OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

October 16, 2024

Via electronic mail
[redacted]

Via electronic mail
Jennifer K. Schwendener
Petrarca, Gleason, Boyle & Izzo, LLC
5121 Main Street, Suite 3
Downers Grove, Illinois 60515
jschwendener@petrarcagleason.com

RE: FOIA Request for Review: 2024 PAC 81203

Dear [redacted] and Jennifer K. Schwendener:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA).[1]

On April 22, 2024, [redacted] submitted a FOIA request to the District seeking:

1. All records related to any investigative reports of sexual harassment allegations made by District employees against Russell Ragon of Manhattan School District 114 from 2019-2024.

[1]5 ILCS 140/9.5(f) (West 2023 Supp.).

2. All records related to any investigative reports of sexual harassment allegations made by District employees against Christina Ruddy of Manhattan School District 114 from 2019-2024.[2]

On April 26, 2024, the District denied the request in full, citing sections 7(1)(a), 7(1)(b), 7(1)(f) and 7(1)(m) of FOIA.[3] Later the same day, [redacted] submitted this Request for Review challenging the District's denial.

On May 3, 2024, this office sent copies of the Request for Review to the District and asked it to provide copies of the withheld records for our confidential review. This office also requested a detailed legal and factual explanation for the District's assertion that the records are exempt from disclosure. On May 14, 2024, this office received the District's written answer and an affidavit signed by the District's legal counsel. The District refused to provide this office with copies of the withheld records, asserting that it would waive the attorney-client privilege by doing so. On May 16, 2024, this office forwarded a copy of the District's answer to [redacted], but did not receive a reply.[4]

DETERMINATION

Section 9.5(c) of FOIA

Section 9.5(c) of FOIA[5] expressly and unambiguously provides that each public body "**shall** provide copies of records requested and **shall** otherwise fully cooperate with the Public Access Counselor." (Emphasis added.) The District refuses to comply with the requirements of section 9.5(c) of FOIA and provide this office with copies of the withheld records for our confidential review, asserting that doing so would waive the attorney-client privilege.

Illinois courts have defined "waiver" as the "voluntary relinquishment of a known right, claim or privilege[.]" *Vaughn v. Speaker*, 126 Ill. 2d 150, 161 (1998). A "voluntary

---

[2]E-mail from [redacted] to [Ron] Pacheco and [Julie] Hantson (April 22, 2024).

[3]5 ILCS 140/7(1)(a), (1)(b), (1)(f), (1)(m) (West 2023 Supp.).

[4]Section 9.5(c) of FOIA prohibits this office from providing the requester with copies of the affidavit. 5 ILCS 140/9.5(c) (West 2023 Supp.) ("Records or documents obtained by the Public Access Counselor from a public body for the purpose of addressing a request for review under this Section may not be disclosed to the public, including the requester, by the Public Access Counselor.").

[5]5 ILCS 140/9.5(c) (West 2023 Supp.).

disclosure by the holder of the attorney-client privilege is inconsistent with the attorney-client confidential relationship and thus waives the privilege." *Powers v. Chicago Transit Authority*, 890 F.2d 1355, 1359 (7th Cir. 1989). "'[V]oluntary disclosure means the documents [at issue] were not judicially compelled.'" *Cobell v. Norton*, 213 F.R.D. 69, 74 (D.D.C. 2003) (quoting *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Washington*, 103 F.R.D. 52, 63 n.2 (D.D.C. 1984)).

In its response to this office, the District asserted that providing the withheld records to the Public Access Counselor would be a voluntary disclosure that would constitute a selective waiver of the attorney-client privilege. The "'selective' or 'limited' waiver theory * * * provides that a party may disclose documents to a government agency without waiving the privilege as to any other party." *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 244 F.R.D. 412, 430 (N.D. Ill. 2006). Selective waiver cases generally concern situations in which parties cooperate with investigating agencies, such as the United States Securities and Exchange Commission or the United States Department of Justice, by choosing to disclose attorney-client privileged records. The courts are split on whether this type of limited disclosure waives the attorney-client privilege.[6] The rationale for rejecting the selective waiver theory is that "disclosure will be used to obtain a strategic advantage, and puzzlement why if the information is really confidential it was disclosed except for some nefarious strategic purpose." *Dellwood Farms v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997). Thus, waiver is more likely to occur when a party voluntarily discloses records to a government agency for its own benefit. *Noval Williams Films LLC v. Branca*, 2016 U.S. Dist. LEXIS 173279, at *10-11 (S.D.N.Y. December 14, 2016) ("Where the disclosed information does not afford the disclosing party a tactical advantage that would lead to a selective and deceptive presentation of evidence at trial, however, selective waiver may be permissible."). The District implies that because of the legal uncertainty around the selective waiver principle, disclosing the withheld records to the Public Access Counselor would risk waiving the privilege.

