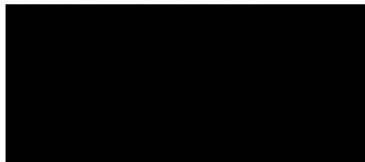


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

May 15, 2024

Via electronic mail



Via electronic mail

Mr. Richard E. Vogel
Tracy Johnson & Wilson
2801 Black Road, 2nd Floor
Joliet, Illinois 60435
rvogel@tracylawfirm.com

RE: FOIA Request for Review – 2022 PAC 69962

Dear [REDACTED] and Mr. Vogel:

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 explained below, the Public Access Bureau concludes that the Romeoville Police Department (Police Department or RPD) improperly withheld certain non-exempt information responsive to [REDACTED] February 8, 2022, FOIA request.

On that date, [REDACTED] submitted a FOIA request to the Police Department seeking copies of her August 21, 2021, polygraph exam results and all her background check records pertaining "to [the] reason for denial of employment by the [Police Department] starting from 8/19/2021 to 9/14/2021."¹ On February 10, 2022, the Police Department denied [REDACTED] request in its entirety pursuant to section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2021 Supp.), as amended by Public Acts 102-694, effective January 7, 2022, revised February 3, 2022; 102-791, effective May 13, 2022; 102-1055, effective June 10, 2022). On February 22,

¹FOIA request submitted by [REDACTED] (February 8, 2022).

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2022, ██████████ submitted the above-referenced Request for Review disputing the Police Department's response.

On February 27, 2022, this office sent a copy of the Request for Review to the Police Department and asked it to provide unredacted copies of the records that it withheld for this office's confidential review, together with a detailed explanation of the factual and legal bases for the applicability of section 7(1)(f) of FOIA. On March 9, 2022, the Police Department submitted its written response. In its response, the Police Department provided ██████████ with a copy of her August 21, 2021, polygraph examination.² However, the Police Department asserted it properly withheld records related to ██████████ background check pursuant to sections 7(1)(a) and 7(1)(d-5) of FOIA,³ in addition to section 7(1)(f). On March 16, 2022, this office sent a copy of the Police Department's written response to ██████████; she replied later that afternoon.

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 2022); *see also Southern Illinoisan v. Illinois Dep't of Public Health*, 218 Ill. 2d 390, 415 (2006). 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 2022).

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." The section 7(1)(f) exemption is equivalent to the deliberative process exemption in the federal FOIA (5 U.S.C. §552(b)(5) (2020)), which applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (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 deliberative process exemption "typically does not justify the withholding of purely factual material." *Enviro Tech Intern., Inc. v. United States Environmental Protection Agency*, 371 F.3d 370, 374 (7th Cir. 2004). Rather, "[o]nly those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." *Kalven v.*

²E-mail from Richard E. Vogel, Tracy, Johnson & Wilson, to ██████████ (March 9, 2022).

³5 ILCS 140/7(1)(a), (1)(d-5) (West 2021 Supp.), as amended by Public Acts 102-694, effective January 7, 2022, revised February 3, 2022; 102-791, effective May 13, 2022; 102-1055, effective June 10, 2022.

City of Chicago, 2013 IL App (1st) 121846, ¶ 24, quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010); *see also Chemical Weapons Working Group v. U.S. E.P.A.*, 185 F.R.D. 1, 3 (D.C. Cir 1999), quoting *Dudman Communications v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("[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.'").

In its response to this office, the Police Department asserted that some of the withheld information falls within the scope of section 7(1)(f) because it is predecisional and generated as part the Police Department's employment process. The Police Department explained:

While RPD is aware that the background check information reflected in the records provided with this letter contains material that in and of itself if factual in nature, RPD asserts that the disclosure of this material will unavoidably reveal its deliberative and decision making process with respect to applicants for prospective employment, and its opinions as to the factors that render an applicant unqualified for employment with the RPD. Disclosure of the results of this background check necessarily defines an opinion of the RPD as to a prospective set of facts that disqualifies an applicant from employment with RPD. Requiring the release of this material may potentially inform other future job applicants to RPD of the RPD's criteria for hiring based on background check results.^[4]

Additionally, the Police Department confirmed that these background check results have never been publicly cited by either the Chief of the RPD or the Village President of the Village of Romeoville.

This office's review of the remaining background check records showed that certain portions contain predecisional opinions, assessments, and information involved in formulating actions which would reveal the give-and-take of the Police Department's deliberative process. This office points to discrete notes and brief opinions cited on pages 6 and 7 of the

⁴Letter from Richard E. Vogel, Tracy, Johnson & Wilson, to Christina M. Lucente-McCullough, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (March 9, 2022), at [2].

withheld background check report.⁵ Although this information contains some factual details, it is inextricably intertwined with the Police Department's deliberations regarding [REDACTED] qualifications. Further, there is no indication that any portion of [REDACTED] background check was publicly cited or identified by the head of the Police Department or other associated police departments. Therefore, we conclude that this information was not improperly withheld pursuant to section 7(1)(f).

