



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 30, 2016

Via electronic mail

Ms. Diane Rado
Education Reporter
Chicago Tribune
drado@chicagotribune.com

Via electronic mail

Ms. Jessica Riddick
Hodges, Loizzi, Eisenhammer,
Rodick & Kohn LLP
3030 Salt Creek Lane, Suite 202
Arlington Heights, Illinois 60005
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RE: FOIA Request for Review – 2016 PAC 41667

Dear Ms. Rado and Ms. Riddick:

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 explained below, the Public Access Bureau concludes that Community Consolidated School District 15 (District) did not improperly withhold records responsive to Ms. Diane Rado's April 18, 2016, FOIA request.

On that date, Ms. Rado, on behalf of the *Chicago Tribune*, submitted a FOIA request to the District seeking copies of the following documents relating to an agreement between the District and its teachers' union:

/The full contract, or a draft of the full contract, or any pages or parts of the contract, including drafts. This information should be available, given that the contract was approved.

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/The salary schedule over the full length of the contract, including all steps and lanes (if that method is being used), as well as additional dollars or stipends for extracurricular duties.

/Any documents, both print and electronic, conveying whether the union and school board will have to negotiate again during the length of the contract, such as in 3-year intervals.

/Any documents, both print and electronic, related to the contract, including abbreviated talking points or any information of any kind, that board members received and were able to review at a public board meeting.

/Any documents, both print and electronic, related to why and how the board and union chose to enter into a 10-year contract.^[1]
(Emphasis omitted.)

On April 25, 2016, the District provided a written response granting in part and denying in part Ms. Rado's request. The District stated that a summary of the contract's major terms is available on the Board of Education's (Board) website and provided a link to that summary. The District also stated that it was still working with the Classroom Teachers Council to finalize the language of the written contract. The District asserted that it was not required to publicly disclose drafts of detailed contract language under FOIA "because the legislature has recognized that this could mislead the public and cause unnecessary labor disputes both in the immediate and long-term."² (Emphasis omitted.) The District also asserted that that the remaining records responsive to Ms. Rado's request are exempt from disclosure under sections 7(1)(f), 7(1)(m), and 7(1)(p) of FOIA (5 ILCS 140/7(1)(f), (1)(m), (1)(p) (West 2014), as amended by Public Acts 99-298, effective August 6, 2015; 99-346, effective January 1, 2016).

On April 29, 2016, Ms. Rado submitted this Request for Review to the Public Access Bureau contesting the partial denial of her FOIA request by the District. Ms. Rado asserted that the District should provide copies of the draft contract documents and salary schedules following its vote to approve the contract. On May 6, 2016, the Public Access Bureau sent a copy of Ms. Rado's Request for Review to the District asking that it provide copies of the withheld records for our confidential review and requesting that it provide a detailed legal and

¹FOIA request from Diane Rado, Education Reporter, *Chicago Tribune*, to Community Consolidated School District 15 (April 18, 2016).

²Letter from Scott B. Thompson, Ed.D., Superintendent of Schools, CCSD 15 FOIA Officer, to Diane Rado, [Education Reporter, *Chicago Tribune*] (April 25, 2016).

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factual basis for its assertion of sections 7(1)(f), 7(1)(m), and 7(1)(p). On May 17, 2016, the District provided copies of the withheld records and a written response stating that the final contract did not exist at the time of Ms. Rado's request. The District contended that a confidential memorandum to the Board about the contract and preliminary drafts of the contract are exempt under section 7(1)(f) of FOIA because "these documents were predecisional and/or draft documents, and none of these documents have been publicly cited and identified by the Board President."³ The District asserted that preliminary drafts of the written contract are also exempt under section 7(1)(p) of FOIA because the documents included the Board's positions in negotiations. The District further asserted that the confidential memorandum is exempt under section 7(1)(m) of FOIA as confidential communication containing legal advice from the Board's attorney. On May 19, 2016, this office sent the District's written response to Ms. Rado; she did not reply.

ANALYSIS

"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); *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 2014).

Section 7(1)(f) of FOIA

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." "[A]s a matter of public policy, section 7(1)(f) exempts from disclosure predecisional materials used by a public body in its deliberative process." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 248 (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. However, the exemption does not extend to communications between public bodies and private third parties who are not consultants. *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 13, 121 S. Ct. 1060, 1069 (2001) (communications with third parties that have independent interests and that stand to benefit from the public body's final decision cannot be characterized as intra-agency communications under

³Letter from Jessica J. Riddick, Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP, to Matt Hartman, Assistant Attorney General, Public Access Bureau (May 17, 2016), at 3.

