



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 2, 2012

PUBLIC ACCESS OPINION 12-007
(Request for Review 2011 PAC 17813)

FREEDOM OF INFORMATION ACT:
Production of Records to the Public
Access Counselor

Mr. Edward F. Mrkvicka, Jr.
22115 O'Connell Road
Marengo, Illinois 60152

Mr. Mark Thompson
General Counsel
Illinois Department of Financial and
Professional Regulation
100 West Randolph Street, 9th Floor
Chicago, Illinois 60601

Dear Mr. Mrkvicka and Mr. Thompson:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 120/9.5(f) (West 2010), as amended by Public Act 97-579, effective August 26, 2011). At issue is disclosure of a file concerning an investigation conducted by the Real Estate Section of the Division of Professional Regulation within the Illinois Department of Financial and Professional Regulation (IDFPR). For the reasons that follow, IDFPR has violated FOIA by failing to respond to the FOIA request, refusing to provide records to the Public Access Counselor for review, and failing to demonstrate by clear and convincing evidence that the requested records are exempt from disclosure.

On December 1, 2011, Mr. Edward F. Mrkvicka, Jr., submitted a request to IDFPR for the complete and full investigative complaint file relating to a particular real estate agent and realty company and identified as Case No. 2009-09739. IDFPR did not respond to his

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request. Mr. Mrkvicka submitted a Request for Review to the Public Access Counselor pursuant to section 9.5(a) of the Freedom of Information Act (FOIA) (5 ILCS 120/9.5(a) (West 2010), as amended by Public Act 97-579, effective August 26, 2011) on December 14, 2011. His request was received on December 19, 2011.

BACKGROUND

Prior Related FOIA Request and Request for Review

This matter is related to a previous FOIA request and Request for Review. On June 14, 2011, Ms. Kelly H. Mrkvicka submitted a FOIA request to IDFPR seeking a copy of the file pertaining to Case No. 2009-09739.¹ On July 29, 2011, IDFPR denied Ms. Mrkvicka's request in its entirety pursuant to sections 7(1)(a), 7(1)(c), and 7(1)(f) of FOIA. 5 ILCS 140/7(1)(a), (c), (f) (West 2010). In doing so, IDFPR asserted that "[t]his case was closed with no disciplinary action being taken by the Department."²

On August 4, 2011, Mr. Edward Mrkvicka filed a Request for Review of IDFPR's denial of Ms. Mrkvicka's FOIA request, 2011 PAC 15981.³ As part of his Request for Review, Mr. Mrkvicka questioned IDFPR's assertion that the agency had closed Case No. 2009-09739 without taking disciplinary action. In support, Mr. Mrkvicka provided a letter that IDFPR had sent to him in 2010 regarding Case No. 2009-09739. In that letter, IDFPR stated that "[i]t has been determined that the respondent's activity did represent a technical violation of the Illinois Real Estate License Act [of 2000 (225 ILCS 454/1-1 *et seq.*)]. The [IDFPR] has imposed a discipline on the named licensee that the Department felt was appropriate."⁴

The Public Access Bureau sent a copy of the Request for Review to IDFPR on August 15, 2011, and asked that IDFPR provide copies of the records in question, detailed summaries of its reasons for asserting the particular exemptions, and clarification as to whether the agency found any violations of the Illinois Real Estate License Act and whether it imposed

¹Letter from Kelly H. Mrkvicka to Illinois Department of Financial and Professional Regulation (June 14, 2011).

²Letter from Mark Thompson, Deputy General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation, to Kelly H. Mrkvicka (July 29, 2011).

³E-mail from Edward Mrkvicka to Mary Jo Vail, Public Access Bureau, Office of the Attorney General (August 4, 2011).

⁴Letter from Debra Dolinski, Administrative Assistant, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation, to Edward F. Mrkvicka Jr., (October 18, 2010).

