



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

March 24, 2022

PUBLIC ACCESS OPINION 22-005
(Request for Review 2021 PAC 69011)

FREEDOM OF INFORMATION ACT:
Disclosure of Complaints
Alleging Public Employee Misconduct

Mr. Timothy McNicholas
CBS Chicago Reporter
CBS 2 Broadcast Center
22 West Washington Street
Chicago, Illinois 60602

Ms. Melissa Nunchuck
FOIA Officer
City of Chicago – Department of Human Resources
121 North LaSalle Street, Room 100
Chicago, Illinois 60602

Dear Mr. McNicholas and Ms. Nunchuck:

This binding opinion is 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 2020)). For the reasons discussed below, this office concludes that the City of Chicago (City) Department of Human Resources (Department) violated the requirements of FOIA by improperly denying in its entirety a FOIA request submitted by Mr. Timothy McNicholas.

BACKGROUND

On November 8, 2021, Mr. McNicholas, on behalf of CBS Chicago, submitted a FOIA request to the Department seeking:

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 2

- [1] Any disciplinary records for Streets and Sanitations employee Eric Duszynski.
- [2] Records of any complaints of racism, discrimination or harassment ever filed against Eric Duszynski.
- [3] Records of any complaints of racism, harassment or discrimination filed within the last 5 years regarding employees at the 34th and Lawndale Streets and San. facility.^[1]

Mr. McNicholas indicated to the Department that he was resubmitting this FOIA request in light of the Public Access Bureau's non-binding determination concluding that the Department had violated FOIA by denying his October 22, 2020, FOIA request for the same records.² With his submission, Mr. McNicholas included copies of his October 22, 2020, FOIA request³ and the November 8, 2021, determination in which the Public Access Bureau concluded that the Department improperly denied Mr. McNicholas' October 22, 2020, FOIA request in its entirety pursuant to sections 7(1)(c)⁴ and 7(1)(f)⁵ of FOIA.⁶ This office had requested that the Department disclose to Mr. McNicholas copies of the complaints responsive to the second and third portions of the request, subject only to redactions of certain personal and private information.⁷ Because the Department did not comply with the Public Access Bureau's non-binding determination letter, on November 8, 2021, Mr. McNicholas sent the second FOIA request seeking the same records.

¹E-mail from Tim McNicholas, CBS Chicago Reporter, to DHRFOIA@cityofchicago.org (November 8, 2021).

²E-mail from Tim McNicholas, CBS Chicago Reporter, to DHRFOIA@cityofchicago.org (November 8, 2021).

³E-mail from Tim McNicholas, CBS Chicago Reporter, to DHRFOIA@cityofchicago.org (October 22, 2020).

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

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

⁶Ill. Att'y Gen. PAC Req. Rev. Ltr. 65673, issued November 8, 2021, at 6-7.

⁷Ill. Att'y Gen. PAC Req. Rev. Ltr. 65673, issued November 8, 2021, at 7-8.

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 3

On November 24, 2021, the Department provided Mr. McNicholas with a "redacted work history and suspension notice"⁸ in response to the first portion of his request.⁹ The Department redacted certain information from those records pursuant to sections 7(1)(a)¹⁰ and 7(1)(b)¹¹ of FOIA.¹² The Department further stated that it was still working on a response to the second and third portions of Mr. McNicholas' request and expected to complete its response by December 3, 2021.¹³

On December 15, 2021, Mr. McNicholas sent an e-mail to the Public Access Bureau concerning the Department's response to his FOIA request.¹⁴ Mr. McNicholas stated that the Department had complied with the first part of his request, but he had not yet received a response to the remaining portions of his request.¹⁵ He inquired whether this office could intervene or advise him of any other methods of recourse he might have. Because Mr. McNicholas had submitted a new FOIA request on November 8, 2021, this office properly treated Mr. McNicholas' December 15, 2021, e-mail as a Request for Review of the Department's response to that request. On December 23, 2021, an Assistant Attorney General in the Public Access Bureau e-mailed the Department a copy of that Request for Review and asked for the

⁸Letter from Maureen Lawless, HR Records Administration Manager, Department of Human Resources, City of Chicago, to Tim McNicholas, CBS Chicago Reporter (November 24, 2021), at 1.

