



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

January 21, 2020

Via electronic mail

Mr. Christopher Hansen

[REDACTED]

[REDACTED]

corruptcu@gmail.com

Via electronic mail

Mr. Todd E. Rent, Sr.

Human Resources Director

City of Urbana

400 South Vine Street

Urbana, Illinois 61801

terent@urbanaininois.us

RE: FOIA Request for Review – 2019 PAC 59241

Dear Mr. Hansen and Mr. Rent:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2018)). For the reasons that follow, the Public Access Bureau concludes that the City of Urbana (City) improperly denied certain portions of the records responsive to Mr. Christopher Hansen's July 25, 2019, FOIA request.

On July 25, 2019, Mr. Hansen submitted a FOIA request to the City requesting copies of all records related to a FOIA request Mr. Hansen sent to Urbana Police Chief Bryant Seraphin on July 7, 2019. On August 2, 2019, the City denied the request in its entirety pursuant to section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2018)). On August 8, 2019, Mr. Hansen submitted this Request for Review of the City's response. He stated that "I believe Urbana is using [FOIA] exemptions incorrectly. They seem to think that virtually any public document can be interpreted as "internal documents generated for the purpose of determining a final agency action."¹

On September 19, 2019, this office sent a copy of the Request for Review to the

¹E-mail from Christopher Hansen to Public Access Counselor [Sarah] Pratt (August 8, 2019).

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City and asked it to provide unredacted copies of the withheld records for our confidential review, and a detailed explanation of the factual and legal bases for the assertion of section 7(1)(f) of FOIA. On September 30, 2019, the City provided this office with copies of the responsive records and its written explanation. On October 1, 2019, this office forwarded a copy of the City's response letter to Mr. Hansen. On October 6, 2019, Mr. Hansen replied by reiterating that he believed the City withheld records to which he is entitled under FOIA.

DETERMINATION

All public records in the possession or custody of a public body are "presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2018); *see also Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2018).

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 is equivalent to the deliberative process exemption in the federal FOIA (5 U.S.C. §552(b)(5) (2018)), which applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). The exemption 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 deliberative process exemption "typically does not justify the withholding of purely factual material." *Enviro Tech Intern., Inc. v. United States Environmental Protection Agency*, 371 F.3d 370, 374 (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*, 2013 IL App (1st) 121846, ¶24, 7 N.E.3d 741, 748 (2013), quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010); *see also Chemical Weapons Working Group v. U.S. E.P.A.*, 185 F.R.D. 1, 3 (D.C. Cir 1999), quoting *Dudman Communications v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("[T]he critical question is whether 'disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'").

In its response to this office, the City asserted:

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The requested records contain internal e-mails generated by, to, and amongst City staff pertaining to the FOIA response filed by the requester. Specifically, the e-mails discuss the gathering of records, the assignment of responsibilities, the assertion of exemptions, and the status of responses. Both the contents of the e-mails and their metadata, i.e. information regarding when, by whom, and to whom each e-mail was distributed, constitute information that reveals the City's administrative decision-making process.^[2]

The City claimed that disclosure of these materials would prevent City employees from having frank and open discussions that section 7(1)(f) exists to protect.

This office's review of the e-mails showed that they contain certain predecisional opinions, recommendations, and information involved in formulating actions which would reveal the give-and-take of the City's deliberative process.³ This information falls within the scope of the section 7(1)(f) exemption. Further, there is no indication that these e-mails were publicly cited or identified by the head of the City. Therefore, we conclude that they were not improperly withheld pursuant to section 7(1)(f).

On the other hand, a large portion of the e-mails contain strictly factual information on the status of Mr. Hansen's FOIA request. These communications do not reveal the give-and-take of the City's deliberations on how to respond to Mr. Hansen's request and, therefore, are not within the scope of section 7(1)(f). Likewise, e-mails between the City and Mr. Hansen, including the City's response to Mr. Hansen's July 25, 2019, FOIA request, do not reflect inter-agency or intra-agency deliberations because Mr. Hansen is a third party with independent interests in the City's response. *Levy v. United States Postal Service*, 567 F. Supp.2d 162, 166 (D.D.C. 1982) ("Information concerning an interactive process between an agency and an outside third party is not deliberative in nature, because such information is no longer secret and cannot advance the policy objectives that [the deliberative process exemption] is intended to serve."). Accordingly, this office concludes that the City improperly withheld those e-mails pursuant to section 7(1)(f).

²E-mail from Todd Rent, Human Resources Director, City of Urbana, to Leo Draws, Assistant Attorney General, Public Access Bureau, (September 30, 2019).

³E-mail from Todd Rent, Human Resources Director, City of Urbana, to Leo Draws, Assistant Attorney General, Public Access Bureau (September 30, 2019). Specifically, our office points to the opinion expressed in the e-mail on page 12 and the e-mails that show the process of formulating how to respond to the request on pages 40-47 of the attachment to the City e-mail to this office on September 30, 2019. However, e-mails on pages 40-47 that merely forward the FOIA request as an attachment are not exempt under section 7(1)(f).

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To remedy the improper portions of its denial, this office asks the City to provide Mr. Hansen with copies of the e-mails, subject to redaction of the discrete predecisional and deliberative material identified in Footnote 4 of this determination.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this file. Please contact me at (312) 814-5383 or the Chicago address on the first page of this letter if you have any questions.

Very truly yours,



CHRISTINA M. LUCENTE-MCCULLOUGH
Assistant Attorney General
Public Access Bureau

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