



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 19, 2018

Via electronic mail



Via electronic mail

Ms. Lori Kikos
FOIA Officer
First Fire Protection District of Antioch Township
835 Holbeck Drive
Antioch, Illinois 60002
lkikos@antiochfire.org

RE: FOIA Request for Review – 2015 PAC 34218

Dear [REDACTED] and Ms. Kikos:

This determination 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 the First Fire Protection District of Antioch Township (District) improperly denied [REDACTED] March 11, 2015, FOIA request.

On that date, [REDACTED] submitted a FOIA request to the District seeking a copy of the budget that the District Administrator, Mr. Ted Jozewiak, provided to the District's trustees during the District's February 12, 2015, Board of Trustees (Board) meeting. On March 16, 2015, the District denied the request under section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2013 Supp.), as amended by Public Act 98-695, effective July 3, 2014), stating: "The requested documents although they may have been discussed at the meeting were not approved; in fact no action was taken for or against them. Providing copies of preliminary drafts of the requested documents would only serve to confuse the public and imply that action had been taken."¹ On March 17, 2015, [REDACTED] submitted this Request for Review disputing the

¹Letter from Lori Kikos, FOIA Officer, First Fire District of Antioch, to [REDACTED] (March 16, 2015).

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District's denial. He stated that Administrator Jozewiak had referenced the budgetary records during the meeting.

On March 30, 2015, this office sent a copy of the Request for Review to the District and requested unredacted copies of the responsive records for our confidential review, together with a detailed explanation for its assertion of section 7(1)(f). In particular, this office asked the District to address whether the withheld records had been publicly cited and identified by the head of the District. On April 3, 2015, the District furnished those records and a written response, maintaining that its denial was proper. On June 16, 2015, this office sent a follow up letter to the District, asking it to explain whether the person with the title of "District Administrator" is the "head of the public body" under section 2(e) of FOIA (5 ILCS 140/2(e) (West 2012), as amended by Public Acts 98-806, effective January 1, 2015; 98-1129, effective December 3, 2014). On June 23, 2015, the District responded. [REDACTED] 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 2016). 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 2016).

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." Section 2(e) of FOIA defines "head 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." Section 7(1)(f) 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.

The District stated that the withheld records pertained to a referendum that was on the ballot for the April 7, 2015, election, and that "[a]t the February 12, 2015, meeting the District Administrator, Ted Jozefiak, gave the District Trustees rough drafts of budgets he had

prepared, one as if the referendum passed and one as if referendum failed."² Administrator Jozefiak merely handed out the budgets, according to the District; "There was no analysis or discussion of the contents by the Trustees nor at any time were the drafts publicly cited by the Trustees."³ The District asserted that the budgets were properly withheld as preliminary drafts so that they would not "be mistakenly interpreted as the District's plans for the future[.]"⁴

This office has reviewed unredacted copies of the withheld budgets as well as the minutes of the February 12, 2015, meeting during which the District Administrator passed the budgets out to the trustees. The pertinent portion of the minutes provides, in full:

Ted handed out copies of the first drafted budget of 2015-2016 with numbers that reflect if the referendum passes or fails, please look over. Ted mentioned that chief sent out an e-mail regarding the Denali lease is ending and the district will be out \$962.00 a month. Ted also mentioned that a Lake County sheriff had wondered if they can store one of their special response vehicles at station 3, as they need to get it out of the old lake county fairgrounds location. Trustees asked that Ted look into a monthly fee to be charged and chief will need to know who needs access to the building to give them a key fob if this is approved. Ted also looked into a loan of \$750,000 at 3-31/2%. Trustee Van Patten stated she looked into a line of credit instead of a loan as she feels this would work out better for the district of only borrowing what they would need, and is checking on the rates. A lengthy discussion ensued regarding the amount of crews the district would be able to pay for if the referendum failed. In summary the trustees said they would pay for 3 employees and 1 metro personnel.^[5]

Thus, it appears that Administrator Jozefiak led the trustees in a substantial discussion of the projected budgetary impact of the impending referendum.

²Letter from Daniel B. Venturi, Law Offices of Daniel B. Venturi Ltd., to Josh Jones, Assistant Attorney General, Office of the Attorney General (April 3, 2015), at 1.

³Letter from Daniel B. Venturi, Law Offices of Daniel B. Venturi Ltd., to Josh Jones, Assistant Attorney General, Office of the Attorney General (April 3, 2015), at 1.

⁴Letter from Daniel B. Venturi, Law Offices of Daniel B. Venturi Ltd., to Josh Jones, Assistant Attorney General, Office of the Attorney General (April 3, 2015), at 2.

⁵First Fire Protection District of Antioch Township, Meeting, February 12, 2015, Minutes 3.

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In response to this office's inquiry about whether Administrator Jozefiak qualified as the head of the District, the District's counsel explained:

The administrator has no such authority.

