



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 7, 2017

PUBLIC ACCESS OPINION 17-012
(Request for Review 2017 PAC 49564)

FREEDOM OF INFORMATION ACT:
Disclosure of Recordings of Public Meetings

Mr. Rick Kambic
Staff Reporter
Pioneer Press Newspapers
777 West Chicago Avenue
Chicago, Illinois 60654

Ms. Valerie Rogers
Executive Secretary
Freedom of Information Act Officer
Lake County Housing Authority
33928 North U.S. Highway 45
Grayslake, Illinois 60030

Dear Mr. Kambic and Ms. Rogers:

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 2016)). For the reasons discussed below, this office concludes that the Lake County Housing Authority (Housing Authority) violated the requirements of FOIA by improperly denying Mr. Rick Kambic's FOIA request for recordings of public meetings of the Housing Authority's Board of Commissioners (Board).

BACKGROUND

On August 23, 2017, Mr. Kambic, on behalf of Pioneer Press Newspapers, submitted a FOIA request to the Housing Authority seeking copies of: (1) all e-mails sent and received from the account assigned to former commissioner Dawn Abernathy; (2) all e-mails sent to or received from the e-mail address dmabers@comcast.net; and (3) "[a]ll audio

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recordings taken during Board of Commissioner meetings in 2017."¹ On August 29, 2017, the Housing Authority responded that it was unable to search the e-mail account assigned to Ms. Abernathy because the account had been "terminated on 7/25/17 as per normal practice[,] but provided copies of e-mails that other staff members sent to or received from her e-mail account."² The Housing Authority also stated that it did not locate any e-mails to or from the e-mail address dmabers@comcast.net, and denied audio recordings of its Board meetings pursuant to section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017).³ On September 8, 2017, Mr. Kambic submitted a Request for Review disputing the denial of the audio recordings of the Board's open meetings, and questioning whether the Housing Authority may have archived or otherwise preserved any responsive e-mails from Ms. Abernathy's terminated e-mail account.⁴

On September 15, 2017, the Public Access Bureau sent a copy of the Request for Review to the Housing Authority and requested a representative sample copy of the Board meeting recordings that were withheld for the office's confidential review, together with a detailed explanation of the factual and legal bases for the applicability of section 7(1)(f) to those recordings.⁵ This office also asked the Housing Authority to "describe any efforts to determine whether any responsive e-mails sent from or received in the e-mail account assigned to Ms. Abernathy were archived or otherwise preserved," and to "clarify if all e-mails in terminated accounts are deleted and incapable of being restored."⁶ On September 29, 2017, the Housing Authority responded by asserting that the audio recordings of Board meetings are preliminary materials within the scope of section 7(1)(f), and that Ms. Abernathy's Housing Authority e-mails

¹Letter from Rick Kambic, Pioneer Press Newspapers, to Valerie Rogers, FOIA Officer, Lake County Housing Authority (August 23, 2017).

²Letter from Valerie Rogers, Executive Secretary, Freedom of Information Act Officer, Lake County Housing Authority, to Rick Kambic (August 29, 2017), at 1.

³Letter from Valerie Rogers, Executive Secretary, Freedom of Information Act Officer, Lake County Housing Authority, to Rick Kambic (August 29, 2017), at 1.

⁴Letter from Rick Kambic, Pioneer Press Newspapers, to Public Access Counselor, Office of the Attorney General (September 8, 2017).

⁵Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Valerie Rogers, Executive Secretary, Freedom of Information Act Officer, Lake County Housing Authority (September 15, 2017), at 2.

⁶Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Valerie Rogers, Executive Secretary, Freedom of Information Act Officer, Lake County Housing Authority (September 15, 2017), at 2.

