



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

March 17, 2023

Via electronic mail



Via electronic mail

Mr. Anthony Rizzo
FOIA Officer
Department of Administrative Hearings
City of Chicago
740 North Sedgwick Street
Chicago, Illinois 60654
AHfoia@cityofchicago.org

RE: FOIA Request for Review – 2022 PAC 71954

Dear [REDACTED] and Mr. Rizzo:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2020)). For the reasons that follow, the Public Access Bureau concludes that the City of Chicago Department of Administrative Hearings (Department) improperly denied portions of the records responsive to [REDACTED] [REDACTED] November 29, 2021, FOIA request.

On that date, [REDACTED], on behalf of the Roger Baldwin Foundation of ACLU, Inc., submitted a FOIA request to the Department seeking copies of various records regarding the City of Chicago's enforcement of five ordinances concerning vehicle ticketing, immobilization, and impoundment. On December 14, 2021, the Department provided [REDACTED] with a copy of the Administrative Law Judge Bench Book (Bench Book) with the first 36 pages withheld

Mr. Anthony Rizzo

March 17, 2023

Page 2

pursuant to section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558, effective August 20, 2021). From December 27, 2021, through March 23, 2022, [REDACTED] and the Department exchanged correspondence regarding the alleged inadequacy of the Department's response. On March 23, 2022, the Department issued a supplemental response to [REDACTED] and provided copies of additional "boilerplate forms that [the] department issues for determinations of liability and notices of hearing."¹ The Department also asserted that the withheld portion of the Bench Book is exempt from disclosure pursuant to section 7(1)(m) of FOIA (5 ILCS 140/7(1)(m) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558, effective August 20, 2021). On May 20, 2022, [REDACTED] submitted the above-referenced Request for Review disputing that the section 7(1)(f) and 7(1)(m) exemptions are applicable to the first 36 pages of the Bench Book.

On May 25, 2022, this office forwarded a copy of [REDACTED] Request for Review to the Department and asked it to provide copies of the withheld pages of the Bench Book, together with a detailed legal and factual explanation for the applicability of sections 7(1)(f) and 7(1)(m). On June 15, 2022, the Department furnished those materials. On that same date, this office forwarded a copy the Department's response to [REDACTED]; he replied on July 7, 2022.

DETERMINATION

All public records in the possession or custody 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 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 2020).

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 in most respects to the deliberative process exemption in the Federal FOIA (5 U.S.C. §552(b)(5) (2018)), which applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247

¹Letter from Anthony Rizzo, FOIA Officer, Department of Administrative Hearings, to [REDACTED] (March 23, 2022), at 1.

[REDACTED]
Mr. Anthony Rizzo

March 17, 2023

Page 3

(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; *see also Kalven v. City of Chicago*, 2013 IL App (1st) 121846, ¶24, 7 N.E.3d 741, 748 (2013), quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010) ("Only those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld."). 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)."

Further, the Attorney General has previously determined that established policies and training materials do not fall within the scope of section 7(1)(f). Ill. Att'y Gen. Pub. Acc. Op. No. 15-015, issued December 29, 2015, at 7 ("[W]hen records are used for training purposes they constitute final decisions rather than predecisional deliberative materials."); *Stokes v. Brennan*, 476 F.2d 699, 703 (5th Cir. 1973) (concluding that "it would be a perversion of the Act to classify" training materials used to train inspectors for the Occupational Safety and Health Administration as exempt from disclosure under the deliberative process exemption in Federal FOIA, which "was not defined as an exception to compelled disclosure in order to authorize an agency to throw a protective blanket over any type of information it might choose by the expedient of casting it in the form of an internal memorandum."); *American Immigration Council v. United States Department of Homeland Security*, 905 F. Supp. 2d 206, 218 (D.D.C. 2012) (because training materials reflected the agency's established policy rather than its deliberations, the deliberative process exemption did not apply).

