



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

July 25, 2022

PUBLIC ACCESS OPINION 22-011
(Request for Review 2022 PAC 71261)

FREEDOM OF INFORMATION ACT:
Applications of Individuals Not Appointed to
Village Board of Trustees Are Public Records and
Are Not Exempt From Disclosure
Under Sections 7(1)(c) or 7(1)(f) of FOIA

Mr. Zach Burtle
117 Grizzly Drive
Chatham, Illinois 62629

The Honorable Dave Kimsey
Village President
Village of Chatham
116 East Mulberry Street
Chatham, Illinois 62629

Dear Mr. Burtle and Mr. Kimsey:

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 Village of Chatham (Village) violated the requirements of FOIA by improperly denying a FOIA request submitted by Mr. Zach Burtle.

BACKGROUND

On April 10, 2022, Mr. Burtle used the Village's website to submit a FOIA request seeking the "names and applications of the candidates for" a vacancy on the Village Board of Trustees (Board).¹ On April 11, 2022, legal counsel for the Village denied the request

¹E-mail from NOREPLY@chathamil.net to Jill Butler [Administrative Assistant, Village of Chatham] (April 10, 2022) ("Form submission from: FOIA Request"; requester Zach Burtle).

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pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(f) of FOIA (5 ILCS 140/7(1)(b),(1)(c),(1)(f) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558, effective August 20, 2021; 102-694, effective January 7, 2022, revised February 3, 2022).² The Village's denial argued that the application process is confidential, and asserted "[c]andidates' resumes and solicitations for appointment to office contain information for the Village to evaluate their credentials; however, this information is not readily available to the public and does not become public merely by inclusion with an application to the Village."³ In an e-mail to the Village on April 12, 2022,⁴ Mr. Burtle provided a copy of a non-binding determination in which the Public Access Bureau concluded that application materials submitted by individuals seeking a position on a public board were not exempt from disclosure in their entirety pursuant to section 7(1)(c) of FOIA.⁵ On April 14, 2022, legal counsel for the Village issued a supplemental response to Mr. Burtle providing him with copies of the application materials for the individual who was appointed to Board, but continued to withhold, pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(f) of FOIA, the materials received from the individuals who were not appointed.⁶ The Village's supplemental response stated, "I am aware of the Attorney General opinion you sent; however, I do not believe it is applicable to the Village and further note its non-binding nature."⁷

On April 14, 2022, Mr. Burtle e-mailed to the Public Access Bureau a copy of the Village's amended response and a Request for Review questioning the Village's withholding of the application materials submitted by the individuals who were not appointed to the Board.⁸ On

²Letter from Gregory E. Moredock, Sorling Northrup, to Zach Burtle (April 11, 2022).

³Letter from Gregory E. Moredock, Sorling Northrup, to Zach Burtle (April 11, 2022), at 1-2.

⁴E-mail from Zach Burtle to Joshua Jones, [Deputy Bureau Chief], [Public Access Bureau], [Office of the Attorney General], Greg Moredock, [Sorling Northrup], P[atrick] McCarthy, [Village Manager], [Village of Chatham], D[ave] Kimsey, [Village President], [Village of Chatham] (April 12, 2022).

⁵Ill. Att'y Gen. PAC Req. Rev. Ltr. 62181, issued September 3, 2020.

⁶Letter from Gregory E. Moredock, Sorling Northrup, to Zach Burtle (April 14, 2022).

⁷Letter from Gregory E. Moredock, Sorling Northrup, to Zach Burtle (April 14, 2022), at 1.

⁸E-mail from Zach Burtle to Joshua Jones, [Deputy Bureau Chief], [Public Access Bureau], [Office of the Attorney General] (April 14, 2022). On May 23, 2022, Mr. Burtle clarified, via e-mail, that he does not dispute the withholding of the trustee applicants' "private information" pursuant to section 7(1)(b) of FOIA. E-mail from [Zach Burtle] to Shannon Barnaby, [Assistant Attorney General], [Public Access Bureau], [Office of the Attorney General] (May 23, 2022).