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any discipline in Case No. 2009-09739.⁵ IDFPR did not respond. On September 14, 2011, this office sent IDFPR a second letter requesting a response.⁶ On September 21, 2011, IDFPR submitted a written response stating that Mr. Mrkvicka had been erroneously informed that the Department imposed discipline in Case No. 2009-09739.⁷ Because the Division of Professional Regulation within IDFPR did not impose discipline in the case, IDFPR argued, "[a]ny investigative files held by the Division and any non-disciplinary action taken by the Division are confidential." In support of this argument, IDFPR cited sections 7(1)(a), 7(1)(c), and 7(1)(f) of FOIA. 5 ILCS 140/7(1)(a), (c), (f) (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. However, IDFPR did not provide copies of the records in question. Consequently, the Public Access Bureau made additional requests for the records.⁸ On October 21, 2011, IDFPR replied that "[p]roducing these records to your Office serves no purpose in addressing the Request for Review as the issue in this matter is purely legal. The Division does not have unlimited resources, and we must use the resources we have in a responsible manner."⁹

On November 4, 2011, the Public Access Counselor issued a letter finding that IDFPR failed to sustain its burden of demonstrating that any of the records are exempt from disclosure pursuant to sections 7(1)(a), 7(1)(c), or 7(1)(f) and directing IDFPR to disclose a copy of Case No. 2009-09739 to Ms. Mrkvicka. Ill. Att'y Gen. Req. Rev. Ltr. 15981, issued November 4, 2011. IDFPR did not comply with that letter.

⁵Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation (August 15, 2011).

⁶Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation (September 14, 2011).

⁷Letter from Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation, to Steve Silverman, Assistant Attorney General, Public Access Bureau (September 21, 2011).

⁸Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation (September 21, 2011); letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation (October 21, 2011).

⁹Letter from Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation, to Steve Silverman, Assistant Attorney General, Public Access Bureau (October 21, 2011).

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Mr. Mrkvicka's December 2011 FOIA Request and Request for Review

On December 1, 2011, Mr. Mrkvicka submitted a FOIA request to IDFPR seeking a copy of Case No. 2009-09739.¹⁰ Mr. Mrkvicka enclosed with his FOIA request a copy of the Public Access Bureau's letter in 2011 PAC 15981, and stated:

Under the FOIA, I hereby request a complete and total copy of Case #2009-09739.

As you can see from the attached, the Attorney General's Office, on November 4, 2011, determined that this file should be provided in its entirety, but, as of this writing, it has failed to do so – which is why I am filing this request.

If there are any questions, please call – otherwise I will expect the file within the time allotted by the law.

If there are any appropriate fees, up to \$100, I will pay them. Anything over that amount, I would appreciate notification.¹¹

IDFPR did not respond to Mr. Mrkvicka's December 1, 2011, letter.

On December 19, 2011, the Public Access Bureau received Mr. Mrkvicka's Request for Review. On December 28, 2011, the Public Access Bureau forwarded a copy of the Request for Review with a letter asking IDFPR to:

[P]rovide us with an explanation of IDFPR's receipt and handling of Mr. Mrkvicka's December 1, 2011, FOIA request. If IDFPR has provided a response to the FOIA request, please provide us with a copy of that response. In addition, please indicate whether IDFPR has determined whether or not to abide by our previous determination that Ms. Kelly Mrkvicka is entitled to a copy of

¹⁰Letter from Edward F. Mrkvicka, Jr., to FOIA Officer, Illinois Department of Financial and Professional Regulation (December 1, 2011).

¹¹Letter from Edward F. Mrkvicka, Jr., to FOIA Officer, Illinois Department of Financial and Professional Regulation (December 1, 2011).

