



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 17, 2015

PUBLIC ACCESS OPINION 15-004
(Request for Review 2015 PAC 33991)

FREEDOM OF INFORMATION ACT:
Disclosure of Settlement Agreements

Ms. Julie O. Herrera
The Law Office of Julie O. Herrera
53 West Jackson, Suite 1615
Chicago, Illinois 60604

Ms. Jennifer Coles
FOIA Officer, City Clerk
City of Markham
16313 Kedzie Parkway
Markham, Illinois 60428

Dear Ms. Herrera and Ms. Coles:

This is a binding opinion 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), as amended by Public Act 98-1129, effective December 3, 2014). For the reasons discussed below, this office concludes that the City of Markham (City) violated the requirements of FOIA by denying Ms. Julie O. Herrera's February 26, 2015, FOIA request for a copy of a settlement agreement and related records.

BACKGROUND

Initial Request

On February 13, 2015, Steven J. Molitor, Jr., on behalf of the Law Offices of Julie O. Herrera, submitted a letter to the City FOIA Officer which stated: "Pursuant to the FOIA, I would like to request the amount of money paid to settle Case No. 12-cv-04003, a case from the

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Northern District of Illinois."¹ The City denied the request, citing section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2013 Supp.), as amended by Public Act 98-695, effective July 3, 2014), which exempts "personal information" from inspection and copying.² On February 23, 2015, Mr. Molitor filed a Request for Review of the City's denial with the Public Access Counselor.³ After consultation with an Assistant Attorney General in the Public Access Bureau, the Request for Review was withdrawn because the underlying inquiry had been in the form of a question, rather than a request for records, and therefore was not subject to FOIA or to its review process.⁴

FOIA Request

On February 26, 2015, Ms. Herrera submitted a FOIA request to the City via an e-mail to Deputy City Clerk Carolyn Murphy, seeking "the settlement agreement entered into to resolve Case No. 12-cv-4003 (between the City of Markham and [Plaintiff]), any other document related to said settlement, and any document related to a vote by the City Council to authorize said payment."⁵ On March 5, 2015, the City denied Ms. Herrera's request pursuant to section 7(1)(c) of FOIA, stating that, "[t]he resolution of this matter was subject to a confidential settlement agreement signed by the parties involved."⁶

On March 6, 2015, the Public Access Bureau received Ms. Herrera's Request for Review of the City's denial of her FOIA request.⁷ On March 17, 2015, the Public Access Bureau forwarded a copy of Ms. Herrera's Request for Review to the City and requested "a written explanation of the factual and legal bases for your assertion of section 7(1)(c) of FOIA, along

¹Letter from Steven J. Molitor, Jr., Associate Attorney, The Law Office of Julie O. Herrera, to FOIA Officer, City Clerk's Office (February 13, 2015).

²Letter from Jennifer Coles, City of Markham, FOIA Officer, City Clerk, to Steven J. Molitor, Jr., Law Office of Julie O. Herrera (February 20, 2015).

³FOIA-Request for Review by Public Access Counselor signed by Steven Molitor, Jr. (February 23, 2015) (2015 PAC 33753).

⁴Ill. Att'y Gen. Req. Rev. Ltr. 33753, issued February 27, 2015.

⁵E-mail from Julie O. Herrera, Law Office of Julie O. Herrera, to cmurphy@cityofmarkham.net (February 26, 2015).

⁶Letter from Jennifer Coles, City of Markham, FOIA Officer, City Clerk, to Julie O. Herrera, Law Office of Julie O. Herrera (March 5, 2015).

⁷E-mail from Julie O. Herrera, Law Office of Julie O. Herrera to Public Access Counselor (March 6, 2015).

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with unredacted copies of the responsive records for our confidential review."⁸ On March 27, 2015, the City sent a response to this office, which included a copy of the settlement agreement it had withheld and a document indicating that the Plaintiff had received the settlement check. The City's written response in support of the applicability of section 7(1)(c) of FOIA stated:

The City of Markham cited disclosure of the settlement agreement and amount paid as a violation of privacy, due to the nondisclosure agreement that was included as a portion of the settlement agreement. This agreement was reached with a current employee of the City who believes her privacy will be violated by violating the agreement she entered into with the City. Her concern is the possible release of information that she thought was confidential and a case that was complete at the time of her signing will be disseminated, not only amongst the public but amongst her coworkers possibly causing an uncomfortable work environment.⁹

The City's response letter was forwarded to Ms. Herrera on April 6, 2015, and she did not reply.¹⁰ On May 4, 2015, this office properly extended the time within which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.¹¹

ANALYSIS

"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 2012). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2012), as amended by Public Act 98-1129, effective December 3, 2014) provides that: "[e]ach 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 2013 Supp.), as amended by Public Act 98-695, effective July 3,

⁸Letter from Benjamin Reed, Assistant Attorney General, Public Access Bureau, to Jennifer Coles, FOIA Officer, City of Markham (March 17, 2015), at 1.