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April 15, 2022, Mr. Burtle completed his Request for Review submission by forwarding to this office a copy of his April 10, 2022, FOIA request.⁹

On April 21, 2022, the Public Access Bureau e-mailed a copy of the Request for Review to the Village.¹⁰ The Public Access Bureau also e-mailed the Village a letter requesting an unredacted copy of the application materials in question, for this office's confidential review, and a detailed written explanation of the legal and factual bases for the applicability of the above-stated exemptions to the withheld records.¹¹ On May 2, 2022, the Village's legal counsel responded on its behalf by furnishing, via e-mail, the withheld records and two versions of the Village's answer: an unredacted version for this office's confidential review and a version from which it redacted the information it provided to this office confidentially pursuant to section 9.5(d) of FOIA (5 ILCS 140/9.5(d) (West 2020)).¹² On May 2, 2022, this office e-mailed Mr. Burtle a copy of the Village's redacted response.¹³ On May 12, 2022, Mr. Burtle informed an Assistant Attorney General in the Public Access Bureau, via e-mail, that he did not plan to submit a reply.¹⁴

On June 9, 2022, this office extended the time within which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.¹⁵

⁹E-mail from Zach Burtle to [Lorraine K. Dunham], [Paralegal II], [Public Access Bureau], [Office of the Attorney General] (April 15, 2022). Section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2020)) requires a Request for Review to be "signed by the requester, and include (i) a copy of the request for access to records and (ii) any responses from the public body."

¹⁰E-mail from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to [Gregory E.] Moredock (April 21, 2022).

¹¹Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Gregory E. Moredock, Sorling Northrup (April 21, 2022).

¹²Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022).

¹³Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Zach Burtle (May 3, 2022 [*sic*]).

¹⁴E-mail from Zach Burtle to Shannon Barnaby, [Assistant Attorney General], [Public Access Bureau], [Office of the Attorney General] (May 12, 2022).

¹⁵Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Zach Burtle and Gregory E. Moredock, Sorling Northrup (June 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 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).

In its response to this office, the Village reiterated its contention that the application materials submitted by the individuals who were not appointed to the Board are exempt from disclosure under sections 7(1)(c) and 7(1)(f) of FOIA, as well as asserting that the withheld records are not public records subject to the requirements of FOIA. Below, this office will consider each argument.

Section 2(c) of FOIA

As background, the Village's response to this office explained that the Board is comprised of a Village president and six trustees, all of whom are elected from the Village at large.¹⁶ The Village stated that a Board trustee passed away on March 2, 2022. Section 3.1-10-50(b) of the Illinois Municipal Code¹⁷ specifies that the Village president's duties include, among others, appointing an individual to the Board in the event of a vacancy.¹⁸ To fill the Board's vacancy, the Village president "invited members of the Village to express interest in the position of Village Trustee. The Village President requested that interested individuals send him a cover letter expressing interest and a resume."¹⁹ The records at issue in this matter are the materials submitted by the individuals who were not appointed to the Board, consisting of letters and e-mails of interest, and résumés. In its response to this office, the Village argued that the materials

¹⁶Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 1; *Village Board*, VILLAGE OF CHATHAM, <https://www.chathamil.gov/staff-directory/leadership> (last visited May 26, 2022).

¹⁷65 ILCS 5/3.1-10-50(b) (West 2020).

¹⁸The Village's response to this office explained that the vacancy was caused by the death of one of the Board's trustees. Section 5/3.1-10-50(e) of the Municipal Code (Municipal Code) (65 ILCS 5/3.1-15-50(e) (West 2020)) governs this process, which provides that a village president must appoint a qualified person to fill the vacant position within 60 days of the vacancy, and the village board must provide its advice and consent within 30 days of receiving the appointment.

¹⁹Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 1-2.

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submitted by the individuals who were not appointed to the Board are not "public records" subject to disclosure under FOIA because "[t]he information at issue was not used by a public body in any way and did not pertain to the transaction of public business."²⁰

Section 2(c) of FOIA (5 ILCS 140/2(c) (West 2020)) defines "public records" as:

all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials **pertaining to the transaction of public business**, regardless of physical form or characteristics, **having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.** (Emphasis added.)