On the other hand, a large portion of this record contains strictly factual information gathered by the Police Department on various aspects of [REDACTED] traffic record, financial information, past references, and employment history. Although these records reveal information the Department apparently considered, they do not provide insight into the weight given to any particular piece of background information or otherwise reveal the give-and-take of the Police Department's deliberations regarding its employment decision-making process and, therefore, are not within the scope of section 7(1)(f). In addition, information and opinions expressed by [REDACTED] or third parties that provided information are not inter-agency or intra-agency-communications that may be properly redacted under the exemption. Accordingly, this office concludes that the Police Department improperly withheld this information pursuant to section 7(1)(f).

Section 7.5(q) of FOIA

Although not asserted by the Police Department, this office will analyze the applicability of section 7.5(q) of FOIA⁶ to certain past employment information. Section 7.5(q) of FOIA exempts from disclosure "[i]nformation prohibited from being disclosed by the Personnel Records Review Act [PRRA]." Section 11 of PRRA (820 ILCS 40/11 (West 2022)) provides: "This Act shall not be construed to diminish a right of access to records already otherwise provided by law, provided that **disclosure of performance evaluations under the Freedom of Information Act shall be prohibited.**" (Emphasis added.)

In construing a statute, the primary goal is to ascertain and give effect to the intent of the General Assembly. *Wisnasky-Bettorf v. Pierce*, 2012 IL 111253, ¶ 16. "We view the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation. Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous." *People v. Gutman*, 2011 IL 110338, ¶ 12.

⁵E-mail from Richard E. Vogel, Tracy, Johnson & Wilson, to Christina M. Lucente-McCullough, Assistant Attorney General, Public Access Bureau (March 9, 2022). See pages 8-14 of the attachment titled "Scanned form a Xerox Multifunction Printer.pdf."

⁶5 ILCS 140/7.5 (West 2022), as amended by Public Acts 103-008, effective June 7, 2023; 103-034, effective June 9, 2023).

The Senate Debates on House Bill 5154, which amended section 11 of the PRRA to add the language barring disclosure of "performance evaluations," indicates that the term was intended to apply to periodic comprehensive evaluations:

The premise is, there is—some protection should be in place for employees and employers. If there is a performance evaluation piece—you work all year, you know your supervisor has set some goals for you to meet—I don't know that it's your business or anyone else's business on what this particular staff person have obtained within that year's evaluation. I think what is and what should be known is, perhaps, the title that the person is in, how much they're actually being paid, even so far just to say whether or not they are an employee of the State of Illinois or any other public employee. But how well you did on your actual performance evaluation year-to-year, I think is a—a measure of privacy. Remarks of Sen. Lightford, April 29, 2010, Senate Debate on House Bill No. 5154, at 182.

When I write an employee evaluation, I do it for that employee to change the behavior to get a better result. When that performance evaluation is written, my goal is to make sure that employee—their goals are met. Their ability to perform their job is enhanced. I don't write it for an audience. If I write a performance evaluation for an audience, then it would change, because I know that other people are looking at it. Remarks of Sen. Millner, April 29, 2010, Senate Debate on House Bill No. 5154, at 186.

Having been on both sides of the employee evaluation questions, it is written for that individual so that individual can correct particular behavior and if it's going to be on the Internet and available to the entire world, it does become where the person writing the evaluation will be much more sensitive to what they write and then the employee may not gain from it. Remarks of Sen. Hendon, April 29, 2010, Senate Debate on House Bill No. 5154, at 188.

In describing the scope of the exemption in the legislation, the House bill's sponsor explained that the "performance evaluation process" identifies the need for improvements and promotes "corrective action." Remarks of Rep. Chapa LaVia, March 11, 2010, House Debate on House Bill No. 5154, at 107 ("[I]t's just a thorough and constructive evaluation. Employees should receive guidance, corrective action and further development all within the goal of helping

employees achieve excellence."). These comments indicate that the General Assembly only intended to bar disclosure of periodic comprehensive performance evaluations that are used to enhance the performance of employees by highlighting their strengths and weaknesses. Confidentiality of such evaluations was deemed necessary in order for supervisors to candidly identify performance problems and initiate corrective action. By contrast, this office has found that section 11 of the PRRA was not intended to apply to specific instances of misconduct. *See* Ill. Att'y Gen. PAC Rev. Ltr. 47540, issued September 13, 2017.

