



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

May 24, 2021

PUBLIC ACCESS OPINION 21-004
(Request for Review 2021 PAC 66968)

FREEDOM OF INFORMATION ACT:
Correspondence Shared With a Third Party
Who Represents Independent Interests Is
Not Part of a Public Body's Deliberative Process

Dr. Rodney B. Nelson
23 Kane Street
Geneva, Illinois 60134

Mr. David DeGroot
Director of Community Development
City of Geneva
22 South First Street
Geneva, Illinois 60134

Dear Dr. Nelson and Mr. DeGroot:

This is a binding opinion 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 discussed below, this office concludes that the City of Geneva (City) violated the requirements of FOIA by improperly denying Dr. Rodney Nelson's FOIA request for communications between the City and a third party who represented independent interests.

BACKGROUND

On February 1, 2021, Dr. Nelson submitted a FOIA request to the City seeking copies of "all communications between the City of Geneva and applicant Malone Funeral Home that have taken place after the date of public notice of a hearing for a zoning change at Malones

Dr. Rodney B. Nelson
Mr. David DeGroot
May 24, 2021
Page 2

Funeral Home."¹ On February 10, 2021, the City denied Dr. Nelson's request pursuant to section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2019 Supp.)).² On February 11, 2021, Dr. Nelson made an initial submission to file a Request for Review. This office received all of the documentation necessary to complete Dr. Nelson's Request for Review contesting the City's denial on February 17, 2021.³

On February 24, 2021, the Public Access Bureau forwarded a copy of the Request for Review to the City with a letter asking it to provide copies of the withheld records for this office's confidential review.⁴ The February 24, 2021, letter also asked the City to provide a detailed explanation of the factual and legal bases for the applicability of section 7(1)(f) of FOIA to the withheld records.⁵ On March 2, 2021, the City furnished the requested materials to this office.⁶ On March 3, 2021, we forwarded a copy of the City's answer to Dr. Nelson and notified him of his opportunity to reply.⁷ Later on that same date, Dr. Nelson submitted a reply.⁸

¹E-mail from Rodney Nelson to foia@geneva.il.us (February 1, 2021).

²Letter from David DeGroot, AICP, Director of Community Development, [City of Geneva], to Rodney Nelson (February 10, 2021).

³E-mail from Rodney Nelson to Public Access [Bureau, Office of the Attorney General] (February 17, 2021). Dr. Nelson's initial submission to the Public Access Bureau on February 11, 2021, did not include a copy of the FOIA request he submitted to the City. See Section 9.5(a) of FOIA (5 ILCS 140/9.5 (West 2018)) (stating a "request for review must be in writing, signed by the requester, and include (i) a copy of the request for access to records and (ii) any responses from the public body.").

⁴Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to David DeGroot, Director of Community Development, City of Geneva (February 24, 2021).

⁵Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to David DeGroot, Director of Community Development, City of Geneva (February 24, 2021).

⁶Letter from David DeGroot, AICP, Director of Community Development, [City of Geneva], to Shannon Barnaby, Assistant Attorney General, Public Access Bureau, [Office of the Attorney General] (March 2, 2021).

⁷Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Rodney Nelson (March 3, 2021).

⁸E-mail from Rodney B. Nelson, M.D., to [Shannon] Barnaby, [Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (March 3, 2021).

Dr. Rodney B. Nelson
Mr. David DeGroot
May 24, 2021
Page 3

On April 9, 2021, this office extended the time within which to issue a binding opinion by 30 business days, to May 24, 2021, pursuant to section 9.5(f) of FOIA.⁹

ANALYSIS

All public records in the possession or custody of a public body "are presumed to be open to inspection and copying" and any public body that denies a public record "has the burden of proving by clear and convincing evidence" that the record is exempt from disclosure. 5 ILCS 140/1.2 (West 2018); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2019 Supp.)) further 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 FOIA (5 ILCS 140/7 (West 2019 Supp.)) are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

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." In its answer to the Public Access Bureau, the City explained that the requested records consist of "review comments from the City of Geneva, the City's storm water consultant WBK Engineering, and the City's consulting arborist Dave Coulter."¹⁰ The City stated that the comments addressed the applications submitted by Malone Funeral Home for a special use and seeking zoning variations for its proposed parking lot expansion.¹¹ The City asserted that the requested records are exempt from disclosure under section 7(1)(f) because:

The review comments are predecisional and deliberative as they are intended to allow City officials to freely express ideas to the applicant regarding application deficiencies, City requirements,

⁹Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Rodney Nelson and David DeGroot, Director of Community Development, City of Geneva (April 24, 2021).

¹⁰Letter from David DeGroot, AICP, Director of Community Development, [City of Geneva], to Shannon Barnaby, Assistant Attorney General, Public Access Bureau, [Office of the Attorney General] (March 2, 2021), at 1.

¹¹Letter from David DeGroot, AICP, Director of Community Development, [City of Geneva], to Shannon Barnaby, Assistant Attorney General, Public Access Bureau, [Office of the Attorney General] (March 2, 2021), at 1.