Therefore, a record must satisfy the following criteria to qualify as a public record under FOIA: "First, the record must pertain to public business rather than private affairs. [Citation.] Second, the record must have been either (1) prepared by a public body, (2) prepared for a public body, (3) used by a public body, (4) received by a public body, (5) possessed by a public body, or (6) controlled by a public body." *Better Government Association v. City of Chicago*, 2020 IL App (1st) 190038, ¶14, 169 N.E.3d 1066, 1072 (2020).

In its response to this office, the Village argued that:

The communications at issue are not public records because they do not pertain to business or community interests and were not utilized by any public body. * * * The dialogue, at the point these documents were sent to the Village President, was strictly between a private citizen potentially interested in the position of Trustee and the Village President. * * * The resumes of private citizens sent to the Village President do not, without more, pertain to the transaction of public business.^[21]

²⁰Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 4.

²¹Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 4.

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Contrary to the Village's assertion, the materials that individuals submitted to the Village president in support of their applications for a trustee position directly relate to both the business of the Village and the interests of the Village community. As mentioned above, the Village president has a statutory duty to consider and evaluate individuals to determine whether they qualify for appointment to the Board. The Village's response to this office acknowledged that "[t]he information at issue was gathered by the Village President to formulate his opinion on potential appointees to the vacant position."²² Accordingly, when the Village president received and reviewed these materials for the official purpose of considering an appointee, he was transacting public business as a Village official on behalf of the Village. Further, as will be discussed below, it is of great public interest to the local community to understand who sought appointment to the Board and their qualifications. Although the application materials contain some personal information, it is clear that the applicants provided that information to demonstrate their suitability for the vacant trustee position, a purpose that concerns public business, rather than private affairs.

The application materials also meet the second criterion to qualify as public records because they were received by and are in the possession of the Village. It is undisputed that applicants e-mailed their materials to the Village president's Village-issued e-mail address. Accordingly, those records are in the possession of the Village because they were received by and stored on the Village's e-mail servers and devices.

Despite the fact that the responsive records were transmitted via the Village's e-mail server, the Village argues that "the receipt of these documents by the Village President does not constitute receipt by the [Village]."²³ The Village argues that "the Village President is not, in and of himself, a public body. An individual member of the corporate authorities is not a public body and cannot conduct business of the municipality acting alone. [*City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶40, 992 N.E.2d 629, 639 (2013).]"²⁴ The Village asserted that

[t]hese documents were never reviewed by the Village Board and were not used by the Village in any manner. * * * While [*City of Champaign v. Madigan*, in dicta, states that a[] public official

²²Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 7.

²³Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 4.

²⁴Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 3-4.

forwarding a private email to a publicly issued electronic device would be under the control of a public body, it does not address when a private citizen sends a private message to a public device attaching documents that are not intended for the public. The Village does not acquire control over the personal information of a private citizen, simply because it is forwarded to one single member of the corporate authorities.^[25]

The Village's reliance on the *City of Champaign* decision is misplaced. In *City of Champaign*, a reporter sought copies of the communications exchanged between members of a city council during city council meetings, including messages from both their city-issued devices and accounts and their personal devices and accounts. The city argued that the communications on privately-owned devices were not "public records" because individual city council members do not constitute public bodies. *City of Champaign*, 2013 IL App (4th) 120662, ¶30, 992 N.E.2d at 636. Therefore, the court had to look further to determine whether the communications of individual council members were records of the "public body" when those records were not in the physical custody of the city but were contained on the city officials' personally owned devices. The court held that the communications responsive to the request were in the possession of the city council because a quorum was present and acting collectively as a public body at the time the messages were sent. *City of Champaign*, 2013 IL App (4th) 120662, ¶¶40, 42-43, 992 N.E.2d at 639-40.

