OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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Via electronic mail
Mr. Mark Kennedy
Director of Legal Affairs
Physicians Committee for Responsible Medicine
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Via electronic mail
Mr. Frank Martinez
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RE: FOIA Request for Review – 2013 PAC 26247

Dear Mr. Kennedy and Mr. Martinez:

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 stated below, the Public Access Bureau concludes that the response by the Southern Illinois University (University) School of Medicine (School of Medicine) to the FOIA request submitted by the Physicians Committee for Responsible Medicine (Committee) on September 12, 2013, did not violate the requirements of FOIA.

On that date, the Committee submitted a FOIA request to the School of Medicine seeking various records regarding the School of Medicine's use of animals in its emergency medicine residency program, including communications from the School of Medicine's Office of the Dean and the Office of the Public Affairs related to this issue. On September 26, 2016, the School of Medicine provided some responsive records but withheld others pursuant to section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2012)). The Committee's Request for Review disputes the withholding of these records.

On October 9, 2013, this office sent a copy of the Request for Review to the School of Medicine and requested copies of the records that were withheld, for our confidential review, together with a detailed explanation of the applicability of section 7(1)(f) of FOIA. This office received those materials on October 18, 2013. On October 22, 2013, we forwarded a copy of the School of Medicine's response to the Committee; the Committee did not reply.

DETERMINATION

All public records in the possession or custody of a public body are "presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2012). 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 2012).

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.***" (Emphasis added.). The section 7(1)(f) exemption is equivalent to the deliberative process exemption in the federal FOIA (5 U.S.C. §552(b)(5) (West 2014)),[1] 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.

Relying on the Illinois Appellate Court's decision in *Dumke v. City of Chicago*, 2013 IL App (1st) 121668, 994 N.E.2d 573 (2013), the Committee asserted in its Request for Review that the School of Medicine waived the exemption from disclosure found in section 7(1)(f) because the School of Medicine's director of public affairs – who the Committee argued is the duly authorized designee of the head of the School of Medicine – issued a public statement regarding its evaluation of the use of animals in its emergency medicine residency program.

[1]Because Illinois' FOIA statute is based on the federal FOIA statute, decisions construing the latter, while not controlling, may provide helpful and relevant precedents in construing the state Act. *Margolis v. Director, Ill. Department of Revenue*, 180 Ill. App. 3d 1084, 1087 (1st Dist. 1989).

Specifically, the Committee argued:

> [U]nder the statute, Ms. Carlson, as director of SIU's Office of Public Affairs is the "duly authorized designee" authorized to speak for President, Glenn Poshard, Ph.D., the 'head [of] the public body," SIU. Because Ms. Carlson has publicly cited and identified SIU's evaluation of its training methods and SIU's investigation into its methods of preparing physician trainees for patient care, SIU has waived exemption 7(1)(f) with respect to the evaluation and the investigation. In *Dumke*, the court explained that "[b]oth 'cite' and 'identify' have a plain and ordinary meaning, as well as a common understanding," * * *, and * * * "if the communication, record or portion thereof is 'publicly cited and identified,' it loses its exemption regardless of whether the communication was adopted or incorporated by the agency." [ ] Under these facts and circumstances, it was inappropriate for SIU to invoke exemption 7(1)(f) to withhold communications related to its evaluation and investigation of SIU's training methods.[2]

However, the School of Medicine asserted in its response to this office that:

> Ms. Carlson was not acting on behalf of President Proshard when she communicated with the media, but was merely acting in her role as Director of the Office of Public Affairs. * * * More importantly, Ms. Carlson did not comment publically about or cite the emails in question. [The withheld e-mails provided to the Public Access Bureau for confidential review in] Exhibit No. 1 and Exhibit No. 3 have no correlation to the public statement and, in any event, she made no reference to these emails in the public statement. Likewise, Exhibit No. 2 deals with changes being made to a subsequent public statement, not the one at issue, and at no point did Ms. Carlson reference or cite to said email."[3]

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[2]Letter from Mark Kennedy, [Director of Legal Affairs, Physicians Committee for Responsible Medicine], to Public Access Counselor, Office of the Attorney General (September 27, 2013), at 3.

[3]Letter from Frank Martinez, Associate General Counsel and FOIA Officer, [SIU School of Medicine], to Shari West, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (October 18, 2013), at 2.

This office has reviewed the e-mails in question and, as a preliminary matter, has determined that they constitute pre-decisional and deliberative records in which opinions and recommendations are expressed and that they contain discussions relating to the School of Medicine's policies or actions. Therefore, this office must determine whether the public statement issued by the School of Medicine's director of public affairs regarding the evaluation of the use of animals in its emergency medicine residency program waived the applicability of the section 7(1)(f) exemption.

Section 2(e) of FOIA (West 2012)) defines the "[h]ead of the public body" as the "president, mayor, chairman, presiding officer, director, superintendent, manager, supervisor or individual otherwise holding primary executive and administrative authority for the public body, or such person's duly authorized designee." As discussed below, even if the director of public affairs could be considered the duly authorized designee of the University, there is no indication that the director of public affairs "publicly cited and identified" the e-mails at issue for purposes of section 7(1)(f).

In *Dumke*, 2013 IL App (1st) 121668, 994 N.E.2d 573 (2013), an Illinois Appellate Court considered whether comments made by the mayor of the City of Chicago (City) during a press conference on a consultant's report of the City's police department operations waived the report from being withheld under section 7(1)(f). The court held that because the mayor directly referenced the consultant's report in a press conference as the basis for the City's decision to reassign police officers and issued a press release that also expressly cited the report, the report was no longer protected by the section 7(1)(f) exemption. Specifically, the court stated:

> Mayor Daley publicly cited and identified the consultants' study and resulting report in the press conference and press release. He mentioned and brought forward the report as support for his reorganization plan. Not only did Mayor Daley cite and identify the report, he acknowledged and commended its authors. *Dumke*, 2013 IL App (1st) 121668, ¶28, 994 N.E.2d at 583.

In contrast, the court in *Harwood* held that comments made by the head of the public body, and the Governor, citing information from a one-page executive summary of the report at issue in that matter, did not waive the applicability of section 7(1)(f). The Court emphasized that the comments did not cite the "complete, full" report. *Harwood*, 344 Ill. App. 3d at 249.

Here, the School of Medicine has specifically asserted that Ms. Carlson did not comment publically about or cite the e-mails at issue when she issued a public statement to the media regarding the School of Medicine's use of animals in its emergency medicine residency

program. Our review of these e-mails and the public statement issued by Ms. Carlson that the Committee provided to this office with its Request for Review confirm the School of Medicine's assertion. Under the plain language of the exemption, the head of a public body must cite a "***specific record*** or relevant portion of a ***record***[ ]" to waive section 7(1)(f). (Emphasis added.) 5 ILCS 140/7(1)(f) (West 2012). A public statement about a particular subject without reference to a specific record does not preclude a public body from withholding that specific record if it falls within the section of the exemption. Therefore, the Committee's reliance on *Dumke* is misplaced, and we conclude that the School of Medicine did not improperly withhold the e-mails in question under section 7(1)(f) of FOIA.

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 by mail at the Chicago address listed on the first page of this letter or by e-mail at sbarnaby@atg.state.il.us. This letter serves to close this file.

Very truly yours,

[redacted]

SHANNON BARNABY
Assistant Attorney General
Public Access Bureau

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