



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

September 11, 2023

Via electronic mail

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Via electronic mail

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RE: FOIA Request for Review – 2019 PAC 58746

Dear Ms. Clark and Ms. Manisco:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2022)). For the reasons that follow, the Public Access Bureau concludes that the response by Geneva Community Unit School District No. 304 (District) to Mr. Kevin Gannon's May 13, 2019, FOIA request violated the requirements of FOIA.

On that date, Mr. Gannon, on behalf of the Geneva Education Association, submitted a FOIA request to the District seeking:

[i]nformation, including but not limited to, e-mails, voice mail recordings, and the contents of conversations between parents or community members in Geneva School District 304 and district administrators and/or school board members related to making up

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the four school days during which the Geneva Education Association was on strike. Please supply any information received by the district, school board members, or administrators between November 15, 2018 and December 31, 2018.^[1]

On May 20, 2019, the District denied Mr. Gannon's request in its entirety pursuant to sections 7(1)(f) and 7(1)(p) of FOIA (5 ILCS 140/7(1)(f), (1)(p) (West 2018)). On June 28, 2019, Ms. Rachel Clark of the Illinois Education Association, on behalf of the Geneva Education Association, submitted this Request for Review challenging the District's denial.

On July 8, 2019, this office sent a copy of the Request for Review to the District and asked it to provide un-redacted copies of the records responsive to Mr. Gannon's FOIA request, together with a detailed explanation of the legal and factual bases for its denial. On August 1, 2019, the District submitted the requested materials. On August 2, 2019, this office forwarded the District's answer to Ms. Clark; she did not submit a substantive reply.

In its answer to this office, the District provided the following background information:

The School District and the GEA [Geneva Education Association] were parties to a collective bargaining agreement that expired on August 14, 2018. Toward the end of the 2017-2018 school year, the two parties began negotiating a successor agreement to their 2015-2018 collective bargaining agreement. Negotiations broke down and the GEA declared a strike in December 2018. The strike lasted a total of five school/working days between Tuesday, December 4, 2018 and Monday, December 10, 2018. Teachers returned to the classroom on Tuesday, December 11, 2018.

With the School District's teachers[] having gone on strike, the issue of "making up" the five student attendance days lost because of the strike was bargained between the School District and the GEA. Ultimately the School District and GEA settled the strike with an agreement tha[t] only one of the five strike days would be made up. At some point during negotiations over this issue, the School District's bargaining representatives informed the

¹E-mail from Kevin Gannon, Science Department Chair, Geneva Community High School District No. 304, to Laura Sprague (May 13, 2019).

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GEA that the School District's position to make up only one day was rooted in part by feedback it had received from community members about the make-up day issue.^[2]

DETERMINATION

Under FOIA, "[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 2018); *see also Southern Illinoisan v. Illinois Dep't of Public Health*, 218 Ill. 2d 390, 415 (2006). Any public body that denies 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 2018). 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 9.5(a) of FOIA

As a threshold matter, section 9.5(a) of FOIA³ provides that a person whose FOIA request is denied may file a Request for Review "not later than 60 days after the date of the final denial." The District's response to this office asserted that Ms. Clark's Request for Review was untimely because on April 9, 2019, the District denied pursuant to section 7(1)(f) and 7(1)(p) an earlier request that included the same records and the Geneva Education Association "slept on its rights[]"⁴ by failing to file a Request for Review within 60 days of that denial. Consequently, the District contends that the Public Access Counselor lacks jurisdiction to review the denial of the second FOIA request and that it must be considered an unduly burdensome repeated request for records that previously were properly denied.⁵ 5 ILCS 140/3(g) (West 2018).

The District, however, did not deny the FOIA request at issue in this matter pursuant to section 3(g) of FOIA. Even if it had, the District would have to prove by clear and

²Letter from James A. Petrungaro, Scariano, Himes and Petrarca, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (August 1, 2019), at 4.

³5 ILCS 140/9.5(a) (West 2018).

⁴Letter from James A. Petrungaro, Scariano, Himes and Petrarca, Chtd., to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 1, 2019), at 2.

