



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 21, 2015

PUBLIC ACCESS OPINION 15-010
(Request for Review 2015 PAC 36285)

FREEDOM OF INFORMATION ACT:
Disclosure of General Information Concerning
Outside Counsel Representing State Agencies

Mr. Mick Dumke
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Ms. Christina McClermon
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Dear Mr. Dumke and Ms. McClermon:

This is a binding opinion issued by the Attorney General pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons discussed below, this office concludes that the Office of the Governor (Governor's Office) violated the requirements of FOIA by denying Mr. Mick Dumke's request for general information concerning outside counsel employed by the State.

BACKGROUND

On June 15, 2015, Mr. Dumke, on behalf of the *Chicago Reader*, submitted a FOIA request to the Governor's Office seeking "[a] list or database, in electronic format, of

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outside counsel used by the [S]tate of Illinois in fiscal years 2014 and 2015 to date (or calendar years 2013, 2014, and 2015 to date)[,]" including "the department or agency for which the work was done and the nature or description of the work."¹ On June 29, 2015,² the Governor's Office responded that it "performed a search and found documents responsive to [Mr. Dumke's] request[,]" but withheld those records pursuant to section 7(1)(m) of FOIA (5 ILCS 140/7(1)(m) (West 2014)), which exempts from disclosure certain communications between a public body and an attorney representing it.³ Specifically, the Governor's Office asserted:

The withheld documents consist of "communications between a public body and an attorney" and "would not be subject to discovery in litigation." An attorney representing the public body prepared the withheld documents in the course of that representation, and thus the documents are exempted from disclosure as attorney work product. This attorney also communicated the withheld information to the public body for the purpose of furnishing legal advice. The withheld documents are thus exempted as attorney-client privileged.^[4]

On July 10, 2015, Mr. Dumke submitted this Request for Review contesting the Governor's Office's denial of his request. He contended that "records showing the expenditure of public funds are not protected by attorney-client privilege[]" and that section 7(1)(m) "is meant to protect records involving legal strategy or confidential discussions of lawsuits or criminal matters--not data about the use of public funds."⁵

¹E-mail from Mick Dumke to Donovan Borvan, Associate General Counsel, Freedom of Information Officer, Office of the Illinois Governor (June 15, 2015).

²This office has not been provided with any information indicating that the Governor's Office properly extended the time for compliance with Mr. Dumke's FOIA request in accordance with section 3(e) of FOIA (5 ILCS 140/3(e) (West 2014)). Because Mr. Dumke has not raised this issue in his request for review, however, we will not address this potential issue.

³Letter from Christina McClernon, Assistant General Counsel/Freedom of Information Act Officer, Office of Governor Bruce Rauner, State of Illinois, to Mick Dumke (June 29, 2015).

⁴Letter from Christina McClernon, Assistant General Counsel/Freedom of Information Act Officer, Office of Governor Bruce Rauner, State of Illinois, to Mick Dumke (June 29, 2015).

⁵E-mail from Mick Dumke, Senior Writer, to Public Access Counselor, Office of the Illinois Attorney General (July 10, 2015).

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On July 21, 2015, this office forwarded a copy of the Request for Review to the Governor's Office and asked it to provide, for this office's confidential review, copies of the records that it had ascertained were responsive to Mr. Dumke's request, together with a detailed explanation of the factual and legal bases it relied upon to withhold them.⁶ On July 30, 2015, the Governor's Office's provided the Public Access Bureau with a written response to its inquiry, as well as copies of the records it withheld, which contain information concerning the retention of outside counsel.⁷

As an initial matter, in its response, the Governor's Office questioned whether the records that it possessed were responsive to the FOIA request because it "does not maintain a master list or a database of all outside counsel." Rather, the Governor's Office "identified four partial and short lists of outside counsel[.]" which "do not describe every relationship with outside counsel."⁸ The Governor's Office further stated that the lists were created by "General [C]ounsel at various [S]tate agencies" for an attorney in the Governor's Office, "who then edited and supplied them to Office of the Attorney General * * * in its role as litigation counsel for the Governor's Office and its executive branch agencies."⁹ In a telephone conversation with an Assistant Attorney General in the Public Access Bureau, an Associate General Counsel for the Governor's Office clarified that the lists were prepared in response to a request by the Office of the Attorney General for a list of all Special Assistant Attorneys General for whom the Governor's Office would be seeking reappointment.

