



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 12, 2017

PUBLIC ACCESS OPINION 17-005
(Request for Review 2017 PAC 46589)

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

Mr. Michael O'Malley
800 Wisconsin Avenue
Oak Park, Illinois 60304

Ms. Rasheda Jackson
Assistant Village Attorney
Village of Oak Park
123 Madison Street
Oak Park, Illinois 60302

Dear Mr. O'Malley and Ms. Jackson:

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 2014)). For the reasons discussed below, this office concludes that the Village of Oak Park (Village) violated the requirements of FOIA by improperly denying Mr. Michael O'Malley's February 22, 2017, FOIA request.

BACKGROUND

On February 22, 2017, Mr. O'Malley submitted a FOIA request to the Village seeking "the traffic counts from the roadway monitoring operations conducted on 10/25/16, 10/26/16 for the following roads: Washington Blvd, Madison Street and Jackson Blvd" and "the traffic counts from the roadway monitoring operations conducted on 11/11/16 for Madison

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Street."¹ By letter dated February 23, 2017, the Village denied Mr. O'Malley's request, asserting that "[t]he traffic counts are in draft form and have not been publicly released. Thus, they are exempt from disclosure pursuant to" section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2015 Supp.), as amended by Public Act 99-642, effective July 28, 2016).² On February 27, 2017, the Public Access Bureau received a Request for Review from Mr. O'Malley disputing the Village's response by stating: "My request is simply for the data from the traffic counts: the number of vehicles that travel those roadways. I am not asking for the interpretation of the data; the notes, opinions, memoranda...or a parsing of the data. Just the data."³

On March 6, 2017, the Public Access Bureau sent a copy of the Request for Review to the Village together with a letter asking it to provide copies of the withheld records for this office's confidential review along with a detailed legal and factual explanation for the Village's assertion that the requested records are exempt from disclosure in their entirety under section 7(1)(f) of FOIA.⁴ On March 15, 2017, the Village submitted to this office a written response and a copy of a preliminary draft of the "Madison Street Corridor Study" provided to the Village by the consulting firm it hired to conduct the traffic study.⁵ On March 16, 2017, the Public Access Bureau forwarded to Mr. O'Malley a copy of the Village's written response.⁶ On March 24, 2017, Mr. O'Malley submitted his reply to the Village's response and provided additional information related to the availability of the requested information.⁷

¹Oak Park Freedom of Information Act Request form signed by Michael O'Malley (February 22, 2017).

²Letter from Rasheda Jackson, Assistant Village Attorney, Village of Oak Park, to Michael O'Malley (February 23, 2017).

³E-mail from Michael O'Malley to Public Access [Bureau, Office of the Attorney General] (February 27, 2017).

⁴Letter from Laura S. Harter, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Rasheda Jackson, Assistant Village Attorney, The Village of Oak Park (March 6, 2017).

⁵Letter from Rasheda Jackson, Assistant Village Attorney, Village of Oak Park, to Laura S. Harter, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (March 15, 2017).

⁶Letter from Laura S. Harter, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Michael O'Malley (March 16, 2017).

⁷Letter from Michael O'Malley to Laura S. Harter, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (March 23, 2017) submitted via e-mail by Michael O'Malley to Barbara Yattoni, [Public Access Bureau, Office of the Attorney General] (March 24, 2017).

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On April 25, 2017, the Public Access Bureau properly extended the time within which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.⁸

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 2014). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2014)) further 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 2015 Supp.)), as amended by Public Act 99-642, effective July 28, 2016) are to be narrowly construed. *See Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

Section 7(1)(f) of FOIA exempts from disclosure "[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." Section 7(1)(f) is equivalent in most respects to the "deliberative process" exemption in the Federal FOIA (5 U.S.C. § 552(b)(5) (2012)), which applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). Section 7(1)(f) is "intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." *Harwood*, 344 Ill. App. 3d at 248. "[I]t is well settled that '[o]nly those portions of a predecisional document that reflect the **give and take of the deliberative process** may be withheld.'" (Emphasis added.) *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶ 24, 7 N.E.3d 741, 747-48 (2014) (quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010)).

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, 743 (2012) (quoting *Enviro Tech International, Inc. v. United States Environmental Protection Agency*, 371 F.3d 370, 374-75 (7th Cir. 2004)). For example, purely factual material may be exempt "if the 'manner of selecting or presenting those facts would reveal the

⁸Letter from Laura S. Harter, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Michael O'Malley and Rasheda Jackson, Assistant Village Attorney, The Village of Oak Park (April 25, 2017).

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deliberative process," or if the factual materials "reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter[.]" *Hamilton Securities Group Inc. v. Department of Housing and Urban Development*, 106 F. Supp. 2d 23, 33 (D.D.C. 2000) (internal citations omitted).

Conversely, statistical data that does not reveal a public body's reasoning or decision-making process falls outside the scope of the deliberative process exemption, even if the data is subject to revision. See *Natural Resources Defense Council, Inc. v. National Marine Fisheries Service*, 409 F. Supp. 2d 379, 385 (S.D.N.Y. 2006) (finding that government agency failed to demonstrate how "disclosing preliminary [factual] findings would reveal the decision making process with regard to policy—as opposed to factual—determinations[.]"; see also *Assembly of the State of California v. United States Department of Commerce*, 968 F.2d 916, 923 (9th Cir. 1992) (noting that "inaccuracy is not a basis for FOIA exemption" and holding that adjusted block-level census data that "reveals no remnants of the deliberative process[]" is not within the scope of the deliberative process exemption even though portions of that data may be less accurate than unadjusted census data).

