OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 17, 2018

Via electronic mail
[redacted]

Via electronic mail
Ms. Keri-Lyn J. Krafthefer
Ancel Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.
140 South Dearborn Street, 6th Floor
Chicago, Illinois 60603
KKrafthefer@ancelglink.com

RE: FOIA Request for Review – 2018 PAC 52748

Dear [redacted] and Ms. Krafthefer,

This determination letter 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 that Wesley Township (Township) did not sustain its burden of demonstrating by clear and convincing evidence that the records requested by [redacted] are exempt from disclosure.

On April 11, 2018, [redacted] submitted a FOIA request to the Township seeking copies of "ALL emails both to and from the lawyers firm that the supervisor hired representing the township within the last 6 months." (Emphasis in original.)[1] On April 17, 2018, the Township denied the request in its entirety pursuant to section 7(1)(m) of FOIA (5 ILCS 140/7(1)(m) (West 2017 Supp.)). On April 18, 2018, this office received [redacted] Request for Review contesting the denial. Specifically, he argued that there is no litigation currently being handled by the firm hired by the current supervisor.

[1]FOIA request from [redacted] to wesleysuper2017@outlook.com, wesleytwp2017@outlook.com (April 11, 2018).

On April 26, 2018, this office forwarded a copy of the Request for Review to the Township and asked it to provide this office with unredacted copies of the requested records for our confidential review, together with a detailed explanation of the factual and legal bases for the applicability of section 7(1)(m). On May 25, 2018, counsel for the Township provided this office with a written response, maintaining that the Township properly withheld the responsive records except for certain records that the Township decided to disclose to [redacted] upon "re-review."[2] However, instead of providing copies of the remaining withheld records to this office, the Township provided a privilege log with information about each withheld e-mail. The Township argued that releasing the records to this office would waive the attorney-client privilege. On May 29, 2018, this office forwarded a copy of the Township's response to [redacted] he replied later on that same date, arguing that the attorney-client privilege does not apply here because the Township attorney's "client" is the public.

DETERMINATION

"All records in the custody or possession 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).

Section 9.5(c) of FOIA

As an initial matter, this office will address the Township's claim that it would waive the attorney-client privilege by providing records for our confidential review. Illinois courts have defined "waiver" as the "voluntary relinquishment of a known right, claim or privilege[.]" *Vaughn v. Speaker*, 126 Ill. 2d 150, 161 (1998). A "voluntary disclosure by the holder of the attorney-client privilege is inconsistent with the attorney-client confidential relationship and thus waives the privilege." *Powers v. Chicago Transit Auth.*, 890 F.2d 1355, 1359 (7th Cir. 1989). However, a party "does not waive the attorney-client privilege for documents which he is compelled to produce." *Transamerica Computer v. International Business Machines*, 573 F.2d 646, 651 (9th Cir. 1978).

Section 9.5(c) of FOIA (5 ILCS 140/9.5(c) (West 2016)) expressly and unambiguously provides that each public body "***shall*** provide copies of records requested and ***shall*** otherwise fully cooperate with the Public Access Counselor." (Emphasis added.) Because section 9.5(c) does not afford the Township discretion to disregard its statutory obligation to

[2]Letter from Keri-Lyn J. Krafthefer, Ancel Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., to Steve Silverman, Marie Hollister, Assistant[ ] Attorney[s] General, Public Access Bureau (May 25, 2018), at 3.

fully cooperate with this inquiry, the Township would not waive the attorney-client privilege by furnishing the records in question to the Public Access Counselor. The General Assembly clearly recognized that the Public Access Counselor must have access to all pertinent records in order to conduct a complete review of a public body's compliance with FOIA. The following colloquy between Representative Elaine Nekritz and Representative Michael Madigan, the House sponsor of the bill, during the House debate on Senate Bill 189 (which, as Public Act 96-542, effective January 1, 2010, created the Office of the Public Access Counselor), evinces the General Assembly's intention to vest the Public Access Counselor with complete authority to conduct confidential reviews of records.

> Nekritz: Thank you Mr. Speaker. I just have some questions * * * to clarify the legislative intent under this. * * * It's my understanding that under this Bill, an agency's required to provide records requested by the public access counselor. What if some other State or Federal Law precludes disclosure of those records to some other party like HIPAA, an IG report or something like that? How does that * * * get resolved?
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> Madigan: Point number one, ***the Attorney General will review those documents in confidence. They would be kept confidential.*** Point number two, if it were a Federal Law in conflict, why, the Federal Law would control.
>
> Nekritz: [A]nd if some investigating authority such as the U.S. Attorney asked to have that certain records not be disclosed * * * what would be the result there?
>
> Madigan: * * * [T]he Office of the U.S. Attorney could interact with the Office of the Attorney General, make a request, but ***the final judgment...the final decision would be made by the Attorney General.*** (Emphasis added.) Remarks of Rep. Nekritz and Rep. Madigan, May 27, 2009, House Debate on Senate Bill No. 189, at 105.

