ILGL Annual Conference

February 17, 2020

FOIA/OMA – New PAC Opinions and caselaw of interest

Pat Lord, Leah Bartelt, Jessica Harrill

A. Public Access Counselor determination letters and binding opinions.

1. **2016 PAC 42153 Determination Letter, issued 12-31-19 concerning withholding of W-2 forms by a county. [FOIA]** [Opinion Attached]

   The PAC held that a county improperly denied a request for copies of W-2 forms it created for elected officials. The confidentiality provision of the IRS Code relating to tax return information does not apply to the County and therefore does not prohibit the County from disclosing the records. Further, W-2 forms are not exempt in their entireties under section 7(1)(b) of 7(1)(c) of FOIA. However, a public body may redact certain information from the forms.

2. **2016 PAC 39896 Determination Letter, issued 8-27-2019 concerning provision of names where signatures have been redacted. [FOIA]** [Opinion Attached]

   If signatures of public employees or officials are redacted, a public body must provide the names that were redacted if requested to do so by the FOIA requester.

   > "Although the Act does not expressly so provide, the Public Access Bureau concludes that when a requester seeks a record prepared by a public body containing the name of a public employee or officer whose signature is redacted from a record, FOIA requires a public body to provide that name upon request, if it may be reasonably identified."

   This approach protects the unique identifier of someone's signature, while providing the public with information they are entitled to.

3. **2018 PAC 555838 Determination Letter, issued 9-13-2019 regarding action on closed session minutes. [OMA]** [Opinion Attached]

   Opinion concludes that a vote to approve closed session minutes should take place in open session.

4. **Binding PAC Opinion 19-013, issued December 31, 2019 [FOIA] Contains two findings:**

   First: Records of a gathering of members of a public body that did not constitute a meeting due to a lack of a quorum are still public records subject to FOIA.

   Second: Records that are the subject of a FOIA request should not be destroyed while the request is pending. "No provision of FOIA authorizes a public body to circumvent the disclosure requirements of section [140] 3(a) by intentionally disposing of the requested records."

5. **Binding PAC Opinion 20-001, issued February 10, 2020**

   PAC found that the Village Board violated section 2.06(b) of the Open Meetings Act because it failed to approve minutes of its regular and special meetings within the required time frame of 30 days after the meeting or at its second subsequent regular meeting, whichever date is later in time.

6. **Binding PAC Opinion 20-002, issued February 11, 2020**

   The PAC determined that Kankakee County violated section 3(d) of FOIA by failing to comply with, deny, or otherwise appropriately respond to requester's October 21, 2019 FOIA request after several communications by the requester and the PAC. The County did ultimately respond that they were searching for the records, but by January 7, 2020 had still not provided the requested records.

B. FOIA Court Cases.

1. ***Shehadeh v. Downey*** (unpublished), issued 2-5-2020, 2020 IL App (3d) 170158-U

Plaintiff was a federal inmate detained at the Jerome Combs Detention Center for 27 days. During those 27 days, he filed 66 grievances and other requests utilizing an inmate kiosk system. Some of them were FOIA requests. Ultimately, Plaintiff filed a pro se complaint against the Sheriff of Kankakee County pursuant to FOIA.

The following is an important excerpt from this Third District case:

> *12 ¶ 53 **The trial court also correctly determined that text messages and e-mails sent or received from the Sheriff's personal and work cell phones was exempt both for security reasons under section 7(1)(e) and because such correspondence constitutes "private information" exempt from disclosure under section 7(1)(b).** Shehadeh cites *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, 40-44, for the proposition that work-related communications on a public employee's personal electronic device are public records subject to disclosure under the Act. However, *City of Champaign* merely held that electronic communications that city

officials sent to each other on their personal devices while conducting public business during a business meeting were subject to FOAI disclosure because such communications were prepared and sent by or for a public body (*i.e.*, while the meeting was in session and while the city officials were "functioning collectively as the 'public body.' ") *Id.*, ¶¶ 40-44. ***City of Champaign* does *not* hold or imply that *any* electronic communication sent or received from a public employee's personal or work-issued electronic device is subject to disclosure under FOIA, even where such communications are sent while the employee is working or where the communications relate to the employee's job functions.** To the contrary, our appellate court expressly declined to reach that holding in *City of Champaign*, noting that it was the legislature's responsibility to make any such determination. *Id.* ¶ 44 ("If the General Assembly intends for communications pertaining to city business to and from an individual city council member's personal electronic device to be subject to FOIA in every case, it should expressly so state."). In any event, Shehadeh's requests were not even limited to the Sheriff's work-related e-mails, much less to e-mails the Sheriff sent or received while functioning collectively with others as a "public body." Accordingly, the trial court correctly found the correspondence at issue exempt from disclosure under FOIA, and *City of Champaign* does not require a contrary result. [Emphasis added.]

2. *Rushton v. the Department of Corrections*, 2019 IL 124552 (December 19, 2019). A journalist submitted a FOIA request to the Illinois Department of Corrections seeking settlement agreements pertaining to claims or lawsuits filed in connection with the death of an inmate at a correctional center. The settlement agreement had been entered into by Wexford Health Sources (which was under contract to provide medical care to inmates) and the estate of an inmate who died from cancer. Wexford refused to provide the settlement agreement, arguing that that it was not a public record since Wexford is not a public body under the language of Section 2.20 of FOIA:

> Sec. 2.20. Settlement and severance agreements. All settlement and severance agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, provided that information exempt from disclosure under Section 7 of this Act may be redacted.

The Illinois Supreme Court concluded that the issue was governed by Section 7(2) of FOIA which provides that:

> (2) A public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act.

Therefore, the Court affirmed the judgment of the appellate court which held that the settlement agreement was a public record subject to disclosure.

3. ***Kelly v. Village of Kenilworth*, 2019 IL App (1st) 170780 (June 21, 2019)**

Plaintiff FOIA requester sought records related to the investigation of a woman as the 50th anniversary of the date of the murder approached. The request was directed to the Village of Kenilworth, the Illinois, State Police, the Cook County State's Attorney's Office and the Cook County Medical Examiner. The Village denied the records claiming that the disclosure would interfere with an ongoing criminal investigation. The other defendants denied the request or did not respond.

The trial court decided that although the exemption stated that it applied to a pending investigation of the public body "*that is the subject of the request*", it would "be absurd to permit one public body to release documents that would interfere with another public body that was entitled to the exemption." The appellate court affirmed the trial court's decision because "Were it otherwise, law enforcement agencies would be discouraged from cooperating due to the risk of harmful disclosures and the people of Illinois would be denied effective law enforcement." 2019 IL App (1st) 170780, ¶ 33 [Emphasis added]

This ruling goes a long way toward reducing the negative impact caused when the "that is the recipient of the request" language was added to the 7(1)(d) law enforcement exemptions. It never made any sense for one public body to put another public body's investigation into jeopardy because the public body who received the FOIA request wasn't the agency conducting the investigation.