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Case No. 2009-09739. Ill. Att'y Gen. PAC Req. Rev. Ltr. 15981,
issued November 4, 2011.¹²

On January 6, 2012, the General Counsel for IDFPR's Division of Professional Regulation responded that the "Division maintains its position that the requested records are confidential and not subject to disclosure under the Freedom of Information Act."¹³

On February 1, 2012, the Public Access Bureau advised IDFPR that we construed its response as an assertion that the records in question are exempt from disclosure pursuant to sections 7(1)(a), 7(1)(c), and 7(1)(f). We again requested that the agency provide the records for our review together with a detailed explanation of its basis for the asserted exemptions. On February 15, 2012, IDFPR responded, in pertinent part:

The Division interpreted Mr. Mrkvicka's letter of December 1, 2011, as a request for the Division to comply with the Public Access Counselor's advisory opinion that the Division release a copy of the requested file to Edward and Kelly Mrkvicka. We have answered accordingly and do not view it as a new request. In addition, the Division declines to produce a copy of the file for your inspection. The contents of the file have no bearing on the confidentiality of the entire investigative file, whether in this case or any other cases involving different parties.¹⁴

On February 10, 2012, the Public Access Bureau extended the time for issuing a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.¹⁵

¹²Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation (December 28, 2011).

¹³Letter from Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation, to Steve Silverman, Assistant Attorney General, Public Access Bureau (January 6, 2012).

¹⁴Letter from Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation, to Steve Silverman, Assistant Attorney General, Public Access Bureau (February 15, 2012).

¹⁵Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau to Mark Thompson, General Counsel, Division of Professional Regulation, Department of Financial and Professional Regulation, and Edward F. Mrkvicka Jr., (February 10, 2012).

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ANALYSIS

All public records in the possession of a public body are "presumed to be open to inspection and copying." 5 ILCS 140/1.2 (West 2010). 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 2010). The exemptions from disclosure are to be read narrowly. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 408 (1997).

As a threshold matter, we do not agree with IDFPR's contention that Mr. Mrkvicka's December 1, 2011, letter was simply a request for compliance with the Public Access Counselor's determination in 2011 PAC 15981, rather than a new FOIA request. In his letter, Mr. Mrkvicka plainly stated that he was requesting the records in question "[u]nder the FOIA[]". As is typical in a FOIA request, Mr. Mrkvicka also stated that he expected to receive the records "within the time allotted by the law" and that he was willing to pay "any appropriate fees, up to \$100". Mr. Mrkvicka noted that IDFPR had not provided the records in response to the Public Access Counselor's previous direction to do so in 2011 PAC 15981, and stated that "is why I am filing this request." Further, the FOIA request in 2011 PAC 15981 was submitted by Ms. Mrkvicka, not Mr. Mrkvicka. For all of these reasons, Mr. Mrkvicka's December 1, 2011, letter was clearly a new FOIA request to which IDFPR was obligated to respond.

Section 3(d) of FOIA (5 ILCS 140/3(d) (West 2010)) requires each public body to "either comply with or deny a request for public records within 5 business days after its receipt of the request, unless the time for response is properly extended" pursuant to section 3(e) (5 ILCS 140/3(e) (West 2010)). Section 3(d) also provides that a public body's failure to "comply with a written request, extend the time for response, or deny a request within 5 business days after its receipt shall be considered a denial of the request."

The fact that IDFPR failed to respond in any manner to Mr. Mrkvicka's December 1, 2011, FOIA request is undisputed. Therefore, IDFPR violated section 3(d), as well as section 9(a) of FOIA (5 ILCS 140/9(a) (West 2010)), which provides:

Each public body denying a request for public records shall notify the requester in writing of the decision to deny the request, the reasons for the denial, including a detailed factual basis for the application of any exemption claimed, and the names and titles or positions of each person responsible for the denial. Each notice of denial by a public body shall also inform such person of the right to review by the Public Access Counselor and provide the address and phone number for the Public Access Counselor. Each notice

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of denial shall inform such person of his right to judicial review under Section 11 of this Act.

