

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION**

DEBBIE SOUTHORN and )  
ERIN GLASCO, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
THE OFFICE OF THE MAYOR OF )  
THE CITY OF CHICAGO )  
 )  
Defendant. )  
 )

Case No. 2018 CH 3902

Hon. Sophia H. Hall

**DECISION**

This matter comes on to be heard on the Office of the Mayor’s Motion for Summary Judgment of Plaintiffs’ complaint. Plaintiffs’ complaint claimed that the Mayor’s Office violated the Illinois Freedom of Information Act, 5 ILCS 140/1 et seq. (“FOIA”), in its response to three FOIA requests Plaintiffs submitted between September 26, 2017 and December 6, 2017. Plaintiffs’ FOIA requests concern the Mayor’s Office’s activities around the building of the Joint Public Safety Training Academy (“JPSTA”).

Plaintiffs allege that the Mayor’s Office’s response to the requests redacted and withheld information that Plaintiffs allege does not fall under FOIA’s exemptions. In particular, the Mayor’s Office improperly invoked Section 7(1)(f) as a basis for redacting and withholding information.

In September 2018, Plaintiffs filed a motion for this Court to engage in an *in camera* inspection of the documents referenced in the Section 11(e) Index the Mayor’s Office had filed. This Court requested that the Index, which set forth each response to each of the three FOIA requests, be reorganized in chronological order so that the Court could understand the chronology of the documents as they related to the process of pursuing the building of the JPSTA. This Court also requested that the Mayor’s Office identify the positions and agencies of the numerous persons who were sent and were copied on the numerous emails listed in the Index, so that the Court could consider the roles the persons played.

On May 19, 2019, the Mayor’s Office filed the instant Motion for Summary Judgment. This Motion sets forth the chronology of activities regarding the JPSTA during the time period covered by the FOIA requests.

The Motion stated that on July 3, 2017, the Mayor announced the JPSTA in a press release. This Press Release included the 4301 W. Chicago Avenue location of the facility and a description of the structure to be built on the site. It stated that the Chicago Investment Trust would work with the Office, and indicated that the cost would be \$95 million. On October 11, 2017, a formal Request for Qualifications was issued. On November 20, 2017, Statements of Qualifications were received. On December 21, 2017, the shortlisted respondents were selected. Plaintiffs have supplied the Mayor's Office July 30, 2017 Press Release announcing the sale of a City property, the proceeds of which would support purchase of the identified Chicago Avenue property.

In support of its Motion, the City of Chicago attached the Affidavit of David Reynolds, the Commissioner of the City of Chicago Department of Fleet and Facility Management. The Affidavit was updated as of November 4, 2019 as a result of this Court's questions about the City's process of planning, acquisition, and building. Reynolds states the development of any project involves many steps. "For a capital development project such as the Joint Public Safety Training Academy ('JPSTA') those steps include, but are not limited to, scope development, site identification, procurement method identification, and financing." Each step involves options and discussions. In particular, he states that "[i]n developing the JPSTA scope, options explored included new construction on a single site; the renovation of several existing City facilities; and a combination of renovating existing City facilities and new construction." He states that new construction was chosen.

Reynolds then lists the deliberative process prior to certain finalized decisions as including "public messaging . . . prior to when press releases were finalized and released on July 3, 2017 and October 10, 2017;" "discussions regarding . . . renderings that were redacted . . . prior to [the renderings' release] on July 30, 2017;" "site selection . . . prior to the finalization of the site acquisition on November 8, 2017;" "drafts of RFQs [Requests for Qualification] . . . prior to the release date of October 11, 2017;" and "budget and financing . . . not finalized until city council approval on March 13, 2019 . . ."

Attached to Reynolds's Affidavit is an updated Section 11(e) Index as of November 4, 2019 listing redacted and withheld emails dated from February 27, 2017 through November 14, 2017. For each document, the Index lists the applicable exemption, the decision date to which the document relates, and the reasons the exemption applies.

The referenced exemptions in the Index are Section 7(1)(b) and 7(1)(f), which provide:

7(1)(b) provides exemptions for "[p]rivate information, unless disclosure is required by another provision of this Act, a State or federal law or a court order."

7(1)(f) provides exemptions for "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated."

5 ILCS 140/7.

The City, in seeking the benefit of the exemptions, has the burden to prove the exemptions apply by clear and convincing evidence. At particular issue is the 7(1)(f) exemption.

### Analysis

#### Standard for 7(1)(f)

The purpose of the Freedom of Information Act is to insure the transparency of government activities. As stated in the *Chicago Tribune Company v. Cook County Assessor's Office*, Section 7(1)(f) is designed to protect the communications process in government agencies, and to encourage frank and open discussion before a final decision is made. Thus, Section 7(1)(f) exempts from disclosure “preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated.” *Chicago Tribune Co. v. Cook County Assessor's Office*, 2018 IL App (1st) 170455, ¶ 22.