In its response to this office, the Township contended that this office's position that section 9.5(c) of FOIA requires public bodies to provide this office with unredacted copies of records subject to a claim of attorney-client privilege "varies from the express provisions of the Open Meetings Act which permit the Public Access Counselor's office to review verbatim

recordings of closed meetings."[3] *See* 5 ILCS 120/3.5(b) (West 2016) ("[T]he Public Access Counselor has the same right to examine a verbatim recording of a meeting closed to the public or the minutes of a closed meeting as does a court in a civil action brought to enforce this Act."). The Township argued:

> Your office has contended in the past that, because Section 3.5(b) expressly provides your office the same right to examine a verbatim recording as a court, and because a court can inspect a verbatim recording in camera, thereby preserving the attorney-client privilege, your office's in camera review of a verbatim recording would preserve the attorney-client privilege[.][4]

The Township further argued that "similar disclosure or waiver protection language is not included in the Freedom of Information Act."[5] Additionally, the Township argued that Representative Madigan's remarks during the House debate on Senate Bill 189 pertained to providing this office with records under the Open Meetings Act (OMA) rather than FOIA, and that "[t]he General Assembly has amended Section 7 of the Freedom of Information Act seven times since that floor debate in 2010 and has never once sought to specify that the attorney-client privilege is not waived by a public body's voluntary disclosure of protected materials to the Public Access Counselor's Office."[6]

Both section 9.5(c) of FOIA and section 3.5(b) of OMA provide that "the public body **shall** provide copies of the records requested and **shall** otherwise fully cooperate with the Public Access Counselor." (Emphasis added.) Despite the Township's argument that "if the General Assembly had intended documents produced to the [Public Access Bureau] under the Freedom of Information Act to be held confidential, as they are under the Open Meetings Act, the General Assembly would have done so[,]"[7] section 9.5(c) of FOIA clearly provides: "To the

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[3]Letter from Keri-Lyn J. Krafthefer, Ancel Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., to Steve Silverman, Marie Hollister, Assistant[ ] Attorney[s] General, Public Access Bureau (May 25, 2018), at 3.

[4]Letter from Keri-Lyn J. Krafthefer, Ancel Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., to Steve Silverman, Marie Hollister, Assistant[ ] Attorney[s] General, Public Access Bureau (May 25, 2018), at 3.

[5]Letter from Keri-Lyn J. Krafthefer, Ancel Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., to Steve Silverman, Marie Hollister, Assistant[ ] Attorney[s] General, Public Access Bureau (May 25, 2018), at 4.

[6]Letter from Keri-Lyn J. Krafthefer, Ancel Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., to Steve Silverman, Marie Hollister, Assistant[ ] Attorney[s] General, Public Access Bureau (May 25, 2018), at 4.

[7]Letter from Keri-Lyn J. Krafthefer, Ancel Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., to Steve Silverman, Marie Hollister, Assistant[ ] Attorney[s] General, Public Access Bureau (May 25, 2018), at 4.

extent that records or documents produced by a public body contain information that is claimed to be exempt from disclosure under Section 7 of this Act, the Public Access Counselor shall not further disclose that information." Additionally, neither Representative Nekritz nor Representative Madigan alluded to OMA. Their remarks plainly did not concern verbatim recordings of closed sessions, which the Township appears to contend are the only records that can be provided to the Public Access Counselor without waiving the attorney-client privilege. Instead, the remarks concerned this office's access to review documents such as medical records and inspector general reports that are denied under FOIA. Moreover, it is unnecessary for the General Assembly to amend FOIA to specifically state that this office is entitled to review records subject to claims of attorney client privilege in light of the plain language of section 9.5(c). If the General Assembly wished to carve out an exception in section 9.5(c) that would have permitted public bodies to withhold from the Public Access Counselor records asserted to be exempt under section 7(1)(m) of FOIA, the General Assembly would have done so expressly. The Township's refusal to provide this office with unredacted copies of the records in question undermines the Public Access Counselor's duty to conduct the type of comprehensive review that the General Assembly deemed to be crucial when it enacted Public Act 96-542. This refusal also violates section 9.5(c) of FOIA. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 12-007, issued April 2, 2012, at 7.