In contrast, the responsive records in this matter were submitted to the Village president's Village-issued e-mail account, not to a private account or to a private device. There is no question that materials transmitted by the Village's e-mail server and received by the Village president's Village e-mail account are under the control of the Village. Secondly, unlike the *City of Champaign* city council members, the Village president has unilateral authority. In *Better Government Association*, 2020 IL App (1st) 190038, ¶19, 169 N.E.3d 1066, 1073, the Illinois Appellate Court distinguished the FOIA requests submitted in that case (to the City of Chicago Mayor's Office and Department of Public Health) from the requests seeking communications of individual city council members in *City of Champaign*. The court explained:

Although we agree with defendants that **the individual officials identified in the requests are not themselves public bodies under FOIA, this does not mean that their communications about public business cannot be public records.** Instead, it is sufficient that the communications were either prepared for, used

²⁵Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 4.

by, received by, or in the possession of a public body. * * * [T]he officials in question here are not limited by a quorum requirement. Rather, defendants—through their individual officials such as those named in the requests at issue—can function as public bodies without any official meeting having been convened. For example, the mayor and the director of CDPH can make unilateral decisions that are binding on their respective public bodies. (Emphasis added.) *Better Gov't Ass'n*, 2020 IL App (1st) 190038, ¶19, 169 N.E.3d at 1073.

The court thus concluded that "the e-mails and text messages from those officials' personal accounts are 'in the possession of' a public body within the meaning of FOIA. It is also reasonable to conclude that, at a minimum, many such communications are prepared for or eventually used by the public body." *Better Gov't Ass'n*, 2020 IL App (1st) 190038, ¶19, 169 N.E.3d at 1073.

Likewise, the Village president in this matter has unilateral authority and may perform duties on behalf of the Village without the requirement of a Board meeting. Indeed, in its answer, the Village stated that the Village president "did not share the [applicants' materials] with the Village Board, as the appointment was his alone to make."²⁶ Therefore, records pertaining to the transaction of public business sent to the Village president are public records.²⁷

Because the Village president used the application materials submitted by the individuals who were not appointed to the Board to assist him in fulfilling a public duty on behalf of the Village, those records pertain to the transaction of public business rather than private affairs. Because the records were sent to a Village-issued e-mail account, they were received by the Village and are in the possession of the Village. Accordingly, the materials are public records subject to the requirements of FOIA.

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

²⁶Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 2.

²⁷65 ILCS 5/3.1-35-5 (West 2020) ("The mayor or president shall perform all the duties which are prescribed by law, including ordinances, and shall take care that the laws and ordinances are faithfully executed.").

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person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." The exemption further provides: "The 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 assertion that the release of information would constitute an 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 condition that the invasion of personal privacy must be "clearly unwarranted" evinces a strict standard to claim the exemption. *Schessler v. Dep't of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994). Illinois courts balance 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 Department*, 399 Ill. App. 3d 1, 13 (1st Dist. 2010).

Under the first factor, Mr. Burtle, as a Village resident, has a personal interest in monitoring how the Village president performs his public duties, including the manner in which he selected an individual to serve on the Board. This interest aligns with the broader public interest in monitoring the affairs of local government to hold public officials accountable. Additionally, there are strong personal and public interests in disclosure of information that sheds light on the identities and qualifications of applicants who were considered to fill a position on a governing body such as the Board.

In its answer, the Village minimized the significance of the applicants' materials and emphasized that the submissions were an early step in the appointment process. The Village argued, therefore, that the records' disclosure would not fulfill either Mr. Burtle's personal interest or a broader public interest. The Village stated that "[t]hese documents were not intended to serve as evaluation criteria for the Village President, but rather were intended to serve as the starting point for a discussion involving the position of Village Trustee."²⁸ The Village argued:

First, there were no official candidates for appointment, rather, there were individuals who were interested in having a conversation with the Village President regarding what Trustee appointment would entail. Next, there are no qualifications other

²⁸Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 3.

than the person is a qualified elector of the Village, has resided in the Village for more than a year, is not in debt to the Village, and has not been convicted of specified crimes. There is no public interest in the education, work history, and other resume items of those potentially interested in the position who ultimately were not appointed.^[29]

Regardless of the informality of the process by which the individuals submitted their applications, the Village acknowledged that the Village president used the withheld materials to aid his decision making.³⁰ The Village president presumably acquired and used those materials as an assessment and screening tool to consider which of the applicants would be the right fit for the vacant trustee position. The fact that there may have been later steps in the appointment process does not diminish the degree of public interest in the withheld materials. It is important for the public to be able to evaluate not only who was appointed to the Board, but also those who were considered. The disclosure of the materials submitted by the individuals who were not appointed to the Board would give the public the opportunity to compare those individuals' skills, educational and professional backgrounds, and reasons for seeking the position, with those of the individual who was selected. Therefore, the Village's contention that there is no real public interest in the disclosure of the application materials of the individuals who were not appointed to the Board is unavailing.

