



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 7, 2017

Via electronic mail

Ms. Alexandra Scott
Mandel Legal Aid Clinic
6020 S. University Avenue
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Via electronic mail

Mr. Joel M. Diers
Freedom of Information Office
Illinois Department of Corrections
1301 Concordia Court
P.O. Box 19277
Springfield, Illinois 62794-9277
joel.diers@doc.illinois.gov

RE: FOIA Request for Review – 2016 PAC 45170; IDOC 16 1110066

Dear Ms. Scott and Mr. Diers:

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 the Illinois Department of Corrections (IDOC) violated FOIA by improperly denying Ms. Alexandra Scott's November 10, 2016, FOIA request.

On that date, Ms. Scott, on behalf of the Mandel Legal Aid Clinic, submitted a FOIA request to IDOC seeking "information regarding the Illinois Department of Corrections Gang Renunciation program under the Freedom of Information Act. I request any general information you may have, including, but not limited to the structure of the program."¹ On November 14, 2016, IDOC denied Ms. Scott's request pursuant to section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2015 Supp.), as amended by Public Act 99-642, effective July 28, 2016), citing section 3-2-5(c) of the Unified Code of Corrections (UCC) (730 ILCS 5/3-2-5(c)

¹Letter from Alexandra Scott, Mandel Legal Clinic, to Freedom of Information Officer Lisa Weitekamp, Illinois Department of Corrections (November 10, 2016).

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(West 2014)), which exempts information collected and maintained by the gang intelligence unit from "disclosure under the Freedom of Information Act as the information contained is highly confidential and may be harmful if disclosed." In her Request for Review, Ms. Scott disputed IDOC's denial, arguing that the records she sought pertained to the structure of the Gang Renunciation Program, not confidential information about the particularities of inmate gang populations, and therefore are not prohibited from being disclosed under section 3-2-5(c) of the UCC.

On December 7, 2016, this office forwarded a copy of the Request for Review to IDOC and asked it to provide the Public Access Bureau with (i) copies of any records responsive to Ms. Scott's request and (ii) a detailed explanation of the factual and legal bases for the exemptions asserted, addressing in particular whether the records sought by Ms. Scott pertaining to the structure of the Gang Renunciation Program were collected and maintained by the gang intelligence unit pursuant to the unit's responsibilities as described in section 3-2-5(c) of the UCC. On December 8, 2016, IDOC submitted a written response, but did not provide this office with copies of records responsive to Ms. Scott's request. Ms. Scott did not reply. On February 24, 2017, an assistant attorney general in the Public Access Bureau sent an e-mail to IDOC renewing this office's request for copies of the records that were withheld for confidential review. On the same day, IDOC's legal counsel responded by stating that because the records contain "highly sensitive" information, "the statute gives IDOC discretion on who this information gets disseminated to and [in] this instance we cannot comply with your request."²

DETERMINATION

Section 9.5(c)

As a threshold matter, the plain language of section 3-2-5(c) of the UCC cited below does not address the Request for Review process or give IDOC discretion to refuse to provide copies of records to the Public Access Counselor for confidential review. Section 9.5(c) of FOIA (5 ILCS 140/9.5(c) (West 2014)) expressly and unambiguously provides that each public body "**shall** provide copies of records requested and **shall** otherwise fully cooperate with the Public Access Counselor." (Emphasis added.) Section 9.5(c) does not afford IDOC discretion to disregard its statutory obligation to fully cooperate with this inquiry. The General Assembly clearly recognized that the Public Access Counselor must have access to all pertinent records in order to conduct a complete review of a public body's compliance with FOIA. The following colloquy between Representative Elaine Nekritz and Representative Michael Madigan, the House sponsor of the bill, during the House debate on Senate Bill 189 (which, as Public Act 96-542, effective January 1, 2010, created the Office of the Public Access Counselor), evinces the General Assembly's intention to vest the Public Access Counselor with complete authority to conduct confidential reviews of records:

²E-mail from Joel M. Diers to Laura Harter (February 24, 2017).

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Nekritz: Thank you Mr. Speaker. I just have some questions * * * to clarify the legislative intent under this. * * * It's my understanding that under this Bill, an agency's required to provide records requested by the public access counselor. What if some other State or Federal Law precludes disclosure of those records to some other party like HIPAA, an IG report or something like that? How does that * * * get resolved?

Madigan: Point number one, *the Attorney General will review those documents in confidence. They would be kept confidential.* Point number two, if it were a Federal Law in conflict, why, the Federal Law would control.

Nekritz: [A]nd if some investigating authority such as the U.S. Attorney asked to have that certain records not be disclosed * * * what would be the result there?

Madigan: * * * [T]he Office of the U.S. Attorney could interact with the Office of the Attorney General, make a request, but *the final judgment...the final decision would be made by the Attorney General.* (Emphasis added.) Remarks of Rep. Nekritz and Rep. Madigan, May 27, 2009, House Debate on Senate Bill No. 189, at 105.

The General Assembly clearly did not intend to allow public bodies to decide what records they would or would not submit for the Public Access Counselor's review. IDOC's refusal to provide copies of the records in question undermines the Public Access Counselor's duty to conduct the type of comprehensive review that the General Assembly deemed to be crucial when it enacted Public Act 96-542. This refusal violates section 9.5(c) of FOIA (*see* Ill. Att'y Gen. Pub. Acc. Op. No. 12-007, issued April 2, 2012).

