



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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June 8, 2022

Via electronic mail
Ms. Lynn Fazekas
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Via electronic mail
Ms. Vivian L. Bright
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FOIA Officer
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RE: FOIA Request for Review – 2022 PAC 69508

Dear Ms. Fazekas and Ms. Bright:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2020)). For the reasons that follow, the Public Access Bureau concludes that the DeKalb County Housing Authority (Housing Authority) improperly withheld records responsive to Ms. Lynn Fazekas' January 10, 2022, FOIA request.

On that date, Ms. Fazekas submitted a FOIA request to the Housing Authority seeking copies of all complaints against a named employee and any reports of related investigatory findings from January 1, 2014, to January 10, 2022. On January 18, 2022, the Housing Authority denied the request pursuant to sections 7(1)(c) and 7(1)(n) of FOIA (5 ILCS 140/7(1)(c), (1)(n) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558, effective August 20, 2021; 102-694, effective January 1, 2022). On January 20, 2022, this office received Ms. Fazekas' Request for Review challenging the denial. She contended that

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complaints alleging misconduct by public employees are not exempt in whole under sections 7(1)(c) or 7(1)(n), as discussed in *Watkins v. McCarthy*¹ and *Kalven v. City of Chicago*.²

On February 1, 2022, this office forwarded a copy of the Request for Review to the Housing Authority and asked it to provide copies of the withheld records, together with a detailed explanation of the factual and legal bases for the applicability of the asserted exemptions. On February 14, 2022, this office received the requested materials. On February 18, 2022, this office forwarded a copy of the Housing Authority's response to Ms. Fazekas; she replied on February 23, 2022.

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 2020); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body that withholds records "has the burden of proving by clear and convincing evidence" that the records are exempt from disclosure. 5 ILCS 140/1.2 (West 2020). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

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, unless the disclosure is consented to in writing by the individual subjects of the information." Section 7(1)(c) defines "unwarranted invasion of personal privacy" as:

[T]he 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 disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.

¹2012 IL App (1st) 100632, 980 N.E.2d 733 (2012).

²2014 IL App (1st) 121846, 7 N.E.3d 741 (2014), *overruled in part on other grounds by Perry v. Department of Financial and Professional Regulation*, 2018 IL 122349, 106 N.E.3d 1016 (2018).

A public body's assertion that the release of information would constitute a clearly unwarranted invasion of personal privacy is evaluated on a case-by-case basis. *Chicago Journeymen Plumbers' Local Union 130 v. Department of Public Health*, 327 Ill. App. 3d 192, 196 (1st Dist. 2001). The phrase "clearly unwarranted invasion of personal privacy" evinces a strict standard to claim the exemption, and the burden is on the public body having charge of the record to prove that standard has been met. *Schessler v. Department of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994). Illinois courts consider 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).

Applying the four-factor analysis described above, the Attorney General has issued two binding opinions concluding that records pertaining to complaints or allegations of misconduct against public employees are generally not exempt from disclosure in their entirety under section 7(1)(c) because such information bears on the performance of the employees' public duties. Ill. Att'y Gen. Pub. Acc. Op. No. 18-018, issued December 31, 2018, at 6; Ill. Att'y Gen. Pub. Acc. Op. No. 22-005, issued March 24, 2022, at 6-13. Further, "there is a significant public interest in disclosure of alleged instances of workplace harassment and discrimination." Ill. Att'y Gen. Pub. Acc. Op. No. 22-005, at 11. The Attorney General has recognized, however, that "[i]nformation identifying individuals who made complaints of this nature against public employees is highly personal; the subjects' privacy rights outweigh any legitimate public interest in disclosure of their identities." Ill. Att'y Gen. Pub. Acc. Op. No. 18-018, at 6. The Attorney General has concluded that "names and other discrete information in the reports that identify the complainants are exempt from disclosure pursuant to section 7(1)(c)." Ill. Att'y Gen. Pub. Acc. Op. No. 18-018, at 6. Further, in circumstances involving complaints of sexual misconduct or harassment in the workplace, this office has recognized that complainants have legitimate privacy interests in the information they submit, but determined that "[r]edacting the relatively minimal content that could be characterized as salacious and disclosing the remaining information concerning the alleged misconduct would strike the appropriate balance between the public interest and the complainant's privacy interest." Ill. Att'y Gen. PAC Req. Rev. Ltr. 52303, issued October 16, 2018, at 6 (investigation report pertaining to sexual harassment complaint not exempt from disclosure in its entirety pursuant to section 7(1)(c)).

