



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

August 2, 2010

Mr. Tom Reuter
FOIA Officer
Illinois Environmental Protection Agency
Via electronic mail
Tom.Reuter@Illinois.gov

RE: FOIA Pre-approval Request – 2010 PAC 5422

Dear Mr. Reuter:

On January 25, 2010, we received from the Illinois Environmental Protection Agency (IEPA) a written request for approval of its intention to assert the Section 7(1)(f) exemption in response to a January 18, 2010 Freedom of Information Act (FOIA) request from Ms. Jennifer Storipan with Lowenstein Sandler, seeking documents related to a specific site. The request was granted in part and denied in part. IEPA sought to withhold certain draft documents and preliminary scoring documents as exempt under Section 7(1)(f). On February 1, 2010, we determined that further inquiry into the matter was warranted and asked IEPA to provide us with copies of some of the documents and with further explanation of the nature of those documents.

Section 7(1)(f) of the Freedom of Information Act allows withholding of:

[p]reliminary drafts, notes, recommendations, memoranda or other documents 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. 5 ILCS 140/7(1)(f).

Based on our review of IEPA's response, we have determined that IEPA has met its burden of justifying its determination to withhold the identified documents pursuant to Section 7(1)(f). The Illinois Appellate Court in *Harwood v. McDonough*, 344 Ill. App. 3d 242 (1st Dist. 2003), ruled that "as a matter of public policy, section 7(1)(f) exempts from disclosure predecisional materials used by a public body in its deliberative process." *Id.* at 247. In considering the matter, the *Harwood* court adopted the defendant's argument that the word "preliminary" does not refer to the "posture of the particular document sought to be disclosed" but rather to "predecisional intra-agency communications." *Id.* at 247-248. The court noted that no previous Illinois caselaw interpreted the use of the word preliminary and, as such, stated that it was helpful to look to cases

interpreting the parallel language of the Federal Freedom of Information Act. The court determined that the exemption is intended to protect "predecisional, deliberative communications that are part of an agency's decision-making process." *Id.* at 248 (quoting *Parmalee v. Camparone*, No. 93 C 7362, 1998 WL 704181 (N.D. Ill October 1, 1998)).

The records at issue appear to fall within the scope of the exemption. One of the records in question is a draft of a plan for addressing issues at the site, which falls clearly within the language of the Section 7(1)(f) exemption. Additionally, IEPA has explained that these documents consist of the preliminary evaluations and recommendations with regard to the assessment of the site in question and the agency's determination of proper action with regard to that site. It is our understanding that IEPA staff consider these recommendations in determining the agency's enforcement options, priorities and strategies with regard to environmental hazards and that these assessments are used in making recommendations to the USEPA. The agency's explanation indicates that the documents are predecisional and constitute part of IEPA's deliberative process in determining how to proceed with regard to enforcement of environmental regulations. Finally, IEPA has indicated that the records have not been publicly cited and identified by the head of the public body. As such, the records may be withheld from disclosure under Section 7(1)(f).

If you have any questions, please feel free to contact me at (217) 785-7438. This letter shall serve to close this file.

Sincerely,

Cara Smith
Public Access Counselor

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Amanda M. Lundeen
Assistant Public Access Counselor

cc: Ms. Jennifer Storipan
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