



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

**Lisa Madigan**  
ATTORNEY GENERAL

June 17, 2016

VIA ELECTRONIC MAIL

Mr. Steve Silverman  
Assistant Bureau Chief  
Public Access Bureau  
Office of the Illinois Attorney General  
100 West Randolph Street  
Chicago, Illinois 60601  
SSilverman@atg.state.il.us

RE: FOIA Request for Review - 2016 PAC 42018 (2016 FOIA 041267)

Dear Mr. Silverman:

I am in receipt of your further inquiry letter of June 1, 2016, wherein you request, pursuant to section 9.5(c) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(c) (West 2014)), un-redacted copies of records that were withheld pursuant to sections 7(1)(d)(i) and 7(1)(f) of FOIA (5 ILCS 140/7(1)(d)(i), (f) (West 2014)), a detailed summary for the assertion of those exemptions, and a description of the specific measures that were taken to search for responsive records in responding to a recent FOIA request submitted to the Office of the Illinois Attorney General by Christopher Horner and Matthew Hardin on behalf of the Energy & Environmental Legal Institute (E&E Legal) and the Free Market Environmental Law Clinic (FME Law). Mr. Horner's request for review relates to part 2 of Freedom of Information request file No. 2016 FOIA 041267 (the FOIA Request), a FOIA request submitted to this office on April 11, 2016.

In their FOIA request, Craig Richardson, Executive Director, E&E Legal, and Mr. Horner on behalf of FME Law sought, in part, the following:

[(2)] [C]opies of all correspondence between the Illinois Attorney General, or the Office's Environmental Division's Office except secretarial/administrative and paralegal staff, and employees of the New York Attorney General's Office, dated from March 20, 2016 through March 30, 2016.

\* \* \*

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**We do not seek** correspondence which are nothing more than received or forwarded press clippings, releases or stories, if no other commentary or substantive commentary is added at any place in the email thread (consider *e.g.*, "interesting" or "FYI" as not being substantive comments.) (Bold, underscore, and italics in original.)

Per our telephone conversation on June 8, 2016, I explained that I required additional time to respond to Mr. Horner's request for review with respect to the records that were withheld in response to part 2 of the FOIA Request pursuant to sections 7(1)(d)(i) and 7(1)(f) of FOIA (5 ILCS 140/7(1)(d)(i), (f) (West 2014)), as well as additional time to respond to your request for a description of the specific measures that were taken to search for records responsive to part 2 of the FOIA Request. You agreed that we may have until June 18, 2016, to provide this office's response. This office has now completed its review and provides the following information.

Two portions of the analysis below are confidential pursuant to sections 7(1) and 9.5(c) of FOIA and are not to be disclosed. Accordingly, we have also included a redacted copy of this response letter that may be forwarded to Mr. Horner and Mr. Hardin for their review.

#### Search Conducted

With regard to your request for a description of the specific measures that were taken to search for records responsive to part 2 of the FOIA Request, please note that FOIA provides that a public body must conduct a "reasonable search tailored to the nature of a particular request." Ill. Att'y Gen. PAC Req. Rev. Ltr. 40292, issued April 21, 2016, citing *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20,, 28 (D.C. Cir. 1998). "A public body's search must be 'reasonably calculated to uncover all relevant documents.'" Ill. Att'y Gen. PAC Req. Rev. Ltr. 40292, issued April 21, 2016, citing *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

This office received the FOIA Request on April 11, 2016, and that same day, the FOIA office contacted the Attorney General's Human Resources Bureau in order to obtain the names of all attorneys employed with this office's Environmental Law and Asbestos Litigation Division during the specified period of time. The Human Resources Bureau provided a listing of attorneys employed with this office's Environmental Law and Asbestos Litigation Division during March 2016. Subsequently, the FOIA office contacted the Attorney General's Information Technology Bureau (IT), provided IT with the listing of attorneys compiled by the Human Resources Bureau, and requested that the IT staff conduct a search of the Environmental Law and Asbestos Litigation Division's attorneys' e-mail archives during the responsive time frame for

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e-mails to or from anyone with an e-mail domain ending in "@ag.ny.gov," which is the Office of the New York Attorney General's e-mail domain. Additionally, the FOIA office notified the Bureau Chiefs of the Environmental Law Bureaus in Chicago and Springfield, that this office had received the FOIA Request and that we were working with IT at that time to locate responsive records. On April 18, 2016, IT completed its search for records responsive to the FOIA Request.