The Governor's Office maintained that its denial was proper under section 7(1)(m) because one of its attorneys "solicited and provided these records for the purpose of the Attorney General's representation of these state agencies[]" and because the withheld records "contain notes written by counsel describing the type of legal work done and matters discussed between

⁶Letter from Shari L. West, Assistant Attorney General, Public Access Bureau, to Christina McClernon, Assistant General Counsel/Freedom of Information Officer, Office of Governor Bruce Rauner, State of Illinois (July 21, 2015).

⁷Letter from Christina McClernon, Assistant General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Shari L. West, Assistant Attorney General, Public Access Bureau (July 30, 2015).

⁸Letter from Christina McClernon, Assistant General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Shari L. West, Assistant Attorney General, Public Access Bureau (July 30, 2015), at 1-2.

⁹Letter from Christina McClernon, Assistant General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Shari L. West, Assistant Attorney General, Public Access Bureau (July 30, 2015), at 1-2.

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an attorney and client."¹⁰ The response added that the "Governor's Office and relevant state agencies intended that these lists remain confidential."¹¹

On July 31, 2015, this office forwarded a copy of the Governor's Office's response letter to Mr. Dumke and offered him the opportunity to reply.¹² On August 10, 2015, Mr. Dumke replied that creating the lists was "a routine administrative" process involving "basic information about [S]tate operations[.]" rather than "a communication involving a legal matter or discussion of strategy" that could be subject to the attorney-client privilege.¹³

ANALYSIS

"It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with [FOIA]." 5 ILCS 140/1 (West 2014). Section 1.2 of FOIA (5 ILCS 140/1.2 (West 2014)) provides that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." Additionally, section 3(a) of FOIA (5 ILCS 140/3(a) (West 2014)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

Section 7(1)(m) of FOIA

Section 7(1)(m) of FOIA exempts from disclosure:

¹⁰Letter from Christina McClernon, Assistant General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Shari L. West, Assistant Attorney General, Public Access Bureau (July 30, 2015), at 2.

¹¹Letter from Christina McClernon, Assistant General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Shari L. West, Assistant Attorney General, Public Access Bureau (July 30, 2015), at 2.

¹²Letter from Shari L. West, Assistant Attorney General, Public Access Bureau, to Mick Dumke, Senior Writer, *Chicago Reader* (July 31, 2015).

¹³E-mail from Mick Dumke, Senior Writer, to Shari L. West, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 10, 2015).

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Communications between a public body and an attorney * * * representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body[.]

Section 7(1)(m) is applicable, among other things, to communications protected by the attorney-client privilege. *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 201 (1st Dist. 1997). The attorney-client privilege applies to communications:

(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are permanently protected, (7) from disclosure by himself or the legal advisor, (8) except the protection be waived. *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 467 (2003).

See also *In re General Instrument Corp. Securities Litigation*, 190 F.R.D. 527, 531 (N.D. Ill. 2000) ("To be privileged, the documents must not only exhibit attorney involvement, but must involve 'a legal adviser acting in his capacity as such.'" (quoting *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997)). The section 7(1)(m) exemption must "be construed and applied narrowly. This is so notwithstanding the countervailing policy favoring confidentiality between attorneys and clients." *Illinois Education Ass'n*, 204 Ill. 2d at 470.

The Governor's Office cited *Illinois Education Ass'n* to support its assertion that the records are exempt from disclosure under section 7(1)(m) of FOIA:

The attorney-client privilege may apply to material submitted by a public body to the Attorney General in a case where the public body is seeking the opinion of the Attorney General. Where a board submits letters drafted by its legal counsel, which were intended to remain confidential, to the Attorney General in seeking the opinion, attorney-client privilege will apply to those documents[.]¹⁴

¹⁴Letter from Christina McClernon, Assistant General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Shari L. West, Assistant Attorney General, Public Access Bureau (July 30, 2015), at 2.

