



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

KWAME RAOUL  
ATTORNEY GENERAL

August 8, 2019

*Via electronic mail*  
Mr. David Giuliani  
Reporter  
*The Daily Journal*  
dgiuliani@daily-journal.com

RE: FOIA Request for Review – 2019 PAC 59048

Dear Mr. Giuliani:

The Public Access Bureau has received the enclosed response to your Request for Review from counsel for Bourbonnais Elementary School District No. 53 (District). Please be advised that additional materials provided by the District for this office's confidential review have not been included with the enclosed response.

You may, but are not required to, reply in writing to the District's response. If you choose to reply, you must submit your reply to this office within 7 working days of your receipt of this letter. 5 ILCS 140/9.5(d) (West 2016). Please send a copy of your reply to the counsel for the District as well.

If you have any questions, please contact me at (217) 782-9054, mhartman@atg.state.il.us, or the Springfield address below.

Very truly yours,

  
MATT HARTMAN  
Assistant Attorney General  
Public Access Bureau

cc: *Via electronic mail*  
Mr. Brian P. Crowley  
Franczek  
300 South Wacker Drive, Suite 3400  
Chicago, Illinois 60606  
bpc@franczek.com

# FRANCZEK

300 SOUTH WACKER DRIVE, SUITE 3400 | CHICAGO, IL 60606  
T: 312.986.0300 | F: 312.986.9192 | FRANCZEK.COM

BRIAN P. CROWLEY  
312.786.6560  
bpc@franczek.com

August 8, 2019

## VIA ELECTRONIC MAIL

Mr. Matt Hartman  
Assistant Attorney General  
Public Access Bureau  
500 South Second Street  
Springfield, Illinois 62701

**Re: FOIA Request for Review – 2019 PAC 59048**

Dear Mr. Hartman:

This law firm represents the Board of Education of Bourbonnais Elementary School District No. 53. The School District received your July 30, 2019 letter regarding Mr. David Giuliani's, reporter for the Daily Journal, request for Public Access Counselor review. Specifically, Mr. Giuliani is challenging the School District's decision to deny his July 1, 2019 Freedom of Information Act request seeking copies of the following records:

All documents related to the investigation of Superintendent Dan Hollowell. This includes grievances, Hollowell's response and the investigatory report.

On July 8, 2019, the School District denied the request, withholding the responsive records pursuant to the following exemptions under the FOIA: Section 7(1)(m)-communications between the School District and its attorney; Section 7(1)(f)-predecisional records; Section 7(1)(n) adjudicatory records; and 7(1)(c)-personal records. Mr. Giuliani appealed the School District's denials based on the Sections 7(1)(m), 7(1)(f), and 7(1)(n) exemptions. Enclosed with this response are the responsive records that are subject to those exemptions. The School District is providing the records to the PAC for its review because it is compelled to do so. The School District is not waiving the attorney-client privilege or any other exemptions that apply to the records. Pursuant to Section 9.5(c) of the FOIA, the records are exclusively for review by the PAC.

The School District's reasoning for each of the exemptions is provided below.

### **Section 7(1)(m) exemption-attorney-client**

Two records that are responsive to the request are exempt under Section 7(1)(m) of the FOIA, which exempts certain attorney-client communications from release. The two documents

are summaries of two investigations conducted by the School District's legal counsel, Franczek P.C., that include the findings of the investigation and legal advice.

Records are exempt under Section 7(1)(m) of the FOIA if they consist of communications between the public body and an attorney representing the public body that would not be subject to discovery in litigation. Attorney-client privileged communications are not subject to discovery. The attorney-client privilege exists to encourage and promote the full and frank consultation between a client and his or her legal advisor by removing the fear of compelled disclosure of information. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 117-18, 59 Ill.Dec. 666, 432 N.E.2d 250 (1982). To be entitled to the protection of the attorney-client privilege, a claimant must show that the statement originated in confidence that it would not be disclosed, was made to an attorney acting in her legal capacity to secure legal advice or services, and remained confidential. *Hyams v. Evanston Hospital*, 225 Ill.App.3d 253, 257-58, 167 Ill.Dec. 512, 587 N.E.2d 1127 (1992). Here, the investigatory reports in question were communicated in confidence by the School District's attorneys to the relevant members of the control group for securing legal advice regarding the investigation.

