GREY AREAS IN THE FREEDOM OF INFORMATION ACT

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7(1)(f) - POLICY RATIONALE -

While the purpose of FOIA is to facilitate access to records that relate to the affairs of government, the exemptions in Section 7 and 7.5 and particularly Section7(1)(f) are a recognition by the General Assembly that there is compelling **countervailing** policy interest in allowing public bodies to have unfettered and frank internal discussions, without the concern that those internal discussions will be made public.

5 ILCS 140/7 and 140/7.5

5 ILCS 140/7(1)(f) PREDECISIONAL MATERIAL

- 5 ILCS 140/7(1)(f) exempts from disclosure:

  Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body.

SCOPE OF 7(1)(f) – Defined in Harwood

- The Illinois Appellate Court outlined the scope of section 7(1)(f) in Harwood v. McDonough, 344 Ill. App. 3d 242 (1st Dist. 2003).
- Harwood concerned a report created by an outside vendor providing recommendations to the State on the Boeing Corporation's relocation to Chicago. The Court compared the IL exemption to the deliberative process privilege found in federal FOIA, "which exempts from disclosure inter- and intra-agency predecisional and deliberative material."
- After noting that the privilege "is intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made," the Court ruled that the outside vendor report was exempt under section 7(1)(f).
- The takeaway is that a final report is still exempt if it was used/relied upon in the deliberative process. The ultimate decision is not exempt, but the discussions and materials used to get to that point are exempt.

Examples of Material that Would be Exempt under Section 7(1)(f):

- DRAFTS…DRAFTS…DRAFTS

- Communications amongst staff *within* a department or *between* departments that contain discussions and recommendations related to making a **decision** or **policy** or **action**

- Scoring sheets with bid proposals that contained notes and impressions that were relied upon to select a bid

- Communications with the public body's attorneys will almost always be 7(1)(f) so long as they are in their role as attorneys.

- Communications with outside consultants or attorneys that are relied upon by a public body are also protected ("interests aligned test)."

Examples of Material that Would NOT be Exempt under Section 7(1)(f):

- Purely factual material/data (unless inextricably intertwined)

- Communications between public body employees/officials and the general public from where advice has not been sought (exceptions may apply).

- Final decisions taken by the public body are not protected

- CAUTION: This exemption is WAIVED when the record is "publicly cited and identified by the head of the public body".

- Remember: "Purely factual material must be disclosed once a final decision has been made, unless the factual material is inextricably intertwined with pre-decisional and deliberative discussions."

State Journal Register v. University of Illinois Springfield, *2013 IL App. (4th) 120881*

As a final note, please remember that the 7(1)(f) language is broad and all-encompassing:

"Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated."

Therefore, there is no requirement that there needs to be a policy discussed, discussing an **action** is sufficient.

There is also no requirement that any policy that is being discussed be "major" or incredibly significant. Any policy or action is sufficient and the exemption does not exclude any kinds of policies or actions.

DISCLOSURE OF COMPLAINTS & INVESTIGATIONS IN THE CONTEXT OF:

- FOIA
- PERSONNEL RECORD REVIEW ACT
- LOCAL RECORDS ACT
- COLLECTIVE BARGAINING AGREEMENTS
- ATTORNEY-CLIENT PRIVILEGE

➢ FOIA

7(1)(n) “Records 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.”

-The plain language of this exemption has been gutted by caselaw and PAC Opinions.

-Complaints and grievances are typically not exempt because they bear on the duties of a public employee. Under 7(1)(c) such information is not an “unwarranted invasion of personal privacy”.

However, complaints and grievances should be redacted based on appropriate exemptions.

Pending investigations – Records may be withheld during an active IAU or other investigation. Applicable exemptions typically include 7(1)(d)(i), 7(1)(d)(ii), 7(1)(f).

After the investigation is concluded as unfounded, or discipline has been imposed, the investigatory records are subject to disclosure.

Redactions can and should be made prior to any release of an investigation in response to a FOIA request to protect complainant's privacy interests and possibly others' privacy interests.

7(1)(n) **only** exempts records of a formal disciplinary process that results in a final and enforceable decision. Such as hearings before the Board of Fire and Police Commissioners or arbitration hearings.

