



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 24, 2013

PUBLIC ACCESS OPINION 13-015
(Request for Review 2013 PAC 24905)

FREEDOM OF INFORMATION ACT:
Statistical Data is Not Exempt from
Disclosure under Section 7(1)(f) of FOIA

Mr. Joe Mahr
Chicago Tribune
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Legal Counsel
Illinois State Police
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Dear Mr. Mahr and Sergeant Sutton:

This binding opinion is issued by the Attorney General pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2012)). For the reasons discussed below, this office concludes that the Illinois State Police (ISP) violated FOIA by improperly withholding crime report statistics requested by Mr. Joe Mahr.

BACKGROUND

On June 11, 2013, Mr. Mahr, on behalf of the *Chicago Tribune*, submitted a FOIA request to ISP seeking "[a]ny and all monthly submissions of Uniform Crime Report statistics submitted by the City of Harvey (or Harvey Police Department) to ISP, for every month covering any part of 2012 and 2013, to date."¹ On June 11, 2013, ISP denied the request in its

¹E-mail from Joe Mahr, *Chicago Tribune*, to FOIA_Officer@isp.state.il.us (June 11, 2013).

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entirety citing section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2012)),² which exempts from disclosure:

Preliminary 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. * * *

In its response, ISP asserted that the requested data is preliminary in nature because agencies that submit data are permitted to review and verify data previously provided before it is published:

Prior to verification, the data submitted is considered preliminary and may not reflect crimes that have actually occurred or been charged within a jurisdiction. For the year 2012, the verification period is scheduled to begin in October, with the final report to be published by the Illinois State Police in December of 2013. The same process will occur for the year 2013, with data verification occurring in October 2014 and the final report being published in December 2014. At this time, the Illinois State Police has not verified and published reports for the time period you are requesting. It would be irresponsible of the Illinois State Police to publish or cause to be published information about crime in a jurisdiction knowing that the data is preliminary and subject to review at the time the data was provided.³

On June 12, 2013, Mr. Mahr submitted his Request for Review in which he disputed the applicability of section 7(1)(f) by asserting that the data he requested consists exclusively of statistics and contains no opinions.⁴ On June 14, 2013, this office forwarded a copy of the Request for Review to ISP and asked it to provide copies of the withheld records together with a detailed explanation of its legal and factual basis for asserting section 7(1)(f).⁵

²Letter from Lieutenant Steve Lyddon, FOIA Officer, Illinois State Police, to Joe Mahr, *Chicago Tribune* (June 11, 2013).

³Letter from Lieutenant Steve Lyddon, FOIA Officer, Illinois State Police, to Joe Mahr, *Chicago Tribune* (June 11, 2013).

⁴E-mail from Joe Mahr, *Chicago Tribune*, to paccess@atg.state.il.us (June 12, 2013).

⁵Letter from Matthew C. Rogina, Assistant Attorney General, Public Access Bureau, to Lieutenant Steve Lyddon, FOIA Officer, Illinois State Police (June 14, 2013).

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On June 20, 2013, ISP responded that the records have "not been confirmed as accurate. * * * These records are preliminary drafts. They are not the final work product."⁶

This office forwarded to Mr. Mahr a copy of ISP's response letter on June 28, 2013.⁷ Mr. Mahr replied on July 1, 2013, stating:

ISP is trying to argue that because the data isn't double-checked, there's a chance a figure may be inaccurate, so the public should be denied these records until the collective law enforcement agencies get around to double-checking each figure, which could take another year, and maybe close to two years. The reality is that FOIA has no allowance for agencies to withhold portions of records on the chance that something may be inaccurate. To the contrary, FOIA can be used by citizens to see if information contained in public records could later be proven inaccurate. It is how citizens help judge the effectiveness of government.⁸

On July 15, 2013, ISP provided the Public Access Bureau with a representative sample of the responsive records, which consist of one-page Illinois Uniform Crime Reporting Program forms for each of three months - March 2012, August 2012, and February 2013. The forms set out specific categories of index crime offenses, index crime arrests, and drug crime arrests with spaces for corresponding numbers to be entered by the reporting agency. The only information provided by the City of Harvey to ISP is the numbers entered in the spaces correlating to the several categories of index offenses, index crime arrests, and drug crime arrests.

