OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 3, 2018

Via electronic mail
Mr. Brian Muñoz
Photography and Multimedia Editor
The Daily Egyptian
bmunoz@dailyegyptian.com

Via electronic mail
Mr. Douglas McCarty
Associate General Counsel
Southern Illinois University
Anthony Hall 318 – Mail Code 4307
1265 Lincoln Drive
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RE: FOIA Request for Review – 2017 PAC 50831

Dear Mr. Muñoz and Mr. McCarty:

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 Southern Illinois University (University) did not improperly withhold a record responsive to Mr. Brian Muñoz's November 30, 2017, FOIA request.

On that date, Mr. Muñoz, on behalf of *The Daily Egyptian*, submitted a FOIA request to the University seeking "[t]he 2016 and/or 2017 consultant review of [University] Athletics game operations AND the contract with the consultant." (Emphasis in original.)[1] Mr. Muñoz further stated that the consultant "review was mentioned by Thomas 'Tommy' Bell, [the University's] Director of Athletics in an interview with the Southern Illinoisan on November 17,

[1]Southern Illinois University Request for Public Records form submitted by Brian Muñoz, *The Daily Egyptian* (November 30, 2017).

2017."[2] On December 7, 2017, the University extended the time to respond pursuant to section 3(e) of FOIA (5 ILCS 140/3(e) (West 2016)). On December 14, 2017, the University provided Mr. Muñoz with a copy of the consultant's contract with certain information redacted pursuant to section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2017 Supp.)). The University, however, denied the portion of the request seeking the consultant review pursuant to section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2017 Supp.)).

On December 15, 2017, this office received Mr. Muñoz's Request for Review disputing the denial of his request for the consultant's review. He asserted that Mr. Bell had publicly mentioned the consultant's review of University game operations in an article published in the *Southern Illinoisan*[3] and had specifically attributed changes that were made to the placement of cheerleaders at games to one of the consultant's recommendations. He stated that the change was implemented after some cheerleaders took a knee during the national anthem. Mr. Muñoz further asserted:

> At the Daily Egyptian, we have reason to believe that these "drafts, notes, recommendations, memoranda and other records" are at this time not preliminary and have been put into effect, because Bell said this report is the reason the cheerleaders have been placed in different areas during games, and because the portion of the report we received indicates that the consultant's findings were shared with staff in 2016.[4]

On December 26, 2017, this office forwarded a copy of the Request for Review to the University and asked it to provide a copy of the consultant's review for this office's confidential review, together with a detailed explanation of the legal and factual basis for the asserted exemption. On January 5, 2018, this office received a written response, a copy of the report at issue, and an affidavit from Mr. Bell. In its written response, the University denied that Mr. Bell was the "head of the public body" under FOIA but nevertheless contended that his statement to the *Southern Illinoisan* did not publicly cite and identify the report. On January 11, 2018, this office forwarded a copy of the University's response to Mr. Muñoz; he replied on

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[2]Southern Illinois University Request for Public Records form submitted by Brian Muñoz, *The Daily Egyptian* (November 30, 2017).

[3]K. Janis Esch, *Change in procedure keeps SIU cheerleaders off field, court during national anthem*, Southern Illinoisan (November 17, 2017), http://thesouthern.com/news/local/siu/change-in-procedure-keeps-siu-cheerleaders-off-field-court-during/article_69060890-3eb3-5b6a-9cbd-a74d529b210a.html (last visited January 30, 2018).

[4]E-mail from Brian Muñoz, Photography and Multimedia Editor, The Daily Egyptian, to whom it may concern (December 15, 2017).

January 18, 2018. Mr. Muñoz maintained that the consultant's report was not preliminary and disputed the University's claim that Mr. Bell was not "the head of the public body." He contended that Mr. Bell was the head of the University's athletics department. Additionally, Mr. Muñoz argued that the University used public funds to perform the review and, thus, it was in the public interest to know the contents of the report. On May 22, 2018, this office requested additional information from the University concerning its claim that Mr. Bell was not the "head of the public body" under FOIA. On June 5, 2018, the University provided a supplemental response to this office addressing that claim. On June 18, 2018, this office forwarded a copy of that supplemental response to Mr. Muñoz; 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 2016); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body that withholds a record "has the burden of proving by clear and convincing evidence" that the record is 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 exempts from disclosure:

> Preliminary 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. 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)).

Further, courts have determined that the section 7(1)(f) exemption may include consultants' reports: "The pivotal fact that remains constant in each case in which the [7(1)(f)] exemption has been extended to consultants' documents is that 'the consultant does not represent an interest of its own, or the interest of any other client, when it advised the agency that hires it.'" *Harwood*, 344 Ill. App. 3d at 248 (citing *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11, 121 S. Ct. 1060, 1067 (2001)).