Section 9.5(c) mandates that public bodies "shall provide" for the Public Access Counselor's confidential review records that were denied in response to FOIA requests so this

[6]*Compare Westinghouse Electric Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991) (rejecting selective waiver because it "does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose.") *and Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (concluding that the party who disclosed attorney-client privileged records to the government "has been willing to sacrifice confidentiality in order to expedite approval of the exchange offer, and now asserts that the secrecy of the attorney-client relationship precludes disclosure of the same documents in other administrative litigation. The attorney-client privilege is not designed for such tactical employment.") *with Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (concluding there was no complete waiver of the attorney-client privilege where party voluntarily surrendered the material to the SEC pursuant to an agency subpoena. "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.").

office can assess whether or not those records are exempt from disclosure. In the selective waiver cases, the parties *voluntarily* choose to disclose records, often to gain a tactical advantage, which negates the purpose of the privilege. Further, in those cases, the government agencies are using the records in connection with investigations and other legal issues rather than for the purpose of determining whether a privilege applies. A public body does not gain a strategic advantage by cooperating with section 9.5(c) of FOIA—it merely complies with the law. Although courts have held that the attorney-client privilege may be waived when a party discloses records in response to a subpoena after entering into a confidentiality agreement with the government,[7] the District has not cited and this office has not identified any authority in which a court held that a public body waived the attorney-client privilege by complying with a *statute* that expressly required records to be disclosed to a governmental entity for its confidential review.

Further, the mandate in section 9.5(c) of FOIA is akin to a judicially-compelled in camera review rather than a voluntary disclosure to an investigative agency. As the United States Supreme Court has held, "disclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege." *United States v. Zolin*, 491 U.S. 554, 568 (1989). "Drawing a parallel to in camera inspections, examination of privileged documents by a court monitor appointed to ensure compliance with court orders or by an administrative agency acting in a quasi-judicial capacity have been held to be judicially compelled, and therefore did not effect a waiver." Paul R. Rice, Attorney-Client Privilege in the United States § 9:27, at 106-107 (2023-2024 ed.). In *Jordan v. United States Dep't of Labor*, 273 F. Supp. 3d 214, 234 (D.D.C. 2017), the United States District Court for the District of Columbia concluded that the attorney-client privilege was not waived when allegedly privileged documents were provided to a Department of Labor Administrative Law Judge (ALJ) for a determination on whether the assertion of privilege was appropriate. The court explained:

> The principle established in *Zolin* logically applies equally to ALJs. ALJs are judicial actors who, in the matters pending before them, must make determinations on the propriety of privilege claims asserted by the parties before them. There is no basis to conclude that they may not avail themselves of in camera review as a useful tool in making those determinations. If submission of information to such review jettisoned privilege, the review would have no purpose, because any privileged document submitted for in camera review would be immediately eligible for full disclosure under FOIA. Nor is the submission of privileged

[7] *See e.g.*, *United State ex. rel Garbe v. Kmart Corp.*, No. 3:12-cv-00881-MJR-PMR, 2014 U.S. Dist. LEXIS 73261, at *15 (S.D. Ill. May 29, 2024).

> documents for in camera review "inconsistent with the confidential nature of the attorney—client relationship." *In re United Mine Workers*, 159 F.R.D. at 310. *Jordan*, 273 F. Supp. 3d at 234.

See also Cobell v. Norton, 213 F.R.D. 69, 74-75 (D.D.C. 2003) (finding attorney-client privilege not waived by providing records to a court-appointed monitor for a determination on whether the privilege applied to the records at issue). Further, parties submitting withheld records for in camera review of a privilege claim act consistently with the attorney-client privilege—they are substantiating and maintaining their claims of privilege, rather than choosing not to assert the privilege. *See Jordan*, 273 F. Supp. 3d at 235 (finding that corporation acted consistently with the attorney-client privilege in providing ALJ with copies of the records to validate its claim of privilege and by submitting the basis for withholding them).

When resolving Requests for Review, the Public Access Counselor acts in a quasi-judicial capacity. Black's Law Dictionary defines "quasi-judicial" as "[o]f, relating to, or involving an executive or administrative official's adjudicative acts."[8] FOIA establishes a procedural framework for the processing of a Request for Review that provides both the requester and the public body the opportunity to be heard. 5 ILCS 140/9.5(a) through (f) (West 2023 Supp.). The process may culminate in the issuance of a binding opinion in which the Attorney General, through the Public Access Counselor, makes "findings of fact and conclusions of law" that are "binding upon both the requester and the public body." 5 ILCS 140/9.5(f) (West 2023 Supp.). Such a binding opinion "shall be considered a final decision of an administrative agency, for purposes of administrative review under the Administrative Review Law (735 ILCS 5/Art. III)." 5 ILCS 140/11.5 (West 2022). Because the Public Access Counselor exercises quasi-judicial authority to resolve disputes concerning FOIA through a statutory framework and may issue binding opinions that carry the force of law, the principle established in *Zolin* and *Jordan* also applies in the Request for Review context: the provision of records to the Public Access Counselor for a confidential review to determine if the privilege applies does not waive the privilege. Because section 9.5(c) does not afford the District discretion to disregard its statutory obligation to fully cooperate with this inquiry, the District would not waive its attorney-client privilege by furnishing the records in question to the Public Access Counselor.

