OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 29, 2015

PUBLIC ACCESS OPINION 15-015
(Request for Review 2015 PAC 37506)

FREEDOM OF INFORMATION ACT:
Disclosure of Training Materials

Mr. Greg Will
SEIU Healthcare IL-IN
2229 South Halsted Street
Chicago, Illinois 60608

Mr. Curt Clemons-Mosby
FOIA Officer
Governor's Office of Management and Budget
401 South Spring Street
603 Stratton Building
Springfield, Illinois 62706

Dear Mr. Will and Mr. Clemons-Mosby:

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 Governor's Office of Management and Budget (GOMB) violated the requirements of FOIA by improperly denying a portion of Mr. Greg Will's August 31, 2015, FOIA request.

BACKGROUND

On August 31, 2015, Mr. Will, on behalf of Service Employees International Union Healthcare Illinois-Indiana, submitted a FOIA request via e-mail to GOMB seeking various records concerning services provided by "Arduin Associates Inc[.], Arduin, Laffer & Moore, or Donna Arduin[.]"[1] On September 9, 2015, GOMB provided certain records but

[1]E-mail from Greg Will, SEIU Healthcare IL-IN, to Curt Clemons-Mosby (August 31, 2015).

withheld a "power point deck in which budget policy is described[,]" citing as its basis for the denial section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2014), as amended by Public Act 99-298, effective August 6, 2015).[2] On September 16, 2015, this office received Mr. Will's Request for Review challenging GOMB's denial of the Microsoft PowerPoint records.[3]

On September 22, 2015, this office sent a copy of Mr. Will's Request for Review to GOMB and asked it to provide copies of the responsive records for our confidential review, together with a detailed explanation of the factual and legal bases for its assertion of the section 7(1)(f) exemption.[4] On September 30, 2015, this office received a copy of the PowerPoint presentation together with GOMB's written response.[5] This office forwarded a copy of GOMB's written response to Mr. Will on October 1, 2015[6] and received Mr. Will's reply to GOMB's response on October 14, 2015.[7] On November 13, 2015, this office properly extended the time in which to issue a binding opinion by 30 business days, to December 29, 2015, pursuant to section 9.5(f) of FOIA.[8]

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 3(a) of FOIA (5 ILCS 140/3(a) (West 2014)) provides that "[e]ach

---

[2]Letter from Curt Clemons-Mosby, Freedom of Information Act Officer, Governor's Office of Management and Budget, to Greg Will, SEIU Healthcare IL-IN (September 9, 2015), at 2.

[3]E-mail from Greg Will, SEIU Healthcare IL-IN, to Public Access Counselor (September 16, 2015).

[4]Letter from Neil P. Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Curt Clemons-Mosby, FOIA Officer, Governor's Office of Management and Budget (September 22, 2015), at 1.

[5]Letter from Curt Clemons-Mosby, Freedom of Information Act Officer, Governor's Office of Management and Budget, to Neil Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (September 30, 2015).

[6]Letter from Ivan O. Taylor, Jr., Legal Fellow, Public Access Bureau, Office of the Attorney General, to Greg Will, SEIU Healthcare IL-IN (October 1, 2015).

[7]E-mail from Greg Will, SEIU Healthcare IL-IN, to Ivan Taylor (October 14, 2015).

[8]Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, Office of the Attorney General, to Greg Will, SEIU Healthcare IL-IN, and Curt Clemons-Mosby, FOIA Officer, Governor's Office of Management and Budget (November 13, 2015).

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." A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2014).

Section 7(1)(f) of FOIA, which was asserted by GOMB, 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." The section 7(1)(f) exemption applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). Section 7(1)(f) is "intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." *Harwood*, 344 Ill. App. 3d at 248. Section 7(1)(f) does not, however, exempt from disclosure purely factual material. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 13-015, issued September 24, 2013, at 7. Rather, "[o]nly those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." *Kalven v. City of Chicago*, 2013 IL App (1st) 121846, ¶24, 7 N.E.3d 741, 748 (2013) (quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010)). Further, a public body that asserts the deliberative process exemption "has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir 1980).