⁵Section 3(g) of FOIA provides, in relevant part: "Repeated requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied under this Act shall be deemed unduly burdensome under this provision."

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convincing evidence that it properly denied the earlier request pursuant to sections 7(1)(f) and 7(1)(p) in order to establish the subsequent request was properly denied as an unduly burdensome repeated request. The Attorney General has issued a binding opinion concluding that "no language in FOIA states that a person whose FOIA request was denied as an unduly burdensome repeated request may not submit a Request for Review to the Public Access Counselor unless he or she submitted a Request for Review of the denial of the previous request, nor does FOIA state that this office may not review whether such a denial was proper." Ill. Att'y Gen. Pub. Acc. Op. No. 18-007, issued June 26, 2028, at 6. Because Ms. Clark submitted her Request for Review within 60 days of the District's May 20, 2019, denial of the Geneva Education Association's May 13, 2019, FOIA request, section 9.5(a) of FOIA authorizes the Public Access Counselor to review that denial.

Section 7(1)(p) of FOIA

Section 7(1)(p) of FOIA exempts from disclosure "[r]ecords relating to collective negotiating matters between public bodies and their employees or representatives, except that any final contract or agreement shall be subject to inspection and copying." The term "relating to" in a FOIA exemption does not signify an expansive scope. *See Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶19, 7 N.E.3d 741, 746-47 (2014) (rejecting the contention that the section 7(1)(n) exemption (5 ILCS 140/7(1)(n) (West 2010)) for records "relating to a public body's adjudication of employee grievances or disciplinary cases" encompasses investigatory records that precede disciplinary adjudications because such an "expansive interpretation" would "render a broad category of public documents immune [citation] to public scrutiny. That is contrary to the intent of FOIA."); *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 32159, issued April 20, 2015, at 3 (concluding that because almost every record in possession of the Illinois Department of Corrections arguably relates to security in some manner, section 7(1)(e) of FOIA⁶ "applies to records that could jeopardize the security of a correctional institution if disclosed, rather than any records merely pertaining to security in any manner whatsoever.").

The Attorney General has issued a binding opinion addressing the applicability of section 7(1)(p) to invoices for legal services containing information related to collective bargaining matters. Ill. Att'y Gen. Pub. Acc. Op. No. 14-002, issued April 15, 2014. The Attorney General examined the exception, to the general requirement that public bodies conduct public business openly, for collective negotiating matters in the Open Meetings Act⁷ and noted: "Section 7(1)(p) of FOIA serves the corollary purpose of exempting from disclosure records

⁶Section 7(1)(e) of FOIA (5 ILCS 140/7(1)(e) (West 2018)) exempts from disclosure "[r]ecords that relate to or affect the security of correctional institutions and detention facilities."

⁷5 ILCS 120/2(c)(2) (West 2018).

pertaining to such aspects of the collective bargaining process as the negotiating of wages and salaries, terms and conditions of employment, working conditions, and similar matters which are subject to collective bargaining." Ill. Att'y Gen. Pub. Acc. Op. No. 14-002, at 6. The Attorney General concluded that only the portions of the invoices that contained specific information pertaining to the collective bargaining process could be redacted pursuant to section 7(1)(p). Ill. Att'y Gen. Pub. Acc. Op. No. 14-002, at 9. Thus, records must reveal aspects of a collective bargaining process to fall within the scope of the exemption.

The District withheld seven e-mails and one voicemail received from members of the community expressing opinions concerning whether and how the District should make up the days of school that were missed when the Geneva Education Association was on strike. In its answer to this office, the District argued that the communications related to collective bargaining because they were mostly sent during the strike and were "aimed at influencing the School District negotiations team and school board concerning settling the strike and the issue of the make-up days."⁸ The District also asserted that "the records were created and submitted to the School District entirely because of the collective bargaining going on between the School District and the GEA. The records exist only because of the ongoing labor dispute and negotiations."⁹ The District argued that the communications were part of its "negotiations team's analysis, motivation, bargaining strategy, and deliberative process related to the ongoing labor strike and negotiations."¹⁰

Although the withheld communications reference a matter raised by the collective bargaining dispute, they do not reveal aspects of the collective bargaining process itself. The communications were not from individuals involved in the negotiations, but rather from third-parties who were not privy to the private strategizing or negotiating involved in the collective bargaining process. Stretching the section 7(1)(p) exemption to include unsolicited communications from members of the public who did not participate in the collective bargaining process would be contrary to the requirement to construe FOIA exemptions narrowly. *Lieber*, 176 Ill. 2d at 40. Accordingly, this office concludes that the communications are not exempt pursuant to section 7(1)(p).

