



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

July 18, 2023

Via electronic mail



Via electronic mail

Ms. Melanie K. Nelson
Chief Deputy, Civil Trial Division
Lake County State's Attorney's Office
18 North County Street, 3rd Floor
Waukegan, Illinois 60085
mnelson@lakecountyil.gov

RE: FOIA Request for Review – 2022 PAC 69899

Dear [REDACTED] and Ms. Nelson:

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 Lake County State's Attorney's Office (State's Attorney's Office) improperly redacted records responsive to [REDACTED] December 3, 2021, FOIA request.

On that date, [REDACTED] submitted a FOIA request to the State's Attorney's Office seeking copies of e-mails sent between four specified individuals between the dates of December 1, 2020, and March 1, 2021. On December 17, 2021, the State's Attorney's Office granted [REDACTED] request in part and denied it in part pursuant to sections 7(1)(c), 7(1)(f), and 7(1)(m) of FOIA (5 ILCS 140/7(1)(c), (1)(f), (1)(m) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558, effective August 20, 2021). On February 14, 2022, [REDACTED] submitted the above-referenced Request for Review disputing the partial denial of his request.

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On February 25, 2022, this office forwarded a copy of the Request for Review to the State's Attorney's Office and asked it to provide unredacted copies of the responsive records, as well as a detailed explanation of the factual and legal bases for the applicability of the asserted exemptions.

On March 16, 2022, the State's Attorney's Office provided this office with a written response. As part of that response, it provided [REDACTED] with a supplemental response containing fewer redactions. The State's Attorney's Office stated that the remaining withheld information consisted of the name of an employee withheld pursuant to section 7(1)(c) and e-mail communications consisting of negotiations between the State's Attorney's Office and Public Defender's Office withheld pursuant to sections 7(1)(f) and 7(1)(m). The State's Attorney's Office further argued that certain types of information within these e-mails also is exempt pursuant to sections 7(1)(a), 7(1)(c), and 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)(a), (1)(c), (1)(d)(iv) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558, effective August 20, 2021).

On March 16, 2022, this office forwarded a copy of the State's Attorney's Office's response to [REDACTED]; 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 2020); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body that withholds records "has the burden of proving by clear and convincing evidence" that the records are exempt from disclosure. 5 ILCS 140/1.2 (West 2020). 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)(c) of FOIA

Section 7(1)(c) of FOIA exempts from disclosure "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 7(1)(c) defines "unwarranted invasion of personal privacy" as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." Additionally, section 7(1)(c) provides that "[t]he disclosure of information that **bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.**" (Emphasis added.)

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It is undisputed that the State's Attorney's Office redacted the name of a former employee from e-mail exchanges between the State's Attorney and the Lake County Public Defender. The context indicates that these two public officials were discussing the progress of assistant state's attorneys implementing the new State's Attorney's policies while that former employee was still employed by the State's Attorney's Office. Because the e-mail discussion involves a public employee's actions while the individual was performing public duties as an employee, the exchange, including the employee's name, unequivocally bears on the performance of that employee's public duties. Therefore, the disclosure of the name would not constitute an unwarranted invasion of the employee's personal privacy under the plain language of section 7(1)(c). Accordingly, this office concludes that the State's Attorney's Office improperly withheld the name of the employee pursuant to section 7(1)(c) of FOIA.

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." Under the exemption, "[t]he government is entitled to withhold documents that reflect the agency's give-and-take leading up to its final decisions." *Chicago Tribune Co. v. Cook County Assessor's Office*, 2018 IL App (1st) 170455, ¶29, 109 N.E.3d 872, 880 (2018).