The appellate court also noted that a public body responding to a FOIA request cannot assert a "blanket" exemption; however, in this case the public bodies could have raised the issue of unduly burdensome and made an effort to narrow the request.

4. ***Barner v. Fairburn*, 2019 IL App (3d) 180742 (July 30, 2019)**

The Canton Police Department granted a FOIA request in part and responded that it did not have records responsive to the remainder of the request. On appeal, the Third District Appellate Court upheld the trial court's determination that there was no violation of FOIA since there is no requirement for a public body to provide a detailed factual basis to a requester when the public body doesn't have the records in question. 2019 IL App (3d) 180742, ¶ 14.

5. ***Timpone v. Illinois Student Assistance Comm'n,*** *2019 IL App (1st) 181115* (December 11, 2019)

The appellate court determined that disclosure of the names of MAP grant recipients would constitute an unwarranted invasion of personal privacy under 5 ILCS 140/7(b); therefore, the names of MAP grant recipients were exempt from disclosure.

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FOIA

2016 PAC 42153
W-2 Forms
(17 pages)

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

December 31, 2019

Via electronic mail
[redacted]

Via electronic mail
Mr. Gregory Vaci
Assistant State's Attorney
DuPage County State's Attorney's Office
503 North County Farm Road
Wheaton, Illinois 60187
Gregory.Vaci@dupageco.org

RE: FOIA Request for Review – 2016 PAC 42153

Dear [redacted] and Mr. Vaci:

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 2018)). For the reasons that follow, the Public Access Bureau concludes that DuPage County (County) improperly denied [redacted] May 22, 2016, FOIA request.

On May 22, 2016, [redacted] submitted a FOIA request to the County seeking copies of the U.S. Internal Revenue Service W-2 forms for all County Board Members, including the Chairman, and all County-wide elected officials for the past two years. In a letter dated May 24, 2016, the County denied the request in its entirety pursuant to sections 7(1)(b) and 7(1)(c) of FOIA (5 ILCS 140/7(1)(b), (1)(c) (West 2015 Supp.)). On May 30, 2016, this office received [redacted] Request for Review contesting the denial.

On June 8, 2016, this office forwarded a copy of the Request for Review to the County and asked it to provide this office with a detailed explanation of the legal and factual bases for the applicability of sections 7(1)(b) and 7(1)(c) of FOIA. On June 15, 2016, the

County furnished its written response, which argued that W-2 Forms are "personal financial information," and therefore exempt from disclosure pursuant to section 7(1)(b) of FOIA. The County argued that the W-2 Forms were also exempt pursuant to section 7(1)(c) of FOIA, because disclosure would constitute a clearly unwarranted invasion of the personal privacy of the taxpayers identified on those forms. Finally, the County asserted that employee W-2 forms are exempt from disclosure pursuant to section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2015 Supp.)) because their disclosure is prohibited by 6103 of the Internal Revenue Code (26 U.S.C. § 6103 (2014)) and section 917 of the Illinois Income Tax Act (35 ILCS 5/917 (West 2015 Supp.)). This office forwarded a copy of the County's response to [redacted] who replied on June 28, 2016, disputing the applicability of each of the cited exemptions.

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 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)(a) of FOIA

Section 7(1)(a) of FOIA exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." "[A]n exemption restricting the expansive nature of the FOIA's disclosure provisions must be explicitly stated-that is, such a proposed disclosure must be *specifically* prohibited." (Emphasis in original.) *Better Gov't Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 816 (4th Dist. 2008).

Section 6103(a) of the United States Internal Revenue Code

In support of its reliance on section 7(1)(a) of FOIA, the County argues that "[s]ection 6103 of the Internal Revenue Code [26 U.S.C. § 6103] generally protects the confidentiality of federal tax return information[,]" and that the U.S. Supreme Court held in *Church of Scientology of California v. Internal Revenue Service*, 484 U.S. 9 (1987), that "return information included Form W-2s, that return information was confidential and that return information was not required to be redacted to remove personal information."[1]

[1]Letter from Gregory Vaci, Assistant State's Attorney, Chief of Civil Bureau, DuPage County State's Attorney's Office, to Leah Bartelt, Assistant Attorney General, Office of the Illinois Attorney General (June 15, 2016).

Section 6103(a) of the Internal Revenue Code provides:

> (a) General rule.--Returns and return information shall be confidential, and except as authorized by this title--
>
> (1) no officer or employee of the United States,
>
> (2) no officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section or section 6104(c), and
>
> (3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), subsection (k)(10), paragraph (6), (10), (12), (16), (19), (20), or (21) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n),
>
> shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

As discussed above, a record is exempt from FOIA pursuant to section 7(1)(a) only if another federal or state law "specifically prohibit[s]" its disclosure. *Better Gov't Ass'n*, 386 Ill. App. 3d at 816. The County's response to this office does not explain, nor is it apparent, which of the three subsections of section 6103(a) specifically prohibits officers or employees of the County from disclosing the requested W-2 forms.

A County officer or employee is not an "officer or employee of the United States." 26 U.S.C. § 6103(a)(1). Section 6103(a)(2) prohibits disclosure by an "officer or employee of any State," but County officers and employees are not officers or employees of the State. Section 6103(b)(5), however, defines "state" to include not only states but also: (1) any "municipalities" that have a population in excess of 250,000, impose a tax on income or wages, and "with which the Secretary (in his sole discretion) has entered into an agreement regarding disclosure;" and (2) any "governmental entity which is formed and operated by a qualified group of municipalities," and "with which the Secretary (in his sole discretion) has entered into an agreement regarding disclosure." 26 U.S.C. § 6103(b)(5)(A)(ii), (b)(5)(A)(iii). In its response to this office, the County did not assert that it imposes a tax on income or wages and that it has entered into an agreement regarding disclosure with the Secretary of the Internal Revenue

Service. Section 6103(a)(2) also prohibits disclosure by local entities performing certain functions; the County did not attempt to demonstrate that it is one of the local entities outlined in that section.

Finally, section 6103(a)(3) prohibits disclosure by any "other person (or officer or employee thereof) who has or had access to returns or return information" for certain specified reasons. The County did not assert that it falls within the definition of any of the provisions identified in that section. This office has reviewed each of the cited sections, and it is not apparent that the County is covered by any of them. The County acknowledges in its response that it possesses the W-2 forms at issue because it is an employer, compelled by federal law to create and furnish W-2 forms to its employees. However, none of the categories listed in section 6103(a)(3) address disclosures made by non-federal and non-state employers who possess return information for their employees by virtue of that relationship.