⁹Letter from Jennifer Coles, City of Markham, FOIA Officer, City Clerk, to Benjamin Reed, Assistant Attorney General, Office of the Attorney General (March 27, 2015).

¹⁰Letter from Benjamin J. Reed, Assistant Attorney General, Public Access Bureau, to Julie Herrera, Esquire (April 6, 2015).

¹¹Letter from Benjamin Reed, Assistant Attorney General, Public Access Bureau, to Julie O. Herrera, Law Office of Julie O. Herrera, and Jennifer Coles, FOIA Officer, City of Markham (May 4, 2015).

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2014) are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

Section 2.20 of FOIA

Section 2.20 of FOIA (5 ILCS 140/2.20 (West 2012)) expressly provides that "[a]ll settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, provided that information exempt from disclosure under Section 7 of [FOIA] may be redacted." The City asserts, however, that disclosure of the requested settlement agreement and related records would violate the confidentiality provision contained in the agreement entered into by the parties.

Under the plain language of the confidentiality provision, however, only the Plaintiff is obligated not to disclose the terms of the settlement agreement. The terms of the confidentiality provision do not impose a concomitant obligation on the City. Furthermore, even if the confidentiality provision did purport to impose such a duty on the City, the agreement would not be enforceable:

Section 2.20 of FOIA specifically provides that all settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public. Because confidentiality provisions in settlement agreements entered into by public bodies are contrary to the specific language of section 2.20 and the legislative intent underlying that section, this office finds that the confidentiality provisions in the settlement agreements are not enforceable[.] Ill. Att'y Gen. Pub. Acc. Op. No. 14-004, issued May 9, 2014, at 9-10.

Accordingly, the confidentiality provision in the settlement agreement in question does not authorize the City to withhold the agreement.

Section 7(1)(c) of FOIA

The City cited section 7(1)(c) of FOIA as its basis for withholding the settlement agreement and related documents. Section 7(1)(c) exempts from inspection or copying:

Personal 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.

"Unwarranted invasion of personal privacy" means 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. ***The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.*** (Emphasis added.)

Specifically, the City has asserted that disclosure of the agreement and the amount of the settlement would violate the privacy of the Plaintiff because she entered into the agreement in the belief that it would remain confidential. The fact that a person anticipates that a specific record will not be disclosed does not mean that its disclosure constitutes a violation of personal privacy. The Plaintiff's concerns that the disclosure of the responsive records to members of the public, including her coworkers, could lead to an uncomfortable work environment fall far short of demonstrating that the Plaintiff's expectation of privacy "outweighs any legitimate public interest in obtaining the information."

Moreover, it is significant that the settlement agreement is predicated upon the dismissal of a lawsuit alleging that the Plaintiff's civil rights were violated by a pretextual discharge from the City's Police Department. Because the allegations leading to the settlement agreement related directly to the Plaintiff's public duties as an employee of the City, under the plain language of section 7(1)(c) disclosure of this information "shall not be considered an invasion of personal privacy."

Further, article VIII, section 1(c) of the Illinois Constitution of 1970 provides that "records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law." The constitutional right to information regarding the use of public funds is incorporated into the provisions of FOIA, as well. See 5 ILCS 140/2.5 (West 2012) ("[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 public has a right to know the purposes for which public funds are expended, including the identity of those who receive the funds and the amount of funds received. Thus, even assuming that disclosure of the records in question could be considered an invasion of the Plaintiff's personal privacy, in view of the strong countervailing interest of the public in information concerning the use of public funds, the disclosure would not be "unwarranted."

The City has not identified a personal privacy interest in the disclosure of these records that outweighs the public's interest in information concerning the payment of public funds by or on behalf of the City to settle this complaint. Accordingly, the City has not sustained

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its burden of demonstrating that the settlement agreement is exempt from disclosure pursuant to section 7(1)(c) of FOIA.