Based upon our review, the PowerPoint presentation reflects general considerations for budget making and conceptual principles concerning the role of government, as well as directives about how to apply those principles and to communicate with the involved parties. In its response to this office, GOMB states that it informed Mr. Will that "a PowerPoint slide deck produced by Ms. Arduin[ ] was being withheld as exempt from disclosure under 5 ILCS 140/7(1)(f), as it contained the description of budget policy."[9] GOMB then relies on the plain language of section 7(1)(f) to support its assertion that "this PowerPoint presentation is exempt because it is a record 'in which opinions are expressed, or policies or actions are formulated.'"[10] The response by GOMB further states:

---

[9]Letter from Curt Clemons-Mosby, Freedom of Information Act Officer, Governor's Office of Management and Budget, to Neil Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (September 30, 2015), at 2.

[10]Letter from Curt Clemons-Mosby, Freedom of Information Act Officer, Governor's Office of Management and Budget, to Neil Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (September 30, 2015), at 2.

> The withheld PowerPoint was presented to GOMB analysts as training material on preparing for their role in the Fiscal Year 2017 budget development process. Throughout the PowerPoint presentation, Ms. Arduin expresses opinions and provides recommendations to the analysts on how best to go about their vital role of gathering and analyzing budget information. Developing a budget is the chief job responsibility of GOMB analysts; this responsibility necessarily involves deliberation and planning. Opinions and suggestions on how analysts go about the process of gathering and analyzing information are at their core fundamental to the formulation of budgetary policy. Different methods of gathering and analyzing information by analysts will, in the end, result in very different final budget presentations.[11]

GOMB's response also asserts that "all records in its possession reflecting the internal discussions, deliberations, preliminary proposals, calculations, and assumptions utilized to produce the Budget Books are preliminary and deliberative, and as such are exempt from disclosure under FOIA's Section 7(1)(f) Pre-Decisional Exemption."[12]

In his reply to that response, Mr. Will asserts that "[d]escribing policy and training staff are different from the deliberative process in which policy is formulated. Just because GOMB staff, once trained, eventually have to interact with the budgetary policies described in this document does not mean the document is part of a deliberative process."[13]

As an initial matter, we should note that Ms. Arduin, who produced the PowerPoint presentation, was serving as a budget consultant to the Governor's Office. The section 7(1)(f) exemption encompasses "communications between government agencies and outside consultants whose analyses and recommendations 'played essentially the same part in an agency's process of deliberation as documents prepared [internal citation] by agency personnel might have done.'" *Harwood*, 344 Ill. App. 3d at 248, quoting *Department of the Interior v. Klamath Water Users Protective Ass'n.*, 532 U.S. 1, 10, 121 S.Ct. 1060, 1067 (2001). Thus, in

---

[11]Letter from Curt Clemons-Mosby, Freedom of Information Act Officer, Governor's Office of Management and Budget, to Neil Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (September 30, 2015), at 2.

[12]Letter from Curt Clemons-Mosby, Freedom of Information Act Officer, Governor's Office of Management and Budget, to Neil Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (September 30, 2015), at 3.

[13]E-mail from Greg Will SEIU Healthcare IL-IN, to Ivan Taylor (October 14, 2015).

Harwood the court concluded that a report prepared by an outside consultant for a State agency fell within the scope of section 7(1)(f) partly because the consultant did "'not represent an interest of its own, or the interest of any other client,'" when it advised the agency. *Harwood*, 344 Ill. App. 3d at 248, quoting *Klamath Water Users Protective Ass'n.*, 532 U.S. at 11, 121 S.Ct. at 1067. Likewise, there is no indication that Ms. Arduin represented any interests other than those of the Governor's Office in connection with the records at issue. Therefore, our determination in this matter hinges on the issue of whether the withheld PowerPoint presentation constitutes exempt pre-decisional deliberative material.