The General Assembly clearly recognized that the Public Access Counselor must have access to all pertinent records to conduct a complete review of a public body's compliance with FOIA. The following colloquy between Representative Elaine Nekritz and Representative Michael Madigan, the House sponsor of the bill, during the House debate on Senate Bill 189 (which, as Public Act 96-542, effective January 1, 2010, created the Office of the Public Access Counselor), evinces the General Assembly's intention to vest the Public Access Counselor with complete authority to conduct confidential reviews of records.

[8]Black's Law Dictionary 1501 (11th ed. 2019).

> Nekritz: Thank you Mr. Speaker. I just have some questions * * * to clarify the legislative intent under this. * * * It's my understanding that under this Bill, an agency's required to provide records requested by the public access counselor. What if some other State or Federal Law precludes disclosure of those records to some other party like HIPAA, an IG report or something like that? How does that * * * get resolved?
>
> Madigan: Point number one, **the Attorney General will review those documents in confidence. They would be kept confidential.** Point number two, if it were a Federal Law in conflict, why, the Federal Law would control.
>
> Nekritz: [A]nd if some investigating authority such as the U.S. Attorney asked to have that certain records not be disclosed * * * what would be the result there?
>
> Madigan: * * * [T]he Office of the U.S. Attorney could interact with the Office of the Attorney General, make a request, but **the final judgment…the final decision would be made by the Attorney General**. (Emphasis added.) Remarks of Rep. Nekritz and Rep. Madigan, May 27, 2009, House Debate on Senate Bill No. 189, at 105.

If the General Assembly wished to carve out an exception in section 9.5(c) that would have permitted public bodies to withhold from the Public Access Counselor records asserted to be exempt under section 7(1)(m) of FOIA, the General Assembly would have done so expressly. The District's refusal to provide copies of the contested records undermines the Public Access Counselor's ability to conduct the type of comprehensive review that the General Assembly deemed to be crucial when it enacted Public Act 96-542. This refusal violates section 9.5(c) of FOIA (*see* Ill. Att'y Gen. Pub. Acc. Op. No. 12-007, issued April 2, 2012). Nevertheless, this office will consider whether the District's written response to this office demonstrates that the record at issue is exempt from disclosure under FOIA.

Section 7(1)(m) of FOIA

"All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2022). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2022)) further provides: "Each public body shall make available to any person for inspection or copying all public

records, except as otherwise provided in Sections 7 and 8.5 of this Act." The exemptions from disclosure contained in section 7 of FOIA (5 ILCS 140/7 (West 2023 Supp.)) are to be narrowly construed. *See Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

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). *See People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 201 (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 (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 (1990); *see also People v. Radojcic*, 2013 IL 114197, ¶ 40 ("[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).

An investigative report prepared by a law firm to advise a public body in connection with allegations of misconduct may be exempt from disclosure under section 7(1)(m). *See Sandra T.E. v. South Berwyn School District 100*, 600 F.3d 612, 620 (7th Cir. 2010) ("Because the [public body's] lawyers were hired in their capacity as lawyers to provide legal services—including a factual investigation—the attorney-client privilege applies to the communications made and documents generated during that investigation."); *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 81704, issued September 30, 2024 (library properly withheld investigation report prepared by law firm that contained attorney's opinions and recommendations, among other privileged information); Ill. Att'y Gen. PAC Req. Rev. Ltr. 35302, issued July 10, 2015 (memorandum prepared by counsel summarizing investigatory interviews and setting out findings and recommendations was exempt from disclosure under section 7(1)(m)).

The affidavit the District submitted with its answer to this office stated that the only records withheld were a February 13, 2024, investigative report and executive summary of the same report. The affidavit stated that the District's Board of Education (Board) retained the law firm Petrarca, Gleason, Boyle & Izzo, LLC to investigate allegations of sexual harassment. At the conclusion of its investigation, the law firm provided the Board with the investigation report and summary. The affidavit stated that the records contained confidential legal advice, mental impressions, conclusions, and opinions of the Board's attorneys.

Based on the available information, the investigation report was prepared by the Board's attorneys to provide the Board with confidential legal advice. Such investigation reports are protected by the attorney-client privilege because the information they contain, including any factual information, was developed and prepared by legal counsel while providing legal services to the public body. *See Sandra T.E.*, 600 F.3d at 620. This office has not received information suggesting that the District has waived the attorney-client privilege in this instance, such as by voluntarily disclosing the investigation report to an uninvolved third party. Under these circumstances, the District demonstrated that it did not improperly withhold the responsive record; therefore, its response to [redacted] April 22, 2024, FOIA request did not violate FOIA.

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

Very truly yours,

[redacted]

LAURA S. HARTER
Deputy Bureau Chief
Public Access Bureau

81203 f 71m proper 95c improper sd