Dr. Rodney B. Nelson
Mr. David DeGroot
May 24, 2021
Page 4

and/or recommendations to improve the applications prior to formal consideration by the Planning and Zoning Commission.

The review comments provide the applicant an opportunity to make revisions to the applications prior to scheduling them for a Planning and Zoning Commission public hearing.^[12]

In his reply, Dr. Nelson asserted that the City is misusing the section 7(1)(f) exemption by withholding records that reflect "city staff [] advising the applicant on 'improvements' to the application" and "coaching of the applicant by taxpayer employed staff[.]"¹³ He contended that the City's withholding of those records creates an unlevel playing field for adjacent property owners, such as himself, who oppose the proposed use.

It is undisputed that the withheld communications from the City and the City's consultants were shared with Malone Funeral Home, a third-party business. The courts have repeatedly emphasized that section 7(1)(f) is limited to internal documents and records exchanged with third parties that represent the public body or otherwise do not have any independent interests in the subject of the communications. *See, e.g., Harwood v. McDonough*, 344 Ill. App. 3d 242, 248 (1st Dist. 2003); *see also* Ill. Att'y Gen. Pub. Acc. Op. No. 15-002, issued January 23, 2015, at 12-13 (finding e-mails exchanged between public body and concert promoter were not exempt from disclosure under section 7(1)(f) because concert promoter had its own financial interests in communicating with public body).

In *Harwood*, 344 Ill. App. 3d at 247-48, the Illinois Appellate Court, First District, explained that section 7(1)(f) applies to "**inter- and intra-agency** predecisional and deliberative material," and is "intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." (Emphasis added.) *See also Chemical Weapons Working Group v. United States Environmental Protection Agency*, 185 F.R.D. 1, 3 (D.D.C. 1999) ("the 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 (citing *Dudman Communications v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987))." Emphasis added.) The *Harwood* court further explained that section 7(1)(f) of the

¹²Letter from David DeGroot, Director of Community Development, [City of Geneva], to Shannon Barnaby, Assistant Attorney General, Public Access Bureau, [Office of the Attorney General] (March 2, 2021), at 1-2.

¹³E-mail from Rodney Nelson to [Shannon] Barnaby, [Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (March 3, 2021).

Dr. Rodney B. Nelson
Mr. David DeGroot
May 24, 2021
Page 5

Act "is the equivalent of the 'deliberative process' exemption found in section 552(b)(5) of the federal Freedom of Information Act[.]" *Harwood*, 344 Ill. App. 3d at 247; *see also Dumke v. City of Chicago*, 2013 IL App (1st) 121668, ¶14, 994 N.E.2d 573, 578 (2013). The court concluded that a report prepared for government officials by an outside consultant was exempt because the consultant did not represent an interest of its own or of any other client. *Harwood*, 344 Ill. App. 3d at 248.

The *Harwood* court approvingly cited *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 121 S. Ct. 1060, 1061 (2001),¹⁴ where the United States Supreme Court considered whether the United States Department of Interior properly withheld, pursuant to section 552(b)(5) of the Federal FOIA,¹⁵ records of communications with a Native-American Indian tribe concerning a plan to allocate water resources. The Court stated that the exemption may shield pre-decisional material prepared by a third-party consultant on behalf of a public body if the third party "does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Klamath Water Users Protective Ass'n*, 532 U.S. at 11, 121 S. Ct. at 1067. By contrast, communications with third parties that have independent interests and that stand to benefit from the public body's final decision cannot be characterized as intra-agency communications. *Klamath*, 532 U.S. at 13-15, 121 S. Ct. at 1068-69. The Court concluded that the records in question did not fall within the scope of the deliberative process exemption because the tribe represented its own interests rather than the interests of the Department of Interior. *Klamath*, 532 U.S. at 15, 121 S. Ct. at 1069.

In *State Journal-Register v. University of Illinois Springfield*, 2013 IL App (4th) 120881, ¶29, 994 N.E.2d 705, 714 (2013), however, the Appellate Court, Fourth District, held that a letter sent to a public body by an attorney representing an adverse party fell within the scope of section 7(1)(f). The court quoted the holding in *Harwood* that "the purpose of exempting predecisional and deliberative material is 'to protect the communications process and encourage frank and open discussion **among agency employees** before a final decision is made.'" (Emphasis added.) *State Journal-Register*, 2013 IL App (4th) 120881, ¶26, 994 N.E.2d at 713 (quoting *Harwood*, 344 Ill. App. 3d at 248). Nevertheless, the court then went on to hold that portions of the letter sent to the University by the attorney representing an individual who

¹⁴Because Illinois' FOIA statute is based on the Federal FOIA statute, decisions construing the latter, "while not controlling, are relevant and helpful precedents in construing the Illinois FOIA." *Margolis v. Director, Ill. Department of Revenue*, 180 Ill. App. 3d 1084, 1087 (1st Dist. 1989).