Incomplete FOIA Response

In addition to the settlement agreement, Ms. Herrera's February 26, 2015, FOIA request sought "any other document related to said settlement, and any document related to a vote by the City Council to authorize said payment."¹² The City's March 5, 2015, denial of the FOIA request stated that it was denying the request for the settlement agreement "as well as any other document related to said settlement[.]"¹³ The City's response did not indicate whether the City searched for and identified responsive records other than the settlement agreement. Section 3(b) of FOIA (5 ILCS 140/3(b) (West 2012), as amended by Public Act 98-1129, effective December 3, 2014) provides that "each public body shall promptly provide, to any person who submits a request, a copy of any public record required to be disclosed[.]"

On March 17, 2015, this office asked the City to submit unredacted copies of responsive records for our confidential review. The City provided only the settlement agreement and the record acknowledging receipt of the settlement proceeds. The City did not provide records responsive to the two additional portions of the FOIA request, and it did not address whether it possessed records responsive to those portions of the request. Under FOIA, a public body is required to conduct a "reasonable search tailored to the nature of a particular request." *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). A public body's search must be "reasonably calculated to uncover all relevant documents." *Weisberg v. Department of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). A public body is not required to "search every record system[.]" but it "cannot limit its search to only one record system if there are others that are likely to turn up the requested information." *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (C.A.D.C. 1990). Accordingly, the City is directed to determine whether it possesses any additional records responsive to Ms. Herrera's FOIA request and to respond to that portion of her request in compliance with the requirements of FOIA.

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:

¹²E-mail from Julie O. Herrera, Law Office of Julie O. Herrera, to cmurphy@cityofmarkham.net (February 26, 2015).

¹³Letter from Jennifer Coles, FOIA Officer, City Clerk, City of Markham, to Julie O. Herrera, Law Office of Julie O. Herrera (March 5, 2015).

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1) On February 26, 2015, Ms. Julie O. Herrera submitted a FOIA request to the City of Markham seeking "the settlement agreement entered into to resolve Case No. 12-cv-4003 (between the City of Markham and [Plaintiff]), any other document related to said settlement, and any document related to a vote by the City Council to authorize said payment."

2) On March 5, 2015, the City denied this request pursuant to section 7(1)(c) of FOIA, stating that, "[t]he resolution of this matter was subject to a confidential settlement agreement signed by the parties involved."

3) On March 6, 2015, Ms. Herrera submitted a Request for Review to the Public Access Counselor that was received on the same day, disputing the denial of her FOIA request. The Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2012), as amended by Public Act 98-1129, effective December 3, 2014).

4) On March 17, 2015, the Public Access Bureau forwarded a copy of Ms. Herrera's Request for Review to the City and requested a written explanation of the factual and legal bases for its assertion of section 7(1)(c) of FOIA, along with unredacted copies of the responsive records for our confidential review.

5) On March 27, 2015, the City sent a written response to this office, which included a copy of the settlement agreement it had withheld and a record indicating that Plaintiff had received her settlement check.

6) On May 4, 2015, this office properly extended the time to issue a binding opinion by 30 business days to June 17, 2015, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) As the confidentiality provision in the settlement agreement is written, its terms do not apply to the City and, thus, do not allow the City to withhold the agreement.

8) Even assuming that confidentiality provision applies to the City, however, the City has violated section 2.20 of FOIA, which specifically provides that all settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public.

9) Further, the requested records directly relate to the City's use of public funds and therefore are expressly subject to disclosure pursuant to section 2.5 of FOIA and article VIII, section 1(c) of the Illinois Constitution of 1970.

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10) The has City failed to meet its burden of demonstrating that the settlement agreement and related records are exempt from disclosure pursuant to section 7(1)(c) of FOIA. Because these records directly bear on Plaintiff's public duties, disclosure would not be considered an unwarranted invasion of her privacy under the plain language of the exemption.

11) The City's response to Ms. Herrera's FOIA request was incomplete, in violation of section 3 of FOIA, because it did not address whether the city conducted a search to locate other records related to the settlement agreement or approval of the settlement by the City Council.

Therefore, it is the opinion of the Attorney General that the City has improperly denied Ms. Herrera's Freedom of Information Act request in violation of the requirements of the Act. Accordingly, the City is directed to take immediate action to comply with this binding opinion by disclosing the requested settlement agreement and the related document to Ms. Herrera, subject only to permissible redactions of signatures under section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2013 Supp.), as amended by Public Act 98-695, effective July 3, 2014). In addition, the City shall conduct a reasonable search for additional records responsive to the FOIA request, and provide those records to Ms. Herrera as required by FOIA. The City is further directed to provide the Public Access Bureau with a complete copy of its response to Ms. Herrera.

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 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 Ms. Julie O. Herrera as defendants. *See* 5 ILCS 140/11.5 (West 2012).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:



Michael J. Luke
Counsel to the Attorney General