➢ THE PERSONNEL RECORD REVIEW ACT ("PRRA")

Section 8 of the PRRA [820 ILCS 40/8] requires employers to delete "disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than **4 years** old".

Even if you have disciplinary records more than 4 years old, they are exempt under the PRRRA. *Johnson v. Joliet Police Dept.* 2018 IL App (3d) 170726.

Encourage your clients to stay on top of the 4 year timeframe and timely delete disciplinary records from personnel files.

➢ Local Records Act

A public body may need to retain complaints and disciplinary records longer than 4 years (the PRRA time limit) under direction from the Local Records Commission.

Just keep these records in a separate file and **out** of employees' personnel files.

➢ Collective Bargaining Agreements

If disciplinary records are not retained in employees' personnel files, there should be no conflict with a collective bargaining agreement which requires their removal within a certain timeframe so long as those records are not used for progressive discipline or any other employment purpose.

➢ ATTORNEY-CLIENT PRIVILEGE

If an attorney conducts the investigation in anticipation of civil, criminal, and/or administrative proceedings, the investigation may be argued to be exempt under **7(1)(m)**

Accord: non-binding PAC Opinion 2012 PAC 19643

EMAIL ISSUES IN FOIA

This is an area fraught with potential pitfalls but here are some pointers to help.

- **Always have your email administrator pull the emails, not the actual email custodian(s).**
- **Look out for 7(1)(f) exempted material, it's commonly missed.**
- **Unduly Burdensome is often your best defense. While there is no magic number, any review that would take over 35 hours worth of work (at a rate of 2 min/page) is likely "unduly burdensome" under FOIA. If there is no public interest in the request, even fewer hours would qualify as UB.**
- **Emails/texts on private accounts is a HOTLY contested issue and is before the Illinois Appellate Court. PAC requires you at least make the "ask" of your employees but even this middle position is problematic.**

LITIGATION PITFALLS

- **Discovery in FOIA cases is increasingly common. Lots of federal case law that disfavors discovery in FOIA cases. Usually Plaintiffs want discovery in FOIA cases to prove willful and intentional conduct, this at least allows you to argue that discovery is improper until Court finds there is a violation.**

- **Look out for 7(1)(f) exempted material, it's commonly missed.**

- **Unduly Burdensome is often your best defense. While there is no magic number, any review that would take over 35 hours worth of work (at a rate of 2 min/page) is likely "unduly burdensome" under FOIA. If there is no public interest in the request, even fewer hours would qualify as UB.**

NO DUTY UNDER FOIA TO CREATE A NEW RECORD vs. TECHNOLOGY

Distinction between "**interpretation**" and "**compilation**".

A FOIA request that calls for any kind of analysis or interpretation of public records would result in creation of a new record – which is *not* required under FOIA.

-e.g. -A list of the first 100 FOIA requests in a year.
-The number of registered students without social security numbers.

National Security Counselors v. CIA, 898 F. Supp. 233, 270 (D.D.C. 2012); *Hites v. Waubonsee Community College*, 2016 IL App (2d) 150836 (¶¶74-79)

But a FOIA request calling for **compilation** of records, including data points within databases under the control of the public body, is not viewed as requiring a public body to create a new record.

Extracting data from a database is considered a **search**.

"…sorting a database to make information intelligible does not create a new record…computer records in a database may require application of codes or programming to retrieve information." *Hites I* at ¶63

e.g. retrieval of zip codes of students in particular classes in particular years; "raw input" for specified fields

UNDULY BURDENSOME

- The FOIA provides in 5 ILCS 140/3(g) that requests for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information.

Requests may be unduly burdensome for the following reasons:

- the request seeks “any and all” records;
- the request uses broad phrasing such as, “all records relating to,” “pertaining to,” “all communications”;
- the request is unclear and vague and you cannot identify the records being sought;
- e-mails are sought without providing key words or e-mail accounts to search;
- e-mails and other records have been identified but the volume of records makes the request burdensome.

