OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 13, 2017

Via electronic mail
Mr. Jeff Egbert
Advertising Director
O'Fallon Weekly
jeff@ofallonweekly.com

Via electronic mail
Mr. Garrett P. Hoerner
Becker, Hoerner, Thompson & Ysursa, P.C.
5111 West Main Street
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RE: FOIA Request for Review – 2017 PAC 47540

Dear Mr. Egbert and Mr. Hoerner:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2016)). For the reasons that follow, the Public Access Bureau concludes Central School District No. 104 (District) improperly denied Mr. Jeff Egbert's February 16, 2017, FOIA request.

On that date, Mr. Egbert, on behalf of *O'Fallon Weekly*, submitted a FOIA request to the District seeking a copy of the notice to remedy resolution approved at the District's special meeting on the same day. On February 24, 2017, the District provided a copy of the resolution but withheld Exhibit A referenced in the resolution pursuant to sections 7(1)(a) and 7(1)(c) (5 ILCS 140/7(1)(a), (1)(c) (West 2016)) as well as section 7.5(q) of FOIA (5 ILCS 140/7.5(q) (West 2016)); the District's response asserted that the requested record is a performance evaluation that is confidential under section 11 of the Personnel Record Review Act (PRRA) (820 ILCS 40/11 (West 2016)). Mr. Egbert disputes the denial of the exhibit.

On April 28, 2017, this office forwarded a copy of the Request for Review to the

District and asked it to provide an unredacted copy of the record at issue for this office's confidential review. On May 19, 2017, counsel for the District furnished those materials; Mr. Egbert did not reply to the District's response.

DETERMINATION

All records in the possession or custody of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2016); *see also Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill. 2d 390, 415 (2006). 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 2016).

Sections 7(1)(a) and 7.5(q) of FOIA

Section 7(1)(a) of FOIA exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." In *Better Gov't Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 816 (2008), the Illinois Appellate Court stated that "an exemption restricting the expansive nature of the FOIA's disclosure provisions must be explicitly stated—that is, such a proposed disclosure must be *specifically* prohibited." *Better Gov't Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 816 (4th Dist. 2008)

Section 7.5(q) of FOIA exempts from disclosure "[i]nformation prohibited from being disclosed by the Personnel Records Review Act." The District denied the exhibit to the resolution under sections 7(1)(a) and 7.5(q) of FOIA based on section 11 of PRRA, which provides: "This Act shall not be construed to diminish a right of access to records already otherwise provided by law, provided that disclosure of performance evaluations under the Freedom of Information Act shall be prohibited."

The record in question is a notice to remedy issued to a teacher. In its response to this office, the District asserted that the notice to remedy constitutes a "performance evaluation" that is prohibited from being disclosed by section 11 of PRRA as well as section 24A-7.1 of the School Code (105 ILCS 5/24A-7.1 (West 2016)).[1] Neither statute defines the term "performance evaluation."

A notice to remedy is a written notice that generally must be provided to a tenured teacher before a school board may proceed with disciplinary proceedings that could result in the

[1]Section 24A-7.1 of the School Code provides: "Except as otherwise provided under this Act, disclosure of public school teacher, principal, and superintendent performance evaluations is prohibited."

teacher's dismissal. 105 ILCS 5/24-12(d)(1) (West 2016). The Public Access Bureau has previously determined that a notice to remedy is not a "performance evaluation" under the School Code or PRRA: "The fact that both statutory provisions refer to 'performance evaluations' indicates that the General Assembly intended only to bar disclosure of documents in which an employee's overall performance is evaluated, not documents that merely address specific instances of misconduct and issue directives to the employee relating to the misconduct." Ill. Att'y Gen. PAC Req. Rev. Ltr. 12095, issued April 17, 2012, at 4.

The District's response to this office asserts that our determination in 2011 PAC 12095 "exalts form over substance, as the same statement would be confidential in an annual performance evaluation but not in a notice to remedy[.]"[2] Yet performance evaluations may contain references to information in numerous types of other records that are subject to disclosure under FOIA, such as résumés, employment applications[3] and Complaint Register files.[4] If the General Assembly had intended section 24A-7.1 of the School Code or section 11 of PRRA to prohibit disclosure of any records that contain such information other than performance evaluations, it would have done so expressly. Further, the District's conclusory assertion that a "notice to remedy is tantamount to a performance evaluation"[5] does not provide clear and convincing evidence in support of the section 7(1)(a) and 7.5(q) exemptions.

In construing a statute, the primary goal is to ascertain and give effect to the intent of the General Assembly. *Wisnasky-Bettorf v. Pierce*, 2012 IL 111253, ¶16, 965 N.E.2d 1103, 1106 (2012). "We view the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation. Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous." *People v. Gutman*, 2011 IL 110338, ¶12, 959 N.E.2d 621, 624 (2011). When a term is used in different portions of statute, it is presumed to have the same meaning throughout unless the context provides otherwise. *Guillen v. Potomac Insurance Co. of Illinois*, 203 Ill. 2d 141, 152 (2003).

