



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

August 23, 2010

Mr. Tom Reuter
Acting FOIA Coordinator
Illinois Environmental Protection Agency
Via electronic mail
Tom.Reuter@illinois.gov

RE: FOIA Pre-approval Request – 2010 PAC 9109

Dear Mr. Reuter:

On August 16, 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 Freedom of Information Act (FOIA) request dated August 3, 2010 from Alison Hayden of Brown, Hay & Stephens. The request sought various records related to a specified site. IEPA seeks to withhold a particular letter as exempt under Section 7(1)(f).

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 this information, we have determined that the IEPA has not sufficiently met its burden to withhold the letter in question under 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 letter here at issue was sent from attorneys for the alleged violator to the Vermillion County State's Attorney. According to IEPA's description, the letter is considered preliminary because it pertains to a draft order. Based on review of the letter, however, it does not appear that its contents constitute pre-decisional, deliberative process communications or that the letter constituted part of the agency's decision-making process. The letter simply reflects the violator's agreement to execute a proposed order relating to the alleged violations. Without further explanation of what role this communication may have made in the decision-making process of the IEPA, it should not be withheld as exempt 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

By 

Amanda M. Lundeen
Assistant Public Access Counselor

cc: Ms. Alison Hayden
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