



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 23, 2010

City Clerk Steve Kapitan
City of DeKalb
200 South 4th Street
DeKalb, Illinois 60115

RE: Pre-Authorization Requests – 2010 PAC 5611

Dear Mr. Kapitan:

We have received and reviewed the written notice from the City of DeKalb (City) of its intent to deny disclosure of certain records under subsection 7(1)(c) of the Freedom of Information Act, 5 ILCS 140/1 *et seq.*, as amended (FOIA).

██████████ submitted a FOIA request to the City on January 22, 2010, seeking: 1) "all records, correspondence, e-mails, lists, information and memos regarding or mentioning the appointment of Pam Verbic as 3rd Ward alderwoman and any other individuals considered for the aldermanic seat" and 2) "any correspondence in any form between Mayor Kris Povlsen and the six other City of DeKalb alderm[e]n regarding the aldermanic seat." The City asserted in its written notice dated January 29, 2010 (Notice), that disclosure of this information would constitute "a clearly unwarranted invasion of personal privacy for applicants for an appointed or elected position" under subsection 7(1)(c) of FOIA. The City further asserted:

While two of the applicants have publicly announced their interest in the position, none of the rest of the applicants has indicated their willingness to have their name disclosed. Further, for about half of the applicants, e-mail addresses and personal telephone numbers are reflected on the list. If the names are not exempt, we believe that e-mail addresses and personal telephone numbers are exempt and should be redacted from the list.

With regard to the e-mail communications, copies of which are attached, in a number of the e-mails, opinions as to the qualifications of the

prospective candidates are expressed. If the Mayor and City Council had chosen to discuss this matter in closed session, pursuant to 5 ILCS 120/2(c)(3), the minutes of those discussions would have been kept confidential and would not be released to the general public. In that light, [the City] believe[s] that it is appropriate to deny the production of those e-mails or to redact the portions of the e-mails that make any reference to the qualifications of the candidates or the opinions of the Mayor and sitting Alderm[e]n on those candidates.

In an additional letter that the City submitted to our office on February 9, 2010, the City asserted, in part:

... [O]f the individuals on the requested list who were under consideration, some were self-referred, others were approached by Mayor Povlsen, while still others were referred by a third party. Of the persons who were self-referred, two have disclosed their names publicly. A third was chosen as the Third Ward Alderman. The City has not received written consent from any of the persons on the list to release their names. And while we may assume that persons who were self-referred would not be opposed to the release of their names, we do not know this for sure. Further, that same assumption cannot be made for the persons who were approached by Mayor Povlsen or were referred by third parties.

The City submitted to us approximately 56 documents related to the appointment of a Third Ward alderman. The information in these documents can be divided into four general categories: 1) names of prospective candidates for the Third Ward position; 2) resumes or curricula vitae from prospective candidates; 3) letters and e-mail correspondence between prospective candidates and Mayor Povlsen concerning the candidates' qualifications for the position; and 4) e-mail correspondence between Mayor Povlsen and sitting City aldermen regarding the Third Ward appointment.

Subsection 7(1)(c) of FOIA exempts from inspection and copying “[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information.” 5 ILCS 140/7(1)(c). The exemption defines “[u]nwarranted invasion of personal privacy” as “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.” *Id.*

Prospective Candidate Names, Resumes, Curricula Vitae and Correspondence

Use of the subsection 7(1)(c) exemption is **denied** with regard to the names of the prospective candidates, their resumes, curricula vitae, and letters or e-mail correspondence between prospective candidates and Mayor Povlsen concerning their qualifications for the Third Ward position. The City has failed to establish either that

disclosure of this information would be highly personal or objectionable to a reasonable person or that the candidates' right to privacy outweighs any legitimate public interest in obtaining this information about the people being considered for appointment to this public office.¹ City aldermen are public officials who represent the residents of their ward on the City Council. Once appointed, aldermen who wish to remain in the position eventually must submit valid nominating petitions to qualify for the ballot and be elected by voters of their ward based on their background and qualifications for the position. As a result, when this public office becomes vacant, citizens have a legitimate interest in knowing who is being considered for the position so that they may evaluate whether the individuals are qualified to represent a particular ward and discern why one applicant was appointed over others. It is precisely this public scrutiny of public officials that the General Assembly had in mind in enacting FOIA. See 5 ILCS 140/1 (declaring the purpose of FOIA). Moreover, a candidate for a vacant aldermanic position must meet a residency requirement for representing a particular ward. See 65 ILCS 5/3.1-10-5(c). The public has a legitimate interest in evaluating whether these candidates have met that residency requirement before the vacancy is filled.

With regard to the prospective candidates' names, disclosure is further supported by the Illinois Supreme Court's decision in *Lieber v. Bd. of Trs. of S. Ill. Univ.*, 176 Ill.2d 401 (1997). In *Lieber*, the Supreme Court considered whether the names and addresses of individuals who had contacted Southern Illinois University about freshman housing constitute "personal information" within the meaning of FOIA and, thus, were exempt from public disclosure. 176 Ill.2d at 411. The Court explicitly rejected the public body's argument that the students' names constitute "personal information" under FOIA. It held that "[a]lthough names and addresses are unquestionably personal in the sense that they are specific to particular persons, the statutory reference to 'personal information' means more than simply that." *Id.* Looking at the statute as a whole, the Court held that reference to one's identity alone does not constitute "personal information" under FOIA. See *Id.* at 411-12.