The exemption has been characterized as the deliberative process exemption, or the preliminary records exemption. *Chicago Tribune*, ¶ 20. The court in *Chicago Tribune* stated that exempted documents must be pre-decisional and deliberative. *Chicago Tribune*, ¶ 28. The pre-decisional deliberative process is described as including a “give and take” process that is facilitated by nondisclosure. *Chicago Tribune*, ¶¶ 12, 29.

If the public body seeks to have records exempted under Section 7(1)(f), the public body has the burden of proving that the exemption applies to the records requested, and must do so by clear and convincing evidence. *Chicago Tribune*, ¶ 22. “The Illinois General Assembly patterned the Illinois FOIA after the federal FOIA, and Illinois courts use case law construing the federal FOIA for guidance in interpreting the Illinois FOIA.” *Korner v. Madigan*, 2016 IL App (1st) 153366, ¶ 10.

One instructive federal case is *National Day Laborer Organizing Network v. United States Immigration & Customs Enforcement Agency*. In this case, the U.S. District Court for the Southern District of New York explains an agency’s burden if it seeks to exempt documents from a federal FOIA request under the “deliberative process privilege.” The agency must demonstrate that the document is related to a specific decision facing the agency and the document must be actually related to the process by which policies are formulated. *See National Day Laborer Organizing Network v. United States Immigration & Customs Enforcement Agency*, 811 F. Supp. 2d 713, 735 (S.D.N.Y. 2011). Public bodies seeking the deliberative process exemption under the Illinois FOIA carry a similar burden. To receive a Section 7(1)(f) exemption, the Mayor’s Office must demonstrate that the document in question is related to a specific decision facing the Mayor’s Office and the document is actually related to the process by which policies are formed.

As is apparent from the emails and responses to this Court's questions, including the identification of the roles of the email recipients, the JPSTA project involves many people and many activities. The development of the JPSTA includes the participation of many parts of the City's government, from the Mayor's Office, its administrators, City agencies, and the City Council. Each has a role to play in the JPSTA Project.

In a case involving a different government action, the U.S. District Court for the District of Columbia considered distinctions in decision roles with respect to a process leading to a government action. *Trea Senior Citizens League v. United States Department of State*, 994 F. Supp. 2d 23, 26 (D.D.C. 2013). In that case, the plaintiff made a FOIA request for documents concerning a signed Agreement between the U.S. Department of State and Mexico. The Department withheld documents under the deliberative process exemption. The Department argued that, though the Agreement between the Department and Mexico had been signed and submitted to the President, to be in effect the Agreement still had to be submitted to Congress. Therefore, the Agreement was not final and the documents requested were pre-decisional deliberations and were exempt. The court rejected the argument. It stated:

The key to determining whether a document is pre-decisional is not necessarily in what state of implementation, or on whose desk, the policy currently rests—because a final policy may never be acted upon—but instead is more simply focused on whether the document 'was generated before the adoption of an agency policy.'

*Trea Senior Citizens League v. United States Department of State*, 994 F. Supp. 2d 23, 34 (D.D.C. 2013) (citation omitted).

In applying the deliberative process exemption to the instant case, this Court must determine what the decision is and who the decision-maker is. Once the decision date is determined, communications of the decision-maker occurring after the decision date as to that decision will not be eligible for the Section 7(1)(f) exemption. In the instant case, the decision date for purposes of the application of the Section 7(1)(f) exemption is determined by when the Mayor performed his role in the JPSTA process.

#### Application of the Exemption

The determination of the application of the deliberative pre-decisional process exemption is fact-intensive. For example, the *Chicago Tribune* case involved a request for documents regarding the Cook County Assessor's process for valuations of property. The *National Day Laborer* case involved a request for information about the opt-in and opt-out process of local jurisdictions regarding the application of the federal Secure Communities Law. This law required local jurisdictions to provide fingerprints of fingerprinted persons to the Federal Bureau of Investigation and U.S. Customs and Immigration Enforcement. In both of these cases, the application of the deliberative process exemption depended on the nature of the request and the

decisions to which the request was directed. In both of those cases, evidence was developed and submitted in a motion for summary judgment process. In the *National Day Laborer* case an *in camera* review was conducted.

A different function of government is implicated in the instant case than in the above cases. The only evidence offered by the Mayor's Office as to its decision-making process with respect to the JPSTA is in Reynolds's affidavit. Reynolds lists the deliberative process and decision date as including: (1) public messaging prior to the press releases' finalization and release on July 3, 2017 and October 10, 2017; (2) renderings discussed prior to July 30, 2017; (3) site selection prior to acquisition November 8, 2017; (4) requests for qualifications prior to October 11, 2017; and (5) budget and financing not finalized until City Council approval on March 13, 2019.

#### *Decision Date*

Plaintiffs argue that the Mayor's decision to proceed with the JPSTA project occurred at the latest at the time of the July 3, 2017 Press Release announcement. In the release, the Mayor announced that the chosen site was 4301 W. Chicago Avenue, and described the buildings and uses of the JPSTA, and that he was working with the Chicago Investment Trust. Plaintiffs argue that at the latest all the activities thereafter were the implementation of his decision.

