



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 13, 2018

PUBLIC ACCESS OPINION 18-005
(Request for Review 2017 PAC 50592)

FREEDOM OF INFORMATION ACT:
Disclosure of Public Employees' Compensation

Ms. Letisha Luecking Orlet
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Nashville, Illinois 62263

Ms. Brittany P. Warren
Attorney for the City of Nashville
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Dear Ms. Orlet and Ms. Warren:

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 City of Nashville (City) violated the requirements of FOIA by improperly denying Ms. Letisha Luecking Orlet's request for records of City employees' wages and salaries.

BACKGROUND

By letter dated November 14, 2017, and received on November 16, 2017, Ms. Orlet submitted a FOIA request to the City seeking a "[c]omplete copy of wages and salaries paid to your employees listed by names and titles during 2016 and 2017."¹ On November 21,

¹Letter from Letisha Luecking Orlet to City of Nashville, Terri Kurwicki (November 14, 2017).

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2017, the City denied the request in its entirety, citing section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2016), as amended by Public Acts 100-026, effective August 4, 2017, and 100-201, effective August 18, 2017), which exempts from disclosure "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"²

On November 27, 2017, the Public Access Bureau received a Request for Review from Ms. Orlet contesting the City's denial of her request.³ On November 29, 2017, the Public Access Bureau forwarded a copy of the Request for Review to the City and asked it to furnish copies of the pertinent records for this office's confidential review, together with a detailed explanation of the factual and legal bases for its assertion of section 7(1)(c) of FOIA.⁴ This office also asked the City to specifically address the applicability of section 2.5 of FOIA (5 ILCS 140/2.5 (West 2016)), which provides that "[a]ll records relating to * * * the use of public funds of * * * units of local government * * * are public records subject to inspection and copying[.]"

On December 7, 2017, the City provided the requested materials and argued that the records are exempt from disclosure under section 7(1)(c) of FOIA.⁵ Later that day, the Public Access Bureau forwarded a copy of the City's written response to Ms. Orlet.⁶ This office did not receive a reply from Ms. Orlet.

Pursuant to section 9.5(f) of FOIA, the Public Access Bureau properly extended the time within which to issue a binding opinion by 30 business days, to March 13, 2018, in a letter dated January 24, 2018.⁷

²Letter from Brittany P. Warren, DeFranco & Bradley, P.C. to Letisha Luecking Orlet, P.C., Attorney at Law (November 21, 2017).

³Letter from Letisha Luecking Orlet to Sarah Pratt, Public Access Counselor, Office of the Attorney General (November 27, 2017).

⁴Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Brittany P. Warren, City Attorney, [City of Nashville], DeFranco & Bradley P.C. (November 29, 2017).

⁵Letter from Brittany P. Warren, DeFranco & Bradley, P.C., to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (December 7, 2017).

⁶Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Letisha Luecking Orlet, Attorney at Law, Letisha Luecking Orlet P.C. (December 7, 2017).

⁷Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Letisha Luecking Orlet, Attorney at Law, Letisha Luecking Orlet P.C., and Brittany P. Warren, City Attorney, DeFranco & Bradley, P.C. (January 24, 2018).

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)) 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 to disclosure contained in section 7 of FOIA (5 ILCS 140/7 (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017) are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

Section 2.5 of FOIA

Section 2.5 of FOIA provides that "[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*." (Emphasis added.) *See also* Ill. Const. 1970, art. VIII, § 1(c) ("[R]ecords 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 City is a unit of local government (5 ILCS 70/1.28 (West 2016); Ill. Const. 1970, art. VII, §1) and the salaries and wages of City employees are paid out of the City's public funds. In its response, the City acknowledged the disclosure requirement in section 2.5 of FOIA but argued that in section 1 (5 ILCS 140/1 (West 2016)), "the FOIA statute itself also recognizes that it is not intended to cause an unwarranted invasion of personal privacy."⁸

Under the plain language of section 2.5 of FOIA, records documenting the payment of public employees with public funds are subject to inspection and copying by the public, unless the public body can demonstrate that the records are expressly exempted from disclosure. Ill. Att'y Gen. Pub. Acc. Op. No. 16-012, issued December 21, 2016, at 5 (concluding that the names of public housing authority employees receiving bonuses and the amounts of bonus compensation paid to each employee were not exempt from disclosure under sections 7(1)(b) or 7(1)(c) of FOIA⁹); Ill. Att'y Gen. Pub. Acc. Op. No. 15-006, issued August

⁸Letter from Brittany P. Warren, DeFranco & Bradley, P.C., to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (December 7, 2017), at 1.

