

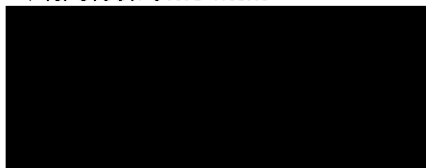


OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

Kwame Raoul  
ATTORNEY GENERAL

February 7, 2019

*Via electronic mail*



*Via electronic mail*

Mr. Brian P. Crowley  
Attorney for Glen Ellyn School District No. 41  
Franczek Radelet P.C.  
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Chicago, Illinois 60606  
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RE: FOIA Request for Review – 2018 PAC 53659

Dear [REDACTED] and Mr. Crowley:

This determination letter is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2016)). For the reasons that follow, the Public Access Bureau concludes that Glen Ellyn School District No. 41 (School District) improperly withheld a certain set of records responsive to [REDACTED]'s May 16, 2018, FOIA request.

On that date, [REDACTED] submitted a FOIA request to the School District seeking copies of all correspondence "to, and from, District 41 school board members Kurt Buchholz and/or Stephanie Clark to, and from, any District 41 employee \* \* \* and to, and from, Superintendent Paul Gordon containing any of the following words: observe (observation), visit (visitation), integration (integrate) from January 1, 2018, until today's date[.]"<sup>1</sup> On May 23, 2018, the School District extended the time to respond pursuant to section 3(e) of FOIA (5 ILCS 140/3(e) (West 2016)). On May 31, 2018, the School District provided [REDACTED] with copies of certain responsive records, but withheld others pursuant to sections 7(1)(f), 7(1)(m), and 7(1)(p) of FOIA (5 ILCS 140/7(1)(f), (1)(m), (1)(p) (West 2017 Supp.)).

<sup>1</sup>E-mail from [REDACTED] to Nancy [Mogk] (May 16, 2018).

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On June 18, 2018, this office received ██████████'s Request for Review disputing the partial denial of her request.

On June 26, 2018, this office forwarded a copy of the Request for Review to the School District and asked it to provide copies of the records that it withheld for this office's confidential review, together with a detailed explanation of the legal and factual basis for the asserted exemptions. On July 11, 2018, this office received the requested materials. On July 15, 2018, this office forwarded a copy of the School District's response to ██████████. She e-mailed this office on August 17, 2018, maintaining that the School District improperly denied her request for certain records as pre-decisional: "The district continues to deny FOIA requests on the basis that the items requested are 'pre-decisional' but has never cited an actual decision to which the documents pertain."<sup>2</sup>

### 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 2016); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body that withholds records "has the burden of proving by clear and convincing evidence" that the records are exempt from disclosure. 5 ILCS 140/1.2 (West 2016). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

### 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." 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 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. Section 7(1)(f) does not exempt from disclosure purely factual material. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 13-015, issued September 24, 2013, at 7. Rather, "[o]nly those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶24, 7 N.E.3d 741, 748 (2014) (quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir.

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<sup>2</sup>E-mail from ██████████ to [Public Access Bureau] (August 17, 2018).

2010)). "[T]he critical question is whether 'disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Chemical Weapons Working Group v. U.S. E.P.A.*, 185 F.R.D. 1, 3 (D.D.C. 1999) (quoting *Dudman Communications v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

In its response to this office, the School District stated that it had withheld internal communications "among, in some cases, Board members, in one instance, the Superintendent with Board members, and in other cases, the School District's attorney with Board members."<sup>3</sup> The School District further asserted, in pertinent part: "The records include opinions regarding specific School District matters and some records include draft documents for review by the various participants in the email discussions. The intended purpose of the various communications was for the District to share opinions and formulate actions regarding specific School District matters."<sup>4</sup> Additionally, the School District asserted that some of those e-mails also fall within the scope of the section 7(1)(m) exemption.<sup>5</sup> Specifically, the School District asserted that those records "were either prepared by or sent to the School District's attorney where his client, the School District, is either seeking or receiving his confidential legal advice regarding specific School District matters."<sup>6</sup>

This office's review of the e-mails withheld under only section 7(1)(f) confirmed that they consist of internal communications that were exchanged in the process of formulating actions. The e-mails reveal the individuals involved in the exchanges sharing opinions on specific School District issues and discussing certain draft documents. The e-mails that were also withheld pursuant to section 7(1)(m) similarly reflect predecisional, deliberative communications. In particular, those e-mails reflect the School District consulting with its attorney as it formulated action and sought legal advice. Although the School District did not

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<sup>3</sup>Letter from Brian P. Crowley to Teresa Lim, Assistant Attorney General, Public Access Bureau, (July 11, 2018), at 2.

<sup>4</sup>Letter from Brian P. Crowley to Teresa Lim, Assistant Attorney General, Public Access Bureau, (July 11, 2018), at 2.

<sup>5</sup>Section 7(1)(m) of FOIA (5 ILCS 140/7(1)(m) (West 2017 Supp.)) exempts from disclosure:

Communications between a public body and an attorney \* \* \*  
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[.]

<sup>6</sup>Letter from Brian P. Crowley to Teresa Lim, Assistant Attorney General, Public Access Bureau, (July 11, 2018), at 2.

