Jedlicka, Kathleen

From: Jedlicka, Kathleen
Sent: Thursday, March 31, 2016 4:03 PM
To: 'kirk@illinoisleaks.com'; 'telliott@rathjewoodward.com'
Cc: Olson, Neil
Subject: PAC Request for Review 38669
Attachments: 38669 f 3a 71m proper univ.pdf

Please find the attached correspondence from AAG Olson. Please contact us if you have any questions. Thank you.

Katie Jedlicka
Administrative Clerk
Public Access Bureau
Office of the Attorney General, Lisa Madigan
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Springfield, IL 62706

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