The fact that the communications are pursuant to an investigation conducted by the Board's attorneys does not waive the privilege. The United States Supreme Court has established that attorneys engaged to conduct investigations for a corporate client such as a school district are "representing" the entity for purposes of the attorney-client privilege. *See Upjohn v. United States*, 449 U.S. 383, 687-361 (1981). In *Upjohn*, the Supreme Court held that the attorney-client privilege protected documents generated during an investigation conducted by in-house and outside counsel into reports that foreign subsidiaries had bribed foreign officials for business. *Upjohn* held that the questionnaires and interviews conducted as part of that investigation were protected by the attorney-client privilege. The Court explained that a narrower reading of the privilege would

overlook[ ] the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. *Id.* at 390-91.

That is exactly what the Board's attorneys did for the District here – they investigated by sifting through the facts, determining what was legally relevant, and providing a report of their results to the Board based on their investigation, including suggestions regarding future actions. As the United States Supreme Court recognized in *Upjohn*, the suggestion that an attorney conducting an investigation is not providing legal services protected by the privilege "threatens to limit the valued efforts of corporate counsel to ensure their client's compliance with the law." *Id.* at 392.

The Seventh Circuit has also found that the attorney-client privilege applied to communications by attorneys hired to conduct an internal investigation by a school district. In *Sandra T. E. v. South Berwyn School Dist. 100*, 600 F.3d 612, 619 (7th Cir. 2010), the school board retained a law firm to conduct an internal investigation into school administrators' responses to allegations of a teacher's sexual abuse of students. The purpose of the investigation was to

“examine whether any district employees had failed to comply with district policies or federal or state law, and [to] analyze the effectiveness of the District’s existing compliance procedures.” *Id.* at 616. The Seventh Circuit concluded that the law firm had been hired to provide legal services, and that legal services included the underlying factual investigation necessary to provide those services. *Id.* at 620. The Court held that “[b]ecause the [ ] lawyers were hired in their capacity as lawyers to provide legal services—including a factual investigation—the attorney-client privilege applies to the communications made and documents generated during that investigation.” 600 F.3d at 620. The Seventh Circuit in *Sandra T.E.* concluded that the attorneys’ communications related to the investigation were protected by the attorney-client privilege. *See also Schlicksup v. Caterpillar, Inc.*, 2011 WL 2731323 (C.D. Ill. 2011) (investigation by law firm into misconduct within corporate entity was legal services sufficient to establish representation for attorney client privilege); *Lerman v. Turner*, 2011 WL 62124 (N.D. Ill. 2011) (same). Here, too, the communications relating to the Board’s investigation were clearly part of the representation that the law firm was providing the Board.

Therefore, the investigatory reports, as confidential communications subject to the attorney-client privilege, would not be subject to discovery in litigation and are exempt from disclosure in their entirety under Section 7(1)(m) of the FOIA.

#### **Section 7(1)(f) exemption-predecisional**

The two investigatory reports prepared by the attorneys are also exempt as predecisional records under Section 7(1)(f) of the FOIA. The records are internal School District communications prepared by the School District’s attorneys. The records provide the attorneys’ opinions and forward-looking recommendations regarding the subject matters of the investigations. In preparing the internal reports, the attorneys’ intended purpose was to inform the Board of the attorneys’ opinions and findings regarding the investigations and to assist the Board in formulating actions related to the investigations. The reports reveal deliberations involved in the School District’s decision-making process. The Section 7(1)(f) exemption is “intended to protect the communication process and encourage frank and open discussion among employees before a final decision is made.” *See Harwood v. McDonough*, 344 Ill. App. 3d 242, 248 (1<sup>st</sup> Dist. 2003). The records included with Exhibit A are the very type of records that the PAC has held are exempt from disclosure under Section 7(1)(f) of the FOIA. *See* 2017 PAC 47818 and 2017 PAC 50191.