Moreover, IDFPR's refusal to provide copies of the records requested and to cooperate with the Public Access Counselor also constitutes a violation of FOIA. Section 9.5(c) of FOIA (5 ILCS 140/ 9.5(c) (West 2010), as amended by Public Act 97-579, effective August 26, 2011) expressly and unambiguously provides that "[w]ithin 7 business days after receipt of the request for review, the public body *shall* provide copies of records requested and *shall* otherwise fully cooperate with the Public Access Counselor." (Emphasis added.) This mandate could not be more clearly stated. By refusing to provide the copies of the records requested to the Public Access Counselor, IDFPR has significantly hampered this office's ability to conduct a full review of this matter.

IDFPR's failure to comply with sections 3(d) and 9.5(c) of FOIA, standing alone, establishes that IDFPR has not sustained its burden of demonstrating by clear and convincing evidence that the records in question are exempt from disclosure. Because of potential third party interests in the contents of the records at issue, however, we also will consider IDFPR's previous assertion of sections 7(1)(a), 7(1)(c), and 7(1)(f) to the extent possible based on the agency's response to Ms. Mrkvicka's June 14, 2011, FOIA request and its arguments in 2011 PAC 15981.

Section 7(1)(a)

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." The Illinois Appellate Court has interpreted this exemption narrowly.

[O]ur legislature has authorized exemptions to the FOIA's expansive disclosure policy when a given disclosure is not just prohibited "by federal or State law or rules and regulations adopted under federal or State law" but *specifically* so prohibited. 5 ILCS 140/7(1)(a) (West 2006). When interpreting a statute, this court cannot disregard explicit statutory language. [citations omitted] Therefore, this court is duty-bound to apply the actual words of the statute enacted by our legislature. Thus, an exemption restricting the expansive nature of the FOIA's disclosure provisions must be explicitly stated – that is, such a proposed disclosure must be *specifically* prohibited. (Emphasis added.) *Better Government Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 816 (4th Dist. 2008).

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In asserting that section 7(1)(a) applies, IDFPR has not identified any statute or implementing rules or regulations that specifically prohibit disclosure of the requested records. Instead, in 2011 PAC 15981, IDFPR argued that disclosure of any information related to an investigation that "did not result in the filing of official charges against a licensee" would violate the licensee's right to procedural due process under the U.S. Constitution as articulated by the 7th Circuit in *Fleury v. Clayton*, 847 F.2d 1229, 1232-33 (7th Cir. 1988).¹⁶ *Fleury*, however, does not hold that the due process clause prohibits disclosure of the records in question. In fact, the Public Access Counselor has previously determined that the *Fleury* decision is not a valid basis for IDFPR to withhold records related to complaints against licensees pursuant to section 7(1)(a) of FOIA. Ill. Att'y Gen. Req. Rev. Ltr. 8273, issued November 18, 2010; Ill. Att'y Gen. Req. Rev. Ltr. 15981, issued November 4, 2011. A close look at *Fleury* and a more recent Seventh Circuit case demonstrates why IDFPR's reliance on that decision is misplaced.

In *Fleury*, an Illinois physician had waived his right to a hearing and consented to a censure by the State's Medical Disciplinary Board. *Fleury*, 847 F. 2d. at 1230. When he learned that the censure might negatively impact his ability to practice in other states, the physician brought a civil rights suit to expunge the censure. In addressing his claims, the court considered whether a State agency's censure of a physician deprived the physician of a constitutionally-protected property interest in his license to practice medicine. *Fleury*, 847 F.2d at 1230. The court held that the State's medical licensing statute "establishes criteria for professional discipline and therefore creates a 'property' interest in a blemish-free license to practice medicine." *Fleury*, 847 F.2d at 1232. Because the relevant statute created a property interest in a "blemish-free" license, the court concluded, the due process clause requires "some kind of hearing" and censuring the physician without following the statutory disciplinary process would violate his right to procedural due process. *Fleury*, 847 F.2d at 1232-33.