Rather than identifying the specific subsection of section 6103(a) that prohibits the County from disclosing tax return information, the County cited *Fort Cherry School District v. Coppola*, 37 A.3d 1259 (Pa. Commw. Ct. 2012), which addressed whether a public school district properly denied a request under Pennsylvania's Right-to-Know Law (65 Pa. Cons. Stat. § 67.101 *et seq.* (West 2014)) in reliance on federal law. There, the Commonwealth Court of Pennsylvania (an intermediate appellate court) concluded that the W-2 forms of school district employees were protected from disclosure pursuant to section 6103(a) of the Internal Revenue Code, and therefore exempt from the Right-to-Know Law. *Fort Cherry School District*, 37 A.3d at 1261. The Commonwealth Court explained that this conclusion followed directly from a prior decision addressing section 6103(a), W-2 forms, and the Right-to-Know Law:

> In [*Office of the Budget v.*] *Campbell*, [25 A.3d 1318 (Pa. Commw. 2011)], we determined that W-2s qualify as 'return information' exempt under the same statutory provision that the School District cites here. * * *
>
> Based upon our decision in *Campbell*, we hold the W-2s are exempt by federal statute[.] * * * As W-2s are exempt, the School District properly withheld them. *Fort Cherry School District*, 37 A.3d at 1261.

In *Campbell*, the Commonwealth Court held that section 6103(a) prohibited the Pennsylvania Office of the Budget from disclosing W-2 forms for employees identified in a request filed under the Right-to-Know Law. 25 A.3d at 1319-20. However, the Office of the Budget is an "administrative agency within the Governor's Office," and therefore, an arm of the State of Pennsylvania. 71 Pa. Cons. Stat. § 229(a) (West 2014). In fact, the *Campbell* court cited section

6103(a)(2) of the Internal Revenue Code, which prohibits disclosure by an "officer or employee of any State," in reaching its conclusion that the Office of the Budget could withhold the W-2 forms. *Campbell*, 25 A.3d at 1319.

The Commonwealth Court in *Fort Cherry School District* appears to have relied on the outcome in *Campbell* without addressing whether section 6103(a) regulates the conduct of school district employees in the same way it regulates the conduct of state government employees. Because that decision does not address what this office understands is a significant factor in assessing the scope of section 6103(a), *Fort Cherry School District* is not persuasive authority, and this office declines to follow it.

The County's response also cites *People v. Gutierrez*, 222 P.3d 925, 933 (Colo. 2009), for the principle that Congress enacted section 6103(a) "to provide adequate assurances that the confidentiality of [taxpayer] returns and the information within would be safeguarded."[2] In that case, the Colorado Supreme Court addressed whether an individual had a reasonable expectation in the privacy of his tax return and return information, which was seized from the office of his private tax preparer, in the context of the individual's motion to suppress that evidence in his criminal prosecution. *Gutierrez*, 222 P.3d at 928. However, the *Gutierrez* decision does not address the question of whether section 6103(a) "specifically prohibits" a local-government-entity employer from disclosing tax return information of its employees, and therefore, does not support the County's reliance on section 7(1)(a) of FOIA.

Moreover, in *Hrubec v. National Railroad Passenger Corporation*, 49 F.3d 1269 (7th Cir. 1995), the U.S. Court of Appeals for the Seventh Circuit rejected the argument that section 6103(a) comprehensively prohibits disclosure of an individual's return or return information, regardless of the identity of the entity that made the disclosure. There, the plaintiff alleged that officers or employees of Amtrak improperly acquired and disclosed his tax return information in violation of section 6103(a), which subjected them to liability under another federal statute. *Hrubec*, 49 F.2d at 1269. The Seventh Circuit upheld the lower court's dismissal of that complaint on the ground that any disclosures the defendants' may have made could not violate section 6103(a) because the defendants do not come within any of the subsections of section 6103(a). *Hrubec*, 49 F.2d at 1270. The court rejected the plaintiff's reliance on the general statement of the confidentiality of tax returns and return information, concluding that an entity's disclosure of that information can violate section 6103(a) only if the entity is actually regulated by section 6103(a)(1), (a)(2), or (a)(3):

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[2]Letter from Gregory Vaci, Assistant State's Attorney, Chief of Civil Bureau, DuPage County State's Attorney's Office, to Leah Bartelt, Assistant Attorney General, Office of the Illinois Attorney General (June 15, 2016), at 4.

> Congress set out to limit disclosure by persons who get tax returns in the course of public business – employees of the IRS, state employees to whom the IRS makes authorized disclosures, and private persons who obtain return information from the IRS with strings attached. The statute does not forbid disclosure when information comes from other sources. [The Plaintiff] supposes that if a statute identifies an evil, such as the unauthorized disclosure of return information, then it necessarily condemns all manifestations of that evil. Not so. Many laws are compromises, going thus far and no further in pursuit of a goal. * * *
>
> Section 6103 tells us exactly how far Congress has gone toward preserving confidentiality. We could not stop with the first seven words of § 6103(a), as [the Plaintiff] wishes us to do, without discarding the profusion of detail that follows and in the process dishonoring the legislative process. The ban on disclosure appears in the last, dangling, unnumbered portion of § 6103(a), not in the introductory phrase, and the ban is linked to the scope of the identified subsections. *Hrubec*, 49 F.3d at 1270-71.

Section 6103(a) of the Internal Revenue Code therefore prohibits disclosure of an individual's tax return and other return information only by some entities and by other entities when they have obtained the information for specific reasons. Because the County has not met its burden of demonstrating that it falls within the scope of the entities that are regulated by section 6103(a), it has not demonstrated that section 6103(a) "specifically prohibits" disclosure of the W-2 forms at issue.

Section 917 of the Illinois Income Tax Act

Next, the County argues that it "must also comply with the Illinois Income Tax Act [35 ILCS 5/917 (West 2015 Supp.)], which also limits the public availability of tax return information."[3] The County's reliance on this provision of state law fails for the same reason its argument with respect to the federal tax return confidentiality provision fails. Section 917(a) of the Illinois Income Tax Act addresses the confidentiality of tax return-related records and states, in pertinent part:

[3]Letter from Gregory Vaci, Assistant State's Attorney, Chief of Civil Bureau, DuPage County State's Attorney's Office, to Leah Bartelt, Assistant Attorney General, Office of the Illinois Attorney General (June 15, 2016), at 3.

> (a) Confidentiality. Except as provided in this Section, all information *received by the Department from returns filed under this Act*, or from any investigation conducted under the provisions of this Act, shall be confidential, except for official purposes within the Department or pursuant to official procedures for collection of any State tax or pursuant to an investigation or audit by the Illinois State Scholarship Commission of a delinquent student loan or monetary award or enforcement of any civil or criminal penalty or sanction imposed by this Act or by another statute imposing a State tax, and any person who divulges any such information in any manner, except for such purposes and pursuant to order of the Director or in accordance with a proper judicial order, shall be guilty of a Class A misdemeanor. (Emphasis added.)

Section 1501(a)(5) of the Illinois Income Tax Act (35 ILCS 5/1501(a)(5) (West 2018)) defines "Department" to be "the Department of Revenue" of Illinois. Therefore, by its own terms, section 917(a) regulates the dissemination of tax return information by the Department of Revenue, and not the County.