In *American Immigration Council v. United States Department of Homeland Security*, 905 F. Supp. 2d 206, 218 (D.D.C. 2012), a federal district court considered whether five versions of PowerPoint slides used by the U.S. Citizenship and Immigration Services (USCIS) to train agency employees to interact with private attorneys were properly withheld under the deliberative process exemption (Exemption 5) in the Federal FOIA (5 U.S.C. §552(b)(5) (2010)).[14] At the outset, the court stated that for the deliberative process exemption to apply:

> a record must meet two requirements. First, it must be predecisional – *i.e.*, "antecedent to the adoption of an agency policy." [Citations.] * * * Second, a record must be deliberative – *i.e.*, "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." [Citation.] *American Immigration Council,* 905 F. Supp. 2d at 217-18.

The court specifically noted that "'[a] document that does nothing more than explain an existing policy cannot be considered deliberative.'" *American Immigration Council,* 905 F. Supp. 2d at 218, quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010). The court further explained that the deliberative process exemption "'calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be.'" *American Immigration Council*, 905 F. Supp. 2d at 218, quoting *Sears, Roebuck & Co.*, 421 U.S.132, 153, 95 S.Ct.1504, 1517-18 (1975). Because the training materials reflected the agency's established policy rather than its deliberations, the court held that the deliberative process exemption did not apply: "These training slides are neither predecisional nor deliberative. A training is not a step in making a

[14]Exemption 5 of the Federal FOIA (5 U.S.C. § 552(b)(5) (2010)) permitted an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

decision; it is a way to disseminate a decision already made. Indeed, by teaching USCIS employees to go forth and apply the information in the slides, USCIS entrenched its policies." *American Immigration Council*, 905 F. Supp.2d at 218.

Similarly, in *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 254 (D.D.C. 2005), the United States Department of Justice cited – among other provisions – Exemption 5 to deny an advocacy group's request for a draft of a training manual on the prosecution of federal election offenses. In addition to emphasizing that the training manual had been shared with non-Justice Department attorneys during a symposium, the court concluded that the training manual was not predecisional deliberative material because it "had been adopted as guidance." *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 255. The court further explained:

> The 2004 manual was not distributed to the symposium attendees to generate suggestions, additional input or recommendations before adoption of a final 7th Edition of the manual. Rather, the training manual was distributed as updated guidance for the attendees. Furthermore, defendants have proffered no evidence that the 2004 training manual was not provided as guidance, to those attending the symposium. *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 255.

Moreover, the court ruled that the draft of the training manual was a "final product[,]" and that the "Justice Department established the finality of the 2004 training manual when they decided to use it to train federal prosecutors for the 2004 national election." *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 256; *see also Stokes v. Brennan*, 476 F.2d 699, 703 (5th Cir. 1973) (concluding that "it would be a perversion of the Act to classify" training materials used to train inspectors for the Occupational Safety and Health Administration as exempt from disclosure under Exemption 5, which "was not defined as an exception to compelled disclosure in order to authorize an agency to throw a protective blanket over any type of information it might choose by the expedient of casting it in the form of an internal memorandum.").

Our courts have determined that because Illinois' FOIA statute is based on the federal FOIA statute, decisions construing similar provisions of the federal Act, while not controlling, may provide helpful and relevant precedents in construing the State Act. *See, e.g., Margolis v. Director, Ill. Department of Revenue*, 180 Ill. App. 3d 1084, 1087 (1st Dist. 1989). In the absence of reported Illinois cases relating to the disclosure of training materials under FOIA, the analysis and reasoning of these federal cases is persuasive.