Recently, the Seventh Circuit has clarified the narrow scope of the holding in *Fleury*. In *Abcarian v. McDonald*, 617 F.3d 931, 933-34 (7th Cir. 2010), a physician involved in a medical malpractice settlement brought a civil rights action against his employer, the University of Illinois, when, as required by law, the university reported the settlement to IDFPR and a national physician database. The physician argued that by filing the notices of the settlement, the university defamed him, infringing his right to pursue his profession and, as a result, violating his right to procedural due process. *Abcarian*, 617 F.3d at 940-41. The District Court dismissed this claim and the Seventh Circuit affirmed. As part of its analysis, the court distinguished and explained *Fleury*:

¹⁶Letter from Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation, to Steve Silverman, Assistant Attorney General, Public Access Bureau (September 21, 2011).

[I]n addressing [Abcarian's property interest] theory, the district court erroneously concluded that our decision in *Fleury v. Clayton*, 847 F.2d 1229 (7th Cir. 1988), meant that the mere reporting of the settlement imposed a property deprivation[.] * * *

Read in context, the language in *Fleury* means only that an Illinois physician has a property interest in a medical license free from formal disciplinary sanction imposed without due process. * * * In other words, the relevant "blemishes" are actual formal disciplinary sanctions[.] *Abcarian*, 617 F.3d at 942.

Thus, *Abcarian* makes clear that the interest in a "blemish-free license" articulated in *Fleury* is limited to an interest in a license that is free of formal discipline imposed without due process. *Abcarian*, 617 F.3d at 942. Nonetheless, IDFPR argues that if the Division of Professional Regulation "were to disclose information about claims of complaints made against specific licenses that did not result in the filing of official charges, the Division would be creating blemishes on these licensees' records."¹⁷ *Fleury* does not support this argument. The Seventh Circuit in *Fleury* did not hold or imply that by complying with FOIA, the professional licensing agency would violate the procedural due process rights of a licensee. Accordingly, we conclude that IDFPR has failed to sustain its burden of demonstrating that the records in question are exempt pursuant to section 7(1)(a) of FOIA because the law specifically prohibits their disclosure.

It is important to note that IDFPR's argument that the exemption in section 7(1)(a) applies here is based entirely on the agency's assertion that the licensee involved in Case No. 2009-09739 was not disciplined. Yet, on October 18, 2010, IDFPR sent a letter to Mr. Mrkvicka stating unequivocally that "[i]t has been determined that the respondent's activity did represent a technical violation of the Illinois Real Estate License Act. The [IDFPR] has imposed a discipline on the named licensee that the Department felt was appropriate." Although IDFPR now indicates that its previous letter was incorrect, the agency's refusal to provide the Public Access Counselor with copies of the records in the case file prevents us from reviewing this discrepancy. As a result, the only documentary evidence at our disposal, IDFPR's October 18, 2010, letter, plainly states that the agency imposed discipline on the licensee. Thus, even if we agreed with its argument regarding the applicability of section 7(1)(a), IDFPR has provided no documentation to demonstrate that Case No. 2009-09739 did not result in charges or discipline.

¹⁷ Letter from Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation, to Steve Silverman, Assistant Attorney General, Public Access Bureau (September 21, 2011).

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Sections 7(1)(c) and 7(1)(f)

Section 7(1)(c) of FOIA exempts from inspection and copying "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information." The exemption 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."

Section 7(1)(f) of FOIA exempts from inspection and copying "[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 applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003).