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could not be retrieved because her e-mail account had been deleted.⁷ On October 2, 2017, this office sent a copy of the Housing Authority's response to Mr. Kambic.⁸ On October 5, 2017, Mr. Kambic replied by asserting that audio recordings of Board meetings open to the public are subject to disclosure.⁹

On October 6, 2017, Mr. Kambic sent an e-mail to an Assistant Attorney General in the Public Access Bureau in which he stated: "[W]e at Pioneer Press want to move forward with your review of the Lake County Housing Authority's denial of my FOIA request for audio recordings made during their Board of Commissioner meetings. However, we do not wish to pursue the issue of former-Commissioner Dawn Abernathy's emails being inaccessible."¹⁰ Therefore, this office's determination in this binding opinion is limited to whether the responsive audio recordings of open meetings are exempt from disclosure pursuant to section 7(1)(f) of FOIA.

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 2016). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2016)) further provides: "Each 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 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) applies to "[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

⁷Letter from Valerie Rogers, Executive Secretary, Freedom of Information Act Officer, Lake County Housing Authority, to Office of the Attorney General, State of Illinois, Steve Silverman, Bureau Chief, Public Access Bureau (September 29, 2017), at 1.

⁸Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Rick Kambic, Pioneer Press Newspapers (October 2, 2017).

⁹Letter from Rick Kambic, Pioneer Press Newspapers, to Public Access Counselor, Office of the Attorney General (October 5, 2017), at 1.

¹⁰E-mail from Rick Kambic, Staff Reporter, Pioneer Press Newspapers, to [Steve] Silverman (October 6, 2017).

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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). Based on the deliberative process exemption in Federal FOIA,¹¹ 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; *see also Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 121 S. Ct. 1060, 1066 (2001) ("The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves [internal citation] if each remark is a potential item of discovery and front page news[.]"); *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151, 95 S. Ct. 1504, 1516 (1975) ("Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.").

Therefore, "[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, 748 (2014) (quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010)). Information that is "already public knowledge" is not within the scope of the deliberative process exemption because it is unclear how disclosure of the information "would in any way stifle agency deliberations." *Parker v. United States Dep't of Justice, Office of Professional Responsibility*, No. CV 15-1070 (JEB), 2017 WL 3531507, at *4 (D.D.C. Aug. 16, 2017). 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)).

The Housing Authority's response to this office asserted that "unless the head of the governmental body * * * publicly identifies and cites the preliminary material, it will not need to be made available for inspection."¹² The response further stated:

The audio recordings are not, or ever have been "publicly cited and identified" by the governing board of Lake County Housing Authority. The audio tape is used by the administrative

¹¹Exemption 5 of Federal FOIA (5 U.S.C. § 552(b)(5) (2012)) applies to "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency[.]"

¹²Letter from Valerie Rogers, Executive Secretary, Freedom of Information Act Officer, Lake County Housing Authority, to Office of the Attorney General, State of Illinois, Steve Silverman, Bureau Chief, Public Access Bureau (September 29, 2017), at 1.

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assistant in conjunction with her written notes to produce the draft version of the written minutes of the meeting. The draft version is presented to the Board of Commissioner's [sic] for review, adjusted when applicable and brought for a full vote of approval. The document receiving the majority of the Board's approval is considered official and posted on the Authority's website.^[13]

The Housing Authority's response focuses on the potentially preliminary nature of draft minutes prepared by the administrative assistant and not on the purely factual nature of the audio recordings that the administrative assistant uses to prepare the draft minutes. Although the Housing Authority is correct that draft minutes may reflect the administrative assistant's subjective judgment of which portions of the meetings are relevant, the recordings themselves provide a verbatim account of what transpired during the meetings, which are open to the public. While they are used in the Housing Authority's deliberative process for preparing and approving meeting minutes, the verbatim recordings of open meetings are not predecisional and deliberative material within the scope of section 7(1)(f) of FOIA.

