



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

September 27, 2022

Via electronic mail

Via electronic mail

Ms. Angelica Lis
FOIA Officer
City of Chicago Department of Planning and Development
121 North LaSalle Street, Room 1000
Chicago, Illinois 60602
DPDFOIA@cityofchicago.org

RE: FOIA Request for Review – 2021 PAC 68657

Dear [REDACTED] and Ms. Lis:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2020)). For the reasons that follow, the Public Access Bureau has determined that the City of Chicago (City) Department of Planning and Development (Department) improperly redacted certain information responsive to [REDACTED] FOIA request.

On October 29, 2021, [REDACTED] submitted a FOIA request to the Department seeking copies of e-mails to and from the Department's Managing Deputy Commissioner, Mr. Chip Hastings, between July 1, 2021, and October 28, 2021, containing three keywords related to the intended sale of a City-owned parking lot at 4050 North Laporte. [REDACTED] also requested copies of written correspondence received by Mr. Hastings regarding a parking lot. On November 19, 2021, the Department responded by providing [REDACTED] with copies of records with redactions pursuant to sections 7(1)(b), 7(1)(f), and 7(1)(r) of FOIA (5 ILCS 140/7(1)(b), (1)(f), (1)(r) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558,

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effective August 20, 2021). On November 22, 2021, ██████████ submitted the above-referenced Request for Review contesting the Department's redactions pursuant to sections 7(1)(f) and 7(1)(r) of FOIA.

On November 24, 2021, this office sent a copy of ██████████ Request for Review to the Department and asked it to provide unredacted copies of the withheld records for this office's confidential review and a detailed written explanation of the legal and factual basis for the applicability of the sections 7(1)(f) and 7(1)(r) exemptions. On December 28, 2021, this office received those materials. On December 29, 2021, this office forwarded a copy of the Department's response letter to ██████████ and notified him of his opportunity to reply. He did not reply.

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 2020); *see also Southern Illinoisan v. Illinois Dept. 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 2020).

As an initial matter, the Department did not differentiate which records it withheld under section 7(1)(f) from which records it withheld under section 7(1)(r). Accordingly, this determination letter examines the applicability of each exemption to all of the contested information.

Section 7(1)(r) of FOIA

Section 7(1)(r) exempts from disclosure:

The records, documents, and information relating to real estate purchase negotiations until those negotiations have been completed or otherwise terminated. * * * **The records, documents and information relating to a real estate sale shall be exempt until a sale is consummated.** (Emphasis added.)

By its plain language, section 7(1)(r) allows a public body to withhold communications involved in selling real property owned by the public body until the sale is complete. Nonetheless, the term "relating to" must be read narrowly to comport with FOIA. *See similarly Peoria Journal Star v. City of Peoria*, 2016 IL App (3d) 140838, ¶13, 52 N.E.3d 711, 714 (2016) ("[T]he phrase

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'relating to' [in section 7(1)(n) of FOIA¹] must be read narrowly and in light of FOIA's purpose to generally provide open access to public records."); *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶19, 7 N.E.3d 741, 746-47 (2014), *overruled in part on other grounds by Perry v. Department of Financial and Professional Regulation*, 2018 IL 122349, 106 N.E.3d 1016 (2018) (concluding that it "is contrary to the intent of FOIA" to give the language "relating to" in section 7(1)(n) "an expansive interpretation and render a broad category of public documents immune to public scrutiny.").

In its response to this office, the Department asserted that it properly redacted information pursuant to section 7(1)(r) of FOIA because it was "currently working to sell 4 city owned parking lots."² The Department explained that it had retained commercial real estate brokers Cushman & Wakefield to market the lots, and that: "The sales are still ongoing negotiation. [The Department] is still reviewing applications for this project, and have not made a final selection."³

This office has reviewed the unredacted copies of the requested e-mails, which were provided for our confidential review. Many of the contested e-mails concern the sale of City-owned parcels of land at a time when the Department was marketing the properties and considering offers. The redacted communications involved in soliciting and reviewing offers for the sale of real estate fall within the scope of section 7(1)(r) of FOIA. Section 7(1)(f) also applies to many of these e-mails, though others only fall within the scope of section 7(1)(f), as discussed further below.