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The *Illinois Education Ass'n* case, however, is inapposite to this situation. In *Illinois Education Ass'n*, the Illinois Supreme Court analyzed whether FOIA required the Illinois State Board of Education (Board) to disclose material it had provided to the Office of the Attorney General pertaining to its request for an Attorney General opinion under section 4 of the Attorney General Act (15 ILCS 205/4 (West 2000)). *Illinois Education Ass'n*, 204 Ill. 2d at 458. The Court stated that in order to sustain its burden to withhold the material, "the Board was required to establish both that: (1) the Attorney General was 'representing' the Board; and (2) the communications would not be 'subject to discovery in litigation.'" *Illinois Education Ass'n*, 204 Ill. 2d at 464. Noting that the Office of the Attorney General is tasked with advising the Governor's Office and other State agencies, the court found that the Board had demonstrated that the Office of the Attorney General was "representing" the Board, for purposes of what is now the section 7(1)(m) exemption,¹⁵ when conducting its opinion writing function. *Illinois Education Ass'n*, 204 Ill. 2d at 464; *see also* 15 ILCS 205/4 (West 2000) (the duties of the Office of the Attorney General include: "To consult with and advise the governor and other state officers, and give, when requested, written opinions upon all legal or constitutional questions relating to the duties of such officers respectively."). However, because the Board did not adequately demonstrate that the communications at issue were of a confidential nature, the court remanded the case for further proceedings, "caution[ing] the circuit court" to consider that "in meeting its burden, the public body may not simply treat the words 'attorney-client privilege' or 'legal advice' as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue." *Illinois Education Ass'n*, 204 Ill. 2d at 470.

Moreover, a public body that wishes to withhold records under section 7(1)(m) "can meet its burden only by providing some *objective* indicia that the exemption is applicable under the circumstances." (Emphasis in original.) *Illinois Education Ass'n*, 204 Ill. 2d at 470; *see also Clarke v. American Commerce National Bank*, 974 F.2d 127, 130 (9th Cir. 1992):

Not all communications between attorney and client are privileged. Our decisions have recognized that the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege. [Citations.] However, correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific

¹⁵At the time of *Illinois Education Ass'n*, the exemption for communications that would not be subject to discovery in litigation was found in section 7(1)(n) of FOIA. *See* 5 ILCS 140/7(1)(n) (West 2000).

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nature of the services provided, such as researching particular areas of law, fall within the privilege. *Clarke*, 974 F.2d at 129.

This office has reviewed the lists withheld by the Governor's Office, which generally identify: the agency represented; the compensating agency; the hourly rate or flat rate (as applicable); the names and addresses of the law firms and/or the names of the attorneys involved; and either the general subject matter of the representation or the court, case name, and case number of the matters for which outside counsel were to be appointed. In other words, the records contain precisely the type of information that the court in *Clarke v. American Commerce National Bank* concluded was not privileged.

The Governor's Office also cited *People ex rel. Ulrich v. Stukel* for the assertion that "where attorney-client billing records contain explanations for legal fees and indicate the type of legal work done or matters discussed between an attorney and client and could reveal the substance of confidential communications, attorney-client privilege will protect disclosure of responsive records."¹⁶ In *Ulrich*, the plaintiff challenged the denial of his request for accounting statements reflecting payments to law firms by the University of Illinois related to an identified law suit. *Ulrich*, 294 Ill. App. 3d at 197. Noting that "[i]t is well-recognized that information regarding a client's fees generally is not a 'confidential communication' between an attorney and client, and thus is not protected by the attorney client privilege[.]" the court held that there was no "colorable legal basis" for the University to withhold accounting statements reflecting "the name [of] the payee law firm" and the "amount and the date of each payment." *Ulrich*, 294 Ill. App. 3d at 203-04. The court did acknowledge, however, that "[c]ertain types of billing records may contain explanations for legal fees and may indicate the type of work done or matters discussed between the attorney and client. As such, they could reveal the substance of confidential attorney-client discussions, and be subject to valid claims of attorney-client privilege[.]" *Ulrich*, 294 Ill. App. 3d at 201.

In the current circumstances, to the extent that the withheld records set forth the rates paid to outside counsel, article VIII, section 1(c) of the Illinois Constitution of 1970 provides that "[r]eports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law." Similarly, section 2.5 of FOIA (5 ILCS 140/2.5 (West 2014)) provides that "[a]ll records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public." Thus, the rates paid to outside counsel do not constitute privileged attorney-client communications and are expressly subject to disclosure under FOIA.

¹⁶Letter from Christina McClernon, Assistant General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Shari L. West, Assistant Attorney General, Public Access Bureau (July 30, 2015), at 2.