⁹The Department's November 24, 2021, response letter indicated that on November 17, 2021, it had sought an extension for additional time to respond. Mr. McNicholas informed this office that he did not receive that extension notice but was told by the Department that it had tried to send it to him using its FOIA portal. E-mail from [Timothy J. McNicholas] to [Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General] (January 20, 2022).

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

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

¹²Letter from Maureen Lawless, HR Records Administration Manager, Department of Human Resources, City of Chicago, to Tim McNicholas, CBS Chicago Reporter (November 24, 2021), at 1.

¹³Letter from Maureen Lawless, HR Records Administration Manager, Department of Human Resources, City of Chicago, to Tim McNicholas, CBS Chicago Reporter (November 24, 2021), at 1.

¹⁴E-mail from Tim McNicholas, CBS Chicago Reporter, to Public Access [Bureau, Office of the Attorney General] (December 15, 2021).

¹⁵E-mail from Tim McNicholas, CBS Chicago Reporter, to Public Access [Bureau, Office of the Attorney General] (December 15, 2021).

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 4

status of the disclosure of the records responsive to the remaining portions of Mr. McNicholas' underlying FOIA request.¹⁶

On January 5, 2022, the Department e-mailed the Public Access Bureau a letter in which it maintained that it had properly denied Mr. McNicholas' October 22, 2020, FOIA request, which sought the same records as the November 8, 2021, FOIA request.¹⁷ The Department stated that the letter was "[i]n response to the remainder of Mr. McNicholas' FOIA request, received by our office on November 9, 2021," and copied Mr. McNicholas on the e-mail transmitting the letter.¹⁸ The Department explained that it was withholding a complaint against the employee specified in the FOIA request and six additional responsive complaints.¹⁹ In its letter, the Department reiterated its assertion that the records of complaints were exempt from disclosure pursuant to sections 7(1)(c) and 7(1)(f) of FOIA.²⁰ This letter constituted the Department's final denial of Mr. McNicholas' November 8, 2021, FOIA request.

On January 7, 2022, Mr. McNicholas replied to the Department and copied two Assistant Attorneys General in the Public Access Bureau, maintaining that he is entitled to receive the withheld records under FOIA.²¹ This office construed Mr. McNicholas' message as a Request for Review challenging the Department's January 5, 2022, denial of the second and third portions of his November 8, 2021, FOIA request.

¹⁶E-mail from Jane Sternecky, Assistant Attorney General, Public Access Bureau, to DHR (December 23, 2021).

¹⁷Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (January 5, 2022).

¹⁸E-mail from Melissa [Nunchuck] to [Jane] Sternecky, [Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (January 5, 2021) (copying DHRFOIA, Teresa Lim, and Timothy J. McNicholas).

¹⁹Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 5.

²⁰Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (January 5, 2022), at 3, 5.

²¹E-mail from Tim McNicholas, CBS Chicago Reporter, to [DHRFOIA, Jane Sternecky, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (January 7, 2022).

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 5

On January 20, 2022, Mr. McNicholas provided the Public Access Bureau with the materials necessary to complete his Request for Review.²² Later that day, the Public Access Bureau sent a copy of the Request for Review to the Department and asked it to provide for this office's confidential review copies of the records it withheld in response to Mr. McNicholas' November 8, 2021 request.²³ The Public Access Bureau also asked the Department to provide a written response addressing the factual and legal bases for the applicability of the asserted FOIA exemptions to those records.²⁴

On February 7, 2022, the Department e-mailed the requested materials to this office.²⁵ The Department also separately e-mailed to this office copies of its written response and the records that it had previously released to Mr. McNicholas.²⁶

On February 8, 2022, this office forwarded a copy of the Department's written response to Mr. McNicholas;²⁷ he did not reply to that response.

Pursuant to section 9.5(f) of FOIA, on February 9, 2022, this office extended the time within which to issue a binding opinion by 30 business days, to March 28, 2022.²⁸

²²E-mail from Timothy J. McNicholas to Teresa Lim (January 20, 2022).

²³Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Melissa Nunchuck, FOIA Officer, City of Chicago — Department of Human Resources (January 20, 2022), at 2.