The Village's response to this office states that the traffic counts and speed survey sought by Mr. O'Malley are exempt from disclosure pursuant to section 7(1)(f) because they are in "preliminary draft form."⁹ The Village explains that the consulting firm conducting the traffic study is preparing a final version of the study and that the Village has not received the final traffic count nor any raw data related to the traffic study.¹⁰ In his reply to this office, Mr. O'Malley states that he is seeking only the data concerning the number of vehicles travelling on the specified roadways; he emphasized that he is not "requesting the finished proposal, or any evaluation."¹¹

This office has reviewed the preliminary draft traffic study provided by the Village. Only two pages of the study appear to contain traffic count information that is responsive to the request. The remainder of the report does not appear to contain any responsive

⁹Letter from Rasheda Jackson, Assistant Village Attorney, Village of Oak Park, to Laura S. Harter, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (March 15, 2017), at 1.

¹⁰Letter from Rasheda Jackson, Assistant Village Attorney, Village of Oak Park, to Laura S. Harter, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (March 15, 2017), at 1.

¹¹Letter from Michael O'Malley to Laura S. Harter, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (March 23, 2017).

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information. The statistical information is purely factual, including numbers representing the traffic volume for sections of Madison Street, Washington Boulevard, and Jackson Boulevard.

Although the Village's response to this office notes the statutory language of section 7(1)(f) of FOIA, the Village has not explained how these traffic counts reveal or provide insight into the Village's deliberative process or how the information could be "inextricably intertwined" with any opinions, recommendations, or other predecisional communications. The Attorney General's Office has previously distinguished predecisional material from preliminary statistical data, finding that "[s]imply 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)." Ill. Att'y Gen. Pub. Acc. Op. No. 13-015, issued September 24, 2013, at 6 (concluding that the Illinois State Police improperly withheld monthly crime statistics reported by a city because the information was purely factual). In sum, the Village has not demonstrated that disclosing the preliminary traffic counts would reveal more than the factual information itself. Accordingly, the Village has not met its burden of demonstrating by clear and convincing evidence that the preliminary traffic counts are exempt from disclosure pursuant to section 7(1)(f) of FOIA.

FINDINGS AND CONCLUSIONS

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

1) On February 22, 2017, Mr. Michael O'Malley submitted a FOIA request to the Village seeking "the traffic counts from the roadway monitoring operations conducted on 10/25/16, 10/26/16 for the following roads: Washington Blvd, Madison Street and Jackson Blvd" and "the traffic counts from the roadway monitoring operations conducted on 11/11/16 for Madison Street."

2) On February 23, 2017, the Village denied the request in its entirety, citing section 7(1)(f) of FOIA.

3) On February 27, 2017, the Public Access Bureau received a Request for Review from Mr. O'Malley contesting the denial of his FOIA request. 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 2014)).

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4) On March 6, 2017, the Public Access Bureau sent a copy of the Request for Review to the Village and asked it to provide a copy of the withheld records for this office's confidential review. This office also asked the Village to provide a detailed explanation of the factual and legal bases for the applicability of the section 7(1)(f) exemption.

5) On March 15, 2017, the Village furnished to this office a preliminary draft of a traffic study containing the requested traffic counts together with a written response.

6) On March 16, 2017, the Public Access Bureau forwarded a copy of the Village's written response to Mr. O'Malley. On March 24, 2017, Mr. O'Malley replied to the Village's response.

7) On April 25, 2017, this office extended the time within which to issue a binding opinion by 30 business days, to June 12, 2017, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

8) Section 7(1)(f) of FOIA does not exempt factual information from disclosure unless that information is inextricably intertwined with a public body's deliberative process, such that its disclosure would reveal the deliberative process.

9) Although the traffic counts that Mr. O'Malley requested are contained within the preliminary traffic study, they are purely factual. The Village has not demonstrated that the traffic counts are inextricably intertwined with a deliberative process, or that their disclosure would reveal any aspect of any deliberative process. Consequently, this office concludes that the Village has not sustained its burden of demonstrating that traffic counts are exempt from disclosure pursuant to section 7(1)(f) of FOIA.

Therefore, it is the opinion of the Attorney General that the Village's response to Mr. O'Malley's Freedom of Information Act request violated the requirements of FOIA. Accordingly, the Village is directed to take immediate and appropriate action to comply with this opinion by disclosing to Mr. O'Malley a copy of those portions of the traffic study containing the traffic counts that he requested.

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 2014). 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 Michael O'Malley as defendants. *See* 5 ILCS 140/11.5 (West 2014).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:

A handwritten signature in black ink, appearing to read "Michael J. Luke", written over a horizontal line.

Michael J. Luke
Counsel to the Attorney General

CERTIFICATE OF SERVICE

Sarah L. Pratt, Public Access Counselor, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 17-005) upon:

Mr. Michael O'Malley
800 Wisconsin Avenue
Oak Park, Illinois 60304
Michaeloms33@gmail.com

Ms. Rasheda Jackson
Assistant Village Attorney
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123 Madison Street
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by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Springfield, Illinois on June 12, 2017.


SARAH L. PRATT
Public Access Counselor

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