



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 12, 2012

PUBLIC ACCESS OPINION 12-005
(Request for Review 2012 PAC 18205)

FREEDOM OF INFORMATION ACT:
Disclosure of Invoices for Legal
Services

Mr. Daniel Kelley
O'Fallon Progress
120 South Illinois Street
Belleville, Illinois 62222

Ms. Jane Hamm
FOIA Officer
Central School District No. 104
309 Hartman Lane
O'Fallon, Illinois 62269

Dear Mr. Kelley and Ms. Hamm:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2010), as amended by Public Act 97-579, effective August 26, 2011). For the reasons discussed below, we find that Central School District No. 104 improperly withheld legal invoices in their entirety in response to a FOIA request from Mr. Daniel Kelley. Although some of the information contained in the responsive records may be exempt from disclosure, other information contained in the invoices, such as a general description of the nature of the services the billing attorney performed, the attorneys' initials, the time spent on the tasks described, and the rate and dollar amounts charged, cannot be withheld.

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BACKGROUND

On December 21, 2011, Mr. Daniel Kelley, Editor of the *O'Fallon Progress*, submitted a FOIA request to Central School District No. 104 (District) seeking records of the District's legal expenses for the following:

[L]awsuit between the district and the City of O'Fallon regarding the city's attempt to restrict the district's use of an access road on the property of Joseph Arthur Middle School[;]

[O]pposition to the City of O'Fallon's planned creation of a \$59 million TIF district to support a proposed corporate campus[;] and

[L]awsuit opposing the City of O'Fallon's creation of a \$22.5 million TIF district to support a proposed medical campus.¹

On January 9, 2012, the District denied this request. The District stated that the only documents in its possession that list the legal expenses separately by subject are the monthly invoices from the District's attorneys. The District asserted that these invoices are exempt from disclosure pursuant to section 7(1)(m) of FOIA (5 ILCS 140/7(1)(m) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011), which exempts "[c]ommunications between a public body and an attorney * * * representing the public body that would not be subject to discovery in litigation[.]" The District's denial letter states that these invoices "constitute attorney/client privileged communications."² The District did advise Mr. Kelley, however, that it maintained other financial records reflecting the total amounts of payments for legal services provided to the District, which would include the amounts paid for the specific matters referenced by Mr. Kelley, and offered to make such records available for his inspection. On January 20, 2012, the Public Access Bureau received Mr. Kelley's Request for Review of this denial.

On January 23, 2012, this office sent a copy of the Request for Review to the District and asked the District for copies of the legal invoices in question, as well as an explanation of its basis for asserting that the invoices are exempt under section 7(1)(m).³ This

¹Letter from Daniel Kelley, Editor, *O'Fallon Progress*, to Freedom of Information Officer, Central School District No. 104 (December 21, 2011)

²Letter from Jane Hamm, FOIA Officer, Central School District No. 104, to Daniel Kelley, *O'Fallon Progress* (January 9, 2012).

³Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Jane Hamm, FOIA Officer, Central School District No.104 (January 23, 2012).

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office received the District's response dated February 2, 2012, which included a sample of the legal invoices at issue.⁴ We forwarded the non-confidential portion of the District's answer to Mr. Kelley on February 15, 2012.⁵ This office received Mr. Kelley's reply on March 2, 2012.⁶

ANALYSIS

Section 7(1)(m) of FOIA exempts from disclosure communications between a public body and an attorney which would not be subject to discovery in litigation, including communications covered by the attorney-client privilege. 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 Association v. Illinois State Board of Education*, 204 Ill. 2d 456 (2003).

The privilege extends both to communications from a client to an attorney and from an attorney to a client. *Midwesco-Paschen Joint Venture for Viking Projects v. Imo Industries, Inc.*, 265 Ill. App. 3d 654 (1994).

"It is well-recognized that information regarding a client's fees generally is not a 'confidential communication' between an attorney and client, and thus is not protected by the attorney-client privilege. [Citations.] The payment of fees is merely incidental to the attorney-client relationship and typically does not involve the disclosure of confidential communications arising from the relationship." *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 203-4 (1997). In *Ulrich*, however, the court acknowledged that "[c]ertain types of billing records may contain explanations for legal fees and may indicate the type of work done or matters discussed between the attorney and client. As such, they could reveal the substance of confidential attorney-client discussions and be subject to valid claims of attorney-client privilege or exemption under [FOIA]." *Ulrich*, 294 Ill. App. 3d at 201.