²⁴Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Melissa Nunchuck, FOIA Officer, City of Chicago — Department of Human Resources (January 20, 2022), at 2.

²⁵E-mail from Melissa Nunchuck to [Teresa] Lim (February 7, 2022).

²⁶E-mail from Melissa Nunchuck to [Teresa] Lim and [Timothy J. McNicholas] (February 7, 2022). In its e-mail, the Department advised: "Please see the attached response letter and documents. In response to 2021 PAC 69011 (as a continuation of 2020 PAC 65673)." Although the Department's written response referenced Mr. McNicholas' October 2020 Request for Review, 2020 PAC 65673, and stated that its "letter is in response to the non-binding opinion by the Public Access Counselor ('PAC') in connection with" 2020 PAC 65673, Request for Review 2020 PAC 65673 was already closed and the Department's February 7, 2022, correspondence served only as an answer to the present Request for Review, 2021 PAC 69011.

²⁷Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Timothy McNicholas, CBS Chicago Reporter (February 8, 2022).

²⁸Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Timothy McNicholas, CBS Chicago Reporter, and Melissa Nunchuck, FOIA Officer, City of Chicago — Department of Human Resources (February 9, 2022).

ANALYSIS

"It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with [FOIA]." 5 ILCS 140/1 (West 2020). Under section 1.2 of FOIA (5 ILCS 140/1.2 (West 2020)), "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2020)) 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 FOIA²⁹ are to be construed narrowly. See *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

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." Section 7(1)(c) defines "unwarranted invasion of personal privacy" as "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." However, the exemption specifies that "[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."

A public body's contention that the release of information would constitute a clearly unwarranted invasion of personal privacy is evaluated on a case-by-case basis. *Chicago Journeymen Plumbers' Local Union 130 v. Dep't of Public Health*, 327 Ill. App. 3d 192, 196 (1st Dist. 2001). The phrase "clearly unwarranted invasion of personal privacy" evinces a strict standard to claim the exemption, and the burden is on the public body having charge of the record to prove that standard has been met. *Schessler v. Dep't of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994). Illinois courts consider the following factors in determining whether disclosure of information would constitute an unwarranted invasion of personal privacy: "(1) the plaintiff'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 Dep't*, 399 Ill. App. 3d 1, 13 (1st Dist. 2010).

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

Under the first two factors of the balancing test, Mr. McNicholas' interest as a member of the media seeking to disseminate information to the public through news reporting aligns with the public interest in disclosure of the records. He contends that "the public has a right to know to what extent racism and discrimination exists in this taxpayer-funded department."³⁰ In its answer to this office, the Department appeared to acknowledge that there was a public interest in disclosure of the complaints because the information bears on the public duties of public employees, but argued that the complainants' privacy rights outweighed the public interest in disclosure of the information.³¹ The Department also argued that there are public policy reasons for maintaining the confidentiality of the complaint information:

to protect complainants from retaliation; to encourage complainants to come forward with complaints without fear that the details of their complaint will be subject to workplace gossip; and, to protect the integrity of the investigative process. The fact that a complainant happens to work for a public employer who is subject to FOIA should not abrogate the reasonable and legitimate expectation that their complaint will be kept confidential.^[32]

In addition, the Department argued that disclosure of the records would discourage City employees from seeking internal resolutions of complaints, and instead lead them to pursue outside resolutions at a higher cost to the City and its taxpayers.³³

In addressing the third factor of the balancing test, the degree of invasion of personal privacy, the Department asserted that "[t]he written interview statements of the complainants contain discussions of intimate interactions of a sexual or racial nature and as such,

³⁰E-mail from Tim McNicholas, CBS Chicago Reporter, to [DHRFOIA, Jane Sternecky, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General, Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General] (January 7, 2022).

³¹Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 3.

³²Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 3.

³³Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 4.