In reviewing the listing of attorneys obtained from the Human Resources Bureau and provided to IT, the FOIA office noted the absence of two names, Matthew Dunn, Division Chief, Environmental Law and Asbestos Litigation Division and James Gignac, Environmental Counsel, Environmental Law and Asbestos Litigation Division. In an attempt to ensure that a thorough search for responsive records was conducted, the FOIA office contacted Mr. Dunn and Mr. Gignac, provided a copy of the FOIA Request to each of them, as well as, to the Bureau Chiefs of the Environmental Law Bureaus in Chicago and Springfield, and the Attorney General's Environmental Crimes Bureau, and requested that each of those individuals conduct a search for records responsive to the FOIA Request. Only Mr. Dunn and Mr. Gignac reported possessing additional responsive records, and they submitted their records to the FOIA office for review and processing. Nonexempt copies of the responsive records located by IT and by Mr. Dunn and Mr. Gignac were provided to Mr. Richardson and Mr. Horner in response to their FOIA Request on May 2, 2016.

In filing its request for review, E&E Legal and FME Law included a copy of a March 25, 2016, e-mail from Michael Meade, Office of the New York Attorney General to James Gignac, Office of the Illinois Attorney General, among other recipients, which was obtained from another state. Please be advised that the March 25, 2016, e-mail provided with this request for review was not withheld by the FOIA office, rather it was not located as part of this office's initial search.

Because the initial search did not locate the responsive March 25, 2016, e-mail and because the FOIA office was concerned that other responsive records may not have been located, after receiving the further inquiry letter from the Attorney General's Public Access Counselor, the FOIA office requested that Mr. Dunn and Mr. Gignac conduct a second search for responsive records. As a result of the second search, additional records responsive to the FOIA Request were located, including the March 25, 2016, e-mail submitted with the request for review. We have determined that additional records resulting from the second search may be released to E&E Legal and FME Law. Accordingly, we are sending a supplemental response to E&E Legal and FME Law that includes additional nonexempt responsive records that were identified during the second search. A copy of this office's correspondence to E&E Legal and FME Law is included for your reference.

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### Records Withheld

With regard to your request that this office provide un-redacted copies of the records that were withheld pursuant to sections 7(1)(d)(i) and 7(1)(f) of FOIA and a detailed summary for the assertion of those exemptions, please note that the responsive records in question relate to ongoing investigations being conducted by this office and other government agencies that may reasonably result in or are related to currently pending administrative enforcement or law enforcement proceedings. Further, the disclosure of the requested records would interfere with this office's ability to cooperate with other government agencies regarding this and future investigations and reasonably contemplated law enforcement proceedings. In this regard, I would note that a common interest agreement (Agreement) was entered into by the Office of the Illinois Attorney General and the other affected stakeholders related to a number of the withheld records. Under the terms of that Agreement, particular categories of documents are to remain confidential. Finally, the requested records contain preliminary drafts and other records in which opinions are expressed or policies or actions are formulated. As a result, the records responsive to the FOIA Request are exempt from disclosure.

Below please find additional analyses addressing particular records responsive to the FOIA Request and this office's basis for withholding those records.

#### Sections 7(1)(d)(i) and 7(1)(f) – Handout, Multistate Working Group

Section 7(1)(d)(i) of FOIA exempts from disclosure "[r]ecords in the possession of any public body created \* \* \* for law enforcement purposes \* \* \* to the extent that disclosure would \* \* \* interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement \* \* \* agency that is the recipient of the request[.]" Additionally, section 7(1)(f) of FOIA exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed, or policies or actions are formulated[.]" "Courts have extended section 7(1)(f) to communications *between government agencies* \* \* \* whose analyses and recommendations 'played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done.'" (Emphasis added.) Ill. Att'y Gen. PAC Req. Rev. Ltr. 19002, issued May 23, 2012, citing *Harwood v. McDonough*, 344 Ill. App. 3d 242, 248 (2003), quoting *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10, 121 S. Ct. 1060, 1067 (2001).

The records that we have determined are exempt under these sections consist of a handout and related records available to attendees of a meeting hosted by the Office of the New York Attorney General on March 29, 2016. The attendees consisted of several Attorneys General, Attorneys General staff, and others that were invited to provide analysis various

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environmental issues. All of the attendees were invited to the meeting for purposes of participating in a confidential strategy and briefing session related to potential investigations and legal actions that could be taken with regard to identified environmental issues.

The withheld handout and related records contain information regarding those investigations, legislation, and legal actions that States might undertake. Releasing these records would alert potential defendants to the legal theories, legal strategies and approach of the various Attorneys General Offices' involved in similar investigations and would provide information with regard to those activities that are being investigated and how to block government agencies from pursuing such investigations.

The handout and related records are also exempt under the rationale that public bodies must be able to evaluate information internally, as well as with other government agencies that may similarly be affected by the information, to explore possible courses of action confidentially before making final determinations that should be shared with the public. *See Ill. Att'y Gen. PAC Req. Rev. Ltr. 19002, issued May 23, 2012; McDonough, 344 Ill. App. 3d at 247* ("as a matter of public policy, section 7(1)(f) exempts from disclosure predecisional materials used by a public body in its deliberative process"). Disclosing this office's and other government agencies' legal theories and attorney mental impressions of those legal theories, along with pertinent factual information, would interfere with actually and reasonably contemplated law enforcement proceedings of this office. Accordingly, some of the records responsive to Mr. Richardson's request are exempt from disclosure under sections 7(1)(d)(i) and 7(1)(f).