The County points to the Illinois Appellate Court's decision in *TTX Company v. Whitley*, 295 Ill. App. 3d 548 (1st Dist. 1998), and argues that the court there "held that permitting disclosure of third parties['] tax information during litigation discovery is a violation of the explicit prohibitions of Section 917."[4] However, *TTX Company* interpreted section 917(a) in the context of a discovery order directed at the Department of Revenue, which is indisputably subject to section 917(a). *TTX Company v. Whitley*, 295 Ill. App. 3d at 794. The County did not cite any authority holding that section 917(a) regulates disclosures made by local government entities. Accordingly, because the County has not met its burden of demonstrating that section 917(a) regulates disclosures it may make of information from tax returns, it has not demonstrated that the Illinois Income Tax Act "specifically prohibits" it from disclosing the W-2 forms at issue.

Section 7(1)(b) of FOIA

The County next argues that employee W-2 forms are "personal financial information," exempt from disclosure pursuant to section 7(1)(b) of FOIA. That section exempts "[p]rivate information, unless disclosure is required by another provision of this Act, a State or

[4]Letter from Gregory Vaci, Assistant State's Attorney, Chief of Civil Bureau, DuPage County State's Attorney's Office, to Leah Bartelt, Assistant Attorney General, Office of the Illinois Attorney General (June 15, 2016), at 3.

federal law or a court order[,]" and section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2015 Supp.)) defines "private information" as:

> [U]nique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, *personal financial information*, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person. (Emphasis added.)

In support of its argument, the County relies on a Public Access Bureau pre-authorization letter and two determination letters addressing W-2 forms. In the first of those determination letters, the Public Access Bureau addressed a denial of a request for employee W-2 forms by a recreation district. The District withheld the forms themselves, but it furnished the requester a report containing employee names, federal wages, social security wages, and Medicare wages, as listed on the W-2 forms. Ill. Att'y Gen. PAC Req. Rev. Ltr. 17122, issued February 2, 2012, at 1. Relying on two prior pre-authorization letters (Ill. Att'y Gen. PAC Pre-Auth. al11752, issued August 18, 2011, and Ill. Att'y Gen. PAC Pre-Auth. al9280, issued September 2, 2010) that determined that employee W-2 forms were "personal financial information" within the scope of section 7(1)(b), the Public Access Bureau concluded that the instant request also was properly denied, as the FOIA request at issue was similar in all respects to the requests at issue in the pre-authorization matters. Ill. Att'y Gen. PAC Req. Rev. Ltr. 17122, issued February 2, 2012, at 4.

The County also cited the determination letter in 2014 PAC 27598, issued two years later, in which the Public Access Bureau again considered whether an employee's W-2 form was personal financial information that was exempt from disclosure pursuant to section 7(1)(b) of FOIA. Ill. Att'y Gen. PAC Req. Rev. Ltr. 27598, issued September 2, 2014, at 1-2. Citing 2011 PAC 17122 and the two pre-authorization letters discussed in that letter, the Public Access Bureau determined that W-2 Forms are "personal financial information[ ]" that were properly withheld under section 7(1)(b). The Public Access Bureau rejected the argument that section 2.5 of FOIA (5 ILCS 140/2.5 (West 2014)), which provides that "[a]ll records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public[,]" required disclosure of those forms. This office reconciled these two statutory provisions by determining that section 7(1)(b) was a more specific provision than section 2.5, which broadly encompasses all records that relate to the use of public funds, and concluded that an employee's W-2 Form is exempt under section 7(1)(b) of FOIA provided that a public body possesses other non-exempt records

that document the employee's salary and compensation. Ill. Att'y Gen. PAC Req. Rev. Ltr. 27598, at 2-3.

Upon further review, this office acknowledges that its determination letter in 2014 PAC 27598 overlooked that section 7(1)(b) itself states that private information is exempt "unless disclosure is required by another provision of this Act[.]" It was therefore unnecessary to apply rules of statutory interpretation to reconcile sections 7(1)(b) and 2.5, and incorrect to conclude that information describing the use of public funds that is required to be disclosed by section 2.5 of FOIA was exempt from disclosure under section 7(1)(b) because section 7(1)(b) was a "more specific" statutory provision.

Furthermore, the determination letter in 2014 PAC 27598 noted that the public body at issue may have possessed other documents that were not personal to any employee that nevertheless contained information about the salaries of public employees. To the extent that the outcome of 2014 PAC 27598 (and also 2011 PAC 17122) relied on the understanding that a public employee or official's W-2 form contains both personal financial and a public body's financial information, and that other records containing the same information as a W-2 form that is expressly subject to disclosure under section 2.5 may be available as a substitute, it did so without due consideration of section 7(1) of FOIA (5 ILCS 140/7(1) (West 2015 Supp.)). That section provides:

> When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. *The public body shall make the remaining information available for inspection and copying.* (Emphasis added.)

Based on the plain language of section 7(1), a public body is permitted, but not required, to redact information that is exempt from disclosure under any applicable section 7 exemption. However, the plain language of section 7(1) also expressly requires a public body to disclose any remaining non-exempt information. Therefore, upon reconsideration of this issue, we have determined that it would be contrary to the intent of FOIA to interpret section 7(1) to permit a public body to withhold a W-2 form in its entirety because only a portion of it contains information relating to the public body's use of public funds, and because an alternative record

may also be available.[5]

Instead of relying exclusively on prior precedent addressing the withholding of W-2 forms, it is appropriate to re-examine whether a public employee or official's W-2 form is "personal financial information," and if so, whether it is exempt from disclosure in its entirety pursuant to section 7(1)(b) of FOIA.

A W-2 form documents the taxable wages, tips, and other compensation paid to an employee (box 1), along with the portion of that compensation subject to Social Security, Medicare, state, and local taxation (boxes 3, 5, 16 and 18). The W-2 form also describes the amount of federal tax (boxes 2, 4, 6) state tax (box 17) and local tax (box 19) withheld from an employee's salary, and the portion of his or her salary, if any, that an employee elected to set aside for dependent care benefits (box 10). Finally, box 12 of the form contains information about the employee's participation in elective retirement (like 401(k)) or deferred compensation (like 403(b)) plans, along with the amounts of pre-tax contributions the employee made to those plans. That box also has lines for the employer to list the cost of employer-sponsored benefits provided to the employee (such as group-term life insurance over $50,000 and health insurance), including the portion paid by the employer.[6]

In interpreting the scope of section 7(1)(b) of FOIA in Binding Opinion 12-003, the Attorney General explained that "[t]he examples of 'unique identifiers' cited in section 2(c-5) include information, such as a social security number, that is alone sufficient to identify a particular individual, as well as information which is both unique to an individual and of a type in which there is a significant personal privacy interest, such as medical or financial records." Ill. Att'y Gen. Pub. Acc. Op. No. 12-003, issued January 18, 2012, at 7. As described above, an employee W-2 Form contains both "personal financial information" documenting personal financial decisions about whether and to what extent to allocate a portion of wages to optional employer-sponsored benefits programs and tax withholding, and also information about the