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 8

disclosure of those statements would be objectionable to a reasonable person."³⁴ The Department contended that information provided by the complainants "could be highly embarrassing to" the complainants if released and "subject them to additional workplace harassment," as well as subject the accused "to embarrassment and unwarranted negative attention if such accusations are determined to have been unfounded."³⁵

Further, the Department cited Federal, State, and local policies and guidance in support of "the legitimate privacy expectations" complainants have in their complaints.³⁶ The Department referenced Federal guidance from the Equal Employment Opportunity Commission (EEOC) concerning complaints of sexual harassment for which "employers are encouraged to take steps to 'ensure confidentiality as much as possible [citation].'"³⁷ The regulations provide, in part, that "[n]either a charge, nor information obtained during the investigation of a charge of employment discrimination under title VII [of the Civil Rights Act of 1964], the ADA [Americans with Disabilities Act], or GINA [Genetic Information Nondiscrimination Act] * * * shall be made matters of public information by the Commission prior to the institution of any proceeding under" those Federal laws.³⁸ The Department noted that the Illinois Department of Human Rights' regulations also provide that its agency files related to charges are not subject to public disclosure, with certain exceptions.³⁹ The Department also explained that the City's Diversity and Equal Employment Opportunity Policy (EEO Policy) is consistent with the

³⁴Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 2.

³⁵Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 3-4.

³⁶Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 3.

³⁷Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 3 (citing U.S. Equal Employment Opportunity Commission, "Policy Guidance on Current Issues of Sexual Harassment," <https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment>).

³⁸29 C.F.R. § 1601.22.

³⁹See 2 Ill. Adm. Code. § 926.210(a) (1980), amended at 41 Ill. Reg. 11555, effective August 29, 2017.

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 9

EEOC's guidance and provides, that for complaints of discrimination, harassment, or retaliation: "All complaints and investigations will be kept confidential, to the extent possible."⁴⁰

As to the fourth factor of the balancing test, the Department contended that "the public's right to know about the extent of harassment or sexual harassment taking place in the workplace can still be satisfied through other records. Specifically, disciplinary action taken against employees who violate the City's EEO Policy is not exempt from disclosure."⁴¹

This office has reviewed the parties' arguments and the withheld records and concludes that, on balance, disclosure of most of the complaints' contents would not constitute a clearly unwarranted invasion of any individual's personal privacy. There is a significant public interest in information that sheds light on claims of racial discrimination, harassment, and other forms of public employee misconduct and the circumstances surrounding those claims. *Greer v. Board of Education of the City of Chicago*, 2021 IL App (1st) 200429, ¶13, ___ N.E.3d ___ (2021) ("[R]acial discrimination [is] a matter inherently of public concern.' [Citation.] The public has a substantial interest in allegations of racial discrimination by public bodies and the Board's response to the allegations, even when the allegations pertain to a single employee."); *State Journal-Register v. University of Illinois Springfield*, 2013 IL App (4th) 120881, ¶¶48, 51, 994 N.E.2d 705, 717 (2013) (recognizing a legitimate public concern in actions and behaviors of coaches preceding alleged sexual misconduct but minimal interest in explicit details of that conduct).

Disclosure of the complaint records implicates the privacy interests of three categories of individuals: the City employees accused of alleged misconduct, the complainants, and third parties mentioned incidentally. The complaints describe alleged workplace misconduct by City employees, but section 7(1)(c) of FOIA expressly provides that the disclosure of information that bears on the public duties of public employees does not constitute an unwarranted invasion of personal privacy. Ill. Att'y Gen. Pub. Acc. Op. No. 18-018, issued December 31, 2018, at 6 (complaints or allegations of misconduct against public employees are generally not exempt from disclosure in whole under section 7(1)(c) because such information bears on the performance of the employees' public duties).

⁴⁰City of Chicago Diversity and Equal Employment Opportunity Policy XIII. Investigation Reports and Communications with Parties, c. Confidentiality (effective February 1, 2019), at 7, *available at* https://www.chicago.gov/content/dam/city/depts/dhr/supp_info/HRpolicies/COC_EEO_Policy_Final_eff_0_01_19.pdf.

⁴¹Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 4.

Further, disclosure of such complaints would not be an unwarranted invasion of the accused employees' privacy interests even if those complaints are later determined to be unfounded. In *Gekas v. Williamson*, 393 Ill. App. 3d 573, 574 (4th Dist. 2009), the Illinois Appellate Court considered whether citizen complaints against a deputy sheriff and related records were exempt from disclosure under a prior version of section 7(1)(c), which also expressly excluded from its scope information that bears on the public duties of public employees.⁴² The trial court had ruled that files concerning unfounded complaints could be withheld to protect the deputy's privacy interests. *Gekas*, 393 Ill. App. 3d at 578. The appellate court reversed, holding that records concerning alleged wrongdoing in the course of the deputy's public duties were subject to disclosure regardless of whether the underlying allegations had merit. *Gekas*, 393 Ill. App. 3d at 586.

