



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 6, 2011

Mr. John W. McCaffrey
General Counsel/Acting FOIA Officer
Illinois Department of Revenue
Legal Services Division
101 W. Jefferson Street, MC5-500
Springfield, Illinois 62702

RE: FOIA Pre-Authorization Request - 2011 PAC 12841

Dear Mr. McCaffrey:

We have received and reviewed the written notice from Illinois Department of Revenue (IDOR) of its intention to deny disclosure of certain information pursuant to sections 7(1)(c) and 7(1)(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/7(1)(c), (f) (West 2009 Supp.), as amended by Public Act 96-1378, effective July 29, 2010).

On February 11, 2011, Mr. John Stevens submitted a FOIA request for "all records relating to the investigation of NorthStar Lottery Group and its members, principals, key employees, and advisory board members conducted by Kroll Associates, Inc., whether these records are in the possession of the Illinois Department of Revenue (IDOR) or Kroll Associates, Inc., or any other party with whom IDOR has contracted to perform a governmental function." In its written notice, IDOR asserts that the requested records are exempt from disclosure under sections 7(1)(c) and 7(1)(f) of FOIA.

On March 17, 2011, this Office sent a further inquiry letter to IDOR, requesting a detailed legal and factual explanation of its basis for asserting that the records are exempt under the cited statutory exemptions, as well as a copy of the withheld records.

In its response letter dated March 28, 2011, IDOR asserted that the requested records are exempt from disclosure under section 7(1)(f) because they are comprised of drafts and other internal documents utilized by Kroll Associates during its initial investigation of NorthStar Lottery Group and the evaluation of the finalists in the Lottery Private Manager RFP. IDOR further noted that the records may also contain personal information which is exempt from disclosure under section 7(1)(c) of FOIA. In addition, IDOR contends that the documents in the

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possession of Kroll Associates are not public records because they were not prepared with the intention that the documents would be provided to IDOR.

Section 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." The exemption defines "unwarranted 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." 5 ILCS 140/7(1)(c) (West 2009 Supp.), as amended by Public Act 96-1378, effective July 29, 2010.

Section 7(1)(f) of FOIA exempts from inspection and copying "[p]reliminary 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." 5 ILCS 140/7(1)(f) (West 2009 Supp.), as amended by Public Act 96-1378, effective July 29, 2010.

DETERMINATION

We disagree with IDOR's contention that the records maintained by Kroll Associates are not public records under FOIA. Section 7(2) of FOIA clearly states that "[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." 5 ILCS 140/7(2) (West 2009 Supp.), as amended by Public Act 96-1378, effective July 29, 2010. In this case, the requested records are in the possession of an agency [Kroll Associates, Inc.] with whom IDOR had contracted to perform a governmental function on behalf of IDOR, and the records relate to that governmental function, regardless of whether the parties ever intended that the records would be furnished to IDOR. For this reason, we have determined that the requested records *are* public records, even though they are not in the possession of IDOR.

IDOR's request to withhold the records pursuant to section 7(1)(c) is **denied**. IDOR's assertion that the records may contain personal information is insufficient to satisfy its burden of proving, by *clear and convincing evidence*, that disclosure of the records would constitute a clearly unwarranted invasion of personal privacy.

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However, IDOR's assertion of section 7(1)(f) to withhold the requested records in their entirety is **approved**. Based on our review, we conclude that the records consist of preliminary drafts and other internal documents that were solicited and utilized by Kroll Associates in its decision-making process regarding specific matters. As a result, IDOR has met its initial burden of demonstrating that the withheld records are exempt from disclosure under section 7(1)(f).

If you have any questions, please contact me at (312) 814-6437. This correspondence shall serve to close this matter.

Very truly yours,



TOLA SOBITAN
Assistant Attorney General
Public Access Bureau

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cc: Mr. John E. Stevens
Freeborn & Peters LLP
217 East Monroe Street
Suite 202
Springfield, Illinois 62701-1147