Despite the Township's lack of cooperation, this office will analyze whether the privilege log and response letter submitted by the Township provide clear and convincing evidence that the withheld e-mails are exempt from disclosure under section 7(1)(m).

Section 7(1)(m) of FOIA

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

> Communications between a public body and an attorney or auditor 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, and materials prepared or compiled with respect to internal audits of public bodies.

Communications protected by the attorney-client privilege are within the scope of section 7(1)(m). *See People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 201 (1st Dist. 1997). A party asserting that a communication to an attorney is protected by the attorney-client privilege must show that: "(1) a statement originated in confidence that it would not be disclosed; (2) it

was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and (3) it remained confidential." *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 228 (2nd Dist. 2006). Moreover, "[t]he privilege applies not only to the communications of a client to his attorney, but also to the advice of an attorney to his client." *In re Marriage of Granger*, 197 Ill. App. 3d 363, 374 (5th Dist. 1990); *see also People v. Radojcic*, 2013 IL 114197, ¶40, 998 N.E.2d 1212, 1221-22 (2013) ("[T]he modern view is that the privilege is a two-way street, protecting both the client's communications to the attorney and the attorney's advice to the client."). A public body that withholds 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 v. Illinois State Board Of Education*, 204 Ill. 2d 456, 470 (2003).

In its response to this office, the Township contended that "[w]hile [redacted] argues that the requested e-mails must be released as the firm is * * * not currently handling any pending litigation for the Township, case law is clear that the attorney client privilege extends to communications of a corporate nature, as well as litigation."[8] The Township argued that because all of the communications listed in the privilege log are e-mails between Ancel Glink attorneys and Township Supervisor JoAnn Quigley or Township Clerk Susan Lyday, all of the communications are subject to the attorney-client privilege.

Although the Township is correct that a communication between Supervisor Quigley or Clerk Lyday and the Township's attorney need not concern pending litigation in order to fall within the scope of section 7(1)(m), the attorney-client privilege does not apply to all communications between an attorney and a client. Rather, as set forth above, it is incumbent on the public body to provide some objective indicia that the other elements of the privilege are met: that the communication was made for the purpose of seeking or providing legal advice and was kept confidential.

The privilege log that the Township provided to this office lists e-mails with the senders' and receivers' names, the dates and times of transmission, and brief, generalized descriptions. A privilege log is insufficient if it contains only "blanket assertions of privilege, devoid of the factual basis necessary to properly establish entitlement to some evidentiary privilege." *Novelty, Inc. v. Mountain View Marketing, Inc.*, 265 F.R.D. 370, 380 (S.D. Ind. 2009); *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 50376, issued February 20, 2018, at 4 (privilege log stating that redacted e-mails contained legal opinions was conclusory; public body did not demonstrate that communications were for the purpose of securing legal advice or remained confidential); Ill. Att'y Gen. PAC Req. Rev. Ltr. 25694, issued August 13, 2014, at 5

[8]Letter from Keri-Lyn J. Krafthefer, Ancel Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., to Steve Silverman, Marie Hollister, Assistant[ ] Attorney[s] General, Public Access Bureau (May 25, 2018), at 2.

("vague and very broad descriptions" in connection with privilege log "[did] not provide the factual detail needed to demonstrate that the records in question [were], in fact, privileged.").

Here, the Township did not provide adequate details to demonstrate that the withheld e-mails are exempt from disclosure under section 7(1)(m). The mere fact that the e-mails were exchanged by the Township and its outside counsel does not demonstrate that all of those e-mails contain or seek legal advice. Additionally, the short and nonspecific descriptions of the withheld e-mails in the privilege log do not conclusively demonstrate that the e-mails consist entirely of the seeking or giving of legal advice. The Township's assertion that the withheld e-mails involve legal advice is conclusory. Further, the extent to which the contents of certain e-mails were kept confidential is unclear. In several instances, the privilege log indicates that the contents of certain e-mails may potentially have been subject to subsequent public discussion, possibly waiving the protection of the attorney-client privilege. Accordingly, the Township has not sustained its burden of demonstrating by clear and convincing evidence that the records in question are exempt from disclosure under section 7(1)(m).

In accordance with the conclusions expressed in this letter, this office requests that the Township disclose copies of the e-mails to [redacted] subject only to permissible redactions under section 7 of FOIA (5 ILCS 140/7 (West 2017 Supp.)).

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have any questions, please contact me at the Chicago address on the first page of this letter.

Very truly yours,

[redacted]

MARIE HOLLISTER
Assistant Attorney General
Public Access Bureau

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