

FOIA 2010: Ten Things We've Learned from the Attorney General's Decisions in the First Ten Months

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INTRODUCTION

Pursuant to 5 ILCS 140/9.5, public bodies must seek PAC's approval before denying a FOIA request based on:

- Invasion of privacy, 7(1)(c): "Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"
- Deliberative process, 7(1)(f): "Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated"

1. PROGRAM REGISTRATION INFORMATION OF MINORS IS LIKELY STILL EXEMPT UNDER UNWARRANTED INVASION OF PERSONAL PRIVACY EXEMPTION

Exempt (unwarranted invasion of personal privacy)

- Detailed transportation invoices that contained names of regular and special education students (2010 PAC 8446)*
- Student names, ID numbers, dates of birth, grades, ethnicities other than white, and languages spoken other than English could be redacted from records provided in response to a blanket request for documents relating to special education programs and services (2010 PAC 8158)*
- Minors' names, names and addresses of schools they attend, dates of births, grade level, and names of their fathers could all be redacted from a police report (2010 PAC 7302)*
- REMEMBER: You still must get pre-approval from PAC.
- NOTE: Adult information may not be exempt.

2. WHEN YOU'RE TRAVELING ON THE GOVERNMENT'S DIME, KEEP IN MIND THAT SOME INFORMATION ISN'T PERSONAL

Exempt (unwarranted invasion of personal privacy)

- Personal expenses related to meals and entertainment that were not reimbursed by government in connection with conference (2010 PAC 7316)

Not exempt

- Hotel occupancy number, adult/child number, and hotel room numbers (2010 PAC 9698)

* *Opinion included in materials*

3. BID SCORING SHEETS AND BID EVALUATIONS ARE USUALLY EXEMPT UNDER THE DELIBERATIVE PROCESS EXEMPTION

Exempt (deliberative process)

- Scoring sheets used by a scoring committee in bidding process to determine final combined scoring which also contained the opinions and recommendations of individual staff members (2010 PAC 8034, 6803)
- Scoring sheets used to evaluate strengths and weaknesses of various bidders were considered pre-decisional in nature and within the scope of 7(1)(f) (2010 PAC 8473)

Not exempt

- Bidders list for specified projects even where bids had not yet been opened because list is not predecisional material used to evaluate proposal like inter-agency communication (2010 PAC 6564)

4. PAC WILL USUALLY ALLOW EMPLOYMENT APPLICATION INFORMATION FOR UNSUCCESSFUL CANDIDATES TO BE WITHHELD

Exempt (unwarranted invasion of personal privacy)

- Names and resumes of finalists not hired (2010 PAC 7965)
- Cover letters, degrees, professional licenses and certificates, letters denying employment, referral list, hiring information summary, final test scores for unsuccessful candidates (2010 PAC 5653)*

NOTE: Candidates for vacant commissioner seats are different than applications for employment.

- Names of prospective candidate, their resumes, and letters or e-mail correspondence between prospective candidates and head of public body are not exempt.
- “Citizens have a legitimate interest in knowing who is being considered for position so that they may evaluate whether individuals are qualified to represent [the district] and discern why one applicant was appointed over the other.”
- However, allowed correspondence between mayor and aldermen that expressed opinions about the qualifications of individual candidates and the process for choosing the person to be withheld under deliberative process exemption (2010 PAC 5611)*

5. ONCE YOU HIRE A CANDIDATE, MOST INFORMATION BECOMES PUBLIC

Not Exempt

- Cover letters, resumes, academic degrees, offer letters, letters of recommendation, professional licenses and certifications, final test scores of successful applicants (2010 PAC 5653)*

NOTE: Some employee information in application file can be withheld.

- For example, academic transcripts and names of references could be withheld but not former places of employment (2010 PAC 5653, 6068)

6. MOST SEARCH COMMITTEE MATERIALS ARE ALSO EXEMPT FROM DISCLOSURE

Exempt (deliberative process)

- Notes and recommendations from police chief interview committee to village manager were pre-decisional and constituted part of village's deliberative process in selecting a police chief for hire (2010 PAC 7224)*
- Similarly, "Committee Consensus Reports" containing recommendations made by search committee members in which opinions regarding qualifications of superintendent candidates are expressed (2010 PAC 6749)
- E-mails among search committee members containing recommendations and opinions by college personnel regarding search for new president – 7(1)(f) (8559)
- Interview questions, rating sheets completed by hiring committee (2010 PAC 7800)*

Not exempt

- E-mails containing actual interview schedules not exempt, but correspondence between personnel about it would be (2010 PAC 7800)*
- Names of agencies used to arrange airfare, or airports departed (2010 PAC 7336, 7704, 7852)*
- Names and e-mail addresses of private citizens who work for trustees in non-university capacity that are in public records (2010 PAC 7336, 7704, 7852)*

7. SOME SPECIFIC EMPLOYEE INFORMATION CONTAINED WITHIN PERSONNEL FILES AND ELSEWHERE INVADES EMPLOYEE'S PRIVACY, BUT SOME DOESN'T.