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Moreover, the records in question are lists containing only general information concerning legal representation of State agencies and rates of pay. The lists do not reveal legal advice or include any discussion of whether to appoint outside counsel or the motive for seeking representation. The records also do not reveal any specific details regarding the nature of the services provided, or otherwise disclose the substance of work performed or matters discussed between attorneys and clients. Thus, the Governor's Office has not demonstrated that any portion of the withheld records constitute privileged attorney-client communications within the scope of section 7(1)(m) of FOIA.

The Governor's Office also argued that section 7(1)(m) exempts the withheld records from disclosure pursuant to the "work product" doctrine. The parameters of "work product" are set out in Illinois Supreme Court Rule 201(b)(2), which provides that material prepared "by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Attorney work product is limited to records that "reveal the shaping process by which the attorney has arranged the available evidence" for trial. *Monier v. Chamberlain*, 35 Ill. 2d 351, 359-60 (1966). In contrast, the outside counsel lists at issue in this matter do not contain any findings or recommendations related to legal advice, much less theories, mental impressions, or litigation plans. The lists merely set out general information about outside counsel and the matters to which they were to be appointed. Because these lists do not reveal any theories, mental impressions, or litigation plans, they are not "work product."

Accordingly, we conclude that the Governor's Office has not sustained its burden of demonstrating by clear and convincing evidence that the withheld lists are exempt from disclosure pursuant to section 7(1)(m) of FOIA.

Completeness of Response

In its response to this office the Governor's Office noted that the lists do not describe every relationship with outside counsel and stated that it "does not maintain a master list or database of all outside counsel."¹⁷ The Governor's Office stated that it "may be able to provide the underlying contracts reflected in this list, but it [is] simply a fact that to the extent a list exists, the Governor's Office cannot disclose it under section 7(1)(m)."¹⁸ The Governor's

¹⁷Letter from Christina McClernon, Assistant General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Shari L. West, Assistant Attorney General, Public Access Bureau (July 30, 2015), at 2.

¹⁸Letter from Christina McClernon, Assistant General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Shari L. West, Assistant Attorney General, Public Access Bureau (July 30, 2015), at 1.

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Office also stated that "[i]t is possible that other information regarding billing by outside counsel to state agencies, or other records regarding the same, would exist and be public records responsive to a future FOIA request."¹⁹ This response implies that the Governor's Office does not believe that FOIA requires it to compile and provide Mr. Dumke with any responsive information in its possession or under its control related to outside counsel that is not reflected in the lists that were withheld. That belief is incorrect. To the extent the Governor's Office possesses or controls records that contain information regarding outside counsel used by the State that is responsive to Mr. Dumke's request, FOIA obligates the Governor's Office to review those records and compile and provide all of the responsive information to Mr. Dumke.

Although a public body is not required to generate new records in response to a FOIA request (*see Kenyon v. Garrels*, 184 Ill. App. 3d 28, 32 (4th Dist. 1989); *see also Heinrich v. White*, 2012 IL App (2d) 110564, ¶10, 975 N.E.2d 726, 730 (2012) ("[A] request for records not yet created is invalid"), simply extracting information from existing public records does not constitute the creation of a new record for purposes of FOIA. Both Illinois and federal courts have rejected claims that the compilation of information in a public body's possession into a different format to respond to a FOIA request entails the creation of a new record.

For example, in *Hamer v. Lentz*, 132 Ill. 2d 49, 56 (1989), the Illinois Supreme Court considered whether a public body was obligated under FOIA to create a computer program to piece together information and to produce the result and concluded that it was, stating: "In sum, the * * * information is maintained by defendants in the ordinary course of business, is nonexempt, and thus must be disclosed. Disclosure of the information in no way involves the creation of a new record." *Lentz*, 132 Ill. 2d at 57.

Similarly, in *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454, 455 (D.D.C. 1977), the Federal district court rejected the United States Department of Defense's assertion that it did not possess a record responsive to a request for the names and addresses of retired service members with disabilities because no single list containing that information existed. The Department of Defense argued that "FOIA applies only to documents in existence and that the FOIA cannot be used by the plaintiff to force defendants to compile a record." *Rumsfeld*, 428 F. Supp. at 455. The court rejected that argument, concluding:

¹⁹ Letter from Christina McClernon, Assistant General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Shari L. West, Assistant Attorney General, Public Access Bureau (July 30, 2015), at 2.