On August 7, 2013, this office properly extended the time to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.⁹

⁶Letter from Sergeant Kerry Sutton, Legal Counsel, Illinois State Police, to Matt Rogina, Assistant Public Access Counselor, Office of the Attorney General (June 20, 2013).

⁷Letter from Matthew C. Rogina, Assistant Attorney General, Public Access Bureau, to Joe Mahr, *Chicago Tribune* (June 28, 2013).

⁸E-mail from Joe Mahr, *Chicago Tribune*, to Matthew Rogina (July 1, 2013).

⁹Letter from Matt Rogina, Assistant Attorney General, Public Access Bureau, to Joe Mahr, Reporter, *Chicago Tribune*, and Master Sergeant Daniel Carter, Illinois State Police (August 7, 2013).

ANALYSIS

Because all public records in the possession or custody of a public body are presumed to be open to inspection and copying (5 ILCS 140/1.2 (West 2012)), exemptions to disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois Univ.*, 176 Ill. 2d 401, 408 (1997). Section 1 of FOIA (5 ILCS 140/1 (West 2012)) provides:

[I]t is declared to be the public policy of the State of Illinois that all persons are entitled to *full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act*. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.

* * *

Restraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to *full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people*. The provisions of this Act shall be construed in accordance with this principle[.] (Emphasis added.)

Thus, FOIA requires a narrow interpretation of the language of exemptions that permit the withholding of records.

Section 7(1)(f) of FOIA is intended to protect the deliberative process and to encourage frank and open discussion among agency employees before a decision is made. *Harwood vs. McDonough* (2003), 344 Ill. App. 3d 242, 248, citing *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51, 95 S. Ct. 1504, 1516-17 (1975). Section 7(1)(f) is the equivalent of the federal Freedom of Information Act's "deliberative process" provision (5 U.S.C. § 552(b)(5) (West 2012)), which exempts inter- and intra-agency predecisional and deliberative material from disclosure. *Harwood*, 344 Ill. App. 3d at 247. The Illinois Appellate Court has stated that "purely factual material" is not exempt from disclosure

under section 7(1)(f) unless the factual material is "inextricably intertwined" with predecisional discussions. *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶ 36, 980 N.E.2d 733 (quoting *Enviro Tech International, Inc.*, 371 F.3d 370, 374-75 (7th Cir. 2004)). Although ISP states that the statistics could eventually be revised for accuracy, there is no suggestion that revising the data involves a deliberative process as such.

In similar circumstances, federal courts have concluded that statistical data is outside the scope of the federal FOIA's "deliberative process" exemption.¹⁰ For example, in *Assembly of State of California v. Department of Commerce*, 968 F.2d 916 (9th Cir. 1992), the State Assembly challenged the Department of Commerce's denial of its request for computer tapes containing statistically adjusted census data pursuant to the "deliberative process" exemption. The federal appeals court agreed with the trial court that the numerical data was purely factual, and because the disclosure of factual data would not divulge the reasoning process behind the ultimate decision not to adjust the census data, the tapes were not exempt under the "deliberative process" exemption. The Department of Commerce also argued, as ISP does here, that it should not be required to release the tapes because the data might not be accurate and could confuse the public. Accepting that the numerical data were estimates and might not be accurate, the appeals court nonetheless concluded that "inaccuracy is not a basis for a FOIA exemption" and that "it is not among FOIA's functions to control the use of disclosed information." *Assembly of State of California*, 968 F.2d at 923.

Likewise, in *Petroleum Information Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1431 (D.C. Cir., 1992), a federal appellate court considered whether the deliberative process exemption applied to portions of a database, called the Legal Land Description (LLD) file. The database contained "geopolitical information about land, such as its location, the relevant political units and administering agency, survey data, and acreage[]" which had been converted into a "series of numeral descriptions." 976 F.2d at 1431. The court emphasized that the scope of the exemption is limited to records that "bear on the formulation or exercise of agency policy-oriented judgment." (Emphasis in original.) *Petroleum Information Corp.*, 976 F.2d at 1435. The federal agency in possession of the data asserted that its disclosure would reveal corrections the agency made to original data transferred to the LLD as well as the agency's deliberations concerning a planned data bank which would consolidate data and other elements

¹⁰Illinois courts have recognized that because Illinois' FOIA statute is based on the federal FOIA statute, decisions construing the federal law, "while not controlling, are relevant and helpful precedents in construing the Illinois FOIA." *Margolis v. Directors, Illinois Dep. of Revenue*, 180 Ill. App. 3d 1084, 1087, appeal denied, 126 Ill. 2d 560 (1989).