In its response to this office, the University asserted that "Section 7(1)(f) applies because the report in question was relied upon by the University as part of the deliberative process regarding improving its practices and procedures for sporting events."[5] The University contended that the report was preliminary in nature, even if any of the report's recommendations were later implemented or shared with staff, because the "report was integral to the University's pre-decisional deliberations regarding the implementation of changes to procedures at sporting events which is sufficient to bring the report fully within the ambit of Section 7(1)(f)[.]"[6]

This office's review of the report in question confirmed that it reflects a consultant's assessment of procedures and practices at University sporting events; the report reveals the consultant's notes and recommendations for improving the events. Although Mr. Muñoz asserted that the report was shared with staff and that new event procedures have since been put into effect, that claim does not undermine the Department's assertion that the report constitutes predecisional and deliberative material under section 7(1)(f). There is no indication that the University adopted the report as final University policy, as opposed to considering it in the process of formulating a policy. Accordingly, the report is exempt from disclosure pursuant to section 7(1)(f) unless Mr. Bell is the head of a public body and his statement in the article published in the *Southern Illinoisan* waived the exemption by publicly citing and identifying the report.

The article in question concerned moving cheerleaders to the entrances to athletic facilities before games after three cheerleaders participated in an off-field protest during the National Anthem. The article quoted Mr. Bell as follows:

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[5]Letter from Doug McCarty, Associate General Counsel, Southern Illinois University, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (January 5, 2018).

[6]Letter from Doug McCarty, Associate General Counsel, Southern Illinois University, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (January 5, 2018).

> Our spirit teams have greeted customers at the entrances in the past, so this is not a new procedure for Athletics. In fact, we had a consultant review our game operations last year, and one of his recommendations was to make arriving to a game an event in and of itself.[7]

The University denied that Mr. Bell was the "head of the public body," which FOIA defines 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." (Emphasis added.) 5 ILCS 140/2(e) (West 2016). The meaning of "public body" includes "all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, * * * all other municipal corporations, boards, bureaus, committees, or commissions of this State, [and] any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof[.]" 5 ILCS 140/2(a) (West 2016).

In its supplemental response to this office, the University described its organizational structure and provided this office with copies of organizational charts identifying leadership within the University.[8] According to the University, the Director of Athletics (Athletic Director) reports to the Chancellor of Southern Illinois University Carbondale (Chancellor). The Chancellor, who is the chief operating officer of the University's Carbondale campus, in turn reports to the Southern Illinois University President (President). The President is the Chief Executive Officer of the entire University system and reports to the University's Board of Trustees (Board). The University argued that the Athletic Director does not have "primary executive and administrative authority" and therefore is not the "head of the public body." The University asserted, in pertinent part:

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[7]K. Janis Esch, *Change in procedure keeps SIU cheerleaders off field, court during national anthem*, Southern Illinoisan (November 17, 2017), http://thesouthern.com/news/local/siu/change-in-procedure-keeps-siu-cheerleaders-off-field-court-during/article_69060890-3eb3-5b6a-9cbd-a74d529b210a.html (last visited January 30, 2018).

[8]Copies of the organizational charts are available online at: https://siu.edu/_documents/siu-organization-chart.pdf and http://siusystem.edu/about/organizational-structure.shtml.

> The Athletic Director may not bind the University to contracts unless specifically delegated that authority by the Chancellor, Board or President. The Athletic Director may not hire or fire employees without the consent of the Chancellor. Thus, while the Athletic Director certainly exercises managerial authority over his or her individual department, the position is not vested with actual "primary executive and administrative authority." Instead, the "primary executive and administrative authority" is exercised at the lowest level by the Chancellor for the Carbondale campus.[9]

The University's description of its leadership hierarchy and organizational charts indicates that the Department is merely a component of the University rather than a "public body" in its own right with independent operations or the authority to make primary executive and administrative decisions. While Mr. Bell is the head of the Department of Intercollegiate Athletics (Department), the Department is part of the University's formal organizational structure and is subject to the Chancellor's direction. It does not appear that the Athletic Director has the authority to make primary executive or administrative decisions for the University. Because the Department's activities are a component of the programs and services offered by the University and because the Athletic Director's authority over the University is limited in terms of final decision-making, this office concludes that Mr. Bell is not the "head of the public body." Accordingly, this office concludes that his reference to the consultant's review could not have waived the applicability of section 7(1)(f) of FOIA, and that the University did not improperly withhold that record pursuant to that exemption.

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

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[9]E-mail from Douglas J. McCarty, Associate General Counsel, Southern Illinois University Carbondale, to Teresa Lim (June 5, 2018).