EXAMPLE: There are a total of **1,029 requested documents** that are responsive. In order to produce these emails, each of the 1,029 emails would need to be reviewed. Information exempt under FOIA would need to be redacted. The redacted documents would need to be separately saved and then produced to you. It is estimated that it would take, **at a minimum**, 1 hour to review, redact and produce 20 emails. Therefore, it would take approximately 51 hours to review and produce the documents that you requested.

***AMOUNT OF TIME TO REVIEW DOCUMENTS MAY VARY WITH ENTITY AND TYPE OF DOCUMENT.**

NO MAGIC NUMBER FOR UNDULY BURDENSOME BUT 35-40 HOURS OF WORK TO COMPLETE IS A GOOD MEASURE.

ALSO, PAC DECISIONS REGARDING UNDULY BURDENSOME:

In 2013 PAC 23430, the PAC found "having to produce more than 1,000 emails that fall within the general category of records sought would be unduly burdensome."

In 2012 PAC 20808, the PAC also held that CACC's use of section 3(g)/ the unduly burdensome exemption was proper.

Hites v. Waubonsee Community College, 2018 IL App (2d) 170617: PL sought database records, Public body denied request as UB, stating it would take 120 hours to complete request. Appellate court found that public body "padded its time" and would really take about a week not to complete, thus not UB under FOIA. Data extraction is not like hand review of paper records so you cannot count that time.

Keep in mind that burden must be weighed against public interest in disclosure.

If there is a strong public interest in disclosure, burden may not matter.

Burdensome letters should try to address the lack of public interest in the disclosure, if possible.

PERMISSIVE vs. MANDATORY FOIA EXEMPTIONS

-Exempt information **<u>may be</u>** redacted. 5 ILCS 7(1).

-That said, some FOIA exemptions are permissive and others are mandatory. *See hand-out.*

Examples of mandatory exemptions:

~PRRA [140/7.5(q)]

~Juvenile law enforcement records where a juvenile is arrested, charged or investigated. [140/7.5(bb)]

~Employees' addresses, telephone numbers, and SS#s on certified payroll records [140/2.10]

PRIVATE INFORMATION – 7(1)(b)

Private information (is exempt), unless disclosure is required by another provision of this Act, a State or federal law or a court order.

Defined in Section 2(c-5) as unique identifiers, including:

-SS#
-Employee I.D.#
-Personal financial info.
-Medical records
-Personal email addresses
-Personal license plates
-Driver's license #
-Biometric identifiers
-Passwords or other access codes
-Home or personal telephone #s
-Home addresses

(Note: D.O.B. should be on this list, but instead has been determined to be a 7(1)(c) exemption. Age is not exempt).

PERSONAL INFORMATION– 7(1)(c)

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 which 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.

A 3 step **balancing test** for a FOIA Officer:

1. The requester's interest, and the public's interest, in the disclosure.
2. The degree of invasion of personal privacy.
3. The availability of an alternate means of obtaining the information.

National Association of Criminal Defense Lawyers v. Chicago Police Dept. 399 Ill. App. 3d 1, 13 (1st Dist. 2010);
See also *Chicago Journeymen Plumbers' Local 130, U.S. v. Dept. of Public Health*, 327 Ill. App. 3ad 192, 196: **Unwarranted invasion of personal privacy is evaluated on a case-by-case basis.**

7(1)(d)(vi) Records in the possession of any public body in the course of administrative enforcement proceedings, and any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would:

(vi) Endanger the life or physical safety of law enforcement personnel or any other person.

LIABILITY FOR FAILURE TO REDACT PRIVATE AND PERSONAL INFORMATION

Munn v. City of Aurora

Facts: Latin King prisoner FOIAs and obtains private and personal information pertaining to city police officers who were responsible for his incarceration.

Information released: names, home addresses, personal phone numbers, information about family members (also SSNs).

The police officers and their families (23 plaintiffs) sue the city and the former city Records Manager/FOIA Officer under 42 U.S.C. §1983 and supplemental state claims.

Plaintiffs alleged that the city's Records Manager "repeatedly, knowingly, recklessly, and/or intentionally disclosed private and personal information in response to the FOIA request".

And that the city failed to properly train and supervise, allowed a custom, pattern, and practice of disclosure of "prohibited" information", and that the actions in question were taken by persons having final policymaking authority.