In 2011 PAC 15981, IDFPR's response to the Public Access Bureau's request for information supporting its assertion of sections 7(1)(c) and (1)(f) stated: "Investigative files contain information of a private nature, including but not limited to personal information about the target of the complaint and other persons and private businesses, professional, or client information. Section 7(1)(f) is very descriptive of the documents that are in an investigative file."¹⁸ As discussed above, IDFPR maintained that providing the Public Access Counselor with copies of the records would be pointless "as the issue in this matter is purely legal."¹⁹

The assertion of sections 7(1)(c) and 7(1)(f) of FOIA presents mixed questions of fact and law rather than purely legal issues. *See City of Belvidere v. Illinois State Labor Relations Bd.*, 181 Ill. 2d 191, 205 (1998) (a case that requires an examination of the "legal effect of a given set of facts[] * * * involves a mixed question of fact and law"). Based upon the Public Access Counselor's prior review of similar materials, it is possible that some information contained in an investigatory file may be exempt under sections 7(1)(c) and 7(1)(f). *See* 5 ILCS 140/7 (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385,

¹⁸Letter from Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation, to Steve Silverman, Assistant Attorney General, Public Access Bureau (September 21, 2011).

¹⁹Letter from Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation, to Steve Silverman, Assistant Attorney General, Public Access Bureau (October 21, 2011).

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effective August 15, 2011; 97-452 effective August 19, 2011. The Public Access Counselor cannot make the necessary factual findings regarding Case No. 2009-09739 to determine whether any information is exempt from disclosure under section 7(1)(c) or section 7(1)(f) without first reviewing the records.

In addition to refusing to provide copies of the records to the Public Access Counselor, IDFPR has failed to offer any specific facts to support the applicability of the asserted exemptions. Instead, IDFPR has simply stated that "the records are confidential and not subject to disclosure" under FOIA.²⁰ Essentially, IDFPR asserts a blanket exemption for everything within its investigatory case files, arguing that, "the contents of the file have no bearing on the confidentiality of the entire investigative file, whether in this case or any other cases involving different parties."²¹ Because IDFPR has improperly refused to provide copies of the records for our examination, and because its assertions of the section 7(1)(c) and section 7(1)(f) exemptions are conclusory and unsupported, the Public Access Counselor determines that IDFPR has failed to sustain its burden of proving by clear and convincing evidence that any of the records are exempt from disclosure.²²

We acknowledge that the disclosure of the records at issue here could adversely impact the privacy interests of third parties who provided information to investigators or whose personally-identifying information appears in the records. Those parties should not be required to forfeit their privacy interests because of IDFPR's disregard of its statutory obligations under section 9.5(c) of FOIA. Accordingly, we direct IDFPR to provide Mr. Mrkvicka with a copy of the records constituting Case No. 2009-09739, subject only to appropriate redactions of "private

²⁰Letter from Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation, to Steve Silverman, Assistant Attorney General, Public Access Bureau (January 6, 2012).

²¹Letter from Mark Thompson, General Counsel, Division of Professional Regulation, Illinois Department of Financial and Professional Regulation, to Steve Silverman, Assistant Attorney General, Public Access Bureau (February 15, 2012).

²²Even if IDFPR could meet its burden to establish by clear and convincing evidence that certain information in the case file is exempt under sections 7(1)(c) or 7(1)(f), FOIA requires that if records containing exempt information also contain information that is not exempt, the public body must disclose the non-exempt information. 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 19, 2011.

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information"²³ under section 7(1)(b) (5 ILCS 140/7(1)(b) (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), and any information that would "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[]" under section 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)(d)(iv) (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).

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 June 14, 2011, Ms. Kelly Mrkvicka submitted a Freedom of Information Act request to the Illinois Department of Financial and Professional Regulation seeking a copy of Case No. 2009-09739. IDFPR denied that request pursuant to sections 7(1)(a), 7(1)(c), and 7(1)(f) of FOIA.

2) On August 4, 2011, the Public Access Bureau received Mr. Mrkvicka's Request for Review of the denial of Ms. Mrkvicka's June 14, 2011, FOIA request. In its response to the allegations in the Request for Review, IDFPR reiterated that the requested records are exempt from disclosure pursuant to sections 7(1)(a), 7(1)(c), and 7(1)(f) of FOIA. IDFPR refused to comply with the Public Access Counselor's request for copies of the records.