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[5]The County also argues that the DuPage County Circuit Court held that a public body correctly denied a FOIA request seeking an employee's W-2 form pursuant to section 7(1)(b) of FOIA. [redacted] *v. College of DuPage*, Docket No. 2015-CH-79 (Circuit Court, DuPage County, May 14, 2015). Based on the information furnished for our review by the County, the Court's Order is a single page and does not describe the Court's reasoning. The County asserts that the Court relied on this office's determination letter in 2014 PAC 27598; however, we have just concluded that that determination letter did not sufficiently address the complete language of section 7(1)(b) and the section 7(1) requirement to disclose non-exempt portions of a record that contains exempt information. Further, "[u]nder Illinois law, the decisions of circuit courts have no precedential value." *Delgado v. Bd. of Election Comm'rs of City of Chicago*, 224 Ill. 2d 481, 488 (2007).

[6]U.S. Department of the Treasury, Internal Revenue Service, General Instructions for Forms W-2 and W-3 (May 2, 2017), https://www.irs.gov/pub/irs-prior/iw2w3--2017.pdf (last visited December 30, 2019).

employer's expenditures related to the employee, in the form of wages and insurance costs. Accordingly, a W-2 form is not exclusively "personal financial information," and cannot be withheld in its entirety pursuant to section 7(1)(b).

Moreover, a W-2 form of a public employee is a record that documents the use of public funds by the public body, which is expressly subject to disclosure pursuant to section 2.5 of FOIA. Although Boxes 1, 3, and 5 describe the employee's taxable income, and therefore, will not necessarily describe the entire salary or compensation paid to the employee by the public body, Box 1 nevertheless documents the taxable portion of the payments made by a public body to its employee for salary, bonuses, and other taxable transfers. Additionally, Box 12 describes the cost of employer-sponsored insurance, part or all of which is usually paid by the employer. Therefore, because records describing the use of public funds are expressly subject to disclosure under section 2.5, this office concludes that a W-2 form is not exempt from disclosure in its entirety pursuant to section 7(1)(b) of FOIA.

Section 7(1)(c) of FOIA

Finally, the County argues that it properly denied the request in its entirety pursuant to section 7(1)(c) of FOIA, which exempts from disclosure:

> Personal 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. "Unwarranted invasion of personal privacy" means the 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.* (Emphasis added.)

The General Assembly's use of the language "*clearly unwarranted invasion* of personal privacy" evinces a "stricter standard to claim exemption," which the public body possessing the records bears the burden of sustaining. (Emphasis in original.) *Schlessinger v. Department of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994).

The Attorney General has consistently concluded that the amount of compensation received by public employees directly bears on their public duties. Therefore, the disclosure of records describing that compensation is not an invasion of personal privacy under

the plain language of the last sentence of section 7(1)(c). Ill. Att'y Gen. Pub. Acc. Op No. 18-005, issued March 13, 2018, at 6; Ill. Att'y Gen. Pub. Acc. Op No. 15-006, issued August 31, 2015, at 7. As discussed above, an employee's W-2 form contains a mix of information, but, in part, is a record that describes the taxable portion of the wages paid by the employer and the employer's cost of certain benefits provided as part of the compensation package. Because a W-2 form is a record that bears on the public duties of public employees and officials, it is not exempt from disclosure in its entirety pursuant to section 7(1)(c) of FOIA.

The County's response to this office does not address the final sentence of section 7(1)(c) of FOIA, arguing instead that an employee's right to privacy in his or her W-2 form outweighs the public interest in the information. Even assuming, however, that information concerning a public employee's compensation does not bear on his or her public duties for purposes of section 7(1)(c), the County has not sustained its burden of demonstrating by clear and convincing evidence that the balance tips in favor of the employee's right to privacy.

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).

With respect to the first and second factors, the County argues that [redacted] does not have a personal interest in disclosure of these records that it distinguishable from the public's interest, but acknowledges that the public has a significant interest in how public funds are spent by public bodies, particularly with respect to "benefits offered to public officials."[7] [redacted] does not identify a unique personal interest in the records, but in both his Request for Review and in his reply, argues that an employee W-2 form describes the use of public funds, and therefore is subject to disclosure under section 2.5 of FOIA (discussed above) and article VIII, section 1(c) of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VIII, § 1(c)), which provides that "records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law." As this office has previously determined, the General Assembly's adoption of section 2.5 of FOIA evinces the strong public interest in access to information concerning the expenditure of public funds. Ill. Att'y Gen. Pub. Acc. Op No. 16-012, issued December 21, 2016, at 5-7.

[7]Letter from Gregory Vaci, Assistant State's Attorney, Chief of Civil Bureau, DuPage County State's Attorney's Office, to Leah Bartelt, Assistant Attorney General, Office of the Illinois Attorney General (June 15, 2016), at 6.

As for the third factor, the degree of invasion of personal privacy, the County relies on the case law, statutory provisions, and Public Access Bureau determination letters it cited in support of its section 7(1)(a) and 7(1)(b) arguments to argue that individuals have a legitimate private interest in their W-2 forms. These provisions do make clear that an individual has a privacy interest in his or her W-2 forms such that disclosure of that record would be measurable.

To bolster this argument, the County also cites an exchange during the debate in the Senate concerning amendments to the FOIA statute, specifically the provision that became section 7(1)(c):

> Senator Righter: Thank you, Mr. President. I want to stay on that issue for a second, Senator Raoul, with regards to what is or what is not an unwarranted invasion of personal privacy. As you know, right now, our Freedom of Information Act statute kind of lists out things that are exempt from a Freedom of Information Act request, such as – the easy one is – an individual's personal income tax return. Would that, under your – in your view, be something that would be – fall under that exception of an unwarranted invasion of personal privacy?
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> * * *
>
> Senator Raoul: I believe a tax return under the Revenue statutes is – is already not subject to disclosure. But in short answer to your question, yes, I wouldn't – notwithstanding it already not being subject to disclosure, I * * * would say that * * * would be unwarranted. Remarks of Sen. Righter and Sen. Raoul, May 28, 2009, Senate Debate on Senate Bill 189, at 47.