In its response to this office, the State's Attorney's Office cited *Harwood v. McDonough*, 344 Ill. App. 3d 242 (1st Dist. 2003) and *State Journal-Register v. University of Illinois Springfield*, 2013 IL App (4th) 120881, 994 N.E.2d 705 (2013) in support of its assertion that the e-mails between the State's Attorney's Office and Public Defender's Office are exempt from disclosure under section 7(1)(f) because they are "part of a predecisional deliberation of plea negotiations."¹

The Appellate Court, First District, explained in *Harwood* that section 7(1)(f) applies to "**inter- and intra-agency** predecisional and deliberative material," and is "intended to protect the communications process and encourage frank and open discussion **among agency employees** before a final decision is made." (Emphasis added.) *Harwood*, 344 Ill. App. 3d at 247-48. "Inter" is defined as "[a]mong; between[,] "² while "intra" is defined as "[i]n; near;

¹Letter from Melanie K. Nelson, Chief Deputy, Civil Trial Division, Lake County State's Attorney's Office, to Benjamin J. Silver, Assistant Attorney General, Public Access Bureau (March 16, 2022), at 4.

²Black's Law Dictionary 728 (5th ed. 1979).

within."³ Thus, communications generally must be exchanged among or between public bodies or occur internally within a public body to meet the threshold requirement of section 7(1)(f). *Fisher v. Office of the Illinois Attorney General*, 2021 IL App (1st) 200225, ¶19, 195 N.E.3d 719, __ (2021) ("In order to be exempt under this provision, the responsive materials must be both (1) inter or intra agency and (2) predecisional and deliberative.").

The *Harwood* court did hold that predecisional deliberative communications between public bodies and third party consultants also may be withheld pursuant to section 7(1)(f), but only if the consultants' "analyses and recommendation 'played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done.'" *Harwood*, 344 Ill. App. 3d at 248, citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11, 121 S. Ct. 1060, 1067 (2001). In *Klamath*, the U.S. Supreme Court considered whether the U.S. Department of Interior properly withheld, pursuant to section 552(b)(5) of the federal FOIA,⁴ records of communications with a Native-American Indian tribe concerning a plan to allocate water resources. The court stated that the exemption may shield pre-decisional material prepared by a third party consultant on behalf of a public body if the third party "does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Klamath Water Users Protective Ass'n*, 532 U.S. at 11, 121 S. Ct. at 1067. However, 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. *Klamath*, 532 U.S. at 13-15, 121 S. Ct. at 1068-69. The court concluded that the records in question did not fall within the scope of the deliberative process exemption because the tribe represented its own interests rather than the interests of the Department of Interior. *Klamath*, 532 U.S. at 15, 121 S. Ct. at 1069. Likewise, the Attorney General has issued a binding opinion concluding that an attorney's letter to a public body on behalf of a client with independent interests in a legal dispute was not exempt from disclosure pursuant to section 7(1)(f) of FOIA. Ill. Att'y Gen. Pub. Acc. Op. No. 22-013, issued November 21, 2022, at 15. Collectively, these precedents stand for the principle that the deliberative process exemption does not allow the withholding of records a public body exchanged with an entity that was representing its own independent interests, rather than the public body's interests, when it exchanged the records with the public body. Construing these authorities in a different context, this office has determined that communications **between public bodies** with opposing interests are similarly not exempt from disclosure pursuant to section 7(1)(f). See Ill. Att'y Gen. PAC Req. Rev. Ltr. 60989, issued

³Black's Law Dictionary 738 (5th ed. 1979).

⁴Federal FOIA Exemption 5 (<https://www.52west.com>) (West 2000)) applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]"

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April 3, 2020, at 4 ("Rather than jointly deliberating in a collaborative manner, the parties were represented by separate counsel and actively negotiating as adversaries over the terms of that agreement.").

However, in *State Journal-Register*, 2013 IL App (4th) 120881, ¶ 26, 994 N.E.2d at 713, a panel of the Appellate Court, Fourth District, held that a letter sent to a public body by an attorney representing a potentially adverse party fell within the scope of section 7(1)(f). The court quoted the holding in *Harwood* that "the purpose of exempting predecisional and deliberative material is 'to protect the communications process and encourage frank and open discussion **among agency employees** before a final decision is made.'" (Emphasis added.) *State Journal Register*, 2013 IL App (4th) 120881, ¶26, 994 N.E.2d at 713 (quoting *Harwood*, 344 Ill. App. 3d at 248)). Nevertheless, that court then went on to hold that portions of a letter sent to the University by an attorney representing an individual who was considering filing suit against the University were exempt from disclosure pursuant to section 7(1)(f) because the information in the letter "would have undoubtedly been relied upon by [the University] in formulating a plan or policy for settling potential litigation with the victim." *State Journal-Register*, 2013 IL App (4th) 120881, ¶29, 994 N.E.2d at 714 (quoting *Harwood*, 344 Ill. App. 3d at 248). In reaching this conclusion, the court did not address the issue of whether the letter was "inter- or intra-agency" material, or distinguish the holdings in *Harwood* and *Klamath* that limit the deliberative process exemption to communications with outside parties who represent the interests of the public body. Because the opinion in *State-Journal Register* does not provide any explanation of how a letter from opposing counsel could be construed as "inter- and intra-agency predecisional or deliberative material" as described in *Harwood* and *Klamath*, we are compelled instead to follow the weight of authority and apply the analysis in those cases when considering the e-mails exchanged between the State's Attorney's Office and Public Defender's Office.