By contrast, the complainants, as well as witnesses and third parties described incidentally in the complaints, have legitimate privacy interests in the disclosure of their identities. As the Attorney General recognized in Binding Opinion 18-018, "[i]nformation identifying individuals who made complaints of this nature against public employees is highly personal; the subjects' privacy rights outweigh any legitimate public interest in disclosure of their identities." Ill. Att'y Gen. Pub. Acc. Op. No. 18-018, at 6. The Attorney General concluded that "names and other discrete information in the reports that identify the complainants are exempt from disclosure pursuant to section 7(1)(c)." Ill. Att'y Gen. Pub. Acc. Op. No. 18-018, at 6. Similarly, courts have concluded that the identifying information of third parties is generally exempt from disclosure to protect personal privacy interests. *See, e.g., Mays v. Drug Enforcement Administration*, 234 F.3d 1324, 1327 (D.C. Cir. 2000) ("Absent exceptional circumstances, the balance [between the public interest in disclosure and the right to privacy] categorically favors withholding the names and addresses of third parties as" such information does not provide insight into the conduct or performance of a government agency).

⁴²At the time of the *Gekas* case, section 7(1)(b)(ii) of FOIA (5 ILCS 140/7(1)(b)(ii) (West 2006)) provided:

(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[.] (Emphasis added.)

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 11

Here, the names and other identifying information of the complainants and third parties mentioned in the complaints are likewise highly personal, and those individuals' privacy rights outweigh the public's interest in the disclosure of that information.

The complainants also have a privacy interest in certain graphic or salacious details in portions of the complaints. In *State Journal-Register*, the Illinois Appellate Court considered whether two categories of information related to a sexual misconduct allegation involving a softball team fell within the scope of section 7(1)(c): "(1) the detailed accounting of the sexual misconduct and (2) the actions and behaviors of the coaches preceding the act of sexual misconduct." *State Journal-Register*, 2013 IL App (4th) 120881, ¶55, 994 N.E.2d at 718. The court found that certain witness statements contained "salacious" and "explicit" information concerning the alleged sexual misconduct and that "[t]he details of that sexual misconduct are highly personal, which weighs heavily in favor of exemption." *State Journal-Register*, 2013 IL App (4th) 120881, ¶¶48, 56, 994 N.E.2d at 717-18. The court concluded that those witness statements fell within the scope of section 7(1)(c), but statements from the team's coaches did not, except for certain discrete parts. *State Journal-Register*, 2013 IL App (4th) 120881, ¶58, 994 N.E.2d at 719.

Based on this office's review of the complaints at issue, portions of some of the complaints contain graphic or salacious details. The complainants have legitimate privacy interests in highly specific information describing sexually explicit conduct or remarks. *State Journal-Register*, 2013 IL App (4th) 120881, ¶¶48, 56, 994 N.E.2d at 717-18. Those graphic or salacious details are inherently highly personal, and the complainants' right to privacy outweighs the public interest in that information. In addition, some of the complaints contain details about the complainants' families or private lives that are highly personal in nature and do not pertain to their public duties. Therefore, the complainants' right to privacy also outweighs the public interest in that particular information.

The privacy rights of complainants and third parties, however, can be protected by redacting discrete portions of the records rather than by withholding them in their entireties. Only small portions of the records contain descriptions that could be characterized as graphic or salacious. The complaints contain many general descriptions of alleged discrimination or harassment by City employees while on the job. The complainants' identities cannot be discerned from those general descriptions if their names and other discrete personally-identifying details are redacted, and they have a minimal privacy interest in the content. In contrast, there is a significant public interest in disclosure of alleged instances of workplace harassment and discrimination. Although the Department highlighted certain Federal and State regulations containing confidentiality provisions for certain types of employee complaints and investigations, the Department did not assert that those laws or regulations prohibit it from disclosing the portions of the complaints at issue in this matter.