The Housing Authority argued that the individual who filed the harassment complaint at issue "has an interest in his/her personal information contained in his/her complaint not being disclosed[,]" and that this "complainant would have to waive this interest for the

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HACD to disclose the complaint under the FOIA request."³ The Housing Authority contended that the Illinois Supreme Court in *Mancini Law Group, P.C. v. Schaumburg Police Department*, 2021 IL 126675, held that "an Illinois public body does not have the ability to waive an individual's interest in his or her personal information that is contained in a document subject to a FOIA request."⁴ Additionally, the Housing Authority argued that the accused also has a privacy interest in disclosure of the complaint. In reply to that answer, Ms. Fazekas maintained that the Housing Authority failed to show that the requested records are exempt from disclosure in their entirety.

This office's review of the confidential records confirmed that the Housing Authority withheld documents concerning complaints made against one of its employees while she was performing her public duties. Disclosure of the complaint does not constitute an unwarranted invasion of the accused's privacy interests, even if the complaint is later determined to be unfounded. *See Gekas v. Williamson*, 393 Ill. App. 3d 573, 586 (4th Dist. 2009) (records concerning alleged wrongdoing in the course of the deputy's public duties were subject to disclosure regardless of whether the underlying allegations had merit). As noted above, however, information identifying the individuals who make complaints of this nature against a public employee is highly personal, and the complainants' privacy rights outweigh any legitimate public interest in disclosure of their identities. Accordingly, the name and other discrete information in the records that identify the complainant are exempt from disclosure under section 7(1)(c) of FOIA. Although the Housing Authority contended that the complainant has a privacy interest in the information that she or he submitted, the withheld records contain general descriptions of alleged misconduct while on the job rather than highly personal details about the complainant. Accordingly, the Housing Authority has not sustained its burden of demonstrating by clear and convincing evidence that the records are exempt in whole pursuant to section 7(1)(c).

Further, the Housing Authority's reliance on *Mancini* is misplaced because that case did not address whether records were highly personal and therefore exempt pursuant to section 7(1)(c), but rather, whether a public body waived its ability to withhold records based on a previous disclosure. The matter of a waiver is not relevant here because there is no claim that the Housing Authority previously disclosed unredacted copies of the requested records. In *Mancini*, the defendant police department furnished accident reports to the plaintiff requester, with driver's license numbers, personal telephone numbers, home addresses, and license plate

³Letter from Timothy F. Horning, Meyer and Horning, P.C., to Teresa Lim, Assistant Attorney General, Public Access Bureau (February 14, 2022), at [3].

⁴Letter from Timothy F. Horning, Meyer and Horning, P.C., to Teresa Lim, Assistant Attorney General, Public Access Bureau (February 14, 2022), at [3].

numbers redacted pursuant to section 7(1)(b) and dates of birth and insurance policy account numbers redacted pursuant to section 7(1)(c). *Mancini Law Group, P.C. v. Schaumburg Police Department*, 2021 IL 126675, ¶3. The plaintiff argued that the defendant was precluded from redacting the reports because it provided the same records, unredacted, to LexisNexis. *Mancini*, 2021 IL 126675, ¶17. In analyzing preclusion, the court examined *Sherman v. United States Department of the Army*, 244 F.3d 357 (5th Cir. 2001), which addressed a similar claim. *Mancini*, 2021 IL 126675, ¶42. In *Sherman*, the Fifth Circuit considered whether the United States Army waived the ability to redact social security numbers (SSNs) of service personnel from award orders pursuant to Exemption 6 of the Federal FOIA when it disclosed that information to the public in other records. *Sherman*, 244 F.3d at 360. The Fifth Circuit concluded there was no waiver, holding that "only the individual whose informational privacy interests are protected by exemption 6 can effect a waiver of those privacy interests when they are threatened by a [] FOIA request." *Sherman*, 244 F.3d at 363-64. The Fifth Circuit further concluded that the "invasion of the informational privacy interest of individual soldiers in disclosure of their SSNs would clearly be unwarranted in the absence of any public interest in those SSNs" and thus that the SSNs were exempt under Exemption 6. *Sherman*, 244 F.3d at 366-67. Adopting the reasoning in *Sherman*, the court concluded "that an Illinois public body does not have the ability to waive an individual's interest in his or her personal or private information that is contained in a document subject to a FOIA request." *Mancini*, 2021 IL 126675, ¶48. Thus, it held that the police department was not precluded from withholding information from the traffic accident reports pursuant to sections 7(1)(b) and 7(1)(c) of FOIA despite having provided LexisNexis unredacted copies of the traffic accident reports. *Mancini*, 2021 IL 126675, ¶57.

Notably, in *Mancini*, "the circuit court already held that the Department carried its burden proving, by clear and convincing evidence, that the information at issue is exempt under sections 7(1)(b) and 7(1)(c)." *Mancini*, 2021 IL 126675, ¶50.⁵ Here, even if there was an alleged waiver, the Housing Authority has not shown by clear and convincing evidence that the records at issue are exempt in whole pursuant to section 7(1)(c). The exemption does not require a public body to withhold all records that contain personal information. Rather, the plain language of section 7(1)(c) permits a public body to withhold records only if "the subject's right to privacy outweighs any legitimate public interest in obtaining the information."

