

OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

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ATTORNEY GENERAL

January 17, 2019

*Via electronic mail*

Mr. Burt L. Dancey  
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*Via electronic mail*

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RE: FOIA Request for Review – 2017 PAC 50558

Dear Mr. Dancey and Mr. Mahrt:

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 2016)). For the reasons that follow, the Public Access Bureau concludes that the City of Minonk (City) improperly redacted and withheld certain records responsive to Mr. Burt L. Dancey's October 12, 2017, FOIA request.

On that date, Mr. Dancey submitted a three-part FOIA request to the City seeking copies of the following from the last six months: (1) correspondence between Mayor Bill Koos, any member of the public or any fellow City Council member regarding former Police Chief John Wherry; (2) correspondence between any member of the public or any City employee and any City Council member other than Mayor Koos regarding the position of the Police Chief or Mr. Wherry; and (3) Council minutes concerning Mr. Wherry's job performance, possible action against him, and any successor or replacement.

On October 26, 2017, the City provided him with copies of responsive records with certain parts redacted pursuant to sections 7(1)(b), 7(1)(c), 7(1)(d)(iv), 7(1)(f), and 7(1)(m) of FOIA (5 ILCS 140/7(1)(b), (1)(c), (1)(d)(iv), (1)(f), (1)(m) (West 2016)). The City also stated that it withheld a few documents pursuant to one or more of those FOIA exemptions.

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On November 21, 2017, this office received Mr. Dancey's Request for Review disputing the partial denial of his request. Mr. Dancey stated that "[o]f particular concern, is the almost blanket redactions of text messages involving council member [Ruestman]."<sup>1</sup> He asserted, in relevant part: "We do not believe, based upon the contexts, and the time frame, that the assertion of preliminary notes is valid[.]"<sup>2</sup>

On December 22, 2017, this office forwarded a copy of the Request for Review to the City and asked it to provide copies of the responsive records for this office's confidential review, together with a detailed explanation of the legal and factual basis for the asserted exemptions. In particular, this office asked the City to address the applicability of the exemptions to the redaction of the text messages. On December 28, 2017, the City provided a written response as well as both redacted and unredacted copies of the text messages responsive to the request; the City clarified that it had redacted Mayor Koos' text messages pursuant to section 7(1)(f) only. The City also asserted that it had withheld the text messages to or from Alderman Ruestman in full because it did not consider them to be public records under FOIA. Specifically, the City asserted that those text messages are from a private device and "do not meet the definition of a public record under" *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, 992 N.E.2d 629 (2013).

On January 4, 2018, this office forwarded a copy of the City's response to Mr. Dancey. On August 9, 2018, Mr. Dancey clarified to this office that he particularly questioned the redaction of a set of e-mails and text messages between Mayor Koos and Alderman Ruestman, which were redacted pursuant to sections 7(1)(f) and 7(1)(m) of FOIA; he provided this office with copies of those redacted records. On August 10, 2018, this office asked the City to provide unredacted copies of those documents and a supplemental response addressing the applicability of sections 7(1)(f) and 7(1)(m) to those specific records. On August 15, 2018, the City provided the requested materials and additional information for this office's confidential review. On August 20, 2018, this office forwarded a copy of the supplemental response to Mr. Dancey; he replied on August 24, 2018. Mr. Dancey continued to contest the redaction of the e-mails and text messages.

#### DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2016); *see also Southern Illinoisan v.*

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<sup>1</sup>Letter from Burt L. Dancey, Elliff, Dancey & Bosich, P.C., to Public Access Counselor, Office of the Attorney General (November 21, 2017).

<sup>2</sup>Letter from Burt L. Dancey, Elliff, Dancey & Bosich, P.C., to Public Access Counselor, Office of the Attorney General (November 21, 2017).

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*Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body that redacts or withholds a record "has the burden of proving by clear and convincing evidence" that the information is exempt from disclosure. 5 ILCS 140/1.2 (West 2016). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

### Public Records

FOIA is intended to ensure public access to "full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees[.]" 5 ILCS 140/1 (West 2016). FOIA, however, "is not intended to cause an unwarranted invasion of personal privacy[.]" 5 ILCS 140/1 (West 2016). In accordance with these policies, FOIA requires 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." (Emphasis added.) 5 ILCS 140/3(a) (West 2016).

Section 2(c) of FOIA (5 ILCS 140/2(c) (West 2016)) 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." (Emphasis added.) A record pertains to the transaction of public business when it "pertain[s] to 'business or community interests as opposed to private affairs.' Indeed, FOIA is not concerned with an individual's private affairs." *City of Champaign*, 2013 IL App (4th) 120662, ¶31, 992 N.E.2d at 637.