Finally, the fact that the Board’s attorney is not an employee of the School District does not waive the predecisional exemption. Courts have extended the predecisional exemption to 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 by agency personnel might have done.” *See Harwood v. McDonough*, 344 Ill. App. 3d 242, 248 (1<sup>st</sup> Dist. 2003).

**Section 7(1)(n) exemption-adjudication of disciplinary case**

All the attached records are exempt under Section 7(1)(n) of the FOIA as records relating to a public body's adjudication of employee grievances or disciplinary cases. 5 ILCS 140/7(1)(n). While this exemption does not apply to the record that is created to establish the final outcome, it does apply to all other records related to the adjudication, even after the final outcome. The School District recognizes that the 7(1)(n) exemption, based on court and PAC interpretations, is a narrow one. *See Kalven v. City of Chicago*, 2014 IL App (1<sup>st</sup>) 121846. The records in question here, however, meet that narrow standard.

In *Kalven*, the appellate court held that only records related to an adjudication are exempt and the court went on to define an "adjudication" as "a formalized legal process that results in a final enforceable decision." *See Kalven v. City of Chicago*, 2014 IL App (1<sup>st</sup>) 121846, ¶13. Here, the records were created pursuant to and during the formal adjudication of a disciplinary case involving the Superintendent under the Board's Uniform Grievance Policy 2:260. A complaint filed in accordance with the Board's Uniform Grievance Policy initiates the formal process. The process includes notice, an opportunity for both the complainant and the individual subject to the complaint, who here is the Superintendent, to present a case to the Board, and, because this matter involved the Superintendent, the formal decision is made by the Board. The process under the Board's Uniform Grievance Policy is a "formalized legal process that results in a final enforceable decision." Therefore, it is an adjudication and, when it involves a disciplinary case, as it did here, records related to and created pursuant to the adjudication/grievance process qualify as exempt from disclosure under the Section 7(1)(n) exemption.

The two investigatory reports completed by the Board's attorneys were created at the direction of the Board to investigate the complaint made pursuant to the Board's Uniform Grievance Policy to assist the Board in its review of the alleged grievance. The two correspondences from the Board, one to the complainant and one to the Superintendent, that are also attached for the PAC's review, discuss the status of the Board's review, but do not include the Board's final disciplinary decision. To date, the Board has not made a final decision related to this adjudication. The only responsive records to the FOIA request are the preliminary records prepared pursuant to the on-going adjudication and prior to the Board's decision. The records responsive to Mr. Giuliani's complaint are exempt as records created pursuant to an adjudication.

**Section 7(1)(c) exemption-personal**

Included in one of the investigatory reports are two records attached as exhibits that, in addition to being exempt under all the exemptions already discussed because they are part of the overall investigatory report, are also exempt from disclosure under Section 7(1)(c) of the FOIA as personal records. As the PAC will conclude after reviewing the two exhibits, they are highly personal, and their release would be objectionable to a reasonable person, who, here, is the individual who made the complaint against the Superintendent. Redacting the complainant's name would not protect her privacy since the community is aware of her identity. Even if in the unlikely circumstance the PAC were to find that investigatory reports are subject to release, the exhibits should remain exempt under the Section 7(1)(c) exemption.

FRANCZEK

Mr. Matt Hartman  
August 8, 2019  
Page 5

Please let me know if I can be of further assistance in your review. The School District will take no further action on this matter until so directed by your office.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian P. Crowley". The signature is fluid and cursive, with the first name "Brian" being the most prominent.

Brian P. Crowley

Attachment

cc: Mr. James B. Duggan, FOIA Officer, Bourbonnais Elementary School District No. 53