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 12

This office acknowledges the Department's policy concern that failing to protect the confidentiality of complainants could discourage employees from reporting alleged misconduct. This office also acknowledges the Department's interest in protecting complainants from embarrassment or other negative attention. As previously noted, however, the identities of complainants and third parties, and salacious details concerning them and the alleged incidents, can be protected by redacting portions of the complaints that contain personally-identifying information, highly personal information such as graphic details of the incidents that occurred, and details about family matters or other aspects of private lives.⁴³ Disclosing those records with such redactions would strike an appropriate balance between the public interest in disclosure and the complainants' privacy interests. *See State Journal-Register*, 2013 IL App (4th) 120881, ¶¶66, 994 N.E.2d at 720 (student's correspondence not exempt from disclosure in its entirety under section 7(1)(c) because redaction of student's name protected the student's privacy interests).

State courts in other jurisdictions have taken similar approaches in balancing the public interest in information concerning public employee misconduct and protecting the privacy interests of complainants. *See, e.g., Rocque v. Freedom of Information Comm'n*, 255 Conn. 651, 668, 774 A.2d 957, 967 (Conn. 2001) (reversing lower court's finding that entire sexual harassment complaint and all of the complainant's statement were exempt from disclosure under the personal privacy exemption in Connecticut's version of FOIA, but agreeing that the complainant's identity and sexually explicit portions of documents fell within scope of the exemption); *Linzmeier v. Forcey*, 2002 WI 84, ¶¶40-42, 254 Wis. 2d 306, 331-32, 646 N.W.2d 811, 821-22 (Wis. 2002) (affirming lower court's finding that investigation report concerning teacher's alleged inappropriate conduct was not exempt from disclosure under Wisconsin's open records law but remanding for appropriate redactions, such as identities of students who were interviewed); *Deseret News Publishing Co. v. Salt Lake County*, 2008 UT 26, ¶¶34-36, 182 P.3d 372, 381 (Utah 2008) (reversing lower court's ruling that county properly withheld investigative report concerning a sexual harassment complaint under Utah's version of FOIA because there was a legitimate public interest in disclosure of the report despite the remote possibility that "a dedicated and enterprising person [could] derive the identities of one or more witnesses regardless of the precautions taken to preserve their anonymity."). *But see Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App. 1992) (finding "that the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.").

⁴³ 5 ILCS 140/7(1) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558, effective August 20, 2021 ("When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying.")

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 13

Finally, there does not appear to be an alternative means for Mr. McNicholas to obtain the responsive records. The Department contended that the public interest in the extent of harassment or discrimination in the workplace might be satisfied by the records of disciplinary action taken against employees who are found to have violated the City's EEO policy. However, the information the City disclosed to Mr. McNicholas in response to the first portion of his FOIA request concerning one disciplinary action was limited. Specifically, the records reflect that an employee received a suspension. The notice of suspension merely referenced a City EEO investigation number and stated that the individual was in violation of a specified rule number. The notice provides no other information regarding any complaints or incidents that served as the basis for the Department's decision to issue the suspension. Further, the Department has not demonstrated that there is any other means by which Mr. McNicholas could obtain information about the accusations of workplace misconduct that have not resulted in a finding of an EEO policy violation.

Accordingly, this office concludes that the Department has not demonstrated by clear and convincing evidence that the complaints responsive to Mr. McNicholas' FOIA request are exempt from disclosure in their entireties under section 7(1)(c) of FOIA.

Section 7(1)(f) of FOIA

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." 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). 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. 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, 740 (2012) (quoting *Enviro Tech International, Inc., v. United States Environmental Protection Agency*, 371 F.3d 370, 374-75 (7th Cir. 2004)). Rather, "[o]nly those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶24, 7 N.E.3d 741, 748 (2013), rev'd on other grounds by *Perry v. Dep't of Financial and Professional Regulation*, 2018 IL 123349, 106 N.E.3d 1016 (2018) (quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010)).