Section 7(1)(n) of FOIA

Section 7(1)(n) of FOIA exempts from disclosure "[r]ecords relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed." FOIA does not define

⁵The plaintiff did not appeal that determination, and the Supreme Court found no reason to disturb the lower court's order. *Mancini*, 2021 IL 126675, ¶50.

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the term "adjudication," but Black's Law Dictionary defines the word as "[t]he legal process of resolving a dispute; the process of judicially deciding a case." Black's Law Dictionary 47 (9th ed. 2009). Black's Law Dictionary further defines an "adjudication hearing" as an "[a]gency proceeding in which a person's rights and duties are decided after notice and an opportunity to be heard." Black's Law Dictionary 788 (9th ed. 2009). Applying similar definitions, the court in *Kalven* construed an "adjudication" for purposes of section 7(1)(n) as a "formalized legal process that results in a final and enforceable decision." *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶13, 7 N.E.3d 741, 745, *overruled in part on other grounds by Perry v. Dep't of Financial and Professional Regulation*, 2018 IL 122349, 106 N.E.3d 1016 (2018). In *Kalven*, the court emphasized that "[t]he phrase 'related to' must be read narrowly," and held that the scope of section 7(1)(n) is limited to records generated during an adjudication; it does not encompass records of the underlying investigation that precede an adjudication. *Kalven*, 2014 IL App (1st) 121846, ¶22, 7 N.E.3d at 747.

In its response to this office, the Housing Authority clarified that it had no reports of findings, but it withheld a complaint of sexual harassment responsive to the request. The Housing Authority stated that the complaint was brought to the attention of the Board of Commissioners, which then hired the law firm of Meyer & Horning to investigate the facts surrounding the alleged harassment and determine whether any employees violated the Housing Authority's personnel policies. According to the Housing Authority, the investigation was ongoing and may result in employee discipline. The Housing Authority contended that the withheld records fall within the scope of section 7(1)(n) because they "relate to employee discipline."⁶ The Housing Authority argued that the purpose of section 7(1)(n) is to permit public bodies to conduct disciplinary investigations and that disclosing the complaint at this stage in the investigation would affect its ability to arrive at a conclusion.⁷

In her reply, Ms. Fazekas noted that under *Kalven v. City of Chicago*, only records of the adjudication of a complaint are entirely exempt. She also noted that a former Housing Authority employee had publicly shared on social media allegations of employee misconduct that occurred in 2014 or 2015. Ms. Fazekas speculated that any investigation of that complaint should be completed and the documents released.

Under the plain language of section 7(1)(n), the exemption is limited to records pertaining to the "**adjudication** of employee grievances or disciplinary cases[.]" (Emphasis added.) In this matter, the Housing Authority has not demonstrated that it reached an

⁶Letter from Timothy F. Horning, Meyer and Horning, P.C., to Teresa Lim, Assistant Attorney General, Public Access Bureau (February 14, 2022), at [2].

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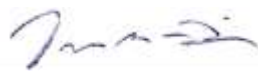
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adjudicatory stage of a disciplinary case. Indeed, the Housing Authority confirmed that it was still in the process of investigating the complaint and had not made a decision whether to pursue employee discipline. Records pertaining to the investigation of a misconduct complaint are distinct from and precede an adjudication, as discussed above. The withheld records are comparable to the Complaint Register (CR) documents at issue in *Kalven* as both involve records of an investigation into an allegation of misconduct by a public employee, which may be used later in a disciplinary adjudication. *Kalven*, 2014 IL App (1st) 121846, ¶20, 7 N.E.3d at 747 (Chicago Police Department improperly withheld CR documents pursuant to section 7(1)(n) because "CRs are created to investigate reports of police misconduct, and any disciplinary adjudication that may take place as a result of the CRs comes later."); *see also* Ill. Att'y Gen. Pub. Acc. Op. No. 13-011, at 8 (police chief's interviews with witnesses and other evidence supporting city's decision to issue suspension not exempt under section 7(1)(n) where the city did not demonstrate that its process culminated in a formalized legal proceeding constituting an "adjudication" within the scope of the exemption). Accordingly, the Housing Authority has not demonstrated by clear and convincing evidence that the withheld records fall within the scope of section 7(1)(n).

In accordance with the conclusions expressed in this determination, this office requests that the Housing Authority provide Ms. Fazekas with copies of the responsive records. The Housing Authority may redact the name, personal e-mail address, home address, and personal signature of the complainant pursuant to sections 7(1)(b) and 7(1)(c) of FOIA.

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,



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Assistant Attorney General
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