



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

January 31, 2022

PUBLIC ACCESS OPINION 22-001
(Request for Review 2021-PAC-C-0536)

FREEDOM OF INFORMATION ACT:
Communications Attorney Provides to
Client Containing Legal Advice
Protected by Attorney-Client Privilege

Ms. Brenda Schory
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Kane County Chronicle
333 North Randall Road
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Ms. Michele Niermann
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Ms. Erin Brady
Assistant State's Attorney
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Dear Ms. Schory, Ms. Niermann, and Ms. Brady:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2020)). For the reasons discussed below, this office concludes that the Office of the State's Attorney (State's Attorney's Office) for Kane

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County (County) did not violate the requirements of FOIA by denying Ms. Brenda Schory's FOIA request.

BACKGROUND

On October 4, 2021, Ms. Schory, in her capacity as a journalist,¹ submitted a FOIA request to the State's Attorney's Office seeking copies of "[a]ny and all reports State's Attorney Jamie Mosser gave to Kane County Board members regarding Roger Fahnestock's actions to fund a De[V]ry degree using [C]ounty funds."² On October 8, 2021, the State's Attorney's Office denied the request pursuant to section 7(1)(m)³ of FOIA.⁴ In the denial letter, the State's Attorney's Office contended that the requested documents are protected by the attorney-client privilege and the Illinois work product doctrine because "the State's Attorney gave [the requested records] to elected officials, namely County Board members in her capacity as their attorney giving her legal advice and recommendations."⁵ The State's Attorney's Office's response also described the records as "contain[ing] privileged and confidential information that reveal the mental impressions and opinions of the State's Attorney as an advisor to the Kane County Board[.]"⁶

On October 18, 2021, Ms. Schory submitted a Request for Review to the Public Access Counselor contesting the denial of her request.⁷ In her Request for Review, Ms. Schory explained, by way of background, that the County Information Technology Director made 17

¹Ms. Schory is a staff writer for the *Kane County Chronicle*. E-mail from Brenda Schory, Staff Writer, Kane County Chronicle, to Public Access Counselor, Office of the Illinois Attorney General (October 18, 2021).

²E-mail from Brenda Schory to Kane County State's Attorney[']s [Office], FOIA Officer Megan Baxter (October 4, 2021).

³5 ILCS 140/7(1)(m) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558, effective August 20, 2021.

⁴Letter from Megan L. Baxter, Assistant State's Attorney, FOIA Officer, Office of the Kane County State's Attorney, to Brenda Schory (October 8, 2021).

⁵Letter from Megan L. Baxter, Assistant State's Attorney, FOIA Officer, Office of the Kane County State's Attorney, to Brenda Schory (October 8, 2021), at 1.

⁶Letter from Megan L. Baxter, Assistant State's Attorney, FOIA Officer, Office of the Kane County State's Attorney, to Brenda Schory (October 8, 2021), at 2.

⁷E-mail from Brenda Schory, Staff Writer, *Kane County Chronicle*, to Public Access Counselor, Office of the Illinois Attorney General (October 18, 2021).

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payments of County funds to DeVry University for a County employee's education.⁸ Ms. Schory stated that the payments were revealed in an audit by the County Auditor posted on the Auditor's website.⁹ Ms. Schory's Request for Review alleged that it was her understanding, based on reporting, that the State's Attorney was not providing legal advice to members of the County Board, but instead "helping to devise a public relations strategy that, in effect, obfuscates the misuse of public funds by a county director."¹⁰ In a newspaper article reviewed by this office, Ms. Schory quoted from a joint statement issued by the County Board Chair and State's Attorney which stated that a review of the allegations in the Auditor's report found no violations of law or County policies, but acknowledged that "there is always room for improvement[.]"¹¹ The article further quoted the joint statement as saying: "We appreciate the due diligence that the auditor and her staff have done on the county audit, and look forward to working with the auditor in assuring that the county's strong financial policies are being reviewed and maintained[.]"¹²

On October 25, 2021, the Public Access Bureau e-mailed a copy of the Request for Review to the State's Attorney's Office's then-FOIA Officer, Ms. Megan L. Baxter.¹³ Along with a copy of the Request for Review, the Public Access Bureau sent the State's Attorney's Office a letter requesting an un-redacted copy of the withheld records for this office's

⁸E-mail from Brenda Schory, Staff Writer, *Kane County Chronicle*, to Public Access Counselor, Office of the Illinois Attorney General (October 18, 2021).