3) On November 4, 2011, the Public Access Counselor issued a letter finding that IDFPR had failed to sustain its burden of demonstrating that the records are exempt from disclosure pursuant to sections 7(1)(a), 7(1)(c), and 7(1)(f) of FOIA. Ill. Att'y Gen. PAC Req. Rev. Ltr. 15981, issued November 4, 2011. This determination letter, which was not a binding opinion pursuant to section 9.5(f) of FOIA, directed IDFPR to furnish Ms. Mrkvicka with a copy of Case No. 2009-09739.

²³Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2010), as amended by Public Act 97-579, effective August 26, 2011) defines private information as "unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person."

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4) IDFPR continued to refuse to provide any documents in response to Ms. Mrkvicka's June 14, 2011, FOIA request.

5) On December 1, 2011, Mr. Mrkvicka submitted a FOIA request seeking the same records. IDFPR did not respond to that request.

6) On December 19, 2011, the Public Access Counselor received from Mr. Mrkvicka a Request for Review concerning his December 1, 2011, FOIA request. On January 6, 2012, IDFPR responded that it maintained its position that the records are not subject to disclosure.

7) Mr. Edward F. Mrkvicka's Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to the allegations in the Request for Review.

8) On February 1, 2012, this office informed IDFPR that it construed its response dated January 6, 2012, as asserting that Case No. 2009-09739 is exempt from disclosure pursuant to sections 7(1)(a), 7(1)(c), and 7(1)(f) of FOIA. We requested that IDFPR provide copies of the records in question together with detailed summaries for the asserted exemptions. On February 15, 2012, IDFPR replied that it construed Mr. Mrkvicka's December 1, 2011, letter as a request to comply with the Public Access Counselor's determination in 2011 PAC 15981 rather than a new FOIA request; IDFPR again refused to provide copies of the records in question for review by the Public Access Counselor.

9) On February 10, 2012, this office sent a letter advising the parties that it was extending the statutory period for issuing a binding opinion by 30 business days pursuant to section 9.5(f) of the Freedom of Information Act.

10) Mr. Mrkvicka's December 1, 2011, letter, which plainly requested records under FOIA, constituted a new FOIA request rather than a request for IDFPR to comply with the Public Access Counselor's determination in 2011 PAC 15981.

11) IDFPR did not respond to Mr. Mrkvicka's December 1, 2011, FOIA request. By failing to comply with the request, deny the request, or extend the time for responding to the request within 5 business days of receipt of the request, IDFPR violated section 3(d) of FOIA.

12) IDFPR also violated section 9(a) of FOIA by denying the request without:
(1) notifying Mr. Mrkvicka of the denial in writing and providing a detailed factual basis for any

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asserted exemptions; (2) identifying the name and title or position of each person responsible for denying the request; (3) informing Mr. Mrkvicka of his right to review by the Public Access Counselor and providing the phone number and address of the Public Access Counselor; and (4) informing Mr. Mrkvicka of his right to judicial review of the denial pursuant to section 11 of FOIA (5 ILCS 140/11 (West 2010)).

13) IDFPR also violated section 9.5(c) of FOIA by refusing to provide records requested by the Public Access Counselor and fully cooperate with the Public Access Counselor's review of this matter.

14) IDFPR also failed to demonstrate by clear and convincing evidence that any records in Case No. 2009-09739 are exempt from disclosure pursuant to sections 7(1)(a), 7(1)(c), or 7(1)(f) of FOIA.

Therefore, it is the opinion of the Attorney General that IDFPR improperly denied Mr. Mrkvicka's December 1, 2011, FOIA request for a copy of Case No. 2009-09739. Accordingly, IDFPR is hereby directed to take immediate and appropriate action to comply with this opinion by furnishing Mr. Mrkvicka with a copy of the documents contained in Case No. 2009-09739, subject only to appropriate redactions under sections 7(1)(b) and 7(1)(d)(iv) of FOIA that are necessary to protect the privacy interests of third parties.

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *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 or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Mr. Edward F. Mrkvicka, Jr., 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