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[2]Letter from Garrett P. Hoerner, Becker, Hoerner, Thompson & Ysursa, to Steve Silverman, Assistant Attorney General, Public Access Bureau (May 19, 2017), at 2.

[3]Ill. Att'y Gen. Pub. Acc. Op. No. 14-015, issued November 25, 2014, at 9 ("No provision of the Personnel Record Review Act prohibits a public body from disclosing résumés or employment applications.").

[4]*Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago*, 2016 IL App (1st) 143884, ¶53, 59 N.E.3d 96, 108 (2016) (concluding that Complaint Register files detailing investigations of misconduct against police officers are subject to disclosure).

[5]Letter from Garrett P. Hoerner, Becker, Hoerner, Thompson & Ysursa, to Steve Silverman, Assistant Attorney General, Public Access Bureau (May 19, 2017), at 2.

Notably, the provision of the School Code that the District relied upon to characterize the notice to remedy as a performance evaluation and deny Mr. Egbert's request is included in Article 24A. The purpose of the Article is to "improve the educational services of the elementary and secondary public schools of Illinois by requiring that all certified school district employees be ***evaluated on a periodic basis*** and that the evaluations result in remedial action being taken when deemed necessary." (Emphasis added.) 105 ILCS 5/24A-1 (West 2016). Each school district is required to develop a "teacher evaluation plan" providing that every teacher is "evaluated" at least once every two years and given an overall rating such as excellent, satisfactory, or unsatisfactory. 105 ILCS 5/24A-4, 24A-5, 24A-5(c) (West 2016). In addition, the provision immediately preceding section 24A-7.1 provides for the development of rules governing the evaluation process in collaboration with a "Performance Evaluation Advisory Council" that includes "persons with expertise in performance evaluation processes and system[.]" 105 ILCS 5/24A-7 (West 2016).

Considering section 24A of the School Code as a whole, it is apparent that the term "evaluation" in sections 24A-1, 24A-4, and 24A-5 and the term "performance evaluation" in section 24A-7 is intended to apply to periodic comprehensive evaluations rather than a document concerning specific instances of misconduct. Because a notice of remedy concerns specific instances of misconduct, it is not a "performance evaluation" that section 24A-7.1 of the School Code prohibits the District from disclosing. Accordingly, we conclude that the District improperly denied the notice to remedy on that basis.

Nor does section 11 of the PRRA prohibit disclosure of a notice to remedy. The Senate Debates on House Bill 5154, which amended section 11 of the Act to add the language barring disclosure of "performance evaluations," indicates that the term was intended to apply to periodic comprehensive evaluations:

> The premise is, there is -- some protection should be in place for employees and employers. If there is a performance evaluation piece – ***you work all year, you know your supervisor has set some goals for you to meet*** – I don't know that it's your business or anyone else's business on what this particular staff person have obtained within that year's evaluation. I think what is and what should be known is, perhaps, the title that the person is in, how much they're actually being paid, even so far just to say whether or not they are an employee of the State of Illinois or any other public employee. But how well you did on your ***actual performance evaluation year-to-year***, I think is a -- a measure of privacy. (Emphasis added.) Remarks of Sen. Lightford, April 29, 2010, Senate Debate on House Bill No. 5154, at 182.

See also remarks of Rep. Chapa LaVia, March 11, 2010, House Debate on House Bill No. 5154, at 107. "[I]t's just a thorough and constructive evaluation. Employees should receive guidance, corrective action and further development all within the goal of helping employees achieve excellence."

As with section 24A-7.1 of the School Code, there is no indication that the term "performance evaluation" in section 11 of PRRA was intended to apply to specific instances of misconduct. Accordingly, this office concludes that the District has not sustained its burden of demonstrating that the notice of remedy is exempt from disclosure pursuant to section 7(1)(a) or section 7.5(q) of FOIA.

Section 7(1)(c) of FOIA

Lastly, the District asserts that the notice to remedy is exempt from disclosure pursuant to section 7(1)(c) "as personal information of the subject teacher."[6] Section 7(1)(c) permits a public body to withhold:

> Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. "Unwarranted invasion of personal privacy" means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. ***The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.*** (Emphasis added.)

Based on this office's review of the notice to remedy, it directly bears on the teacher's performance of her public duties. Because the above-definition of "unwarranted invasion of personal privacy" expressly excludes information that bears on the public duties of public employees, this office concludes that the District improperly withheld the notice to remedy under section 7(1)(c) of FOIA.

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[6]Letter from Garrett P. Hoerner, Becker, Hoerner, Thompson & Ysursa, to Steve Silverman, Assistant Attorney General, Public Access Bureau (May 19, 2017), at 2.

In accordance with the conclusions expressed in this determination, we request that the District provide Mr. Egbert with a copy of the notice to remedy. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (312) 814-6756. This file is closed.

Very truly yours,

[redacted]

STEVE SILVERMAN
Bureau Chief
Public Access Bureau

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