### CONFIDENTIAL ANALYSIS



### END OF CONFIDENTIAL ANALYSIS

#### Sections 7(1)(d)(i) and 7(1)(f) – Multistate Working Group – E-Mails

As noted above, section 7(1)(d)(i) of FOIA exempts from disclosure "[r]ecords in the possession of any public body created \* \* \* for law enforcement purposes \* \* \* to the extent that disclosure would \* \* \* interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement \* \* \* agency that is the recipient of

the request[.]" Additionally, section 7(1)(f) of FOIA exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed, or policies or actions are formulated[.]" "Courts have extended section 7(1)(f) to communications *between government agencies* \* \* \* whose analyses and recommendations 'played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done.'" (Emphasis added.) Ill. Att'y Gen. PAC Req. Rev. Ltr. 19002, issued May 23, 2012, citing *Harwood v. McDonough*, 344 Ill. App. 3d 242, 248 (2003), quoting *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10, 121 S. Ct. 1060, 1067 (2001).

The records that we have determined are exempt under these sections consist of five multistate working group e-mail exchanges among staff of this office,<sup>1</sup> other Attorneys General's Offices,<sup>2</sup> the District of Columbia, multiple cities, and Broward County, Florida,<sup>3</sup> that contain opinions and recommendations regarding legal strategy with respect to *State of West Virginia v. U.S. Environmental Protection Agency*, No. 15-1363 (D.C. Cir. 2015). The indicated governmental agencies have joined together to file a brief in support of the Respondents in the *State of West Virginia v. U.S. Environmental Protection Agency* case. The withheld records contain information and recommendations related to the filing of the appellate brief in that case.

These records are exempt under the rationale that public bodies must be able to evaluate information internally, as well as with other government agencies that may similarly be affected by the information, to explore possible courses of action confidentially before making final determinations that should be shared with the public. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 19002, issued May 23, 2012; *McDonough*, 344 Ill. App. 3d at 247 ("as a matter of public policy, section 7(1)(f) exempts from disclosure predecisional materials used by a public body in its deliberative process"). Disclosing this office's and other government agencies' legal theories and attorney mental impressions of those legal theories, along with pertinent factual information

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<sup>1</sup> This office's employees that received the multistate working group e-mails include Matthew Dunn and James Gignac.

<sup>2</sup> The other Attorney General Offices that received the multistate working group e-mails include the Office of the California Attorney General, the Office of the Connecticut Attorney General, the Office of the Delaware Attorney General, the Office of the Hawaii Attorney General, the Office of the Iowa Attorney General, the Office of the Maine Attorney General, the Office of the Maryland Attorney General, the Office of the Massachusetts Attorney General, the Office of the Minnesota Attorney General, the Office of the New Hampshire Attorney General, the Office of the New Mexico Attorney General, the Office of the New York Attorney General, the Office of the Oregon Attorney General, the Office of the Rhode Island Attorney General, the Office of the Virginia Attorney General, the Office of the Washington Attorney General, and the Office of the Vermont Attorney General.

<sup>3</sup> The city that received the multistate working group e-mails include the City of Boulder, the City of Chicago, New York City, the City of Philadelphia, and the City of South Miami.

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recommendations and opinions related to the legal matters, would interfere with actually and reasonably contemplated law enforcement proceedings of this office. Accordingly, some of the records responsive to the FOIA Request are exempt from disclosure under sections 7(1)(d)(i) and 7(1)(f).

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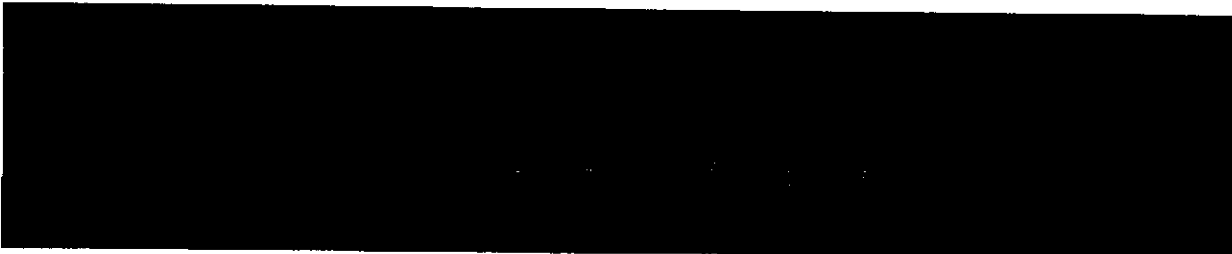
### END OF CONFIDENTIAL ANALYSIS