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Plaintiff is not attempting to use the FOIA to force defendants to create a record which they do not already have, and its request is one for an existing record within the meaning of the Act. * * * [The] defendants have stated that the Department of Defense has personnel and financial records pertaining to retired disabled officers, and plaintiff is only requesting them to disclose a limited portion of, or amount of information from these files, the names and addresses of the retired disabled officers. *The fact that defendants may have to search numerous records to comply with the request and that the net result of complying with the request will be a document the agency did not previously possess is not unusual in FOIA cases nor does this preclude the applicability of the Act.* (Emphasis added.) *Rumsfeld*, 428 F. Supp. at 456.

Accordingly, to the extent that the Governor's Office possesses or controls additional responsive information in records that it maintains that it has not previously identified or provided for this office's review, FOIA obligates the Governor's Office to search for, compile, and provide that information to Mr. Dumke. For example, if the Governor's Office possesses or controls contracts for outside counsel that include the information Mr. Dumke seeks, the Governor's Office is required to review the contracts and compile and provide Mr. Dumke with the information that he seeks.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the arguments submitted, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

- 1) On June 15, 2015, Mr. Mick Dumke, on behalf of the *Chicago Reader*, submitted a FOIA request to the Governor's Office seeking copies of lists of outside counsel, including the agencies represented and a description of the nature of the work, for calendar years 2013 through 2015 to date or fiscal years 2014 and 2015 to date.
- 2) On June 29, 2015, the Governor's Office denied Mr. Dumke's request pursuant to section 7(1)(m) of FOIA.
- 3) On July 10, 2015, Mr. Dumke submitted a Request for Review of the denial of his FOIA request to the Office of the Attorney General's Public Access Bureau. Mr. Dumke's Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2014)).

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4) On July 21, 2015, the Public Access Bureau sent a copy of the Request for Review to the Governor's Office and asked it to provide copies of the outside counsel lists for this office's confidential review, together with an explanation of the legal and factual bases for withholding the records under section 7(1)(m) of FOIA.

5) On July 30, 2015, the Governor's Office furnished the records to this office and responded that it had properly withheld the outside counsel lists pursuant to section 7(1)(m) of FOIA.

6) On July 31, 2015, a copy of the Governor's Office's response was forwarded to Mr. Dumke for his review and comment. On August 10, 2015, Mr. Dumke replied that section 7(1)(m) is inapplicable to the lists because they do not reveal privileged attorney-client communications.

7) On September 3, 2015, the Public Access Bureau properly extended the time within which to issue a binding opinion pursuant to section 9.5(f) of FOIA, to October 21, 2015. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

8) The Governor's Office has failed to demonstrate by clear and convincing evidence that the outside counsel lists are protected attorney-client communications or work product within the scope of section 7(1)(m). The lists do not contain confidential legal advice or theories, mental impressions, or litigation plans. Rather, the lists contain only general information about the nature of legal services performed for public bodies.

9) The outside counsel lists detail the use of public funds of the State. Records concerning the use of public funds by the State are expressly subject to inspection and copying under the Illinois Constitution of 1970 and section 2.5 of FOIA.

10) To the extent that the Governor's Office possesses additional information that Mr. Dumke requested concerning outside counsel which is not reflected in the existing lists, that information is responsive to the request and subject to disclosure. Compiling information which is already in the possession of the Governor's Office in order to respond to Mr. Dumke's request would not constitute the creation of a new record.

For the reasons stated above, it is the opinion of the Attorney General that the Governor's Office improperly denied Mr. Dumke's Freedom of Information Act request in violation of the requirements of FOIA. Accordingly, the Governor's Office is directed to take immediate action to comply with this binding opinion by providing Mr. Dumke with the withheld lists and any other information in its possession or under its control identifying outside counsel used by the State in fiscal years 2014 and 2015 to the date of Mr. Dumke's request, June

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15, 2015, or calendar years 2013 through 2015 to the date of the request, including the department or agency for which the work was performed, and the general nature of the representation.

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2014). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Mr. Mick Dumke as defendants. *See* 5 ILCS 140/11.5 (West 2014).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:



Michael J. Luke
Counsel to the Attorney General