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 14

The Department's response to this office stated that "the purpose of the Section 7(1)(f) exemption is to allow decision makers to engage in frank discussions consisting of the free flow exchange of opinions and thoughts without the worry of public scrutiny."⁴⁴ The Department contended that the withheld complaints fell within the scope of section 7(1)(f) because they "demonstrate the opinions and deliberations by the authors in preparation for an action or policy which had not yet been accomplished."⁴⁵ According to the Department, the complaint against the named employee falls within the scope of section 7(1)(f) because "it is a statement presenting alleged facts and opinions of one employee."⁴⁶ The remaining withheld complaints similarly "present descriptions of events and conduct as experienced by the complaining employees."⁴⁷ The Department argued that the complaints are preliminary in nature, as at the time that they were submitted, it "had not taken any steps to substantiate the allegations and had not yet made a decision about which of the facts DHR would investigate."⁴⁸

The Department has not demonstrated that the complaints reveal information that would provide insight into the give-and-take of any Department decision-making process. Complaints may lead to a process that involves deliberative discussions culminating in final action, but the complaints themselves are not part of that deliberative process. The complaints do not, for instance, reveal the mental impressions or opinions of the investigators who reviewed them. Instead, the complaints precede the decision-making process and are factual in nature, providing the dates of particular incidents and descriptions of the alleged conduct that occurred. Noting that purely factual information is not exempt from disclosure, the court in *State Journal-Register* advised that "[f]actual information includes that which is collected within investigative reports, such as affidavits of witnesses and investigator's interviews[.]" *State Journal-Register*,

⁴⁴Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 5.

⁴⁵Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 5.

⁴⁶Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 5.

⁴⁷Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 5-6.

⁴⁸Letter from Melissa Nunchuck, FOIA Officer, Department of Human Resources, City of Chicago, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 7, 2022), at 6.

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 15

2013 IL App (4th) 120881, ¶27, 994 N.E.2d at 713. In that case, the court concluded that witness statements did not fall within the scope of section 7(1)(f) because they "contain factual accountings of the events by witnesses, [and] are capable of standing alone, with no evidence they are 'inextricably intertwined' with the predecisional process." *State Journal-Register*, 2013 IL App (4th) 120881, ¶30, 994 N.E.2d at 714.

Because the complaints do not reveal the Department's predecisional deliberative process for responding to the complaints, this office concludes that the Department did not sustain its burden of demonstrating by clear and convincing evidence that the records 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 November 8, 2021, Mr. Timothy McNicholas, on behalf of CBS Chicago, submitted a FOIA request to the City of Chicago Department of Human Resources seeking: (1) any disciplinary records for a named City employee; (2) records of any complaints of racism, discrimination or harassment against that named employee; and (3) records of any complaints of racism, discrimination or harassment against any employees at a particular Streets and Sanitation facility filed within the previous five years.

2) On November 24, 2021, the Department responded to Mr. McNicholas by providing copies of records responsive to the first item in his request. The Department stated it was working on a response to the remaining portions of his request and planned to respond by December 3, 2021.

3) On December 15, 2021, Mr. McNicholas submitted a Request for Review to the Public Access Bureau stating that the Department did not respond to the second and third portions of his request.

4) On December 23, 2021, an Assistant Attorney General in the Public Access Bureau notified the Department that it was in receipt of a Request for Review, 2021 PAC 69011, and asked it to provide a status update on the disclosure of records to Mr. McNicholas.

5) On January 5, 2022, the Public Access Bureau received a letter from the Department in which the Department maintained that it had properly denied a request that was the subject of a previous Request for Review, 2020 PAC 65673; that request was identical to Mr. McNicholas' November 8, 2021, FOIA request. The Department asserted that the records

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 16

responsive to the second and third portions of the request are exempt from disclosure pursuant to sections 7(1)(c) and 7(1)(f) of FOIA.

6) On January 7, 2022, Mr. McNicholas submitted an updated Request for Review in which he informed the Department and the Public Access Bureau that he remained interested in the withheld records and maintained that he is entitled to receive them under FOIA.

7) On January 20, 2022, Mr. McNicholas provided this office with a copy of his November 8, 2021, FOIA request, thereby completing his Request for Review. Mr. McNicholas' 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)).

8) On January 20, 2022, the Public Access Bureau sent a copy of the Request for Review to the Department and asked it to provide for this office's confidential review copies of the withheld records responsive to Mr. McNicholas' November 8, 2021, request. This office also asked the Department to provide a detailed explanation of the factual and legal bases for withholding those records.