The County argues that this exchange "clearly suggests that the Senators believed that the information contained in Form W-2, a form which is the foundation for a tax return," fell within the scope of section 7(1)(c).[8] We disagree. The document the Senators discussed was "an individual's personal income tax return," not a public body's W-2 Form or even the more general term "return information," which, when used in the context of the federal Internal Revenue Code, has been construed to include W-2 Forms. Moreover, then-Senator Raoul's response that he

[8]Letter from Gregory Vaci, Assistant State's Attorney, Chief of Civil Bureau, DuPage County State's Attorney's Office, to Leah Bartelt, Assistant Attorney General, Office of the Illinois Attorney General (June 15, 2016), at 3.

believed tax returns were independently exempt "under the Revenue statutes" indicates his understanding that the question referred to returns created by individuals and filed with the Department of Revenue. As discussed above, section 917(a) of the Illinois Income Tax Act, which was in effect at the time of this debate, prohibits that Department from disclosing information "from returns filed under this Act." Given this context, it is more reasonable to construe this exchange between the Senators to be referencing tax returns, and not all records in the possession of employers that will relate to tax returns filed with the Department.

Finally, with respect to the fourth factor, the County asserts that [redacted] can obtain the same information on a W-2 form from other records in the County's possession, and notes that it details the compensation packages of its elected officials and employees on its website. Our review of that website indicates that the County posts a spreadsheet listing, by employee or elected official name, the salary, clothing and vehicle allowances, and number of vacation, sick, holiday, and personal days earned by each individual.[9] That spreadsheet also describes whether the individual is eligible for health and dental insurance, whether the individual has opted out of either the health or dental insurance, and whether the individual is a pension participant.[10] On a separate page, the County outlines the costs of each of the four health insurance plans and the dental insurance plan offered to employees, distinguishing the various charges for covering the employee alone, the employee and spouse, the employee and children, and the employee and family.[11] The County further breaks down the gross cost of insurance into employee contribution and employer net cost.

In reply, [redacted] disputed that the information posted on the County's website is complete or accurate, and alleged that when he has requested a copy of elected officials' "complete compensation package thru FOIA, the complete package and dollar amounts were never provided in their entirety."[12] In a telephone conversation with an Assistant Attorney General in the Public Access Bureau, [redacted] further explained that the information available on the County's website did not specify for every employee the amount of money the County spent on health insurance for that particular employee, meaning that the publicly-available

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[9]County of DuPage, *Employee Compensation*, https://www.dupageco.org/empcompensation/ (last visited December 30, 2019).

[10]County of DuPage, *Employee Compensation*, https://www.dupageco.org/empcompensation/ (last visited December 30, 2019).

[11]County of DuPage, *Employee Compensation*, https://www.dupageco.org/empcompensation/ (last visited December 30, 2019).

[12]Letter from [redacted] to Leah Bartelt, Assistant Attorney General, Office of the Illinois Attorney General (undated).

information did not describe the particular health plan any individual employee had selected and whether the County was paying the employer cost for only the employee's insurance or also for insurance for the employee's spouse or dependents. [redacted] explained that the W-2 forms would provide a complete picture of the cost to the County of a specific employee because it would list not only the employee's salary, but also the cost of health insurance for the employee and his family (if applicable), life insurance for the employee, pension contributions, and fringe benefits like vehicle reimbursement.[13] Therefore, despite the significant amount of information available on the County's website and furnished in response to other FOIA requests, [redacted] directly disputes the County's assertion that he can obtain this information through alternative means.

After carefully considering the contents of a W-2 form, and based on our analysis of the four factors set out in *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, this office concludes that the significant public interest in the disclosure of those forms is not outweighed by the privacy interests of the public employees for whom they were created. Accordingly, the Public Access Bureau concludes that the County has not sustained its burden of demonstrating by clear and convincing evidence that disclosure of W-2 forms in their entirety would constitute a clearly unwarranted invasion of personal privacy.

Permissible Redactions

In accordance with the conclusions expressed in this letter, this office requests that the County disclose the W-2 forms requested by [redacted] However, because W-2 forms

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[13]We note that the employee W-2 form also does not necessarily provide the information sought by [redacted], because it does not describe all public funds transferred to an employee in a particular tax year. Rather than reporting an employee's salary, the W-2 Form reports employees' *taxable* compensation, which is the salary and other payments less the portion of the salary that the employee has elected to defer pre-tax, contribute to a pre-tax retirement or dependent care account, or used to pay premiums for County-sponsored health and dental insurance plans. Therefore, the "wages" displayed in Box 1 of any particular W-2 form could be significantly less than the amount of money the County pays that employee in salary. Furthermore, based on our review of the W-2 Form and instructions published by the Internal Revenue Service, employers are not required to disclose on a W-2 Form contributions it makes to an employee pension plan, which is a piece of information [redacted] is seeking. Those contributions are not considered to be taxable wages, and unlike payments made for life and health insurance, the instructions for the W-2 form do not direct the employer to list the amount of such contributions on a specified line; the W-2 Form includes only a box to be checked if the employee participates in a retirement plan. Finally, to the extent that the County furnished its elected officials meals that would be considered taxable employee compensation, those benefits are reported on W-2 Forms only as part of the employees' taxable wages, and are not documented separately on a different line. U.S. Department of the Treasury, Internal Revenue Service, *Publication 15-B, Employer's Tax Guide to Fringe Benefits* (December 16, 2016), at 29. For that reason, a person will only be able to use a W-2 Form to calculate the value of fringe benefits if that person knows the employee's taxable compensation before the value of those benefits was added. However, as explained above, an employee' taxable compensation is itself a calculation of salary minus excludable deferrals, contributions, and insurance premiums.

contain unique identifiers and personal financial information that does not relate to the public body's use of public funds, the County may redact the information displayed in many of the boxes. An employee's social security number (box a) and home address and zip code (box f) are unique identifiers expressly included in the definition of private information listed in section 2(c-5) of FOIA. Additionally, the amount of money withheld from an employee's paycheck for income tax is determined by the employee's declared filing status (single or married) and the number of allowances (often related to the number of employee's dependents) an employee identifies. An employee may also direct the IRS to withhold additional money from each paycheck, which would also be reflected in the tax withholding listed on the W-2 form.[14] Because the values listed in the income tax withholding boxes (boxes 2, 17, and 19) are based in part on the employee's personal financial decisions, they are "personal financial information" that can be redacted under section 7(1)(b).[15] *See also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 24332, issued July 20, 2015, at 2-3 (tax information relating to a personal financial matter unrelated to public duties is personal financial information exempt from disclosure pursuant to section 7(1)(b)). Similarly, the portion of compensation that an employee sets aside pre-tax for "dependent care benefits" (box 10) and various retirement or deferred compensation programs (certain lines in box 12) fall within the scope of personal financial information because they reflect an employee's personal decisions as to how to spend his or her salary.[16]

Finally, box 12 on the Form (under code DD) will display the gross cost of the health insurance plan in which the employee is enrolled.[17] On its website, the County lists the total monthly costs of the four medical insurance plans and the dental and vision care plans available to employees, and distinguishes between the costs of covering the employee alone, with a spouse, with children, or as part of a family.[18] If someone were to compare the cost of health insurance value listed on an employee's W-2 form with the costs described on the

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[14]An employee declares his or her filing status, number of allowances, and other withholding by submitting a W-4 Form to his or her employer. U.S. Department of the Treasury, Internal Revenue Service, Form W-4, https://www.irs.gov/pub/irs-pdf/fw4.pdf (last visited December 30, 2019).

