



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

Lisa Madigan  
ATTORNEY GENERAL

July 18, 2011

Officer Rory O'Brien  
Assistant Freedom of Information Officer  
Chicago Police Department  
3510 S. Michigan Ave.  
Chicago, IL 60653

RE: FOIA Preauthorization Request– 2011 PAC 13094

Dear Officer O'Brien:

We have received and reviewed the written notice from the Chicago Police Department of its intention to deny certain information requested by Mr. Jeremy Gorner of the *Chicago Tribune* as exempt from disclosure under section 7(1)(f) of the Freedom of Information Act (FOIA). 5 ILCS 140/7(1)(f) (West 2010). Mr. Gorner had requested records relating to the death of David Koschman, who died after being struck during an altercation in 2004. We have also received and reviewed the records which the Department claims are exempt under section 7(1)(f). As discussed below, we conclude that the records are not exempt from disclosure in their entirety under section 7(1)(f), although certain specific statements in the records may be redacted. The two pages containing those statements are provided to the Department only, and the statements that may be redacted under section 7(1)(f) are highlighted in yellow.

**DETERMINATION**

Section 7(1)(f) exempts from disclosure "[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." This provision "is the equivalent of the 'deliberative process' exemption set forth in section 552(b)(5) of the federal Freedom of Information Act." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247, 799 N.E.2d 859, 864 (1<sup>st</sup> Dist. 2003). The purpose of this exemption is to encourage honest and open discussions among government employees before decisions are reached. *Harwood*, 344 Ill. App. 3d at 248.

The purpose of the deliberative process exemption "severely limits its scope." *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 133, 580 P.2d 246, 252 (1978). The exemption applies

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only if disclosure will "inhibit the flow of recommendations, observations, and opinions" from government employees. *Hoppe*, 90 Wash.2d at 133, 580 P.2d at 252. Accordingly, factual data are not exempt because disclosure of factual data does not reveal or expose the deliberative process. *Hoppe*, 90 Wash.2d at 133, 580 P.2d at 252.


Most of the records that the Department seeks to withhold are reports from police officers describing statements made by witnesses to the incident that caused David Koschman's death. The New York Court of Appeals has held that portions of police reports setting forth witness statements contain factual data that is not within that State's deliberative process exemption. *Matter of Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 277, 675 N.E.2d 808, 813, 653 N.Y.S.2d 54, 59 (1996). The court in that case stated that "a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations." *Matter of Gould*, 89 N.Y.2d at 277, 675 N.E.2d at 813, 653 N.Y.S.2d at 59. We agree with this conclusion because identifying the substance of what a witness said is a factual matter that does not implicate the deliberative process.

Accordingly, the Department's request to assert the section 7(1)(f) exemption to withhold the reports in their entirety is denied. Statements in which police officers express opinions may, however, be redacted from the reports. As indicated above, the two pages containing those statements are provided to the Department only, and the statements that may be redacted under section 7(1)(f) are highlighted in yellow.

We note that the Department also asserts that the requested records are exempt from disclosure under other provisions of FOIA. We will not consider those exemption claims at this time because the Department does not require preauthorization from the Public Access Counselor to assert them. *See* 5 ILCS 140/9.5(b) (West 2010).

If you have any questions, please contact me at 312-814-2770. This correspondence will serve to close the matter.

Very truly yours,

  
JOHN SCHMIDT  
Senior Assistant Attorney General  
Public Access Bureau

13069 pre-auth al 71f prelim draft pd

cc: Mr. Jeremy Gorner  
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