⁸Letter from James A. Petrungaro, Scariano, Himes and Petrarca, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (August 1, 2019), at 4.

⁹Letter from James A. Petrungaro, Scariano, Himes and Petrarca, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (August 1, 2019), at 4.

¹⁰Letter from James A. Petrungaro, Scariano, Himes and Petrarca, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (August 1, 2019), at 4.

Section 7(1)(f) of FOIA

Section 7(1)(f) exempts from inspection and copying "[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 applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). A public body that asserts the deliberative process exemption "has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir 1980)." The section 7(1)(f) 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 scope of section 7(1)(f) does not encompass a public body's communications with third parties unless they represent the public body or otherwise do not have any independent interests in the subject of the communications. *See, for example, Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 13, 121 S. Ct. 1060, 1069 (2001) (communications with third parties that have independent interests and that stand to benefit from the public body's final decision cannot be characterized as intra-agency communications under the exemption for deliberative material in the federal FOIA); Ill. Att'y Gen. Pub. Acc. Op. No. 21-004, issued May 24, 2021 (correspondence shared with third party constituent who represents independent interests is not part of public body's deliberative process).

In its response to this office, the District argued that it relied on the withheld communications as part of its bargaining strategy. Acknowledging that the communications were sent by third-parties, the District nevertheless asserted that "[u]nlike communications with a third party representing 'independent interests' of the public body that have been held to be outside the exemption [citation], the subject records here are from the very taxpayer constituents and parents of students[] whose interests the School District's administration and school board are charged with representing."¹¹

The withheld communications express a variety of opinions from members of the public on how the District should handle the make-up days. The opinions in the records are the community members', not the District's. The submissions reflect the community members' own interests, as they stood to benefit from the District's decisions on the make-up days. Further, the

¹¹Letter from James A. Petrungaro, Scariano, Himes and Petrarca, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (August 1, 2019), at 5.

communications were unsolicited and were not created at the request of the District as part of a deliberative process. Although the District may have discussed the communications while strategizing or during negotiations, the withheld records themselves do not reflect any intra-agency or inter-agency discussion of the make-up days. Because the communications do not constitute inter- or intra-agency, pre-decisional deliberative materials, the District improperly withheld those records pursuant to section 7(1)(f) of FOIA.

In accordance with this determination, this office requests that the District provide Mr. Gannon with copies of the withheld responsive¹² communications, with appropriate redactions of private information pursuant to section 7(1)(b) of FOIA.¹³ Any additional information such as names, job titles, and business contact information that could be used to personally identify members of the public who sent the communications also may be redacted pursuant to section 7(1)(c), which exempts from disclosure highly personal information that would constitute a clearly unwarranted invasion of personal privacy if disclosed. *State Journal Register v. University of Illinois Springfield*, 2013 IL App (4th) 120881, ¶¶65-66, 994 N.E.2d 705, 720 (2013) (recognizing that students and parents have "a privacy interest in being able to privately express * * * opinions and concerns to" a university and holding that the university may redact a student's name from an e-mail pursuant to section 7(1)(c) but must disclose the remaining portions "because nothing in the content of the e-mail, other than the student's name, identifies the student.").

¹²In its response to this office, the District provided a number of records that are non-responsive. The responsive records include the voice message and pages 8-14 of Exhibit A.

¹³5 ILCS 140/7(1)(b) (West 2022), as amended by Public Acts 103-154, effective June 30, 2023; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023. Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2022)) defines "private information" as:

unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.

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The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have any questions, please contact me at laura.harter@ilag.gov.

Very truly yours,



LAURA S. HARTER
Deputy Bureau Chief
Public Access Bureau

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