[15]Disclosure of this information may also cause an unwarranted invasion of the employee's personal privacy, and can also be withheld pursuant to section 7(1)(c) of FOIA.

[16]For the same reason, this information can also be withheld pursuant to section 7(1)(c) of FOIA. Ill. Att'y Gen. PAC Req. Rev. Ltr. 47124, issued May 30, 2017, at 3.

[17]U.S. Department of the Treasury, Internal Revenue Service, *Form W-2 Reporting of Employer-Sponsored Health Coverage,* https://www.irs.gov/affordable-care-act/form-w-2-reporting-of-employer-sponsored-health-coverage (last visited December 30, 2019).

[18]County of DuPage, *Employee Compensation*, https://www.dupageco.org/empcompensation/ (last visited December 30, 2019).

County's website, that person may be able to determine the particular health insurance plan an employee has selected and whether that employee has a spouse or children (if the spouse and children are covered by the plan). The Public Access Bureau has previously determined that the disclosure of the amounts contributed by employees for particular benefit plans that employees have opted to participate in and information concerning employee benefits deductions that reflect the number of dependents of each employee is exempt pursuant to section 7(1)(c) of FOIA. Ill. Att'y Gen. PAC Req. Rev. Ltr. 17922, issued June 26, 2012, at 5 ("Such information is based on highly personal circumstances of an individual's life; the individual's right to privacy outweighs any legitimate public interest in disclosure of this information."). Although the amount recorded in Box 12, code DD, reflects, both the premiums paid by employee and the amount of public funds used to pay for health insurance, disclosure of this value would reveal highly personal information about the employee's family status and insurance decisionmaking. Accordingly, the County also may redact this value pursuant to section 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 serves to close this matter. If you have any questions, please contact me at (312) 814-6437 or the Chicago address on the first page of this letter.

Very truly yours,

[redacted]

LEAH BARTELT
Deputy Public Access Counselor
Public Access Bureau

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FOIA
2016 PAC 39896
Duty to supply names of public employees or officers where their signatures have been redacted

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

August 27, 2019

Mr. Scott Moran
Paralegal
Law Offices of Thomas W. Duda
330 West Colfax Street
Palatine, Illinois 60067

Mr. Stepfon R. Smith
Smith Amundsen
150 North Michigan Avenue, Suite 3300
Chicago, Illinois 60601

RE: FOIA Request for Review – 2016 PAC 39896

Dear Mr. Moran and Mr. Smith:

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 discussed below, the Public Access Bureau concludes that the City of Harvey's (City) response to Mr. Scott Moran's December 8, 2015, FOIA request did not violate the requirements of FOIA.

On that date, Mr. Moran, on behalf of a law firm representing City firefighter Jerry Valadez, submitted a FOIA request seeking records relating to Mr. Valadez, including fire suppression call records and accident reports. On December 29, 2015, the City furnished Mr. Moran with forty-six pages of redacted records, but denied copies of medical records relating to Mr. Valadez under section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2015 Supp.), and also redacted certain typed names and signatures. In his Request for Review, Mr. Moran challenged the City's redaction of names and asserted that when the City redacted signatures it should have provided him with the names of the signatories.

On February 9, 2016, this office sent a copy of the Request for Review to the City, and requested that it provide un-redacted copies of the records at issue and a detailed explanation of the factual and legal bases for the redactions. On February 18, 2016, the City

furnished this office with copies of the un-redacted records. On August 3, 2016, the City provided a written response.

On August 5, 2016, this office forwarded a copy of the City's response to Mr. Moran; he replied on August 14, 2016. On June 11, 2018, Mr. Moran informed an Assistant Attorney General in the Public Access Bureau that the only issue he continued to contest is whether the City was obligated to provide the names of signatories when it redacted signatures from the records provided.

DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2018). FOIA requires that "each public body shall make available to any person for inspection and copying all public records, except as otherwise provided in Section 7 of this Act." 5 ILCS 140/3(a) (West 2018).

Under section 7(1)(b), "[p]rivate information" is exempt from disclosure "unless disclosure is required by another provision of this Act, a State or federal law or a court order." Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2018), defines "private information" as:

> unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.

The Public Access Bureau has consistently concluded that a person's signature is a unique identifier that may be redacted under section 7(1)(b) of FOIA. *See, e.g.*, Ill. Att'y Gen. Pub. Acc. Op. No. 14-015, issued November 25, 2014, at 11. Mr. Moran contends that although the signatures may be redacted, the City should have provided him with the names of the persons whose signatures were redacted from the records. Because this issue has arisen in previous instances, we will take the opportunity to clarify.

Although the Act does not expressly so provide, the Public Access Bureau concludes that when a requester seeks a record prepared by a public body containing the name of

a public employee or officer whose signature is redacted from a record, FOIA requires a public body to provide that name upon request, if it may be reasonably identified. The purpose of section 7(1)(b) is to safeguard "unique identifiers," in this case a signature; the name of the person who signed the document is not *per se* exempt from disclosure under section 7(1)(b) of FOIA.[1] *See Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 411-12 (1997) (names are "basic identification," not private information, and, thus, not within the scope of section 7(1)(b)). Indeed, in many circumstances, the name of the person signing a document is information without which the validity or significance of the document cannot be determined. Providing the name of a public employee or officer signatory whose signature was redacted effectuates the intent of FOIA to provide members of the public with "full and complete information regarding the affairs of government and the official acts and policies of * * * public officials and employees." 5 ILCS 140/1 (West 2018).

Because Mr. Moran did not ask the City to identify the names of the individuals whose signatures were redacted from the responsive records until after he received the City's response, this office concludes that the City did not violate FOIA by redacting those signatures without providing the names of those individuals. In light of the conclusion this office has reached in this determination, however, Mr. Moran may wish to ask the City to identify the names of those public employees or officers whose signatures were redacted from the specific records, if those signatures may be reasonably identified.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, please contact me at 312-814-5201 or at the Chicago address listed on the bottom of the first page of this letter.

Very truly yours,

[redacted]

EDIE STEINBERG
Assistant Attorney General
Public Access Bureau

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[1]In addition to signatures, the City redacted typed names of public employees that appear in signature blocks and other portions of the responsive records. Because typed names are basic identification rather than "unique identifiers," they are not exempt from disclosure pursuant to section 7(1)(b). *Lieber*, 176 Ill.2d at 411-12.

OMA
2018 PAC 55838
Open session vote needed to approve Closed session minutes.

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

September 13, 2019

Via electronic mail
[redacted]

Via electronic mail
Mr. Jack Elsner
General Counsel
Forest Preserve District of DuPage County
3S580 Naperville Road
Wheaton, Illinois 60189
jelsner@dupageforest.org

RE: OMA Request for Review – 2018 PAC 55838

Dear [redacted] and Mr. Elsner:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2016)). For the reasons that follow, the Public Access Bureau requests that the Board of Commissioners (Board) of the Forest Preserve District of DuPage County (District) approve the minutes of its closed sessions in open session.