This office has reviewed the background check records and concludes that certain information was drawn directly from [REDACTED] past performance evaluations. In particular, the Police Department collected [REDACTED] personnel files from the Cicero and Bedford Park Police Departments and highlighted certain information in performance evaluations that the General Assembly intended to prohibit from being disclosed. Because section 11 of the PRRA prohibits the disclosure of performance evaluations, the Police Department did not violate FOIA by withholding discrete information pulled directly from [REDACTED] personnel records pursuant to section 7.5(q) of FOIA. Certain discrete information that was redacted, however, appears to have been drawn from records in personnel files other than performance evaluations. That information is not exempt from disclosure under section 7.5(q) of FOIA.

Section 7(1)(a) of FOIA and LEADS Information

Section 7(1)(a) of FOIA exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." In its response to this office, the Police Department asserted it obtained some of the information in [REDACTED] background check report through the Illinois Law Enforcement Agencies Data System (LEADS).

Section 1240.80(d) of title 20 of the Administrative Code (20 Ill. Adm. Code §1240.80(d) (2020), last amended at 23 Ill. Reg. 7521, effective June 18, 1999) provides that "LEADS data shall not be disseminated to any individual or organization that is not legally authorized to have access to the information."⁷ *See also Better Gov't Ass'n v. Zaruba*, 2014 IL App (2d) 140071, ¶ 27 ("The regulations make clear that the public is not entitled to view or possess data that is transmitted through, received through, or stored in LEADS.").

This office's review of the background check report confirmed that certain information was generated from LEADS. Members of the public, including individuals such as [REDACTED] requesting records about themselves, are not among the parties authorized to access LEADS data under section 1240.30(c) of title 20 of the Administrative Code (20 Ill. Adm. Code §1240.30(c) (2020), last amended at 23 Ill. Reg. 7521, effective June 18, 1999). Because the

⁷That provision implements section 7 of the Illinois Criminal Identification Act (20 ILCS 2630/7 (West 2020)).

Police Department is specifically prohibited from disseminating LEADS data to unauthorized parties, the Police Department did not improperly withhold certain parts of the report pursuant to section 7(1)(a) of FOIA.

However, the Department did not illustrate that all of the information in the report concerning [REDACTED] driving and financial history was specifically generated from the LEADS database. This office's review also determined that some of the information is general in nature. General information that is obtained from the LEADS database and incorporated into an investigative report is not exempt under section 7(1)(a) of FOIA. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 34767, issued August 12, 2016, at 6. Accordingly, the Police Department did not demonstrate by clear and convincing evidence that certain limited parts of the report fall within the scope of the 7(1)(a) exemption.

Section 7(1)(d-5) of FOIA

Section 7(1)(d-5) of FOIA exempts from disclosure:

A law enforcement record created for law enforcement purposes and contained in a shared electronic record management system if the law enforcement agency that is the recipient of the request did not create the record, did not participate in or have a role in any of the events which are the subject of the record, and only has access to the record through the shared electronic record management system.

In its response to this office, the Police Department asserted that certain information in the background check records is exempt because it was "obtained by the RPD from a shared electronic law enforcement database from entries made by other law enforcement and in which the RPD had no other involvement, other than the receipt of the information."⁸ Additionally, the Police Department submitted a signed affidavit from Deputy Chief, Brant Hromadka, confirming the fact that certain information was obtained from a shared electronic law enforcement database.⁹

This office's review confirmed that certain information the Police Department withheld was obtained from other law enforcement agencies, such as the Brookfield Police

⁸Letter from Richard E. Vogel, Tracy, Johnson & Wilson, to Christina M. Lucente-McCullough, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (March 9, 2022), at [3].

⁹E-mail from Richard E. Vogel, Tracy, Johnson & Wilson, to Christina M. Lucente-McCullough, Assistant Attorney General, Public Access Bureau (March 9, 2022). *See* pages 28-29 of the attachment titled "Scanned form a Xerox Multifunction Printer.pdf."

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Department. Under the plain language of section 7(1)(d-5), the withheld information is exempt from disclosure because the Police Department did not create certain records, but rather accessed it from a shared electronic record management system. Therefore, this office concludes that the Police Department did not improperly withhold certain information pursuant to section 7(1)(d-5).

However, the Police Department did not illustrate that all of the information in the report concerning [REDACTED] financial history was specifically generated from a shared electronic law enforcement database. In the financials section of the background check report, the Police Department stated that it obtained this information from an Accurint report. Based on an electronic search, Accurint is a service provided by LexisNexis and is open to any person who subscribes to this service.¹⁰ Information that is not obtained from a shared electronic law enforcement database is not exempt under section 7(1)(a) of FOIA. Accordingly, the Police Department did not demonstrate by clear and convincing evidence that certain limited parts of the report fall within the scope of the 7(1)(a) exemption.

Under separate cover, this office will identify for the Police Department the portions of the background check report that fall within the asserted exemptions. This office requests that the Department disclose the remaining information in the report.

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]
CHRISTINA LUCENTE-MCCULLOUGH
Assistant Attorney General
Public Access Bureau

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¹⁰LexisNexis Risk Solutions, Accurint, *available at* <https://www.accurint.com>.