⁹E-mail from Brenda Schory, Staff Writer, *Kane County Chronicle*, to Public Access Counselor, Office of the Illinois Attorney General (October 18, 2021).

¹⁰E-mail from Brenda Schory, Staff Writer, *Kane County Chronicle*, to Public Access Counselor, Office of the Illinois Attorney General (October 18, 2021).

¹¹Brenda Schory, *Kane Chair, SAO Find No Policy or Legal Violation in \$54,709 P-Card Payments to DeVry*, KANE COUNTY CHRONICLE (August 11, 2021, 5:47 a.m.), <https://www.shawlocal.com/kane-county-chronicle/news/local/2021/08/11/kane-chair-sao-find-no-policy-or-legal-violation-in-54709-p-card-payments-to-devry/>.

¹²Brenda Schory, *Kane Chair, SAO Find No Policy or Legal Violation in \$54,709 P-Card Payments to DeVry*, KANE COUNTY CHRONICLE (August 11, 2021, 5:47 a.m.); <https://www.shawlocal.com/kane-county-chronicle/news/local/2021/08/11/kane-chair-sao-find-no-policy-or-legal-violation-in-54709-p-card-payments-to-devry/>.

¹³In an October 28, 2021, letter, Ms. Baxter informed the Public Access Bureau that she would no longer be employed with the Kane County State's Attorney's Office effective November 5, 2021. Her letter directed all future correspondence to be sent to Ms. Michele Niermann, Chief of the Kane County State's Attorney's Office's Civil Division, and Ms. Erin Brady, Deputy Chief of the Kane County State's Attorney's Office's Civil Division. Letter from Megan L. Baxter, Assistant State's Attorney, Office of the Kane County State's Attorney, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (October 28, 2021), at 4.

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confidential review and a detailed written explanation of the legal and factual bases for the State's Attorney's Office's denial of Ms. Schory's request.¹⁴

On October 28, 2021, the State's Attorney's Office provided the Public Access Bureau with a copy of the withheld record. The State's Attorney's Office also provided this office with a written answer for this office's confidential review, pursuant to section 9.5(d) of FOIA (5 ILCS 140/9.5(d) (West 2020)), and a redacted version to be shared with Ms. Schory.¹⁵ Later that day, this office forwarded a copy of the redacted answer to Ms. Schory and notified her that she could reply to that answer.¹⁶ Ms. Schory did not submit a reply to the State's Attorney's Office's redacted written answer.

On December 16, 2021, this office extended the time within which to issue a binding opinion by 30 business days, to February 2, 2022, pursuant to section 9.5(f) of FOIA.¹⁷

ANALYSIS

Section 1 of FOIA (5 ILCS 140/1 (West 2020)) declares that it is "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." Under FOIA, "[a]ll 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 2020).

Section 7(1)(m) of FOIA exempts from disclosure:

¹⁴Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Megan L. Baxter, Assistant State's Attorney/FOIA Officer, Kane County State's Attorney's Office (October 25, 2021).

¹⁵Letter from Megan L. Baxter, Assistant State's Attorney, Office of the Kane County State's Attorney, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (October 28, 2021).

¹⁶Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Brenda Schory, Staff Writer, *Kane County Chronicle* (October 28, 2021).

¹⁷Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Brenda Schory, Staff Writer, *Kane County Chronicle*, Michele Niemann, Assistant State's Attorney, Chief of the Civil Division, Kane County State's Attorney's Office, and Erin Brady, Assistant State's Attorney, Deputy Chief of the Civil Division, Kane County State's Attorney's Office (December 16, 2021).

Communications between a public body and an attorney
* * * representing the public body that would not be subject to
discovery in litigation, and materials prepared or compiled by or
for a public body in anticipation of a criminal, civil or
administrative proceeding upon the request of an attorney advising
the public body[.]

Section 7(1)(m) exempts from disclosure documents that are subject to the attorney-client privilege. *See People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 201 (1st Dist. 1997) (determining communications protected by the attorney-client privilege are within the scope of section 7(1)(m)). The Illinois Supreme Court has described the attorney-client privilege as follows: "(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are permanently protected, (7) from disclosure by himself or the legal advisor, (8) except the protection be waived." *Ill. Education Ass'n v. Ill. State Board of Education*, 204 Ill. 2d 456, 467 (2003). "The privilege applies not only to the communications of a client to his attorney, but also to the advice of an attorney to his client." *In re Marriage of Granger*, 197 Ill. App. 3d 363, 374 (5th Dist. 1990). A public body that withholds records as attorney-client privileged under section 7(1)(m) "can meet its burden only by providing some *objective* indicia that the exemption is applicable under the circumstances." (Emphasis in original.) *Illinois Education Ass'n*, 204 Ill. 2d at 470.