To be exempt from disclosure under section 7(1)(f), records "must be both (1) inter or intra agency and (2) predecisional and deliberative." *Fisher v. Office of the Illinois Attorney General*, 195 N.E.3d 719, 726 (2021), appeal denied, 175 N.E.3d 142 (Ill. 2021). "In order to qualify for the deliberative process exemption, a document must be both predecisional in the sense that it is actually antecedent to the adoption of an agency policy, and deliberative in the sense that it is actually related to the process by which policies are formulated." *Chicago Tribune Co. v. Cook County Assessor's Office*, 109 N.E.3d 872, 880 (2018).

In its response to this office, the Department asserted that the Bench Book is predecisional in that it is intended to assist Administrative Law Judges in reaching decisions in Administrative Hearings. The Department argued that the Bench Book is thus part of the decision-making process and asserted that "the Bench Book is intended to provide 'frank discussion'" to Administrative Law Judges in that process.² In his reply, [REDACTED] argued that

²Letter from Anthony J. Rizzo Jr, FOIA Officer, Department of Administrative Hearings, to Jane Sternecky, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (June 15, 2022), at 5.

Mr. Anthony Rizzo

March 17, 2023

Page 4

the Bench Book is not preliminary and noted that the Department's response also did not argue that it is preliminary.

The forward of the Bench Book, shared by the Department in its response to this office, states: "[t]he Bench Book covers all aspects of the administrative adjudicatory process and the common legal and situational issues that may arise in the proceedings."³ The document provides guidance to Administrative Law Judges in the conduct of an Administrative Hearing, including procedural matters and specific topics that may arise during a hearing. This office concludes that this material is not pre-decisional or deliberative. While it is intended to provide guidance for Administrative Law Judges, it constitutes established policy and is not "antecedent to the adoption of an agency policy." *See Chicago Tribune Co.*, 109 N.E.3d at 880. Rather than reflecting the give and take of a deliberative process, the finalized and published document is a one-way street. The Bench Book constitutes guidance akin to the training materials discussed above. Because the Bench Book is not pre-decisional deliberative material, this office concludes that the Department improperly withheld it pursuant to section 7(1)(f) of FOIA.

Section 7(1)(m) of FOIA

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

Communications between a public body and an attorney or auditor 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, and materials prepared or compiled with respect to internal audits of public bodies.

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 confidential communication 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); *see also Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 327 (N.D. Cal. 1985) ("The proponent of the privilege carries the burden of establishing all elements of the privilege, including confidentiality, which is not presumed"). Moreover, "[t]he privilege applies not only

³Letter from Anthony J. Rizzo Jr, FOIA Officer, Department of Administrative Hearings, to Jane Sternecky, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (June 15, 2022), at 2.

Mr. Anthony Rizzo

March 17, 2023

Page 5

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."). "The privilege does not extend, however, beyond the substance of the client's confidential communications to the attorney." *In re Fischel*, 557 F.2d 209, 211-12 (9th Cir. 1977), *citing Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951, 83 S. Ct. 505 (1963). This privilege does not extend to all communications from an attorney to a client, but only those where "the 'primary' or 'predominant purpose' of the communication is to render or solicit legal advice." *Towne Place Condominium Ass'n v. Philadelphia Indemnity Insurance Co.*, 284 F. Supp. 3d 889, 894 (N.D. Ill. 2018).

A public body that withholds records under section 7(1)(m) must provide a supporting factual basis for the application of the exemption:

[I]n meeting its burden, the public body may not simply treat the words "attorney-client privilege" or "legal advice" as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue. Rather, the public body 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*, 204 Ill. 2d at 470.

The attorney-client privilege applies to communications:

(1) Where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are permanently protected, (7) from disclosure by himself or the legal advisor, (8) except the protection be waived. *Illinois Education Ass'n*, 204 Ill. 2d at 467 (2003).

In its response to this office, the Department argued that the Bench Book is privileged because it "is (1) intended to provide legal advice to Departmental ALJs on several issues, (2) was drafted by a departmental attorney for that purpose, (3) the materials at issue were specifically intended to give legal advice, (4) have been kept confidential by (5) the Department and are (6) continuously protected from disclosure by (7) Department personnel and (8) the

██████████
Mr. Anthony Rizzo

March 17, 2023

Page 6

Department has not waived the privilege."⁴ In reply, ██████████ argued that, rather than confidential legal advice, the Bench Book is a general guidance document.