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claim that an actual decision ultimately stemmed from the e-mails, that fact does not undermine the School District's assertion that the records constitute predecisional and deliberative material under section 7(1)(f), as the exemption generally protects both the thought processes behind final decisions and ideas that were explored on a preliminary basis but never adopted. Further, while the communications contain some factual information, that information is inextricably intertwined in the predecisional deliberations. There is no indication that the e-mails were publicly cited or identified by the head of the School District. Because the communications are deliberative and pre-decisional in nature, this office concludes that the School District did not improperly withhold them pursuant to section 7(1)(f) of FOIA.<sup>7</sup>

### Section 7(1)(p) of FOIA

Section 7(1)(p) of FOIA exempts from disclosure "[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." Because FOIA exemptions must be construed narrowly (*Lieber*, 176 Ill. 2d at 407), the term "relating to" in a FOIA exemption does not signify an expansive scope. *See Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶19, 7 N.E.3d 741, 746-47 (2014) (rejecting the contention that the section 7(1)(n) exemption (5 ILCS 140/7(1)(n) (West 2010)) for records "relating to a public body's adjudication of employee grievances or disciplinary cases" encompasses investigatory records that precede disciplinary adjudications because such an "expansive interpretation" would "render a broad category of public documents immune [citation] to public scrutiny. That is contrary to the intent of FOIA."); *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 32159, issued April 20, 2015, at 3 (concluding that because almost every record in possession of the Illinois Department of Corrections arguably relates to security in some manner, section 7(1)(e) of FOIA,<sup>8</sup> which concerns "[r]ecords that relate to or affect the security of correctional institutions and detention facilities[,] "applies to records that could jeopardize the security of a correctional institution if disclosed, rather than any records merely pertaining to security in any manner whatsoever.").

The Attorney General has issued a binding opinion addressing the applicability of section 7(1)(p) to invoices for legal services containing information related to collective bargaining matters. Ill. Att'y Gen. Pub. Acc. Op. No. 14-002, issued April 15, 2014. In that binding opinion, the Attorney General examined the exception for collective negotiating matters in the Open Meetings Act (5 ILCS 120/2(c)(2) (West 2012)) and noted: "Section 7(1)(p) of FOIA serves the corollary purpose of exempting from disclosure records pertaining to such

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<sup>7</sup>Because this determination concludes that the records that were withheld pursuant to section 7(1)(m) of FOIA are exempt from disclosure pursuant to section 7(1)(f), we decline to address the applicability of section 7(1)(m).

<sup>8</sup>5 ILCS 140/7(1)(e) (West 2013 Supp.), as amended by Public Act 98-695, effective July 3, 2014.

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aspects of the collective bargaining process as the negotiating of wages and salaries, terms and conditions of employment, working conditions, and similar matters which are subject to collective bargaining." Ill. Att'y Gen. Pub. Acc. Op. No. 14-002, at 6. The Attorney General concluded that only the portions of the invoices that contained specific information pertaining to the collective bargaining process could be redacted pursuant to section 7(1)(p). Ill. Att'y Gen. Pub. Acc. Op. No. 14-002, at 9. Thus, records must reveal aspects of a collective bargaining process to fall within the scope of the exemption.

In its response to this office, the School District contended that certain responsive records pertained to collective negotiating matters. The School District asserted:

The discussions contained in the emails concern working conditions and are between a representative of the employer (the Board President) and a representative of the Glen Ellyn Education Association (the exclusive bargaining unit for the School District's teachers). Specifically, the discussions regard observations of teacher classrooms, which is contemplated in the School District's collective bargaining agreement with the teachers. The issues identified in the emails, if not resolved, *may result* in a demand to bargain, a grievance under the collective bargaining agreement, or the filing of an unfair labor practice under the Illinois Educational Labor Relations Act. (Emphasis added.)<sup>9</sup>

This office has reviewed the communications at issue and determined that they do not reflect involvement in an active collective bargaining process between the School District and Glen Ellyn Education Association, Illinois Education Association-NEA (Association). Although the records reveal discussions between the School District and Association related to working conditions, the School District's response appears to acknowledge that no formal negotiation process had actually begun. Instead, the School District stated that the issues discussed in the records *may result* in a demand to bargain, a grievance under the collective bargaining agreement, or the filing of an unfair labor practice claim. In the absence of an active collective bargaining process or a demand for collective bargaining that indicates such a process is imminent, the narrowly construed section 7(1)(p) exemption does not encompass records related to working conditions simply because they could lead to collective bargaining if unresolved. In other words, records that merely reflect the possibility of future collective negotiations do not yet relate to actual "collective negotiating matters between public bodies and their employees or representatives[.]" Because the records do not concern matters discussed as

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<sup>9</sup>Letter from Brian P. Crowley to Teresa Lim, Assistant Attorney General, Public Access Bureau, (July 11, 2018), at 3.

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part of a collective bargaining process, this office concludes that the School District has not demonstrated by clear and convincing evidence that the records are exempt from disclosure pursuant to section 7(1)(p) of FOIA. This office requests that the School District provide copies of all the records contained in "Exhibit C" of the School District's response to [REDACTED]

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 the Chicago address listed on the first page of this letter.

Very truly yours,

[REDACTED]

TERESA LIM  
Assistant Attorney General  
Public Access Bureau

53659 f 71f proper 71p improper sd