Exempt (unwarranted invasion of personal privacy)

- Emergency contact information (2010 PAC 7640)
- Educational transcripts of superintendent (2010 PAC 6398)
- Items in Governor's schedule that pertain to personal medical information (e.g., doctor's appointments) (2010 PAC 9371)
- Employee race (2010 PAC 5602, 7800)

Not exempt

- Employee names (2010 PAC 5873)
- Gender and ethnicity information of all school superintendents (2010 PAC 5124)
- Employee timesheets that include attendance record and category of time off used (2010 PAC 5800)

- Notification of absence slips, timesheets, sick time call-ins which reference FMLA and leaves of absence (although specific medical condition can be redacted) (2010 PAC 7323)*
- Personnel Action Forms containing salary and position information and dates of employment leaves (2010 PAC 7323)*
- Educational background (2010 PAC 7323)*
- Officer's disciplinary file (2010 PAC 8010)*

NOTE: DON'T FORGET OTHER EXEMPTIONS SUCH AS DELIBERATIVE PROCESS!

- Memos and e-mails alleging disciplinary complaints, e-mails discussing drafts of disciplinary notes and performance evaluations, drafts of the notices and evaluations, and drafts of a payroll change form were all exempt (2010 PAC 8180)*
- Correspondence containing impressions, opinions and recommendations of individuals used to formulate final decisions regarding disciplinary actions and performance evaluations and the drafts of the notices and evaluations were preliminary documents (2010 PAC 8180)*

8. PERSONNEL EVALUATIONS CANNOT BE COMPLETELY WITHHELD UNDER THE INVASION OF PRIVACY EXEMPTION, BUT DON'T GIVE UP ON OTHER EXEMPTIONS!

- "State and municipal employee evaluations relate to the public duties of public employees and officials . . . therefore, disclosure . . . is not an invasion of personal privacy." (2010 PAC 9137)*
- "Evaluations of public employees directly address the manner in which public employees perform their public duties." (2010 PAC 7719)*
- "Performance evaluations of public employees impact what public duties that employee will have in the future." (2010 PAC 9137)*
- "Public bodies use these evaluations to determine if employees should be retained, promoted, or terminated." (2010 PAC 7719)*

House Bill 5154

- Amends Personnel Records Review Act
- Prohibits disclosure of performance evaluations in response to FOIA
- Passed House 70-39-00
- Passed Senate 45-09-01
- Amendatory Veto: wipes out the prohibition exception for law enforcement

NOTE: Language in some PAC opinions suggests other exemptions may allow portions of personnel evaluations to be withheld!

- "Other provisions of FOIA may exempt from disclosure discreet information contained in personnel evaluations" (2010 PAC 9137)*

- “. . . unless the [public body] properly asserts an exemption other than 7(1)(c) to deny disclosure. . .” (2010 PAC 9137)*
- “We recognize that [an employee] performance evaluation may contain information that may be redacted under other exemptions in FOIA. As you know, the use of the exemption in 7(1)(f) of FOIA [deliberative process] requires pre-approval from [AG’s] office.” (2010 PAC 6548)
- *State Journal-Register*, October 19, 2010: Reason PAC ruled that personnel evaluation must be disclosed is because public body asserted the privacy exemption, not the exemption that allows public bodies to withhold records that contain opinions!

9. DOCUMENTS THAT CONTAIN RECOMMENDATIONS, OPINIONS, OR ANALYSES BY GOVERNMENT STAFF ARE TYPICALLY EXEMPT AS LONG AS THEY ARE NOT PUBLICLY CITED BY THE HEAD OF THE PUBLIC BODY, BUT IF THE STATEMENTS OF OPINION ARE NOT MADE BY GOVERNMENT EMPLOYEE IN COURSE OF EMPLOYMENT, OR CONTAIN FACTS RATHER THAN OPINIONS, THEY ARE NOT EXEMPT.

Exempt (deliberative process)

- Preliminary draft budget that was still subject to substantial revisions relating to allocation of funds to specific programs and areas of emphasis by administration and board (2010 PAC 8132)*
- Employee position dates where the budget had not been finalized and was subject to revisions, and where the release of the position date information prior to finalization of the budget could be disconcerting to staff members whose positions may be affected (2010 PAC 9286)
- Design drafts and employee site notes containing opinions regarding employee’s site survey (2010 PAC 7931)
- E-mails containing opinions by Attorney General’s staff members as part of effort to formulate a policy or decide a course of action relative to issues and problems with the Attorney General’s website estate tax calculator (2010 PAC 8237)
- Documents related to the Attorney General’s “determination of the next enforcement step” (2010 PAC 8129)
- “Preliminary drafts, notes, and recommendations by Attorney General’s staff concerning settlement of a labor case (2010 PAC 6885)

Not exempt

- Statements of opinions by an individual complainant in an EEOC complaint (2010 PAC 8934, 8935)
- Emails that simply state facts where no opinion is expressed or policy is formulated (2010 PAC 8083)
- E-mail relating to district’s determination that children are not eligible for free transportation because of proximity to school because e-mail consisted primarily of

recitation to relevant measurements (though two sentences that contain factual underpinning upon which the determination was based could be redacted) (2010 PAC 9710)

10. SOME PERSONAL INFORMATION WITHIN E-MAILS CAN BE REDACTED, BUT YOU SHOULD PROBABLY ASSUME THE PUBLIC MAY SEE IT!

Exempt

- Portion of e-mails regarding birth of employee's child (2010 PAC 9225, 8222)
- Portion of e-mails regarding relative's death (2010 PAC 9225, 7799)

Not exempt

- Portion of an e-mail referencing a birthday party for a public employee and identifying the employee's age (2010 PAC 9225)

CONCLUSION

- Remember that public bodies must notify PAC before using invasion of privacy or deliberative process (drafts, opinions, recommendations) exception
- Work with local counsel in drafting pre-approval requests
- If there are good policy reasons for withholding, say so
- Don't forget other exemptions!