



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

December 31, 2013

Ms. Tamara Brenner
137 North Caroline Avenue
Elmhurst, Illinois 60126

Ms. Erin C. Moriarty
Storino, Ramello & Durkin
9501 West Devon Avenue
Rosemont, Illinois 60018

RE: FOIA Request for Review – 2013 PAC 26456

Dear Ms. Brenner and Ms. Moriarty:

This determination letter is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2012)). For the reasons that follow, the Public Access Bureau concludes that the City of Elmhurst improperly denied Ms. Tamara Brenner's FOIA request.

On September 18, 2013, Ms. Brenner submitted a FOIA request to the City seeking various records including communications provided to the City Council and/or referred to by City employees at the City Council's September 16, 2013, meeting which concern "cost projections for the Addison garage and actual expenditures for various phases of the Schiller and Adelaide garages."¹ The City provided certain responsive records on September 19, 2013. On September 20, 2013, Ms. Brenner sent the City an e-mail stating that she was seeking estimates of specific construction figures totaling several million dollars and documentation supporting those figures.² The City treated that e-mail as a new FOIA request and, on September 27, 2013, extended the time for responding pursuant to section 3(e)(v) of FOIA (5 ILCS 140/3(e)(v) (West 2012)). On October 4, 2013, the City denied that request in its entirety pursuant to section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2012)), asserting that the estimates are contained in pre-decisional records that had not been publicly cited or identified by the head of the City. In her Request for Review, Ms. Brenner asserts that the City failed to demonstrate that a responsive

¹E-mail from Tamara Brenner to Elmhurst FOIA (September 18, 2013).

²E-mail from Tamara Brenner to Elmhurst FOIA (September 20, 2013).

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memorandum and preliminary draft with handwritten notes fall within the scope of section 7(1)(f) of FOIA; she contends that the records were publicly cited and identified by the Mayor at the City Council's September 16, 2013, meeting.

On October 22, 2013, this office forwarded a copy of the Request for Review to the City and requested a detailed explanation of the factual basis and legal basis for asserting section 7(1)(f), including a response to Ms. Brenner's assertion that the Mayor publicly cited and identified the responsive records during the September 16, 2013, City Council meeting. On November 5, 2013, the City furnished its response, the records in question, and the minutes and a video recording of the City Council meeting. On November 18, 2013, Ms. Brenner replied to that response.

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 2012); *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 2012).

Section 7(1)(f) of FOIA exempts from inspection and copying "[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). 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. Federal courts have construed the scope of the deliberative process exemption to cover factual information that is so "inextricably connected to the deliberative material that disclosure of the factual material would reveal the agency's decision-making processes." *Nadler v. Dept. of Justice*, 955 F.2d 1479, 1491 (11th Cir. 1992); *Ryan v. Dept. of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980); *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 17451, issued April 10, 2012 (Factual data in inspection reports which contain opinions and recommendations about inspected levees is exempt from disclosure under section 7(1)(f)).

The Public Access Bureau has reviewed the records in question, which consist of (1) a one-page document marked as a draft proposal of projected costs for one option for the project, and (2) a copy of a proposal by the general contractor outlining additional options for the

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project and related exhibits together with a memorandum from the City Manager seeking input from the members of the City Council. Counsel for the City has clarified, in a telephone conversation with an Assistant Attorney General in the Public Access Bureau, that the draft proposal was created by the general contractor and that some, but not all, of the handwritten notes on that document were made by the Assistant City Manager; counsel could not identify the source of the remaining notes. Counsel also stated that the general contractor is working with the development company with which the City reached an agreement for the project.

Draft Proposals and Handwritten Notes

The City appears to assert that draft proposals created by the general contractor for the project constitute intra-agency predecisional records. In *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 121 S. Ct. 1060, 1061 (2001), the U.S. Supreme Court considered whether the U.S. Department of Interior properly withheld, pursuant to the federal FOIA's version of section 7(1)(f),³ 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. However, 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, 121 S. Ct. at 1069. The court went on to conclude that the records in question did not fall within the scope of the federal FOIA version of section 7(1)(f) because the tribe represented its own interests rather than the interests of the Department of Interior: the "position of the Tribe as beneficiary is * * * a far cry from the position of the paid consultant." *Klamath*, 532 U.S. at 13, 121 S. Ct. at 1069.

Here, the general contractor that prepared the proposals has its own financial interest in the multi-million dollar project. Although the City Council may consider the general contractor's proposals in its decision-making process, the proposals themselves do not constitute inter-agency or intra-agency communications because the interests of the City and the general contractor are not the same. Accordingly, we conclude that the City has not sustained its burden of demonstrating that the general contractor's draft proposals are exempt from disclosure pursuant to section 7(1)(f) of FOIA.

³Federal 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[.]"

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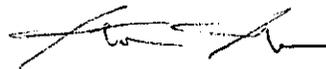
However, the one-page draft proposal does contain certain handwritten notes. Some of the notes are factual information that do not fall within the scope of section 7(1)(f). Other notes, which counsel for the City indicated were made by the Assistant City Manager, consist of financial figures or highlight or comment on financial figures in the draft proposal. Because those handwritten notes appear to reflect the Assistant City Manager's pre-decisional opinions in the process of formulating action, the notes are exempt from disclosure under section 7(1)(f) unless those notes have been cited or identified by the Mayor. Based on this office's review of a video recording of the meeting, however, the Mayor did not publicly cite and identify the Assistant City Manager's handwritten notes. Accordingly, the City may properly redact those handwritten notes from the remaining portions of the draft proposal which, as discussed above, are not exempt from disclosure pursuant to section 7(1)(f) of FOIA.

Memorandum

Lastly, the City withheld a memorandum from the City Manager to the City Council which was attached to one of the proposals. The memorandum simply provides factual background information and requests input from members of the City Council. Because the memorandum does not express opinions or formulate actions or policies, we conclude that the City improperly withheld this record pursuant to section 7(1)(f) of FOIA.

In accordance with the conclusions expressed in this letter, the City must disclose the memorandum and the general contractor's draft proposals, but may redact the Assistant City Manager's handwritten notes. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (312) 814-6756.

Very truly yours,



STEVE SILVERMAN
Assistant Bureau Chief
Public Access Bureau

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cc: Ms. Erin K. Van De Walle
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