Plaintiffs claim that release of the information in question constituted a Constitutional violation of their substantive due process rights to privacy, safety, and security under the 4th and 14th Amendments of the U.S. Constitution.

Plaintiffs seek compensatory damages against the city and Records Manager/FOIA Officer, claiming emotional distress because they allege that they live in a state of compromised safety, family upheaval, and are **contemplating** taking costly steps to protect themselves.

The Records Manager is sued in her individual capacity. Plaintiffs also seeks punitive damages against her.

Attorneys' fees and costs are also at stake. 42 U.S.C. §1988.

Defendants' Motion to Dismiss was denied by Judge Ellis who found the facts, as pled, sufficient to state a cause of action based on **"state-created danger"** (even though plaintiffs did not assert that claim).

"State-created danger" is an exception to the general rule that the state does not have a duty to protect an individual against private violence. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197(1989).

The elements of a claim of state-created danger are:

1. The state, by its affirmative acts, must create or increase danger to plaintiffs.

2. The failure of the state to protect plaintiffs from danger must be the proximate cause of their injury; and

3. The state's failure to protect plaintiffs must "shock the conscience".

Qualified immunity.

Judge Ellis found the Records Manager ineligible for the defense of qualified immunity since the theory of state-created danger was clearly established at the time of the disclosure.

***Monell*.**

Defendants argued that plaintiffs' allegations did not give rise to a claim of policy or practice under *Monell*. Judge Ellis disagreed, "…a plaintiff may rely solely on his own experience." Also, plaintiffs alleged a city audit showing other disclosures of private and personal information by the city in response to FOIA requests.

In denying the Motion to Dismiss, Judge Ellis relied heavily on ***Kallstrom v. City of Columbus***, 136 F.3d 1055 (6th Cir. 1998) which had an analogous fact-pattern. Personnel files of 3 undercover officers were given to the attorney of several gang member defendants in a criminal prosecution. The gang members had access to the records.

The 6th Circuit held that the officers had a constitutionally protected privacy interest under the substantive component of the 14th Amendment's Due Process Clause and that the state action requirement necessary to prove a violation of the 14th Amendment was met through the theory of state-created danger.

***On remand the city won on SJ. Plaintiffs made no showing of substantial harm. The disclosure of records did not "shock the conscience".

Summary judgment in *Munn* is to be fully briefed by June, 2019.

By then the case will have been pending for 23 months.

The city and FOIA Officer will very likely be vindicated, but at significant cost in terms of the expense to defend and the wear and tear on plaintiffs and defendants who are usually on the same side.

Going forward-

- We should consider advising our FOIA Officers to **be aware of the identity of the FOIA requester** if possible. This is contrary to the basic tenet of FOIA – that the identity of the requester is irrelevant (and at times the requester is anonymous.)

- If a dangerous situation can be imagined as a result of releasing FOIAed records, the FOIA Officer should err on the side of nondisclosure (a no-win position given inevitable PAC appeals.)

- Consider citing the *Munn* case in support of redactions based on personal or private information, or if there's a possible danger to law enforcement personnel or others.

- Private information under 7(1)(b) should no longer be treated as a permissive exemption; it should be treated as a mandatory exemption.

- The more difficult issue will be determining when 7(1)(c) “unwarranted Invasion of personal privacy” is “mandatory”.

- The most difficult issue will be explaining all this to our FOIA Officers who could be sued, as the FOIA Officer in *Munn* is being sued, in their individual capacities for compensatory and punitive damages.

FOIA AND DISCOVERY IN CRIMINAL CASES

In ***Turner v. Joliet Police Department***, 2019 IL App (3d) 170819, the Third District opined, in *dicta*, that IL Supreme Court Rule 415 governs discovery in criminal cases and that a FOIA request is not a proper avenue for defendant to pursue release of records. Therefore, the defendant could view the police records through his attorney, but was not entitled to receive or possess them in response to a FOIA.

-Contrary to PAC Opinion 13-017.

-Doesn't address situations where a criminal defense attorney seeks records through FOIA in advance of discovery. Or situations where someone else FOIAs on behalf of a defendant.

QUESTIONS


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