Despite IDOC's lack of cooperation, this office will analyze the assertion of section 7(1)(a) based on the limited information available for our review. A court "need not conduct an *in camera* review where the public body meets its burden of showing that the statutory exemption applies by means of affidavits." *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 469 (2003). However, such affidavits "will not suffice if the public body's claims are conclusory, merely recite statutory standards, or are too vague or sweeping." *Illinois Education Ass'n*, 204 Ill. 2d at 469. Because IDOC has refused to provide this office with the records in question for our confidential review, we will determine whether the response letter submitted by IDOC provides clear and convincing evidence that the withheld records are exempt from disclosure under section 7(1)(a).

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Section 7(1)(a)

FOIA provides that "[a]ll 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). 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). "To meet its burden * * *, the public body must provide a detailed justification for its claim of exemption, addressing the requested records specifically and in a manner allowing for adequate adversarial testing." *Rockford Police Benevolent and Protective Ass'n, Unit No. 6 v. Morrissey*, 398 Ill. App. 3d 145, 150 (2nd Dist. 2010).

Section 7(1)(a) of FOIA exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The General Assembly "has authorized exemptions to the FOIA's expansive disclosure policy when a given disclosure is not just prohibited 'by federal or State law or rules and regulations adopted under federal or State law' but *specifically* so prohibited." (Emphasis in original.) *Better Government Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 814 (4th Dist. 2008).

IDOC cited section 3-2-5(c) of the UCC as its basis for denying the records in question under section 7(1)(a) of FOIA. Section 3-2-5(c) provides:

The Department shall create a gang intelligence unit under the supervision of the Director. The unit shall be specifically designed to gather information regarding the inmate gang population, monitor the activities of gangs, and prevent the furtherance of gang activities through the development and implementation of policies aimed at deterring gang activity. The Director shall appoint a Corrections Intelligence Coordinator.

All information *collected and maintained* by the [gang intelligence] unit shall be highly confidential, and access to that information shall be restricted by [IDOC]. * * * Due to the highly sensitive nature of the information, the information is exempt from requests for disclosure under the Freedom of Information Act as the information contained is highly confidential and may be harmful if disclosed. (Emphasis added.)

Generally, principles of statutory construction interpret the term "and" as conjunctive rather than disjunctive. *City of Carbondale v. Bower*, 332 Ill. App. 3d 928, 933 (2002), citing *People ex rel. Aramburu v. City of Chicago*, 73 Ill. App. 2d 184 (1966). "As a general rule, the use of the conjunctive, as in the word 'and,' indicates that the legislature intended for *all* of the listed

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requirements to be met." *Byung Moo Soh v. Target Marketing Systems, Inc.*, 353 Ill. App. 3d 126, 131 (2004).

Section 3-2-5(c) of the UCC provides that the gang intelligence unit is "designed **to gather information regarding the inmate gang population, monitor the activities of gangs,** and prevent the furtherance of gang activities through the development and implementation of policies aimed at deterring gang activity." Section 3-2-5(c) further provides that "[a]ll information **collected and maintained** by the [gang intelligence] unit shall be highly confidential, and access to that information shall be restricted by [IDOC]". (Emphasis added.)

Ms. Scott does not seek information regarding the inmate gang population or gang activities. Rather, she seeks general information regarding the Gang Renunciation Program including, but not limited to, the structure of that program. IDOC's response to this office stated that the "[t]he information regarding renunciation sought by Ms. Scott is maintained by the gang intelligence unit."³ The mere fact that the unit "maintains" such general program information, however, does not mean that it is exempt from disclosure under section 3-2-5(c) of the UCC. The information must be both "collected and maintained" by the unit to fall within the scope of that provision.

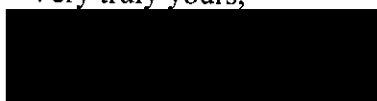
There is no indication from IDOC's response that the records it identified as responsive to Ms. Scott's request included information "collected" by the gang intelligence unit. It seems more likely that the general program information she is seeking would have been *created* by the gang intelligence unit or perhaps other divisions of IDOC. Because IDOC has refused to provide this office with copies of the responsive records, we are unable to verify the records' origins. In light of IDOC's scant assertions and lack of supporting evidence, this office cannot conclude that IDOC has met its burden of demonstrating by clear and convincing evidence that the records Ms. Scott sought are prohibited from being disclosed by section 3-2-5(c) of the UCC. Accordingly, this office finds that IDOC violated FOIA by denying Ms. Scott's request pursuant to section 7(1)(a). This office requests that IDOC provide Ms. Scott with records responsive to her request for general information on the Gang Renunciation Program, including, but not limited to the structure of the program.

³Letter from Joel M. Diers, Freedom of Information Office, to Laura Harter, Assistant Attorney General, Office of the Illinois Attorney General (December 8, 2016).

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The Public Access Counselor has determined that resolution of this issue does not require the issuance of a binding opinion. This letter shall serve to close the matter. If you have any questions, please contact me at the Springfield address listed on the first page of this letter. Thank you.

Very truly yours,

A solid black rectangular box used to redact the signature of Laura S. Harter.

LAURA S. HARTER
Assistant Attorney General
Public Access Bureau

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