⁹5 ILCS 140/7(1)(b), (1)(c) (West 2015 Supp.), as amended by Public Act 99-642, effective July 28, 2016.

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31, 2015, at 5 (concluding that the amount of compensation paid to physicians employed by a public hospital district was not exempt from disclosure under section 7(1)(b) or 7(1)(c) of FOIA,¹⁰ and must be disclosed pursuant to section 2.5 of FOIA). Accordingly, the withheld records documenting the wages and salaries of City employees are subject to inspection and copying under FOIA, unless the City demonstrates that these records are specifically exempt under section 7(1)(c).

Section 7(1)(c) of FOIA

Section 7(1)(c) of FOIA exempts from disclosure "[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." Section 7(1)(c) defines "unwarranted invasion of personal privacy" as:

[T]he 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.)

The General Assembly's use of the language "*clearly unwarranted invasion of personal privacy*" evinces a "stricter standard to claim exemption," which the public body possessing the records bears the burden of sustaining. (Emphasis in original.) *Schessler v. Department of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994).

In response to the Public Access Bureau, the City argued that information concerning the compensation of public employees is personal in nature and has no bearing on their public duties. In support of that argument, the City cited *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 415 (2009) and *Copley Press, Inc. v. Board of Education for Peoria School District No. 150*, 359 Ill. App. 3d 321, 324 (3rd Dist. 2005), noting that the *Copley Press* court included "*payroll information*" in its definition of "FOIA's personnel-file exemption." (Emphasis in original.)¹¹

¹⁰5 ILCS 140/7(1)(b), (1)(c) (West 2014).

¹¹Letter from Brittany P. Warren, DeFranco & Bradley, P.C. to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (December 7, 2017), at 1.

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Both the *Stern* and the *Copley Press* courts, however, interpreted an earlier and substantively different version of the personal privacy exemption. Prior to January 1, 2010, the personal privacy exemption was found in section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2008)). It exempted from disclosure, in pertinent part:

(b) Information that, if disclosed, 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 disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. Information exempted under this subsection (b) shall include but is not limited to:

* * *

(ii) personnel files and personal information maintained with respect to employees, appointees or elected officials of any public body or applicants for those positions[.]

In analyzing the earlier version of section 7(1)(c), the Illinois Supreme Court in *Lieber*, 176 Ill. 2d at 408-09, concluded that records that fell within any of the enumerated subsections of the exemption were *per se* exempt from disclosure. This decision resolved a split among appellate court districts, which had reached different conclusions on the question of whether information falling within one of the subsections was *per se* exempt from disclosure, or whether a court was required, on a case-by-case basis, to weigh the implicated privacy rights against the public interest in the records to determine if disclosure would cause a clearly unwarranted invasion of personal privacy. Compare *Margolis v. Director of Department of Revenue*, 180 Ill. App. 3d 1084, 1089-90 (1st Dist. 1989) (finding the use of a balancing test was required) with *Healey v. Teachers Retirement System*, 200 Ill. App. 3d 240, 243 (4th Dist. 1990) (concluding records within the subsections of section 7(1)(b) were *per se* exempt). Under *Lieber*, records properly contained in a public employee's personnel file were considered to be *per se* exempt from disclosure and no balancing of interests was required. Thus, in both *Stern* and *Copley Press*, the court's analysis was limited to whether specific records fell within the *per se* exemption for employee personnel files.