¹⁵Federal FOIA Exemption 5 (5 U.S.C. § 552(b)(5) (West 2000)) applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]"

Dr. Rodney B. Nelson
Mr. David DeGroot
May 24, 2021
Page 6

was considering filing suit against the University were exempt from disclosure pursuant to section 7(1)(f) because the information in the letter "would have undoubtedly been relied upon by [the University] in formulating a plan or policy for settling potential litigation with the victim." *State Journal-Register*, 2013 IL App (4th) 120881, ¶29, 994 N.E.2d at 714. In reaching this conclusion, the court did not address the issue of whether the letter was "inter- or intra-agency" material or distinguish the holdings in *Harwood* and *Klamath* that have found the deliberative process exemption only is applicable to communications with outside parties if the outside parties represent the interests of the public body.

Because the opinion in *State-Journal Register* does not explain how a letter from opposing counsel could be construed as "inter- and intra-agency predecisional or deliberative material" as described in *Harwood* and *Klamath*, this office is compelled instead to follow the weight of authority and apply the analysis set out by the courts in *Harwood* and *Klamath* when considering the communications that the City and the City's consultants shared with Malone Funeral Home.

In the current circumstances, the withheld records were not exchanged exclusively among City employees and the City's consultants who represent the City's interests. Instead, the communications reflect the City's advice to Malone Funeral Home about its zoning applications before the formal public zoning hearing was conducted. Malone Funeral Home is a third-party business that has its own independent interests and stands to benefit from the City's final decision concerning the zoning applications. In fact, the City acknowledged that the correspondence was created for the purpose of providing Malone Funeral Home with an opportunity to make the suggested revisions to its applications before the zoning decisions were made. Accordingly, the withheld records do not constitute inter- or intra-agency communications within the scope of the deliberative process exemption, and the City has not sustained its burden of demonstrating that those communications are exempt from disclosure pursuant to 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 February 1, 2021, Dr. Rodney B. Nelson submitted a FOIA request to the City of Geneva seeking communications exchanged between the City and Malone Funeral Home after the date that public notice was given for a hearing about a zoning change at the funeral home.

Dr. Rodney B. Nelson
Mr. David DeGroot
May 24, 2021
Page 7

2) On February 10, 2021, the City denied the request pursuant to section 7(1)(f) of FOIA.

3) On February 11, 2021, Dr. Nelson made an initial submission to file a Request for Review with the Office of the Attorney General. On February 17, 2021, Dr. Nelson submitted all of the documentation necessary to complete his Request for Review contesting the City's denial. The Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA.

4) On February 24, 2021, the Public Access Bureau forwarded a copy of Dr. Nelson's Request for Review to the City and asked it to provide copies of the withheld communications for this office's confidential review. This office also asked the City to provide a detailed explanation of the factual and legal bases for its assertion of section 7(1)(f) of FOIA.

5) On March 2, 2021, the City provided this office with the requested materials.

6) On March 3, 2021, this office forwarded a copy of the City's answer to Dr. Nelson. Later that day, Dr. Nelson submitted a written reply to the answer.

7) On April 9, 2021, this office extended the time within which to issue a binding opinion by 30 business days, to May 24, 2021, 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 7(1)(f) of FOIA exempts from disclosure inter- and intra-agency pre-decisional and deliberative materials. Pre-decisional material prepared by a third-party consultant on behalf of a public body may also fall within the scope of the deliberative process exemption if the third party does not have its own independent interests.

9) The City argued the requested communications were exempt from disclosure under section 7(1)(f) because they were pre-decisional and deliberative records in which City officials candidly conveyed their opinions to a business regarding its applications for zoning modifications before a public hearing took place.

10) The requested records, however, were provided to a third-party business that has interests independent from the City and that stands to benefit from the City's final decision concerning the zoning applications. Because the communications do not constitute inter- or intra-agency communications within the scope of the deliberative process exemption, they are not exempt from disclosure under section 7(1)(f) of FOIA.

Dr. Rodney B. Nelson
Mr. David DeGroot
May 24, 2021
Page 8

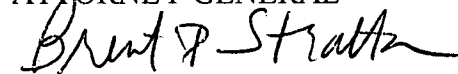
Therefore, it is the opinion of the Attorney General that the denial of Dr. Nelson's Freedom of Information Act request by the City violated the requirements of FOIA. Accordingly, the City is directed to take immediate and appropriate action to comply with this opinion by disclosing to Dr. Nelson copies of the communications responsive to his request.

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2018). 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 Dr. Rodney Nelson as defendants. *See* 5 ILCS 140/11.5 (West 2018).

Sincerely,

KWAME RAOUL
ATTORNEY GENERAL

By:



Brent D. Stratton
Chief Deputy Attorney General


CERTIFICATE OF SERVICE

Sarah L. Pratt, Public Access Counselor, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 21-004) upon:

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by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Springfield, Illinois on May 24, 2021.



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