To the extent that the recordings may document Board members or Housing Authority employees expressing opinions and recommendations while deliberating during open meetings, those deliberations also do not provide a basis for withholding the recordings. In *Veltri v. Charleston Urban Renewal Authority*, 178 W.Va. 669, 363 S.E.2d 746 (1987), the West Virginia Supreme Court held that a government agency improperly denied a verbatim recording of a public meeting that was used to prepare meeting minutes under the West Virginia FOIA exemption (W.Va. Code § 29B-1-4(8) (1986)) that corresponds to section 7(1)(f) of FOIA.¹⁴ The court emphasized that the meeting was open to the public, and that there was no reason to believe that disclosure of the recording could have a chilling effect on the agency's deliberations:

¹³Letter from Valerie Rogers, Executive Secretary, Freedom of Information Act Officer, Lake County Housing Authority, to Office of the Attorney General, State of Illinois, Steve Silverman, Bureau Chief, Public Access Bureau (September 29, 2017), at 1.

¹⁴Section 29B-1-4(8) of West Virginia's FOIA exempts from disclosure "[i]nternal memoranda or letters received or prepared by any public body[.]" The *Veltri* Court characterized the exemption in a manner similar to section 7(1)(f) of Illinois' FOIA, noting that "[a]n authority considering the purpose of the internal memorandum exemption has indicated that this exemption is intended to insulate the inner workings of public bodies from public scrutiny and to promote the free exchange of ideas between persons within those bodies." *Veltri*, 178 W.Va. at 671, 363 S.E.2d at 748 [citation.].

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Although the Charleston Urban Renewal Authority indicates that the tape in question was made for the purpose of providing the secretary who took minutes of the open meeting with an opportunity to check the correctness of those minutes, the tape was of a public, open meeting. By virtue of the character of that meeting the exchange of ideas which occurred at that meeting was inherently subject to public scrutiny. This Court does not believe that the knowledge that a tape of the meeting was made in any way altered the exchange of ideas which occurred during the meeting. In effect, this Court cannot see how suppression of the tape in any way could have altered the exchange of ideas at the meeting or could alter such an exchange in the future. *Veltri*, 178 W.Va. at 671, 363 S.E.2d at 748.

Similarly, the Housing Authority has not provided a basis to conclude that the disclosure of recordings of open meetings would result in the type of harm to the Board's deliberative process that section 7(1)(f) is intended to prevent.

Moreover, the Board's assertion that recordings of Board meetings open to the public are exempt from disclosure under section 7(1)(f) cannot be reconciled with the public policy that the General Assembly articulated in section 1 of the Open Meetings Act (OMA) (5 ILCS 120/1 (West 2016)):

It is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business. In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.

To construe section 7(1)(f) as exempting from disclosure recordings of meetings open to the public would undermine the public's right to be fully informed of how the Board conducted public business during those meetings. Notably, section 7(1)(l) of FOIA (5 ILCS 140/7(1)(l) (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017) exempts from disclosure "[m]inutes of meetings of public bodies ***closed to the public*** as provided in the Open Meetings Act until the public body makes the minutes available to the public under Section 2.06 of the Open Meetings Act." (Emphasis added.) Section 2.06(e) of OMA (5 ILCS 120/2.06(e) (West 2016)) similarly permits a public body to withhold verbatim recordings of ***closed sessions*** "[u]nless the public body has made a determination that the

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verbatim recording no longer requires confidential treatment or otherwise consents to disclosure[.]”¹⁵ In contrast, there are no provisions of FOIA or OMA that restrict access to verbatim recordings of meetings that are *open to the public*. Indeed, section 2.05 of OMA (5 ILCS 120/2.05 (West 2016)) permits “any person” to record open meetings subject only to reasonable rules promulgated by the public body. If the General Assembly had intended to restrict access to recordings of meetings of public bodies that are open to the public, it could have done so expressly. It did not. Accordingly, this office concludes that the Housing Authority has not sustained its burden of demonstrating by clear and convincing evidence that recordings of its Board’s open meetings are exempt from disclosure pursuant to section 7(1)(f) 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:

1) On August 23, 2017, Mr. Rick Kambic, on behalf of Pioneer Press Newspapers, submitted a FOIA request to the Lake County Housing Authority seeking copies of: (1) all e-mails sent and received from the account assigned to former commissioner Dawn Abernathy; (2) all e-mails sent to or received from the e-mail address dmabers@comcast.net; and (3) “[a]ll audio recordings taken during Board of Commissioner meetings in 2017.”