GOMB's response to this office acknowledged that the PowerPoint presentation at issue "contained the description of budget policy[ ]" and was "presented to GOMB analysts as training material on preparing for their role in the Fiscal Year 2017 budget development process."[15] While GOMB's response to this office also describes in detail the back-and-forth collaborative process that takes place as a budget is being crafted, the PowerPoint presentation does not reflect any of the "internal deliberations and discussions, iterations of proposals, calculations, and assumptions that combine to ultimately produce the Budget Book."[16] Instead, as noted above, the PowerPoint slides largely consisted of general policy considerations for budget making and conceptual principles concerning the role of government, as well as directives to the budget analysts about how to apply those principles and to communicate with the involved parties. The presentation does not reflect the give and take of any deliberative process concerning the formulation of a specific budget, or any deliberative process between Ms. Arduin, who conducted the training, and the budget analysts who attended. Rather, the training materials constitute straightforward policy directives and guidance for budget analysts to use when they are participating in formulating budgets. In short, the PowerPoint itself is not a draft or predecisional – any decisions that may have been made with respect to what policies and information would be provided to budget analysts to help them prepare for their role in the budget process were finalized and memorialized in the slides that were presented as guidance to them. Additionally, the PowerPoint presentation is not deliberative – it explains the considerations and policies that should guide the budget analysts in their role rather than reflecting the process of working out which policies and considerations should guide the analysts.

As the courts explained in *American Immigration Council* and *Leadership Conference on Civil Rights*, when records are used for training purposes they constitute final decisions rather than predecisional deliberative materials. GOMB has not cited any authority for its assertion that these training materials are exempt from disclosure under section 7(1)(f) of FOIA. Accordingly, this office concludes that GOMB has not sustained its burden of demonstrating by clear and convincing evidence that the PowerPoint slides at issue in this matter are exempt from disclosure pursuant to section 7(1)(f) of FOIA.

---

[15]Letter from Curt Clemons-Mosby, Freedom of Information Act Officer, Governor's Office of Management and Budget, to Neil Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (September 30, 2015), at 2.

[16]Letter from Curt Clemons-Mosby, Freedom of Information Act Officer, Governor's Office of Management and Budget, to Neil Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (September 30, 2015), at 3.

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 August 31, 2015, Mr. Greg Will, on behalf of Service Employees International Union Healthcare Illinois-Indiana, submitted a FOIA request to the Governor's Office of Management and Budget seeking various records concerning services provided by Arduin Associates Inc., Arduin, Laffer & Moore, or Donna Arduin.

2) On September 9, 2015, GOMB provided certain records to Mr. Will but withheld a Microsoft PowerPoint presentation, citing section 7(1)(f) of FOIA as its basis therefor.

3) On September 16, 2015, the Public Access Bureau received Mr. Will's Request for Review disputing the denial of the PowerPoint records. The 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)).

4) On September 22, 2015, this office sent a copy of Mr. Will's Request for Review to GOMB and asked it to provide copies of the responsive records for this office's confidential review, together with a detailed explanation of the factual and legal bases for its assertion of the section 7(1)(f) exemption.

5) On September 30, 2015, this office received a copy of the PowerPoint presentation together with GOMB's written response.

6) This office forwarded a copy of GOMB's written response to Mr. Will on October 1, 2015 and received his reply to GOMB's response on October 14, 2015.

7) On November 13, 2015, this office properly extended the time in which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

8) 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, 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."

9) GOMB has failed to demonstrate by clear and convincing evidence that the PowerPoint presentation is exempt from disclosure pursuant to section 7(1)(f) of FOIA. The policy directives and guidance reflected in the presentation constitute training materials that were presented to budget analysts for use in preparing for their role in the process of formulating budgets. The PowerPoint presentation is not a draft of training materials; it is the final presentation given to the budget analysts. Additionally, it does not reflect a deliberative process about what policy directives and guidance should be given to the budget analysts to assist them in creating a budget. Similarly, it does not reflect the deliberative give and take of crafting a budget itself. As a result, the PowerPoint presentation was neither predecisional nor deliberative in nature.

Therefore, it is the opinion of the Attorney General that GOMB has improperly denied, in part, Mr. Will's Freedom of Information Act request in violation of the requirements of the Act. Accordingly, GOMB is directed to take immediate and appropriate action to comply with this opinion by providing the requested PowerPoint presentation to Mr. Will.

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. Greg Will 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