In *American Immigration Council*, the court held that PowerPoint slides used to train agency attorneys to interact with private attorneys were not privileged because the agency had not established a connection to confidential information obtained from a client. The court explained:

[The agency] offers no explanation of what confidential client communications might underlie these slides, and the slides themselves do not hint at underpinning confidentialities. Nor should they. The slides were used for general trainings by [agency] lawyers, and such generally applicable legal advice will rest on none of the factual particularities conveyed in a typical confidential communication by a client. *American Immigration Council*, 905 F. Supp. 2d at 222-23.

Similarly, in this matter the Department provided no objective indicia that the withheld portions of the Bench Book convey legal advice based on underlying confidential communications. This office's review of the Bench Book also finds no objective indicia that the Bench Book constitutes legal advice that meets the criteria to apply the attorney-client exemption. As described above, the Bench Book conveys guidance to Administrative Law Judges about the processes and issues that may arise during an Administrative Hearing. Rather than providing advice regarding underlying confidential facts, the Bench Book provides generalized procedural and factual information that may be useful to Administrative Law Judges in potential future hearings. To the extent that the Bench Book summarizes cases or describes the current state of the law, it does so based on previously concluded hearings and settled cases, rather than any underlying confidential facts ascertained or shared by the Department. The attorney-client privilege extends to communications from an attorney to a client in order to protect the secrecy of underlying facts. *See In re Fischel*, 557 F.2d 209, 211-12 (9th Cir. 1977). Because the Bench Book is not based on confidential facts conveyed by the Department as client to an attorney, and disclosure of the Bench Book will not reveal any privileged facts or communications, this office concludes that the Department improperly withheld it pursuant to section 7(1)(m) of FOIA.

⁴Letter from Anthony J. Rizzo Jr, FOIA Officer, Department of Administrative Hearings, to Jane Sternecky, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (June 15, 2022), at 4.

Attorney Work Product

The Public Access Bureau has previously determined that the section 7(1)(m) exemption also encompasses records excluded from discovery under the Illinois work product doctrine. Ill. Att'y PAC Req. Rev. Ltr. 20541, issued January 10, 2013, at 4. The parameters of "work product" are set forth in Illinois Supreme Court Rule 201(b)(2), which provides that material prepared "by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." A public body asserting that records are attorney work-product must demonstrate that the records "reveal the shaping process by which the attorney has arranged the available evidence for use in trial as dictated by his training and experience[.]' [Citation.]" *Monier v. Chamberlain*, 35 Ill. 2d 351, 359 (1966).

Training materials are distinguishable from work product even if the training materials were developed in anticipation of agency proceedings. *American Immigration Council*, 905 F. Supp. 2d at 222. Work product must be prepared in connection with litigation arising from a particular transaction and involve "assembling information, sifting through facts, preparing legal theories, or planning strategy" for an agency case. *American Immigration Council*, 905 F. Supp. 2d at 222. Thus, guidance and training materials that are generally applicable or relevant to the type of cases a public body litigates are not attorney work product.

Though the Department described the Bench Book as "work product,"⁵ it did not advance this argument, and the Department's description of the document in its response indicates that it was not prepared for use in a particular trial or hearing. This office's review of the record confirms this.

For the reasons stated above, the Department has not sustained its burden of demonstrating by clear and convincing evidence that the Bench Book is exempt from disclosure under section 7(1)(f) or 7(1)(m). Therefore, this office requests that the Department disclose the contested portion of the Bench Book to [REDACTED]

⁵Letter from Anthony J. Rizzo Jr, FOIA Officer, Department of Administrative Hearings, to Jane Sternecky, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (June 15, 2022), at 3.


Mr. Anthony Rizzo

March 17, 2023

Page 8

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

Very truly yours,


BENJAMIN J. SILVER
Assistant Attorney General
Public Access Bureau

71954 f 1f improper 71m improper mun