As noted above, the City stated that it had withheld a set of text messages maintained on Alderman Ruestman's private device because it believed that they were not "public records" under FOIA. In *City of Champaign*, the Illinois Appellate Court affirmed a trial court's decision to uphold a binding opinion<sup>3</sup> in which the Attorney General concluded that e-mails and text messages concerning public business that were sent or received by city council members on their personal devices during a public meeting were "public records" subject to the requirements of FOIA. The court held that the communications were in the possession of the city council because a quorum was present and acting collectively as a public body at the time. *City of Champaign*, 2013 IL App (4th) 120662, ¶¶40, 42-43, 992 N.E.2d at 639-40. The court also stated that "[u]nder this interpretation, a message from a constituent 'pertaining to the transaction of public business' received at home by an individual city council member on his personal electronic device would not be subject to FOIA" unless "it was forwarded to enough members of the city council to constitute a quorum for that specific body[.]" *City of Champaign*,

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<sup>3</sup>Ill. Att'y Gen. Pub. Acc. Op. No. 11-006, issued November 15, 2011.

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2013 IL App (4th) 120662, ¶41, 992 N.E.2d at 639. That reasoning, however, was not part of the court's holding as records from individual constituents were not at issue in the case.

Other jurisdictions have interpreted public records laws similar to FOIA to include records, such as e-mail and text messages, concerning public business which are stored in private accounts. *See, e.g., City of San Jose v. Superior Court*, 2 Cal. 5th 608, 615, 389 P.3d 848, 851 (Cal. 2017) (e-mails and text messages related to the conduct of public business but sent or received on private electronic devices used by the mayor, two city council members, and their staffs subject to the California's Public Records Act); *Toensing v. Attorney General*, 2017 VT 99, ¶¶21-22, 178 A.3d 1000, 1007-08 (Vt. 2017) (Vermont Access to Public Records Act applies to public records of officials and employees that are stored in private accounts such as e-mail or texts); *Competitive Enterprise Institute v. Office of Science & Technology Policy*, 827 F.3d 145, 149 (D.C. Cir. 2016) (public records in the private e-mail account of an agency's director are subject to search and disclosure under federal FOIA).

In addition, the Attorney General has issued a binding opinion concluding that e-mails pertaining to the transaction of public business that were sent to or from the personal e-mail accounts of Chicago Police Department (CPD) employees are subject to the requirements of FOIA. Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, issued August 9, 2016. CPD contended that the e-mails were not public records because they were prepared and possessed by individual officers but were not received and used by CPD. Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, at 7. This office rejected that argument as "undercut[ing] the principle that public bodies act through their employees" and as "erroneously focus[ing] not on the content of a communication but on the method by which it is transmitted." Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, at 7. The Attorney General went on to conclude that:

Interpreting the definition of "public records" in FOIA to exclude communications pertaining to the transaction of public business which were sent from or received on personal e-mail accounts of public officials and public employees would be contrary to the General Assembly's intent of ensuring full and complete information regarding the affairs of government. Such an interpretation would yield an absurd result by enabling public officials to sidestep FOIA and conceal how they conduct their public duties simply by communicating via personal electronic devices. Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, at 7.

Likewise, if text messages pertaining to the transaction of public business sent to or from a City Council member were beyond the reach of FOIA because they were maintained on the elected official's personal phone or other device, elected officials could conceal records

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documenting how they conducted their public duties by simply electing not to use their public bodies' electronic devices, e-mail accounts, and recordkeeping systems. FOIA cannot reasonably be construed as giving elected officials the option to withhold communications concerning public business simply because the communications are maintained on personal devices.

This office's review of the withheld text messages confirmed that they pertain to the transaction of public business. Although the City stated that the text messages are maintained on Alderman Ruestman's private device, the text messages clearly discuss issues pertaining to City business and involve the public duties of City personnel. Because the text messages discuss matters pertaining to the transaction of public business, this office concludes that the text messages constitute "public records" under section 2(c) of FOIA.

Accordingly, this office requests that the City provide Mr. Dancy with copies of the withheld text messages sent to or received from Alderman Ruestman's private device, subject to permissible redactions under section 7(1)(f) as discussed below.

#### **Section 7(1)(f) of FOIA**

Section 7(1)(f) of FOIA exempts from disclosure:

Preliminary 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. Section 7(1)(f) does not exempt from disclosure purely factual material. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 13-015, issued September 24, 2013, at 7. 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 (2014) (quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010)). "[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.'" *Chemical Weapons Working Group v. U.S. E.P.A.*, 185 F.R.D. 1, 3 (D.D.C. 1999) (quoting *Dudman Communications v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