2) On August 29, 2017, the Housing Authority responded that it was unable to search the e-mail account assigned to Ms. Abernathy because the account had been “terminated,” but provided copies of e-mails that other staff members sent to or received from her e-mail account. The Housing Authority also stated that it did not locate any e-mails to or from the e-mail address dmabers@comcast.net, and denied audio recordings of its Board meetings pursuant to section 7(1)(f) of FOIA.

3) On September 8, 2017, Mr. Kambic submitted a Request for Review disputing the denial of audio recordings of the Board’s open meetings and questioning whether the Housing Authority may have archived or otherwise preserved any responsive e-mails from Ms. Abernathy’s terminated e-mail account. The Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2016)). Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

¹⁵Therefore, verbatim recordings of closed meetings are generally exempt from disclosure pursuant to section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017), which permits a public body to withhold “[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.”

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4) On September 15, 2017, the Public Access Bureau sent a copy of the Request for Review to the Housing Authority and requested a representative sample copy of the recordings of Board meetings that were withheld for the office's confidential review, together with a detailed explanation of the factual and legal bases for the applicability of section 7(1)(f) to those recordings. This office also asked the Housing Authority to describe its efforts to locate e-mails from Ms. Abernathy's Housing Authority e-mail account.

5) On September 29, 2017, the Housing Authority provided a written response asserting that the audio recordings of Board meetings are preliminary materials within the scope of section 7(1)(f). The Housing Authority also stated that Ms. Abernathy's Housing Authority e-mail account was deleted and that the e-mails in that account cannot be restored.

6) On October 2, 2017, the Public Access Bureau forwarded a copy of the Housing Authority's written response to Mr. Kambic. On October 5, 2017, Mr. Kambic submitted a written reply asserting that recordings of Board meetings are subject to disclosure under FOIA.

7) On October 6, 2017, Mr. Kambic sent an e-mail to an Assistant Attorney General in the Public Access Bureau stating that he wished to pursue only the portion of his Request for Review disputing the denial of recordings of open Board meetings. Therefore, this binding opinion is limited to that issue.

8) Section 7(1)(f) permits a public body to withhold "[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 scope of the exemption is limited to records that provide insight into the public body's deliberative processes; it does not encompass factual material unless the facts are inextricably intertwined with predecisional material.

9) A verbatim recording of an open meeting is not predecisional within the meaning of section 7(1)(f). Although the recording may reflect preliminary discussions of matters pending before the public body, as the court in *Veltri v. Charleston Urban Renewal Authority* noted, "[by] virtue of the [public] character of that meeting the exchange of ideas which occurred at that meeting was inherently subject to public scrutiny." The public body's purpose in recording an open meeting is immaterial to this analysis.

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10) To the extent that recordings of the Board's meetings document deliberative discussions, the Housing Authority has not provided a basis to conclude that the disclosure of the recordings of open meetings would discourage the Board from engaging in frank and open discussions of public business.

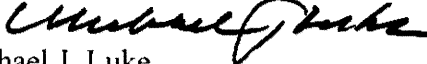
11) Further, construing section 7(1)(f) as exempting from disclosure recordings of meetings open to the public would undermine the public policy articulated in section 1 of OMA, which provides that the public has the right to be fully informed of how public bodies conduct public business during open meetings. Because the Board's meetings were open to the public, recordings of those meetings are inherently subject to public inspection and copying and therefore are not exempt from disclosure pursuant to section 7(1)(f) of FOIA.

Therefore, it is the opinion of the Attorney General that the Housing Authority has improperly denied Mr. Kambic's Freedom of Information Act request in violation of the requirements of the Act. Accordingly, the Housing Authority is directed to take immediate and appropriate action to comply with this opinion by disclosing the requested recordings of the Board's open meetings to Mr. Kambic.

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 2016). 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. Rick Kambic as defendants. *See* 5 ILCS 140/11.5 (West 2016).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
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 17-012) upon:

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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 November 7, 2017.


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