Additionally, subsection 2(c)(3) of OMA does not support the City's assertion of the exemption from disclosure in subsection 7(1)(c) of FOIA. Both OMA and FOIA "ensure the public's access to information concerning the conduct of public bodies, except in limited circumstances, and must be construed together." *Copley Press, Inc. v. Board of Education for Peoria School District No. 150*, 359 Ill. App. 3d 321, 325 (3rd Dist. 2005). OMA exceptions authorizing a public body to hold closed meetings, however, do not

¹That some candidates did not submit their names for consideration, but rather were referred for consideration by Mayor Povlsen or a third party, is not controlling in this analysis. Rather, the issues are (1) whether the disclosure of the names, or the information in the resumes and curricula vitae or the letters and email correspondence between the prospective candidates and Mayor Povlsen is highly personal or objectionable to a reasonable person and, if so, (2) whether the candidates' right to privacy with respect to this information outweighs the public's legitimate interest in knowing that these candidates are being considered for the Third Ward position and obtaining information on the prospective candidates' qualifications.

purport to exempt from disclosure documents that might be or have been discussed in a closed meeting. Conversely, with the exception of the minutes and the verbatim recording of a closed meeting, FOIA does not expressly exempt from disclosure any records relating to closed meetings. While the fact that a public body can properly discuss certain records in a closed meeting may suggest a heightened sensitivity to the nature of the matters contained in the records, the disclosure of those records is nonetheless governed solely by FOIA, and not by OMA. Thus, to the extent that a public body seeks to withhold a document, the public body must identify a specific FOIA exemption that applies to the document.

In sum, the names of the prospective candidates do not constitute "personal information" for purposes of subsection 7(1)(c) and must be disclosed. Any resumes or curricula vitae that the candidates submitted, and any letters or e-mail correspondence between the candidates and Mayor Povlsen concerning the candidates' qualifications for the Third Ward position do not constitute "personal information ... the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" under subsection 7(1)(c) and also must be disclosed.² We note that these documents may contain information that may be exempt from disclosure under exemptions in FOIA outside of those at subsections 7(1)(c) or 7(1)(f). The appropriate use of these other exemptions to deny disclosure of information does not require preapproval from our office. With regard to whether the prospective candidates' personal e-mail addresses and telephone numbers are exempt from disclosure, we would note that subsection 7(1)(b) of FOIA exempts from disclosure "private information", which includes personal e-mail addresses and personal telephone numbers. Thus, under subsection 7(1)(b), the City should redact the prospective candidates' personal e-mail addresses and personal telephone numbers from the information disclosed.

E-Mail Correspondence Between the Mayor and Sitting Aldermen

The City has asserted that e-mail correspondence between Mayor Povlsen and sitting City aldermen on the issue of the Third Ward appointment is exempt from disclosure under subsection 7(1)(c). However, after reviewing this correspondence, we have determined that the correspondence is exempt from disclosure under **subsection 7(1)(f)** of FOIA.

Subsection 7(1)(f) exempts from inspection and copying "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or

² The fact that the candidates for the position of Third Ward alderman have not consented in writing to the disclosure of this information has no bearing on whether this information is subject to disclosure under subsection 7(1)(c). FOIA does not require the City to secure written consent from the candidates before disclosing this information. The phrase in subsection 7(1)(c) cited by the City – "unless the disclosure is consented to in writing by the individual subjects of the information" – comes into play only when the information is deemed to be "personal information ... the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". 5 ILCS 140/7(1)(c). Because the names of the City's prospective candidates are not "personal information" under subsection 7(1)(c) and because the disclosure of the information in their resumes or curricula vitae, and any letters or e-mail correspondence between candidates and Mayor Povlsen concerning the candidates' qualifications would not constitute a clearly unwarranted invasion of personal privacy, the need for consent does not apply here.

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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). In this case, Mayor Povlsen and several City aldermen exchanged e-mail correspondence in which they expressed opinions about the qualifications of individual candidates and discussed the process for choosing an appropriate person to fill the Third Ward position. Additionally, there is no evidence from the City’s submission that Mayor Povlsen, as “the head of the public body” for purposes of subsection 7(1)(f), has publicly cited or identified any of this e-mail correspondence. Thus, as to this e-mail correspondence, the City may assert the exemption from disclosure under subsection 7(1)(f) for records in which opinions are expressed or policies or actions are formulated about the appointment of a Third Ward alderman.³

Should you have questions or concerns regarding this response, please feel free to contact me.


Sincerely,

Cara Smith
Public Access Counselor

By:


Sara Gadola Gallagher
Deputy Public Access Counselor

cc:


Daily Chronicle
1586 Barber Greene Road
DeKalb, Illinois 60115

³ Please note that the determinations made in this response to the City’s pre-authorization request do not apply to a pending Request for Review that involves an alleged violation of the Open Meetings Act by Mayor Povlsen and sitting City aldermen (2010 PAC 5703).