Addressing the third factor of the personal privacy analysis—the degree of invasion of personal privacy—the Village argued that the disclosure of the records in question would constitute an unwarranted invasion of the individuals' personal privacy, noting that they are "not public officials, nor are they a part of any public body. Indeed, it is likely they had no knowledge that their information could and would become public, because ordinary citizens are often not aware of the requirements of FOIA."³¹

The individuals seeking appointment might not have known that their submissions would become public records subject to disclosure even if they were not appointed, but the fact they are private individuals, alone, does not warrant withholding the records in full. The privacy rights of applicants for appointments to elected offices are diminished by the inherently public

²⁹Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 5.

³⁰Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 7.

³¹Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 6.

nature of the election process, in which candidates willingly subject themselves to public scrutiny. In *Lambert v. Belknap County Convention*, 157 N.H. 375, 949 A.2d 709 (N.H. 2008), the New Hampshire Supreme Court concluded that the privacy rights of applicants for appointment to a county sheriff vacancy did not outweigh the public interest in disclosure of their applications, which had been withheld in their entireties under the version of section 7(1)(c) in New Hampshire's Right to Know Law (RSA 91-A:5, IV (West 2006)):

Under normal circumstances, they would have run for election and much of their personal information would have been subject to public scrutiny. * * * Each candidate's employer as well as the general public would have had full knowledge that the candidate sought to become county sheriff, and, thus, the candidate could not have reasonably expected to keep his or her "application" private.
* * *

We see no reason why candidates who apply for a vacancy in an elected office should have a greater privacy interest than candidates who run for that same office during an election year. In both situations, a candidate's decision to apply for an elected public office places his or her qualifications for that office at issue, and, consequently, requires members of the public, either individually or through their representatives, to evaluate the particular candidate. Thus, a candidate voluntarily seeking to fill an elected public office has a diminished privacy expectation in personal information relevant to that office. *Lambert*, 157 N.H. at 383-84, 949 A.2d at 718.³²

Although information about the applicants' educational background and work history may be considered highly personal, it is notable that the information was presented by the individuals themselves in a favorable manner. The records do not appear to contain any embarrassing or unflattering details about any individuals. Although members of the Board do receive a salary,³³ there is no indication that Board members are prohibited from having outside employment.³⁴ Therefore, unlike the negative impact that the disclosure of records concerning

³²The court remanded the case to the trial court to determine whether any discrete information in the applications could be properly redacted. *Lambert*, 157 N.H. at 386, 949 A.2d at 720.

³³Chatham City Ordinance No. 81-1 (passed January 27, 1981), as amended by Ordinance No. 95-02 (passed January 24, 1995).

³⁴The Public Officer Prohibited Activities Act (50 ILCS 105/2) (West 2020)) precludes a member of a village board from holding another office, with the exception of certain enumerated positions, but does not prohibit outside employment.

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pending or unsuccessful applications for public employment could have on an applicant's current employment, there is no evidence that the disclosure of the individuals' applications would negatively affect their current employment or otherwise harm them. To the contrary, their statements of their dedication to their community and interest in public service were clearly intended to portray themselves in a positive light. Although the Village argued that candidates running for elective office have the ability to decide what to publically release as a part of their campaign strategy, it is reasonable to presume that, at a minimum, those candidates would share the same type of information at issue in this matter: their interest in serving the community, their educational background, and their work history.

As to the fourth factor of the privacy analysis, the Village's response acknowledged that there is no other way for Mr. Burtle to obtain the responsive information.