#### Sections 7(1)(d)(i) and 7(1)(f) – Interagency

As noted above, section 7(1)(d)(i) of FOIA exempts from disclosure "[r]ecords in the possession of any public body created \* \* \* for law enforcement purposes \* \* \* to the extent that disclosure would \* \* \* interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement \* \* \* agency that is the recipient of the request[.]" Additionally, section 7(1)(f) of FOIA exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed, or policies or actions are formulated[.]" "Courts have extended section 7(1)(f) to communications *between government agencies* \* \* \* whose analyses and recommendations 'played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done.'" (Emphasis added.) Ill. Att'y Gen. PAC Req. Rev. Ltr. 19002, issued May 23, 2012, citing *Harwood v. McDonough*, 344 Ill. App. 3d 242, 248 (2003), quoting *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10, 121 S. Ct. 1060, 1067 (2001).

The records that we have determined are exempt under these sections consist of interagency e-mail communication between this office and the Office of the New York Attorney General that relate to the above referenced March 29, 2016, meeting and the filing undertaken in *State of West Virginia v. U.S. Environmental Protection Agency*. The e-mails related to the March 29, 2016, meeting discuss the logistics of the meeting as they relate to specified substantive areas of law, and solicit information related to specific environmental issues contemplated or taken by the participating offices, and contain draft records shared with the stakeholders.

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**END OF CONFIDENTIAL ANALYSIS**

These records are exempt under the rationale that public bodies must be able to evaluate information internally, as well as with other government agencies that may similarly be affected by the information, to explore possible courses of action confidentially before making final determinations that should be shared with the public. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 19002, issued May 23, 2012; *McDonough*, 344 Ill. App. 3d at 247 ("as a matter of public policy, section 7(1)(f) exempts from disclosure predecisional materials used by a public body in its deliberative process"). Disclosing this office's and other government agencies' legal recommendations, legal theories, and attorney mental impressions of those legal theories, along with pertinent factual information, would interfere with actually and reasonably contemplated law enforcement proceedings of this office. Accordingly, some of the records responsive to the FOIA Request are exempt from disclosure under sections 7(1)(d)(i) and 7(1)(f).

**Sections 7(1)(d)(i) and 7(1)(f) – Multistate Drafts**

As noted above, section 7(1)(d)(i) of FOIA exempts from disclosure "[r]ecords in the possession of any public body created \* \* \* for law enforcement purposes \* \* \* to the extent that disclosure would \* \* \* interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement \* \* \* agency that is the recipient of the request[.]" Additionally, section 7(1)(f) of FOIA exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed, or policies or actions are formulated[.]" "Courts have extended section 7(1)(f) to communications *between government agencies* \* \* \* whose analyses and recommendations 'played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done.'" (Emphasis added.) Ill. Att'y Gen. PAC Req. Rev. Ltr. 19002, issued May 23, 2012, citing *Harwood v. McDonough*, 344 Ill. App. 3d 242, 248 (2003), quoting *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10, 121 S. Ct. 1060, 1067 (2001).



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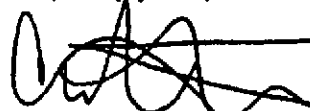
The records that we have determined are exempt under these sections consist of draft agreements exchanged between this office and other government agencies, including a draft common interest agreement applicable to the above referenced multistate working group's activities with respect to investigating and prosecuting various environmental issues and a draft brief related to *State of West Virginia v. U.S. Environmental Protection Agency*.

The above referenced draft records are exempt under the rationale that public bodies must be able to evaluate information internally to explore possible courses of action confidentially before making final determinations that should be shared with the public. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 19002, issued May 23, 2012; *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (2003) ("as a matter of public policy, section 7(1)(f) exempts from disclosure predecisional materials used by a public body in its deliberative process"). Disclosing preliminary drafts would interfere with actually and reasonably contemplated law enforcement proceedings of this office by disclosing various legal theories and attorney mental impressions of information that was predecisional; it would also reveal limitations of this office's legal theories. The disclosure of this information would reveal information regarding the internal deliberative process, which would interfere with reasonably contemplated law enforcement proceedings by disclosing legal theories and mental impressions related to investigations. Accordingly, some of the records responsive to the FOIA Request are exempt from disclosure under sections 7(1)(d)(i) and 7(1)(f).

I have attached unredacted copies of the records in question that will assist you in your review of this matter. The attached records contain confidential information pursuant to FOIA and are not to be provided to the requester.

Should you have any questions or need any additional information, please contact me at (312) 814-1493.

Very truly yours,



CAITLIN Q. KNUTTE  
Assistant Attorney General  
FOIA Officer

CQK:ga

Attachments