9) On February 7, 2022, the Department furnished the requested materials to this office by e-mail. Although the Department's written response referenced 2020 PAC 65673, the Department's transmittal e-mail advised that it was also in response to 2021 PAC 69011.

10) On February 8, 2022, this office forwarded a copy of the Department's written response to Mr. McNicholas and notified him of his opportunity to reply. He did not submit a reply.

11) On February 9, 2022, this office properly extended the time within which to issue a binding opinion by 30 business days, to March 28, 2022, pursuant to section 9.5(f) of FOIA. Accordingly, the Attorney General may properly issue a binding opinion with respect to this matter.

12) 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 "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 exemption expressly provides that "[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."

13) Complaints describing alleged workplace misconduct bear directly on the public duties of public employees. The records at issue describe alleged racism, discrimination, or harassment by City employees while on duty. Therefore, they are not exempt from disclosure in their entirety pursuant to section 7(1)(c) of FOIA. However, the identifying information of complainants, witnesses, and third parties mentioned incidentally in the records may be redacted because disclosure of that information would constitute a clearly unwarranted invasion of those individuals' personal privacy.

14) The Department asserted that disclosure of the complainants' statements would be objectionable to a reasonable person because they "contain discussions of intimate interactions of a sexual or racial nature." However, the records also include more general discussions concerning alleged harassment or discrimination in the workplace. While complainants have a legitimate privacy interest in details that are highly personal and graphic or salacious in nature, there is a strong public interest in information that sheds light on the circumstances surrounding the alleged inappropriate conduct or behavior. Therefore, the Department did not demonstrate by clear and convincing evidence that the complaints are exempt in their entirety pursuant to section 7(1)(c) of FOIA. Pursuant to that exemption, however, the Department may redact discrete portions of the statements containing details that are graphic or salacious in nature, such as details that are sexually explicit. The Department may also redact details concerning the complainants' family and private lives because they are highly personal do not bear directly on the employees' public duties.

15) 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."

16) The Department asserted that the complaints are preliminary in nature, but they consist of factual information and precede any decision-making process in which the Department formulated responses to the complaints. Therefore, the Department did not sustain its burden of demonstrating by clear and convincing evidence that the records are exempt from disclosure pursuant to section 7(1)(f) of FOIA.

Therefore, it is the opinion of the Attorney General that the Department's response to Mr. McNicholas' November 8, 2021, Freedom of Information Act request violated the requirements of FOIA. Accordingly, the Department is directed to take immediate and appropriate action to comply with this opinion by disclosing to Mr. McNicholas copies of the responsive records, subject only to the redactions authorized above.

Mr. Timothy McNicholas
Ms. Melissa Nunchuck
March 24, 2022
Page 18

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 County or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Mr. Timothy McNicholas and CBS 2 Chicago News as defendants. *See* 5 ILCS 140/11.5 (West 2020).

Very truly yours,

KWAME RAOUL
ATTORNEY GENERAL

By: 
Brent D. Stratton
Chief Deputy Attorney General

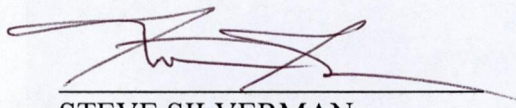
CERTIFICATE OF SERVICE

Steve Silverman, Bureau Chief, Public Access Bureau, hereby certifies that he has served a copy of the foregoing Binding Opinion (Public Access Opinion 22-005) upon:

Mr. Timothy McNicholas
CBS Chicago Reporter
CBS 2 Broadcast Center
22 West Washington Street
Chicago, Illinois 60602
tjmcnicholas@cbs.com

Ms. Melissa Nunchuck
FOIA Officer
City of Chicago – Department of Human Resources
121 North LaSalle Street, Room 100
Chicago, Illinois 60602
dhrfoia@cityofchicago.org

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 March 24, 2022.


STEVE SILVERMAN
Bureau Chief

STEVE SILVERMAN
Bureau Chief
Public Access Bureau
Office of the Attorney General
100 West Randolph Street, 11th Floor
Chicago, Illinois 60601
(312) 814-6756