Weighing the four factors together as set out in *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, for the reasons explained above, this office concludes that the public interest in the disclosure of the materials submitted by the individuals who were not appointed to the Board outweighs those individuals' privacy interests. Therefore, the Village did not sustain its burden of proving by clear and convincing evidence that the records are exempt from disclosure 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." Section 7(1)(f) is equivalent in most respects to the "deliberative process" exemption in the Federal FOIA,³⁵ which applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). Section 7(1)(f) is "intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." *Harwood*, 344 Ill. App. 3d at 248. It is well settled that the scope of section 7(1)(f) only "protects the opinions that public officials form **while creating government policy** []" and materials that "reflect the **give and take of the deliberative process** [.]". (Emphasis added.) *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶ 24, 7 N.E.3d 741, 747-48 (2014), 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

³⁵Federal FOIA Exemption 5 (5 U.S.C. § 552(b)(5) (West 2018)) applies to "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency[.]"

Public Citizen, Inc. v. Office of Management & Budget, 598 F.3d 865, 876 (D.C. Cir. 2010)); *see also Chicago Tribune Co. v. Cook County Assessor's Office*, 2018 IL App (1st) 170455, ¶28, 109 N.E.3d 872, 880 (2018) ("In order to qualify for the deliberative process exemption, a document must be both predecisional in the sense that it is actually antecedent to the adoption of an agency policy, and deliberative in the sense that it is **actually related to the process by which policies are formulated.**" (Emphasis added.)). Further, 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)).

The Village contends that the responsive records fall within the scope of this exemption because the Village president gathered and considered the individuals' application materials to formulate opinions concerning whom to appoint to the Board. Therefore, the Village argues "this information was used solely by him as predecisional information."³⁶

The records, however, consist only of information that the individuals seeking appointment to the Board provided to the Village president. Although he may have considered the application materials in the process of determining which individual to appoint to the vacant trustee position, the contents of the records do not reveal the Village president's opinions, reflect the give-and-take of his deliberations, or provide insight into how he formulated action. Further, the work history and educational background information are purely factual. The applicants' statements of interest contain opinions, but those individuals had interests independent of the Village's interests, and they were not part of the Village at the time they submitted their materials; their opinions are third party communications rather than inter- or intra-agency communications. Accordingly, the Village has not sustained its burden of demonstrating that the materials submitted by the individuals who were not appointed to the trustee position are exempt from disclosure under section 7(1)(f) 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 April 10, 2022, Mr. Zach Burtle submitted a FOIA request to the Village of Chatham seeking copies of the applications submitted by the individuals seeking appointment to fill a vacancy on the Village's Board of Trustees.

³⁶Letter from Gregory E. Moredock, Sorling Northrup, to Shannon Barnaby, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (May 2, 2022), at 7.

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2) On April 11, 2022, legal counsel for the Village denied the request in its entirety citing sections 7(1)(b), 7(1)(c), and 7(1)(f) of FOIA. On April 14, 2022, the Village issued an amended response and disclosed copies of the application materials for the individual who was appointed to the Board, but continued to withhold the materials submitted by the individuals who were not appointed.

3) On April 14, 2022, Mr. Burtle submitted to the Public Access Bureau a copy of the Village's initial response, amended response, and a written Request for Review disputing the denial. On April 15, 2022, Mr. Burtle completed his submission by providing this office with a copy of his FOIA request. The Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2020)).

4) On April 21, 2022, the Public Access Bureau sent a copy of the Request for Review to the Village. The Public Access Bureau also sent the Village a letter requesting an unredacted copy of the application materials in question for this office's confidential review and a detailed written explanation of the legal and factual bases for withholding the records in their entirety pursuant to the section 7(1)(c) and 7(1)(f) exemptions.

5) On May 2, 2022, counsel for the Village sent this office copies of the application materials, an unredacted written response for the Public Access Bureau's review, and a copy of the response with confidential information redacted.

6) On May 3, 2022, the Public Access Bureau forwarded a copy of the redacted response to Mr. Burtle and notified him of the opportunity to reply. On May 12, 2022, Mr. Burtle informed an Assistant Attorney General in the Public Access Bureau that he did not plan to submit a reply.

7) On June 9, 2022, the Public Access Bureau extended the time within which to issue a binding opinion by 30 business days, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

8) Section 2(c) of FOIA defines "public records" as "all records * * * pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body." Public records are records that pertain to government or public business interests rather than private affairs.