On November 21, 2018, [redacted] submitted this Request for Review alleging that the Board violated section 2(e) of OMA (5 ILCS 120/2(e) (West 2018)) on October 16, 2018, by approving closed session minutes in closed session and failing to identify in open session which meetings' minutes were approved. On December 4, 2018, this office sent a copy of the Request for Review to the Board and asked it to respond to [redacted] allegation. This office also asked for copies of minutes of the Board's October 16, 2018, meeting (both open and closed sessions), together with the verbatim recording from the closed session in question. On December 11, 2018, the Board provided this office with a transcript of the closed session and a written response contending that, although it approved closed session minutes during closed session at its October 16, 2018, regular meeting, it did not violate section 2(e) of OMA. On

December 14, 2018, this office forwarded a copy of the Board's written response to [redacted]; he did not reply.

DETERMINATION

OMA is intended "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (West 2016). Section 2(e) of OMA provides that "[n]o final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted."

The Board entered closed session on October 16, 2018, pursuant to section 2(c)(21) of OMA (5 ILCS 120/2(c)(21) (West 2018)), which permits a public body to hold a closed session for "**[d]iscussion** of minutes of meetings lawfully closed under this Act, whether **for purposes of approval by the body of the minutes** or for semi-annual review of the minutes as mandated by Section 2.06." (Emphasis added.)

In its response to this office, the Board acknowledged that it met in closed session to review and approve previous closed session minutes and confirmed that it "thereafter took no further action regarding the minutes in open session."[1] The Board noted that there are two instances in which a public body must take action on closed session minutes in open session: (1) if the public body wishes to destroy the closed session verbatim recording from a meeting that occurred at least 18 months prior, the public body must first approve closed session minutes of the meeting that contain sufficient information (5 ILCS 120/2.06(c) (West 2018)); and (2) each public body must semi-annually decide and report on the extent to which it needs to keep its closed session minutes confidential. Because the Board was merely approving the draft minutes of closed sessions in this matter rather than serving either of those purposes, the Board argued, it was not obligated to take action in open session. The Board cited *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, 77 N.E.3d 625 (2017) for its assertion that "a public body can take action in closed session as long as it is not final action of business being conducted by the" public body.[2]

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[1]Letter from John T. Elsner, General Counsel, Forest Preserve District of DuPage County, to Leo Draws, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (December 11, 2018), at 1.

[2]Letter from John T. Elsner, General Counsel, Forest Preserve District of DuPage County, to Leo Draws, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (December 11, 2018), at 2.

In *Springfield School District*, the Supreme Court of Illinois found that OMA "contains no bar to a public body's taking a preliminary vote at a closed meeting." *Springfield School District*, 2017 IL 120343, ¶73, 77 N.E.3d at 637. The Supreme Court stated that a public body must hold a public vote to properly take final action: "Without the public vote, no final action has occurred." *Springfield School District*, 2017 IL 120343, ¶74, 77 N.E.3d at 637. OMA does not define "final action," however, and no Illinois court has precisely defined that term. In *Gosnell v. Hogan*, 179 Ill. App. 3d 161 (5th Dist. 1989), the Illinois Appellate Court examined whether a board's decision in closed session to authorize a request for mediation as an alternative to the negotiations it had been conducting with the secretaries' union was a final action, and concluded that it was not; instead, the board's authorization of mediation was merely a step towards reaching final action on the union's contract. *See Gosnell*, 179 Ill. App. 3d at 176 ("Mediation, similar to negotiating, is not an end in itself, but rather, a means to an end. Negotiations and mediations are made up of many 'unilateral' decisions, such as what to offer or counteroffer, and to hold that each of the unilateral strategical decisions that make up the constituent parts of a negotiation is in and of itself a final action is unreasonable."). Accordingly, "final action" generally must resolve a matter. *Compare Davis v. Board of Education of Farmer City– Mansfield Community Unit School District No. 17*, 63 Ill. App. 3d 495, 499 (4th Dist. 1978) (adoption of resolution in closed session stating tentative intent to terminate superintendent's employment "did not dispose of the question of whether that employment should be terminated and, therefore, was not final action[,]" where board subsequently took final action to terminate the superintendent's employment in open session); *with Kosoglad v. Porcelli*, 132 Ill. App. 3d 1081, 1092 (1st Dist. 1985) (vote to remove commissioner from police board in open session was final action);[3] *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 32463, issued July 14, 2015, at 3 ("[A] component of a public body's process of reaching final action generally does not, itself, constitute final action.").

The approval of minutes disposes of the question of whether minutes are to be approved; such approval does not constitute a mere component of a larger decision-making process. Although the Board argues that it was not yet required to approve the closed session minutes at issue during its October 16, 2018, meeting because it was not yet seeking to destroy the corresponding closed session verbatim recordings, "final actions" are not limited to decisions that a public body is required to make at the time. Therefore, the approval of minutes is a final action that public bodies are required to take in open session. As set forth in *Springfield School District*, a public body may take a preliminary vote in closed session as to whether it intends to approve certain minutes. Nonetheless, in keeping with OMA's mandate that "no final action may

[3]For an analogous articulation of "final action" outside of the OMA context, *see U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016) (final agency action "[f]irst * * * must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 1168 (1997))).

be taken at a closed meeting" the vote to approve the minutes that serves as final action should take place in open session.

This office is aware that public bodies may have interpreted the section 2(c)(21) exception, which contains the phrase "for purposes of approval by the body," as permitting final approval of minutes to occur in closed session. As noted in the Board's response, the Public Access Counselor's electronic training curriculum paraphrased the statute in a way that suggested that closed session minutes could be approved in closed session.[4] This office has not previously considered this question in the context of a Request for Review. Upon careful consideration, this office concludes that in keeping with OMA's underlying purpose that actions and deliberations of public bodies be conducted openly, as well as the prohibition of final action in closed session, the better practice is to conduct the vote to approve minutes of closed sessions in open session. Just as the other OMA exceptions to open meetings allow discussion of particular, limited topics in closed session, but require public votes to take final action, closed session "[d]iscussion of minutes of meetings lawfully closed" is allowed, but the vote constituting the final approval should occur in open session.

This office's review of the verbatim transcript of the Board's October 16, 2018, closed session confirmed that the Board took a formal roll call vote in an attempt to approve certain closed session minutes. This office requests that the Board follow that closed session vote with a vote in open session to formally approve the minutes.

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 (217) 782-1699, ldraws@atg.state.il.us, or the Springfield address on the bottom of the first page of this letter.

Very truly yours,

[redacted]

LEO DRAWS
Assistant Attorney General
Public Access Bureau

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[4]The online OMA training has been updated to clarify this point in keeping with the conclusions in this letter.