In the confidential version of its answer to Ms. Schory's Request for Review, the State's Attorney's Office provided additional, detailed information explaining the legal and factual bases for its reliance on this provision.¹⁸ Because the State's Attorney's Office provided its explanation confidentially, this office is prohibited from disclosing that explanation in this opinion.¹⁹

The Counties Code provides that each State's Attorney has the duty "[t]o give the State's Attorney's opinion, without fee or reward, to any county officer in the county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned." 55 ILCS 5/3-9005(a)(7) (West 2020), as amended by Public Act 102-056, effective July 9, 2021); *see also People ex rel. Thompson v. Anderson*, 119 Ill. App. 3d 932, 939 (3d Dist. 1983) (stating the state's attorney is the legal representative of county government).

¹⁸Letter from Megan L. Baxter, Assistant State's Attorney, Office of the Kane County State's Attorney, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (October 28, 2021), at 2-4.

¹⁹*See* 5 ILCS 140/9.5(d) (West 2020).

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Therefore, the Kane County State's Attorney has an attorney-client relationship with the County Board.

Ms. Schory alleges the State's Attorney was not acting as a legal advisor in connection with the withheld records, but instead was providing non-legal public relations advice related to the Auditor's report.²⁰ As mentioned above, documents protected by the attorney-client privilege must contain confidential communications in which legal advice is requested or provided. See *Chicago Trust Co. v. Cook County Hospital*, 298 Ill. App. 3d 396, 408-09 (1st Dist. 1998) (finding the attorney-client privilege inapplicable because the documents at issue did not show that the client was seeking legal advice). Therefore, the attorney-client privilege does not apply when someone who happens to be an attorney engages in communications that seek or convey business or other non-legal advice. See *CNR Investment, Inc. v. Jefferson Trust & Savings Bank*, 115 Ill. App. 3d 1071, 1076 (3d Dist. 1983) ("The attorney-client privilege of confidentiality does not apply to documents discussing business advice instead of legal advice."). When attorneys have the dual roles of advising clients on both legal and non-legal matters, their communications might have both legal and non-legal purposes. For the attorney-client privilege to apply in such cases, the communications between client and attorney must be primarily for the purpose of providing legal assistance. See *Bankdirect Capital Finance, LLC v. Capital Premium Finance, Inc.*, 326 F.R.D. 176, 181 (N.D. Ill. 2018) ("The question is always whether the 'primary' or 'predominant purpose' of the communication is to render or solicit legal advice.").

In *Evans v. City of Chicago*, 231 F.R.D. 302, 312-13 (N.D. Ill. 2005), the District Court for the Northern District of Illinois held that the attorney-client privilege did not protect certain e-mails that were exchanged between the senior counsel for former-Governor Rod Blagojevich and various members of the Governor's staff, including the Governor's deputy director of communications.²¹ In relevant part, the court addressed an e-mail from the Governor's senior counsel to the deputy director responding to questions that the Governor's Office received from a newspaper. *Evans*, 231 F.R.D. at 314. The court determined that the deputy director neither requested legal advice from the senior counsel nor had the senior counsel provided legal advice regarding the media inquiries. *Evans*, 231 F.R.D. at 314. Instead, the court stated that the deputy director "asked for and was provided advice about how to present the pardon decisions to the media." *Evans*, 231 F.R.D. at 314. The court concluded that "[p]olitical or public relations advice does not become privileged simply because it is given by an attorney." *Evans*, 231 F.R.D. at 314. Likewise, the court determined that an e-mail attaching a draft of

²⁰E-mail from Brenda Schory, Staff Writer, *Kane County Chronicle*, to Public Access Counselor, Office of the Illinois Attorney General (October 18, 2021).

²¹Illinois law regarding attorney-client privilege is identical to federal law. See, for example, *Listewood Corp. v. AT&T Corp.*, No. 13 CV 1418, 2015 WL 1539051, at *5 (N.D. Ill. Mar. 31, 2015).