9) The materials submitted by individuals who sought appointment to the Board were used by the Village president to assist him in fulfilling his statutory duty of appointing an individual to the vacant Board seat. Applications for appointment to public office directly

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concern government affairs, and therefore, pertain to the transaction of public business rather than private affairs. The records are in the possession of the Village because they were received on the Village president's Village-issued e-mail account. Accordingly, the records are public records subject to the requirements of FOIA.

10) 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." The Village did not demonstrate by clear and convincing evidence that the disclosure of the records submitted by individuals who sought appointment to the Board would constitute an unwarranted invasion of personal privacy under section 7(1)(c) of FOIA.

11) Section 7(1)(f) 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." This exemption permits public bodies to withhold portions of predecisional communications that reflect the give and take of deliberations in the process of formulating decisions.

12) The Village has not demonstrated the contents of the records would reveal the Village president's opinions concerning the applicants, reflect the give-and-take of his deliberations, or provide insight into how he formulated action concerning the appointment process. These records submitted to the Village by third parties with independent interests do not constitute inter-agency or intra-agency predecisional and deliberative material. Accordingly, the Village has not demonstrated by clear and convincing evidence that the materials submitted by individuals who were not appointed to the Board are exempt from disclosure pursuant to section 7(1)(f) of FOIA.

Therefore, it is the opinion of the Attorney General that the Village of Chatham violated the requirements of FOIA by improperly withholding the records responsive to Mr. Zach Burtle's April 10, 2022, Freedom of Information Act request. Accordingly, the Village is hereby directed to take immediate and appropriate action to comply with this opinion by providing Mr. Burtle with copies of the application materials responsive to his FOIA request, except for the permissible redaction of private individuals' personal phone numbers, home addresses, personal e-mail addresses, and signatures as "private information" under section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2020), as amended by Public Acts 102-038, effective

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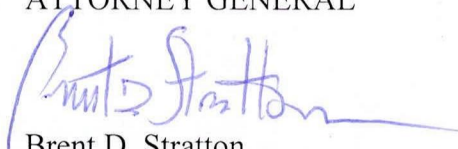
June 25, 2021; 102-558, effective August 20, 2021; 102-694, effective January 7, 2022, revised February 3, 2022; 102-791, effective May 13, 2022; 102-1055, effective June 10, 2022).³⁷

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 Mr. Zach Burtle 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

cc: Mr. Gregory E. Moredock
Sorling Northrup
1 North Old State Capitol Plaza, Suite 200
P.O. Box 5131
Springfield, Illinois 62705

³⁷Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2020)) defines "private information" as "unique identifiers, including * * * home or personal telephone numbers, and personal email addresses * * * [and] home address[es.]" Because signatures are "unique identifiers" they also qualify as a form of "private information."

CERTIFICATE OF SERVICE

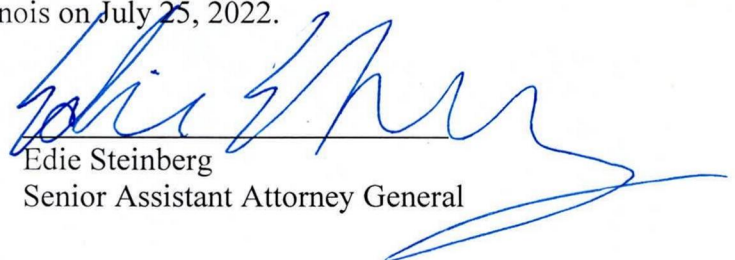
Edie Steinberg, Senior Assistant Attorney General, Public Access Bureau, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 22-011) upon:

Mr. Zach Burtle
117 Grizzly Drive
Chatham, Illinois 62629
zburtle@gmail.com

The Honorable Dave Kimsey
Village President
Village of Chatham
116 East Mulberry Street
Chatham, Illinois 62629
dkimsey@chathamil.gov

Mr. Gregory E. Moredock
Sorling Northrup
1 North Old State Capitol Plaza, Suite 200
P.O. Box 5131
Springfield, Illinois 62705
gemoredock@sorlinglaw.com

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 July 25, 2022.


Edie Steinberg
Senior Assistant Attorney General

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Senior Assistant Attorney General
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