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in the LLD with related information. *Petroleum Information Corp.*, 976 F.2d at 1436. In finding that the records were not deliberative in nature, the court noted that the data was derived from publicly available documents and dismissed the agency's concerns about corrections to the data and its accuracy: "The Bureau, moreover, does not convincingly explain why its concerns with public confusion and harming its own reputation could not be allayed by conspicuously warning FOIA requesters that the LLD file is as yet unofficial and that the Bureau disclaims responsibility for any errors or gaps." *Petroleum Information Corp.*, 976 F.2d at 1437. Further, the court held that disclosure of the data would not reveal any agency decision-making or reasoning because the file merely transferred "information contained in public source documents, albeit with corrections where the documents are inaccurate or in conflict, or additions when records are incomplete. The objective, in sum, is not so much to select and edit as to reorganize and repackage a mass of dispersed public information." *Petroleum Information Corp.*, 976 F.2d at 1438.

Here, the disclosure of the statistical data submitted by the City of Harvey would not reveal any information about ISP's decision-making process in compiling the Uniform Crime Report. Section 7(1)(f) protects communications in which public employees express opinions in the course of formulating actions or policies; the Illinois Uniform Crime Reporting Program forms contain factual data derived from public source documents, such as police records. Disclosing this statistical data would not provide insight into ISP's deliberative process or discourage ISP employees from engaging in discourse aimed at effectuating a course of action. Rather, the statistics merely represent the number of criminal offenses and arrests that the City of Harvey reported to ISP over a given period. ISP's apparent concern that disclosure of unconfirmed data may cause confusion can be allayed by providing the information to the requester with the caveat that the data has not been verified. Simply because the data may be subject to review and possible revision does not make that data itself preliminary or deliberative communications within the scope of section 7(1)(f).

FINDINGS AND CONCLUSIONS

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

1) On June 11, 2013, Mr. Joe Mahr submitted a FOIA request to ISP seeking "[a]ny and all monthly submissions of Uniform Crime Report statistics submitted by the City of Harvey (or Harvey Police Department) to ISP, for every month covering any part of 2012 and 2013, to date."

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2) On June 11, 2013, ISP denied the request in its entirety citing section 7(1)(f) of FOIA, which exempts from disclosure preliminary records in which opinions are expressed or policies or actions are formulated.

3) On June 12, 2013, Mr. Mahr submitted a Request for Review of ISP's denial of his FOIA request, asserting that the data is factual and numerical and not exempt under section 7(1)(f). The Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2012)).

4) On June 14, 2013, this office forwarded a copy of the Request for Review to ISP and asked it to explain the legal and factual basis for its assertion of section 7(1)(f) and to provide a copy of the responsive records for review.

5) On June 20, 2013, ISP provided the Public Access Bureau with an explanation of its reasoning for asserting section 7(1)(f); on July 15, 2013, ISP provided this office with a representative sample of the statistical data that Mr. Mahr requested.

6) On August 7, 2013, the Public Access Counselor extended the time to issue a binding opinion by 30 business days, to September 24, 2013. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) Section 7(1)(f) of FOIA does not exempt purely factual information from disclosure. The records Mr. Mahr requested contain statistical information concerning incidents of crimes in the City of Harvey. The records do not touch upon any aspect of any deliberative process relating to the compilation or publication of the Uniform Crime Report. Consequently, ISP improperly denied Mr. Mahr's FOIA request pursuant to section 7(1)(f) of FOIA.

Therefore, it is the opinion of the Attorney General that the ISP has, in violation of the requirements of the Freedom of Information Act, improperly denied Mr. Mahr's FOIA request. Accordingly, ISP is directed to take immediate and appropriate action to comply with this opinion by providing the monthly Uniform Crime Report statistics submitted to it by the City of Harvey for 2012 and 2013, as requested by Mr. Mahr.

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 2012). An aggrieved party may obtain judicial review of the decision by filing a

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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. Joe Mahr of the *Chicago Tribune* as defendants. See 5 ILCS 140/11.5 (West 2012).

Sincerely,

LISA MADIGAN
ATTORNEY GENERAL

By: 
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Counsel to the Attorney General