On the other hand, certain discrete information redacted from a couple of the e-mails falls outside the scope of the exemption. Specifically, the information redacted from the e-mail from a representative of the Six Corners Chamber of Commerce falls outside the scope of the exemption because it is extraneous to the Department's efforts to negotiate and complete property sales. Similarly, the redacted utilization rate tables are not akin to offers, evaluations of offers, negotiations with prospective buyers, or other aspects of real estate purchase negotiations and real estate sales themselves. Rather, the utilization rate tables are at a level removed from

¹Section 7(1)(n) of FOIA (5 ILCS 140/7(1)(n) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558, effective August 20, 2021) exempts from inspection and copying "[r]ecords relating to a public body's adjudication of employee grievances or disciplinary cases[.]"

²Letter from Angelica Lis, FOIA Officer, City of Chicago Department of Planning and Development, to Jane Sternecky, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (December 28, 2021), a [2].

³Letter from Angelica Lis, FOIA Officer, City of Chicago Department of Planning and Development, to Jane Sternecky, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (December 28, 2021), a [2].

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those processes as tangential considerations that do not directly relate to purchase negotiations and sales. Therefore, the Department did not prove by clear and convincing evidence that those records are exempt from disclosure under section 7(1)(r) of FOIA.

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 is equivalent in most respects to the deliberative process exemption in the Federal FOIA (5 U.S.C. §552(b)(5) (2020)), which 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.

However, "[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*, 2013 IL App (1st) 121846, ¶24, 7 N.E.3d 741, 748 (2013) (quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010)). The Illinois Appellate Court has stated that "purely factual material" is not exempt from disclosure under section 7(1)(f) unless "inextricably intertwined" with predecisional discussions. *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶36, 980 N.E.2d 733, 743 (2012) (quoting *Enviro Tech Int'l, Inc. v. United States Environmental Protection Agency*, 371 F.3d 370, 374 (7th Cir. 2004)).

In its response to this office, the Department asserted that it redacted "deliberative conversations, memos, and attachments."⁴ The Department contended that these records contain preliminary opinions and the formulation of policies and actions. This office's review confirmed that the Department withheld various internal communications pursuant to section 7(1)(f) of FOIA that are predecisional and deliberative in nature as the Department formulated actions with respect to the sale of the parking lot. These materials reflecting the give and take of the deliberative process and are therefore exempt from disclosure pursuant to section 7(1)(f) of FOIA.

However, the e-mail from the Six Corners Chamber of Commerce is not exempt under section 7(1)(f) because it is a third party communication with an entity representing

⁴Letter from Angelica Lis, FOIA Officer, City of Chicago Department of Planning and Development, to Jane Sternecky, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (December 28, 2021), at [2].

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independent interests. Additionally, the Department did not demonstrate that the utilization rate tables for the parking lots meet the terms of the exemption. It is clear from portions of the e-mails disclosed to [REDACTED] that rate utilization tables were considered as part of the deliberative process; however, the tables themselves consist of purely factual information that does not provide any additional insight into the process of formulating action and, therefore, are not inextricably intertwined with any undisclosed predecisional discussions. Accordingly, the utilization rate tables are not exempt from disclosure.

Additionally, it is unclear from the records this office reviewed confidentially whether the Department withheld final promotional materials, rather than drafts. To the extent that it withheld marketing materials disseminated externally, the Department did not demonstrate that these materials are exempt from disclosure under either exemption and should disclose them.

To remedy its improper withholding of the information identified above as non-exempt, the Public Access Bureau asks that the Department provide [REDACTED] with an updated copy of the requested e-mails without the redaction of these discrete portions.

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, you may contact me at jane.sternecky@ilag.gov. This letter serves to close this file.

Very truly yours,

[REDACTED]
JANE STERNECKY
Assistant Attorney General
Public Access Bureau

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