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background information to be provided to members of the press regarding individuals who had been pardoned, along with a response by senior counsel with suggested changes, consisted of "political or public relations" advice and therefore those records were not protected by the attorney-client privilege. *Evans*, 231 F.R.D. at 314; *see also In re Chevron Corp.*, 749 F. Supp. 2d 141, 167 (S.D.N.Y. 2010) (holding that an attorney's communications were not privileged when "substantial evidence" suggested his predominant role was "not the rendition of professional legal services, but politics, lobbying, and media and public relations"). *But see Alomari v. Ohio Department of Public Safety*, 626 Fed. App'x 558, 571 (6th Cir. 2015), *cert. denied*, 577 U.S. 1144, 136 S. Ct. 1228 (2016) (the attorney-client privilege may protect communications about responding to media inquiries with legal ramifications when gathering information to provide legal advice is the principal purpose of the communications: "Given the potential for legal liability, [counsel]'s input on how to draft a media response was essential.").

This office's confidential review of the withheld record, together with the State's Attorney's Office's responses, confirmed that the responsive record does not devise a public relations strategy or contain any advice about how to frame or convey its findings to the public or the media. Instead, the State's Attorney developed the record in her capacity as the County Board's attorney, for the primary purpose of providing legal guidance to County Board members on a specific issue. The document reflects the substance of the State's Attorney's opinions and her confidential legal advice concerning the underlying matter. Because disclosure of the record would reveal the substance of confidential attorney-client communications, it falls within the scope of the attorney-client privilege. Even if the contents of the record later influenced certain public statements, the record is nevertheless protected by the attorney-client privilege because its predominate purpose was to provide legal advice. Further, there is no indication that the State's Attorney's Office or the County Board has shared the document with outside parties or otherwise waived the attorney-client privilege. Accordingly, the State's Attorney's Office sustained its burden of proving by clear and convincing evidence that the responsive record is exempt from disclosure under section 7(1)(m) 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) On October 4, 2021, Ms. Brenda Schory submitted a FOIA request to the Kane County State's Attorney's Office seeking copies of reports that the Kane County State's Attorney provided to Kane County Board members regarding "Roger Fahnestock's action to fund a De[V]ry degree using [C]ounty funds."

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2) On October 8, 2021, the State's Attorney's Office denied the request pursuant to section 7(1)(m) of FOIA, asserting that the records were protected by the attorney-client privilege.

3) On October 18, 2021, Ms. Schory submitted a Request for Review to the Public Access Counselor disputing the State's Attorney's Office'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 2020)).

4) On October 25, 2021, the Public Access Bureau sent a copy of the Request for Review to the State's Attorney's Office and requested un-redacted copies of the withheld records for this office's confidential review and a detailed written explanation of the legal and factual bases for the State's Attorney's Office's denial of the request.

5) On October 28, 2021, this office received the requested materials from the State's Attorney's Office, including both a redacted written answer and a complete written answer.

6) On that same date, the Public Access Bureau forwarded to Ms. Schory a copy of the State's Attorney's Office's redacted answer and notified her of her opportunity to reply. Ms. Schory did not submit a reply.

7) On December 16, 2021, this office properly extended the time within which to issue a binding opinion by 30 business days, to February 2, 2022, pursuant to section 9.5(f) of FOIA. Accordingly, the Attorney General may properly issue a binding opinion with respect to this matter.

8) Section 7(1)(m) of FOIA exempts from disclosure: "Communications between a public body and an attorney * * * representing the public body that would not be subject to discovery in litigation." This provision exempts from disclosure documents that are subject to the attorney-client privilege.

9) Communications between an attorney and client for the primary purpose of managing general public relations issues do not fall within the scope of the attorney-client privilege. The record at issue, however, did not provide public relations advice or devise a strategy for conveying information to the public or the media.

10) The State's Attorney's Office has sustained its burden of proving by clear and convincing evidence that the responsive record qualifies as a confidential attorney-client

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communication because it was created for the purpose of providing legal guidance to County Board members on a specific issue.

Therefore, it is the opinion of the Attorney General that the State's Attorney's Office did not violate the requirements of FOIA by denying Ms. Brenda Schory's Freedom of Information Act request.

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 2020). 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 Kane County State's Attorney's Office as defendants. *See* 5 ILCS 140/11.5 (West 2020).

Sincerely,

KWAME RAOUL
ATTORNEY GENERAL

By: 
Brent D. Stratton
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

Steve Silverman, Bureau Chief, Public Access Bureau, hereby certifies that he has served a copy of the foregoing Binding Opinion (Public Access Opinion 22-001) 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 Chicago, Illinois on January 31, 2022.



STEVE SILVERMAN
Bureau Chief

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