Subsequent to these decisions, however, the General Assembly enacted Public Act 96-542, effective January 1, 2010, which, among other things, replaced the former section 7(1)(b)(ii) with the current section 7(1)(c) of FOIA. Under section 7(1)(c), records are no longer exempt from disclosure simply because they are maintained in a personnel file. Instead, a public

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body is required to release personal information regarding its officers and employees when the requested records pertain to the transaction of public business unless the public body can demonstrate that the employee's "right to privacy outweighs any legitimate public interest in obtaining the information." In other words, the General Assembly has replaced the *per se* exemptions with a balancing test that requires a public body to weigh an employee's right to privacy in information contained in public records against the public interest in obtaining that information. Further, the General Assembly has clearly provided that, in balancing these interests, "[t]he disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy."

In finding that records containing payroll information were *per se* exempt as part of an employee's personnel file, *Copley Press* did not directly address whether information concerning public funds paid to public employees bears on their public duties. The Court in *Stern* concluded that a superintendent's contract was not exempt from disclosure because it bore on his public duties. *Stern*, 233 Ill. 2d at 411-12. The City discussed these cases in its response to this office and argued that the contract in *Stern*, which "contained the duties of a public official[,] is distinct from the employee wage and salary information at issue here. The City asserted that the employee wage and salary information "does not reflect the public duties of such employees."¹² The Attorney General, however, has previously addressed this issue and found that the amount of compensation received by public employees "directly bears" on their public duties and therefore "is not an invasion of personal privacy under the plain language of section 7(1)(c)." Ill. Att'y Gen. Pub. Acc. Op. No. 15-006, at 7.

Even assuming, for the sake of argument, that information concerning a public employee's compensation does not bear on his or her public duties for purposes of section 7(1)(c), the City has not sustained its burden of demonstrating by clear and convincing evidence that the exemption is applicable.

The City relied on *State Journal-Register v. University of Illinois Springfield*, 2013 IL App (4th) 120881, 994 N.E.2d 705 (2013) to support its argument that the responsive wage and salary information is exempt from disclosure in its entirety under section 7(1)(c). In *State Journal-Register*, the plaintiff sought records relating to the resignation of three University coaches. The court considered, among other things, whether "documents reflecting [university] coaches' compensation for accrued vacation and sick time, employee status, and other related documents[]" contained in their personnel files were exempt from disclosure pursuant to section 7(1)(c) of FOIA. *State Journal-Register*, 2013 IL App (4th) 120881, ¶41, 994 N.E.2d at 716. The court distinguished *Stern* as being "limited to the disclosure of employment contracts, as

¹²Letter from Brittany P. Warren, DeFranco & Bradley, P.C. to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (December 7, 2017), at 2.

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those contracts set forth the duties of public employees *and the compensation paid from public funds.*" (Emphasis added.) *State Journal-Register*, 2013 IL App (4th) 120881, ¶41, 994 N.E.2d at 716. Finding *Copley* to be more analogous, the court stated:

We fail to see how the coaches' election for the disbursement of accrued vacation, sick leave, and related documents have any bearing on their alleged misdeeds or public duties. Instead, we conclude this information is of a highly personal nature, contained appropriately in a personnel file, and exempt from disclosure. *State Journal-Register*, 2013 IL App (4th) 120881, ¶41, 994 N.E.2d at 716.

Thus, the appellate court in *State Journal-Register* acknowledged that records specifying compensation from public funds are generally subject to disclosure under *Stern*, but concluded that the specific, limited information concerning disbursement of accrued vacation time and sick leave was exempt from disclosure. The election that a public employee makes regarding the disbursement of accrued vacation and sick leave reflects a personal financial decision concerning those funds. In contrast, the employee's salary itself does not reflect a personal financial decision by an employee. In any event, Ms. Orlet did not request records detailing accrued vacation time or sick leave; she requested records of employees' wages and salaries. Therefore, the narrow holding in *State Journal-Register* regarding disclosure of an employee's election for disbursement of accrued vacation and sick time is not dispositive of this matter.

The determination of whether the disclosure of requested information would constitute a clearly unwarranted invasion of personal privacy is made by considering and weighing four factors: "(1) the [requester's] interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information." *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 3d 1, 13 (1st Dist. 2010).