⁴Letter from Garrett P. Hoerner, Becker Paulson, Hoerner & Thompson, P.C., to Steve Silverman, Assistant Attorney General, Office of the Attorney General (February 2, 2012).

⁵Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Daniel Kelly, *O'Fallon Progress Newspaper* (February 15, 2012).

⁶Letter from Daniel Kelley, Editor, *O'Fallon Progress*, to Steve Silverman, Assistant Attorney General, Public Access Bureau (February 27, 2012).

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The District cites *Ulrich* for the proposition that because the legal invoices could reveal the substance of confidential attorney-client discussions, they are therefore exempt from disclosure in their entirety. *Ulrich* does not stand for that proposition, however. To the contrary, the court in *Ulrich* drew a distinction between descriptions of work that could reveal privileged information and fee information which is not privileged, and concluded that the latter must be produced.

The invoices at issue here include dates on which work was performed, the initials of attorneys, descriptions of the work performed, the numbers of hours billed and the dollar amounts for each item. Some of the descriptions may contain attorney-client communications; others would not. Even in those work descriptions which could arguably reveal privileged information, however, other parts of the descriptions could be released without revealing the content of any substantive communication between the District and its attorneys. For example, to the extent they may appear in these invoices, generic descriptions of the tasks an attorney performed (such as "read e-mail," "telephone conference," "court appearance," etc.) could be disclosed without revealing any privileged matter. Similarly, the attorneys' initials, the time spent on the tasks described, and the dollar amounts charged would not disclose any privileged matters. Therefore, although some parts of these invoices containing detailed descriptions of the work performed may be subject to redaction under 7(1)(m), if disclosure could reveal privileged information, other parts of the invoices are clearly not exempt from FOIA's disclosure requirement.

Section 7(1) of FOIA (5 ILCS 140/7(1) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 18, 2011) provides:

When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying.

This section requires the District to disclose the non-exempt information contained in these invoices.

Further, section 2.5 of FOIA (5 ILCS 140/2.5 (West 2010)) provides that "[a]ll records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public." The amounts billed to a public body by a law firm as well as the generic descriptions of

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the work performed and the time spent on that work are subject to disclosure pursuant to this section.

FINDINGS AND CONCLUSIONS

After full review and giving due consideration to the arguments of the parties, the Public Access Counselor's findings, and the applicable law, the Attorney General finds that:

1) On December 21, 2011, Mr. Daniel Kelley, Editor of the *O'Fallon Progress*, submitted a Freedom of Information Act request to Central School District No. 104 seeking records of the District's legal expenses for three specified matters.

2) On January 9, 2012, Central School District No. 104 denied Mr. Daniel Kelley's FOIA request, asserting that legal invoices containing the information Mr. Kelley seeks are exempt from disclosure pursuant to section 7(1)(m) of FOIA, which exempts from disclosure "[c]ommunications between a public body and an attorney * * * representing the public body that would not be subject to discovery in litigation[.]"

3) On January 20, 2012, the Public Access Counselor received Mr. Kelley's Request for Review of the District's response. Mr. Kelley's Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2010), as amended by Public Act 97-579, effective August 26, 2011). Therefore, the Attorney General may properly issue a binding opinion with respect to the District's denial of Mr. Kelley's request.

4) Based upon a review of the samples of the legal invoices in question, some of the information contained in the responsive records may be subject to redaction under section 7(1)(m) of FOIA. The disclosure of information contained in the invoices, such as a general description of the nature of the services the billing attorney performed, the attorneys' initials, the time spent on the tasks described, and the rate and dollar amounts charged, however, would not disclose privileged information and may not properly be withheld under section 7(1)(m) of FOIA.

Therefore, it is the opinion of the Attorney General that Central School District No. 104 violated section 7(1) of FOIA by withholding the legal invoices in their entirety, and by failing to release the non-exempt information in those invoices to Mr. Kelley. Accordingly, the District is directed to immediately furnish copies of the invoices to Mr. Kelley, subject only to the redaction of information that would reveal the substance of any confidential attorney-client communications.

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Under section 9.5(f) of FOIA, the District must either immediately comply with this binding opinion or initiate administrative review under section 11.5 of FOIA (5 ILCS 140/11.5(f) (West 2010)).

This opinion shall be considered a final decision of an administrative agency for the purpose of administrative review under the Administrative Review Law. 735 ILCS 5/2-101 *et seq.* (West 2010). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook County or Sangamon County within 35 days of the date of this decision, naming the Attorney General of Illinois and Mr. Daniel Kelley as defendants. *See* 5 ILCS 140/11.5 (West 2010).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
Counsel to the Attorney General