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In its supplemental response to this office, the City asserted that it had redacted certain responsive text messages and e-mails because they "were made in relation to the initiation, the implementation and the discussions surrounding whether or not disciplinary action or a disciplinary investigation should be conducted concerning matters arising in the Minonk Police Department."<sup>4</sup> The City asserted that those communications, which involved the City's administrator, Mayor Koos, and aldermen, fall within the scope of section 7(1)(f) because they "reflected opinions of these individuals regarding possible action to be taken in connection with matters brought to their attention and none of the communications involved a final decision."<sup>5</sup>

This office's review of the e-mails and text messages that were redacted pursuant to section 7(1)(f) confirmed that most of the communications reflect the formulation of action by Mayor Koos and members of the City Council regarding certain matters related to the City's police department. Those communications provide insight into the deliberations of the City officials as they expressed their opinions and discussed how to proceed with those police matters. While the communications contain some factual information, that information is inextricably intertwined with the City's preliminary discussions. There is no indication that those communications were publicly cited or identified by Mayor Koos. However, a small set of e-mails and a part of a text message does not appear to be deliberative in nature, and it is not apparent from this office's review how disclosure of that set of communications would reveal the City's deliberative process or possible actions that the City had considered taking. Because all redacted portions of the communications do not all appear to be pre-decisional and preliminary in nature, this office concludes that the City has not demonstrated by clear and convincing evidence that those records are exempt from disclosure in their entireties pursuant to section 7(1)(f) of FOIA. Under separate cover, this office will identify for the City the limited set of communications that do not fall within the scope of the section 7(1)(f) exemption.

#### **Section 7(1)(m) of FOIA**

Section 7(1)(m) of FOIA exempts from disclosure:

Communications between a public body and an attorney  
\* \* \* representing the public body that would not be subject to  
discovery in litigation, and materials prepared or compiled by or

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<sup>4</sup>Letter from Steven D. Mahrt, Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 15, 2018), at 1.

<sup>5</sup>Letter from Steven D. Mahrt, Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 15, 2018), at 1.

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for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body[.]

Communications protected by the attorney-client privilege are within the scope of section 7(1)(m). See *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 201 (1st Dist. 1997). A party asserting that a confidential communication is protected by the attorney-client privilege typically must show that: "(1) a statement originated in confidence that it would not be disclosed; (2) it was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and (3) it remained confidential." *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 228 (2d Dist. 2006). Further, "[t]he privilege applies not only to the communications of a client to his attorney, but also to the advice of an attorney to his client." *In re Marriage of Granger*, 197 Ill. App. 3d 363, 374 (5th Dist. 1990); see also *People v. Radojcic*, 2013 IL 114197, ¶40, 998 N.E.2d 1212, 1221-22 (2013) ("[T]he modern view is that the privilege is a two-way street, protecting both the client's communications to the attorney and the attorney's advice to the client."). A public body that withholds records under section 7(1)(m) must provide a supporting factual basis for the application of the exemption, including "some *objective* indicia that the exemption is applicable under the circumstances." (Emphasis in original.) *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 470 (2003).

In its supplemental response to this office, the City stated that it had "engaged the law firm of Ancel Glink to conduct an investigation of the Police Department in connection with complaints received concerning individuals within the Police Department in anticipation of future disciplinary action to be taken by the City."<sup>6</sup> The City asserted that all of the communications it had identified as exempt under section 7(1)(m) were exchanged between its attorney and members of its control group, consisting of Mayor Koos, the City administrator, and members of the City Council. The City argued that the communications at issue either contained "requests for advice or the giving of legal advice to a member of the control group" or related "to the production of materials dealing with an internal investigation, and dealing with personnel of the Police Department, all in anticipation of future administrative action to be taken by the City of Minonk."<sup>7</sup> The City stated that it eventually took disciplinary action and reached a settlement agreement related to the investigation.

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<sup>6</sup>Letter from Steven D. Mahrt, Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 15, 2018), at 2.

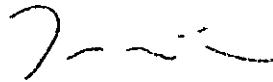
<sup>7</sup>Letter from Steven D. Mahrt, Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 15, 2018), at 2.

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This office has reviewed the e-mails that were redacted pursuant to section 7(1)(m) and confirmed that most of the e-mails reflect the seeking or provision of legal advice between the City's top management and attorney in connection with the City's investigation of its police department. Those communications include deliberations regarding materials pertaining to the investigation. However, this office has determined that a limited set of e-mails do not contain details that would reveal the substance of any confidential communications between the City's top management and attorney. Those e-mails either reveal information in only general terms or information that was already publicly disclosed. Because most of the e-mails at issue reveal confidential communications between the City's top management and attorney for the purpose of seeking legal advice, this office concludes that those particular e-mails are exempt from disclosure pursuant to section 7(1)(m) of FOIA. However, under separate cover, this office will identify for the City the limited set of e-mails that this office concludes do not fall within the scope of section 7(1)(m).

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at the Chicago address listed on the first page of this letter.

Very truly yours,



TERESA LIM  
Assistant Attorney General  
Public Access Bureau

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