While the State's Attorney's Office and Public Defender's Office shared a goal of reaching plea agreements in the cases discussed in the contested e-mails, both public bodies and their clients had opposing interests as to the terms of possible plea agreements and the subject matter of the e-mails. The State's Attorney's Office represents the public in prosecuting crimes, while the Public Defender's Office advocates for its clients' interests; they are adversarial parties. Accordingly, the withheld correspondence between those offices does not constitute inter- or intra-agency communications of the State's Attorney's Office within the scope of the deliberative process exemption, and the State's Attorney's Office has not sustained its burden of demonstrating that the communications are exempt from disclosure in whole or in part pursuant to section 7(1)(f) of FOIA.

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Section 7(1)(m) of FOIA

Section 7(1)(m) of FOIA exempts from disclosure:

Communications between a public body and an attorney * * * representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body[.]

Communications protected by the attorney-client privilege are within the scope of section 7(1)(m). *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 201 (1st Dist. 1997). A party asserting that a communication to an attorney is protected by the attorney-client privilege must show that: "(1) a statement originated in confidence that it would not be disclosed; (2) it was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and (3) it remained confidential." *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 228 (2d Dist. 2006). Moreover, "[t]he privilege applies not only to the communications of a client to his attorney, but also to the advice of an attorney to his client." *In re Marriage of Granger*, 197 Ill. App. 3d 363, 374 (5th Dist. 1990); see also *People v. Radojcic*, 2013 IL 114197, ¶40, 998 N.E.2d 1212, 1221-22 (2013) ("[T]he modern view is that the privilege is a two-way street, protecting both the client's communications to the attorney and the attorney's advice to the client."). A public body that withholds records under section 7(1)(m) "can meet its burden only by providing some *objective* indicia that the exemption is applicable under the circumstances." (Emphasis in original.) *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 470 (2003).

The work product doctrine "applies to documents prepared by either client or attorney in anticipation of litigation or trial." *Dalen v. Ozite Corp.*, 230 Ill. App. 3d 18, 27 (2nd Dist. 1992). The protection of the doctrine, however, is waived by voluntary disclosure to a third party. *Dalen*, 230 Ill. App. 3d at 29 (company waived work product doctrine by providing opposing counsel access to its files even though company's attorney's claimed disclosure of memorandum containing work product was inadvertent because he did not have time to purge the memorandum from the files); see also *Eagle Compressors, Inc., v. HEC Liquidating Corp.*, 206 F.R.D. 474, 479 (N.D. Ill. 2002) ("The voluntary disclosure of attorney work product to an adversary waives work product protection.")

In its response to this office, the State's Attorney's Office argued that e-mails from the Public Defender's Office that include the mental impressions of assistant public defenders in

pursuit of plea negotiations are exempt despite being shared with the State's Attorney's Office, which is a third party adversary.

The State's Attorney's Office does not have, nor did it claim to have, an attorney-client relationship with the Public Defender's Office. Section 7(1)(m) of FOIA applies to "communications between a public body and an attorney * * * representing the public body" and to work product prepared "upon the request of an attorney advising the public body." The attorney-client privilege and work product doctrine do not apply to communications or materials exchanged by adversarial parties.