With respect to the first two factors, there is a significant public interest in disclosure of the amounts of compensation paid to public employees for the performance of their public duties because it concerns the expenditure of public funds. See Ill. Att'y Gen. Pub. Acc. Op. No. 16-012, issued December 21, 2016, at 7 ("[T]he 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.") (quoting Ill. Att'y Gen. Pub. Acc. Op. No. 15-006, at 7).

Concerning the third factor, based on the plain language of section 2.5 of FOIA, employees of a public body—paid with public funds—do not have a reasonable expectation of

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privacy in the amount of compensation that they receive. Even if public employees had some expectation of privacy in such information, in view of the strong countervailing interest in public wage and salary transparency, the invasion of personal privacy would not be "clearly unwarranted."

Finally, there appears to be no readily available means for Ms. Orlet to obtain all of the requested compensation information elsewhere. Taking all of these factors into account, this office concludes that the public interest in the disclosure of information concerning the use of public funds outweighs any interest public employees may have in the privacy of the amount of their publicly-funded wages and salaries. Accordingly, the City has not sustained its burden of demonstrating that the requested records are exempt from disclosure pursuant to section 7(1)(c) of FOIA.

FINDINGS AND CONCLUSIONS

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

1) By letter dated November 14, 2017, and received on November 16, 2017, Ms. Letisha Luecking Orlet submitted a FOIA request to the City seeking a "[c]omplete copy of wages and salaries paid to your employees listed by names and titles during 2016 and 2017."

2) On November 21, 2017, the City denied the request in its entirety, citing as its basis section 7(1)(c) of FOIA.

3) On November 27, 2017, the Public Access Bureau received a Request for Review from Ms. Orlet contesting the City's denial. 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 2016)).

4) On November 29, 2017, the Public Access Bureau forwarded a copy of the Request for Review to the City and asked it to furnish copies of the withheld records for the Public Access Bureau's confidential review, together with a detailed explanation of the factual and legal bases for the assertion of section 7(1)(c) of FOIA.

5) On December 7, 2017, the City furnished copies of the records and its written response. The City argued that the records are exempt from disclosure in their entireties pursuant to section 7(1)(c) of FOIA. On the same day, the Public Access Bureau sent a copy of the written response to Ms. Orlet; she did not reply.

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6) On January 24, 2018, this office extended the time within which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA, to March 13, 2018. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) Section 2.5 of FOIA specifically provides that "[a]ll records relating to the obligation, receipt, and use of public funds of * * * units of local government * * * are public records subject to inspection and copying by the public." The City is a unit of local government and its employees' wages and salaries are paid from public funds. Therefore, the amount of compensation paid to each employee is subject to disclosure unless otherwise expressly exempted from disclosure.

8) The City has not sustained its burden of demonstrating that disclosure of the requested employee information would constitute a clearly unwarranted invasion of personal privacy under section 7(1)(c) of FOIA. The identity of City employees and the amount of their wages and salaries directly bears on the performance of their public duties. There is a significant public interest in the amount of public funds paid to individual public employees. Any privacy interest that an employee may have in this information is outweighed by the public's legitimate interest in knowing how public funds are spent. Therefore, disclosure of such records would not constitute a "clearly unwarranted invasion of personal privacy."

Accordingly, it is the opinion of the Attorney General that the City's response to Ms. Orlet's Freedom of Information Act request violated the requirements of the Act. The City is directed to take immediate and appropriate action to comply with this opinion by providing Ms. Orlet with records setting forth the names and positions of each City employee, and the wages and salaries paid to those employees for the years 2016 and 2017.

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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 with 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. Letisha Luecking Orlet as defendants. *See* 5 ILCS 140/11.5 (West 2016).

Sincerely,

LISA MADIGAN
ATTORNEY GENERAL

By:



Michael J. Luke
Counsel to the Attorney General

cc: Ms. Terri Kurwicki
City Clerk/FOIA Officer
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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 18-005) 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 March 13, 2018.



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