Based on the evidence presented, the Mayor's role was to make a decision whether to pursue the construction of the JPSTA. The Mayor's Office's announcement in the July 3, 2017 Press Release reflected the Mayor's Office's decision to build the JPSTA. It identified the Chicago Avenue Property, containing two buildings, and announced the decision to develop and finance the JPSTA with the participation of the Chicago Investment Trust. The Mayor's Office did not identify any subsequent decisional role he played at any later point in the JPSTA process.

It is important to note that the Plaintiffs' FOIA request was directed to the Mayor's Office regarding his decision to proceed, not the decision of others who had roles to play in taking steps to implement the decision, such as the City Council's role in approving the project, a role much like the Congress's approval discussed in *Trea Senior Citizen's League*. These subsequent decisions, as far as the Mayor's decision is concerned, are the steps in implementing his decision to proceed.

This Court finds that, for purposes of Plaintiff's FOIA request of the Mayor, as opposed to anyone else having to make a decision in their roles in the JPSTA project, the Mayor's decision date, with respect to his role in the JPSTA project, was July 3, 2017 at the latest, as reflected in the press release. The Mayor's Office in its evidence has not identified any other decision the Mayor was required to make to effectuate the implementation of the decision to acquire and build. This Court, therefore, finds that documents generated prior to July 3, 2017 are subject to evaluation under Section 7(1)(f) as pre-decisional.

Additionally, based on the evidence presented, the Court finds that, for purposes of the FOIA request on the Mayor, requested documents bearing a date after July 3, 2017 are post-decisional. Therefore, they are not subject to the Section 7(1)(f) exemption.

#### *Budget and Finance*

This Court finds that any of the Mayor's Office's documents concerning budget and finance after July 3, 2017 are post-decisional. The Mayor's Office has not identified any other decision it made with regard to the City Council approval process preceding the March 13, 2019 City Council approval.

#### *Request for Qualifications*

The Request for Qualifications issued October 2017 is an implementation of the Mayor's decision to construct the JPSTA. No evidence has been presented to show any decision-making role that the Mayor's Office had in the Request for Qualifications process implementing his July 3, 2017 decision to proceed.

#### *Renderings*

Renderings were publicly revealed in the July 30, 2017 Press Release. Reynolds generally stated that renderings were a part of the JPSTA process. No evidence was presented about the Mayor's decision-making role as to the renderings created or released after the July 3, 2017 announcement. It appears that renderings existed prior to the July 3, 2017 announcement, based on the content therein. Therefore, to the extent that there were discussion of renderings prior to July 3, 2017, they would be pre-decisional and subject to the 7(1)(f) evaluation.

#### *Public Messaging*

Documents or emails discussing public messaging are exempted if the messaging conversations occurred prior to the decision date as a part of how and what the decision would be. *Mayer, Brown, Rowe & Maw LLP v. IRS*, 537 F. Supp. 2d 128, 139 (D.D.C. 2008). Here the decision date is July 3, 2017. If a document is dated after the decision date, it is an explanation of the decision made.

#### *In Camera Review*

This Court has reviewed the November 4, 2019 Section 11(e) Index that identified the emails and documents, the reasons for exempting them, and the decision dates to which the emails or documents were directed. This Court has also reviewed the material delivered for the *in camera* review, which includes emails and attachments to emails, as well as other documents. Some of the emails that have been delivered contain redactions or withholding and are not noted in the Index.

Based upon the above discussion of the law and facts, and the review of the reasons set forth in the Section 11(e) Index, this Court finds that:

*Emails and Materials Dated After July 3, 2017*

The Office of the Mayor has failed to provide sufficient evidence that the emails and documents dated after July 3, 2017 relate to any role of the Mayor to make any decision as to steps taken to implement his July 3, 2017 policy decision to pursue the building of the JPSTA expressed in the Press Release. Accordingly, the 7(1)(f) exemption does not apply to any of these emails and materials redacted or withheld based on the exemption. Accordingly, as to the application of the exemption to the delivered material dated after July 3, 2017, this Court denies the Mayor's Office Motion for Summary Judgment.

Plaintiffs do not dispute that private or personal information should be redacted or withheld; thus those redactions shall remain. Accordingly, this Court requires a supplemental Section 11(e) filing based solely on the Section 7(1)(b) items in the November 4, 2019 Index.

*Emails and Materials Dated Before July 3, 2017*

This Court compared the Section 11(e) Index to the delivered materials for *in camera* review. For the reasons indicated above, that some delivered materials containing redactions are not itemized, it is not clear which delivered materials dated before July 3, 2019 are included in the Index. Since the burden is on the Mayor's Office to prove the application of the Section 7(1)(f) exemption by clear and convincing evidence, this Court finds that the Mayor's Office has failed to do so in the Section 11(e) filing. Accordingly, this Court denies the Mayor's Office's Motion for Summary Judgment as to the delivered material dated before July 3, 2017.

Entered: \_\_\_\_\_  
**ENTERED**  
Judge Sophia H. Hall-0162  
JAN 10 2020  
Date: \_\_\_\_\_ Judge Sophia H. Hall  
DOROTHY BROWN  
CLERK OF THE CIRCUIT COURT  
OF COOK COUNTY, IL  
DEPUTY CLERK