The State's Attorney's Office additionally argued, citing *Nelson v. County of Kendall*, 2014 IL 116303, and *Newman, Raiz & Shelmadine, LLC. v. Brown*, 394 Ill. App. 3d 602 (1st Dist. 2009) that disclosure of this material would be incongruous with FOIA because the Public Defender's Office is not subject to FOIA. Because this FOIA request concerns public records maintained by the State's Attorney's Office, it is not relevant whether the Public Defender's Office would be subject to FOIA. The definition of "public records" in section 2(c) of FOIA⁵ (5 ILCS 140/2(c) (West 2020)) expressly applies to all records in the possession of the State's Attorney's Office pertaining to the transaction of public business. This definition does not contain an exception for records exchanged with third parties that are not public bodies subject to the requirements of FOIA. Further, while the cases cited by the State's Attorney's Office confirmed that the judiciary is not subject to FOIA, none of them addressed whether public defenders' offices are part of the judiciary. This office has previously determined that public defenders' offices are not part of the judiciary and are subject to the requirements of FOIA. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 39421, issued January 8, 2019, at 6 ("the Public Defender's Office is not part of the judicial branch of government, for purposes of FOIA. Instead, it is a county office, which falls under the definition of a "public body" in section 2(a) of FOIA."). Accordingly, this office concludes that the State's Attorney's Office has not sustained its burden of demonstrating that any portions of the contested records exempt from disclosure pursuant to section 7(1)(m) of FOIA.

⁵Section 2(c) of FOIA defines "public records" as:

all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.

Potential Redactions Pursuant to Sections 7(1)(a), 7(1)(c), and 7(1)(d)(iv)

In its response to this office, the State's Attorney's Office asserted that unspecified pieces of information contained within the withheld records would also be exempt pursuant to sections "(7)(1)(a)(confidentiality provisions of the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/3); 7(1)(d)(iv) (withholding information identifying complaining witnesses) and 7(1)(c)(personal privacy relating to victims of crime)."⁶ Although the State's Attorney's Office did not specify which records or portions of records may be exempt under these provisions, this office's review of the withheld records confirms that discrete portions of some of the withheld e-mails would be subject to permissible redactions.

Section 7(1)(a) exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." Section 3(a) of the Mental Health and Developmental Disabilities Confidentiality Act provides:

All records and communications shall be confidential and shall not be disclosed except as provided in this Act. Unless otherwise expressly provided for in this Act, records and communications made or created in the course of providing mental health or developmental disabilities services shall be protected from disclosure regardless of whether the records and communications are made or created in the course of a therapeutic relationship.

Section 2 of the Mental Health Confidentiality Act (740 ILCS 110/2 (West 2014)) defines "record," in pertinent part, as "any record kept by a therapist or by an agency in the course of providing mental health or developmental disabilities service to a recipient concerning the recipient and the services provided." To the extent that information within the requested records falls within this category, the State's Attorney's Office is specifically prohibited from disclosing such information except in accordance with the terms of that act.

Section 7(1)(c) exempts from disclosure "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 7(1)(d)(iv) exempts from disclosure:

⁶Letter from Melanie K. Nelson, Chief Deputy, Civil Trial Division, Lake County State's Attorney's Office, to Benjamin J. Silver, Assistant Attorney General, Public Access Bureau (March 16, 2022), at 3-4.

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(d) Records in the possession of any public body created in the course of administrative enforcement proceedings, and any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would:

* * *

(iv) unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies[.]

Accordingly, the State's Attorney's Office may redact the identities of victims, witnesses and other third parties who were not arrested or charged with crimes. *See, for example, Dillon v. DOJ*, 102 F. Supp. 3d 272, 295 (D.C. Cir. 2015) (disclosure of the names of third parties in law enforcement records would constitute an unwarranted invasion of personal privacy).

In accordance with the conclusions expressed in this determination, this office requests that the State's Attorney's Office provide [REDACTED] with copies of the withheld records, subject only to permissible redactions. If any information is redacted, the State's Attorney's Office must provide [REDACTED] with a supplemental written response that includes a detailed factual basis for the applicability of any asserted exemptions.

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 (773) 590-7878 or benjamin.silver@ilag.gov.

Very truly yours,

[REDACTED]

BENJAMIN J. SILVER
Assistant Attorney General
Public Access Bureau

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