The district administrator position is a part time position that acts as a liaison between the Fire Chief, who runs the day to day operations, and the Board of Trustees of the District. The administrator does not have any authority to contract on behalf of the District, all such authority is exclusively vested in the Board of Trustees and has not been delegated.⁶

The District's counsel also provided this office with a copy of the job description for the District Administrator position, which, conversely, describes the District Administrator as "the chief executive" of the District.⁷ In light of that label and the rest of his job description, it appears that Administrator Jozefiak held primary executive and administrative authority for the District or, at a minimum, was the duly authorized designee of the Board of Trustees. Accordingly, the issue is whether he "publicly cited and identified" the budgetary documents within the meaning of section 7(1)(f).

In *Dumke v. City of Chicago*, 2013 IL App (1st) 121668, 994 N.E.2d 573 (2013), the Illinois Appellate Court considered whether a public statement by the mayor of the City of Chicago "publicly cited and identified" a record for purposes of section 7(1)(f). The plaintiff alleged that then-Mayor Richard Daley waived the section 7(1)(f) exemption with respect to a study prepared for the Chicago Police Department by an outside consulting firm when he referred to the study during a press conference and in an ensuing press release. *Dumke*, 2013 IL App (1st) 121668, ¶¶16, 17, 994 N.E.2d at 576. At the outset, the court noted that "[s]ection 7(1)(f) does not provide any guidance on how much or how little needs to be said or done to constitute an effective waiver. The parties have not advanced or presented any legislative history or citation to any legal authority, nor has our research found any, that assists us in determining what minimum conduct amounts to public citation and identification." *Dumke*, 2013 IL App (1st) 121668, ¶18, 994 N.E.2d at 579. In the absence of authority, the court turned to the plain language of section 7(1)(f) and found it to be unambiguous:

⁶Letter from Daniel B. Venturi, Law Offices of Daniel B. Venturi Ltd., to Josh Jones, Assistant Attorney General, Office of the Attorney General (June 23, 2015).

⁷Job Description, District Administrator – Antioch First Fire Protection District (undated).

Both "cite" and "identify" have a plain and ordinary meaning, as well as a common understanding. "Cite" is defined as, "[t]o mention or bring forward as support, illustration, or proof." [Citation.] "Identify" means to "1 a: to cause to be or become identical b: to conceive as united (as in spirit, outlook, or principle) <groups that are *identified* with conservation> 2 a: to establish the identity of b: to determine the taxonomic position of (a biological specimen) "establish the identity of: show or prove the sameness of." [Citation.] (Emphasis in original.) *Dumke*, 2013 IL App (1st) 121668, ¶20, 994 N.E.2d at 580.

Employing those definitions, the court determined:

The mayor cited and identified the report as a "management study requested by Superintendent Weis earlier this year" and its purpose as "the study of police administration staffing." He cited the report and he identified it as support for his reorganization plan. Specifically, he stated that Superintendent Weis requested the management study, and as a result of the study, 130 more police officers would be on the streets keeping the city safe. * * * The mayor identified the individuals and businesses that conducted the study and issued the resulting report. He stated that "the study of police administration staffing" began in 2010 and was conducted *pro bono* by the Civic Consulting Alliance with the assistance of Ryan Faye. Mayor Daley also stated that A.T. Kearney helped with various parts of the review. Mayor Daley not only identified the study and the key players, but personally thanked them. The mayor also indicated that the report "offers many findings and ways that the department will improve its management." There is no question that the mayor cited and identified the report in public given that it occurred during a press conference that was later available on the mayor's YouTube page, a summary of which was released in printed form. *Dumke*, 2013 IL App (1st) 121668, ¶24, 994 N.E.2d at 582.

The court went on to conclude that because the mayor commended the authors of the management study and directly referred to the management study to support the reorganization plan, the section 7(1)(f) exemption was waived. *Dumke*, 2013 IL App (1st) 121668, ¶28, 994 N.E.2d at 583.

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In this instance, the evidence is less extensive than it was in *Dumke*; this office lacks the benefit of a recording or transcript of the Board's February 12, 2015, meeting. Nonetheless, it appears that Administrator Jozewiak publicly cited and identified the budget comparisons he prepared within the meaning of section 7(1)(f). The minutes indicate that during open session, Administrator Jozewiak cited and identified the documents he passed out to the trustees as showing a comparison of budgetary figures based on whether the referendum passed or failed. The minutes further indicate that Administrator Jozewiak discussed the ramifications of his budgetary comparison with the trustees, as they considered "the amount of crews the district would be able to pay for if the referendum failed."⁸ Rather than momentarily acknowledging the existence of the budget comparison documents, it appears that Administrator Jozewiak publicly cited and identified them as showing the consequences in the event that the referendum failed. Under these circumstances, the District did not sustain its burden of demonstrating by clear and convincing evidence that the withheld budgets are exempt from disclosure pursuant to section 7(1)(f). This office requests that the District provide copies of those records to [REDACTED].

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have questions, you may contact me at (312) 814-8413 or jjones@atg.state.il.us. This letter serves to close the matter.

Very truly yours,

[REDACTED]
JOSH JONES
Deputy Bureau Chief
Public Access Bureau

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Cc: *Via electronic mail*
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⁸First Fire Protection District of Antioch Township, Meeting, February 12, 2015, Minutes 3.