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the exemption for deliberative material in the federal FOIA (5 U.S.C. § 552(b)(5) (West 2000));⁴ *Levy v. United States Postal Service*, 567 F. Supp.2d 162, 166 (D.D.C. 1982) ("Information concerning an interactive process between an agency and an outside third party is not deliberative in nature, because such information is no longer secret and cannot advance the policy objectives that Exemption 5 is intended to serve."); *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 26456, issued December 31, 2013, at 3 (general contractor's draft proposals for a construction project do not constitute a city's pre-decisional deliberative material).

The District's response to this office asserted the following:

In the instant case, the contract has not yet been finalized and remains in draft form; therefore, the draft contract proposals may be characterized as preliminary and properly fall within the provisions of 7(1)(f). Similarly, the confidential memorandum was drafted to provide analysis and input into the Board's decision whether to ratify the agreement. This memorandum exemplifies the deliberative process contemplated by *Harwood v. McDonough, supra*.⁵

This office has reviewed the responsive records, which are draft proposals and preliminary contract language exchanged between the District and the Classroom Teachers Council as well as a confidential memorandum from the superintendent to the Board. The minutes of the Board's April 13, 2016, meeting state that the Board voted to approve the contract "as presented."⁶ A video of the meeting posted on the District's website shows that the District's superintendent presented a summary of the terms of the agreements that is consistent with the summary of terms posted on the District's website.⁷ At the time of Ms. Rado's FOIA request, the Board had approved the general terms of the contract, but the draft of the final contract and proposed contract language had not been finalized. The Public Access Bureau has previously

⁴Federal FOIA Exemption 5 applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]"

⁵Letter from Jessica J. Riddick, Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP, to Matt Hartman, Assistant Attorney General, Public Access Bureau (May 17, 2016), at 3.

⁶Board of Education of Community Consolidated School District 15, Regular Meeting, April 13, 2016, Minutes 3.

⁷Board of Education of Community Consolidated School District 15, Regular Meeting, April 13, 2016, available at http://ccsd15.granicus.com/MediaPlayer.php?clip_id=131&embed=1&auto_start=0&starttime=0&stoptime=7498&player_width=640&player_height=480, last visited June 3, 2016.

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concluded that a draft teacher contract was exempt as a preliminary draft under section 7(1)(f) of FOIA where the school board had approved the contract, but had not finalized the language of the contract. Ill. Att'y Gen. PAC Req. Rev. Ltr. 20502, issued July 19, 2012. Although the draft proposals and preliminary contract language were generated in the process of developing the teachers' contract, those records do not constitute inter-agency pre-decisional and deliberative material. Rather, those records were exchanged between the District and representatives of the Classroom Teachers Council, a third party with a private interest in the teachers' contract. Because representatives of the Classroom Teachers Council are a third party, the draft proposals and language exchanged between the District and the Classroom Teachers Council do not constitute inter-agency or intra-agency pre-decisional deliberative material. Accordingly, we conclude that the District has not sustained its burden of demonstrating that the draft proposals and draft contract language are exempt from disclosure pursuant to section 7(1)(f) of FOIA.

Conversely, the confidential memorandum to the Board is an intra-agency communication that contains the superintendent's analysis of the proposed contract as well as an overview of the recommendations of the District's attorney concerning the proposed terms. Such a communication is pre-decisional in nature, and there is no indication that it has been cited or publicly identified by the head of the public body. Accordingly, we conclude that the District has sustained its burden of demonstrating that the confidential memorandum is exempt from disclosure pursuant to section 7(1)(f) of FOIA. Because that determination is dispositive, we decline to address the District's assertion that the memorandum is exempt from disclosure under section 7(1)(m) of FOIA.

Section 7(1)(p) of FOIA

The District also asserted that the draft proposals and preliminary contract language are exempt from disclosure pursuant to section 7(1)(p) of FOIA, which exempts "[r]ecords relating to collective negotiating matters between public bodies and their employees or representatives, except that any final contract or agreement shall be subject to inspection and copying."

The District's response to this office asserted that the draft proposals and preliminary contract language contain the Board's positions on the items subject to negotiations with the Classroom Teachers Council. This office reviewed the draft proposals and preliminary draft contract language, which contain both the District's and the Classroom Teachers Council's positions on items discussed during negotiations on the proposed contract. Because the draft proposals and preliminary contract language constitute the substance of the District's ongoing collective negotiations with the teachers' representatives concerning a proposed contract, those records are exempt from disclosure under the plain language of section 7(1)(p) of FOIA. Accordingly, we conclude the District has sustained its burden of demonstrating that the draft

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proposals and preliminary contract language are exempt from disclosure pursuant to section 7(1)(p) 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, you may contact me at (217) 782-9054 or the Springfield address listed on the first page of this letter.

Very truly yours,



MATT HARTMAN
Assistant Attorney General
Public Access Bureau

41667 71f proper improper 71p proper sd