



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

April 8, 2019

Via electronic mail



Via electronic mail

Ms. Heather Neveu
Counsel for Village of Waterman
Chilton Yambert Porter LLP
303 West Madison Street, Suite 2300
Chicago, Illinois 60606
hneveu@cyp-law.com

RE: FOIA Request for Review – 2018 PAC 56112

Dear [REDACTED] and Ms. Neveu:

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 that the Village of Waterman (Village) did not improperly charge a copying fee for the copies of records it furnished [REDACTED] and with limited exceptions, did not improperly redact information responsive to [REDACTED] FOIA request. The Village has also proposed furnishing [REDACTED] with redacted copies of records it previously withheld; the Village's proposed redactions are permissible.

On October 10, 2018, [REDACTED] submitted a 16-part FOIA request to the Village. On October 16, 2018, the Village notified [REDACTED] that records responsive to his request would be available the next day, that there were 428 pages of responsive records, and that the cost of the copies was \$56.70 (for the 378 pages exceeding the 50 pages that [REDACTED] is entitled to receive without charge). [REDACTED] retrieved the copies on October 17, 2018, paying the stated copy fee. The Village's response letter notifies [REDACTED] that it had (1) denied certain parts of the request in their entirety; (2) redacted some portions of the records that it did provide; and (3) it did not possess records responsive to certain other parts of the

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request. On December 14, 2018, this office received ██████████ Request for Review contesting the Village's response to parts six, eight, nine, and fifteen of his request.

In part six of the FOIA request, ██████████ sought copies of "[r]ecords related to the Legal Expenses of Kendall County Case 17 L 72 and Dekalb County Case 2018 CH 139 which includes but is not limited to billable hours and description of legal services rendered."¹ The Village furnished ██████████ twenty-two pages of billing invoices with some redactions to the descriptions of the legal services rendered. In his Request for Review, ██████████ contests the redactions.

In part eight of the FOIA request, ██████████ sought copies of "[a]ny written communication that includes but is not limited to Emails and Letters between any Village of Waterman Public Official and Village Attorney David William Porter and his Law firm of Chilton Yambert Porter LLP from 6-15-2019 until the present day."² Part nine of the request sought similar correspondence between any Village employee and the Village's outside counsel. The Village denied these parts of the request in their entirety, asserting that the "information [fell] under attorney client privilege."³ ██████████ contests the denial of those records.

Finally, in part fifteen of the FOIA request, ██████████ requested "[a]ny records that the Village of Waterman has on Kendall County Case 17 L 72 and Dekalb County Case 2018 CH 139."⁴ The Village furnished ██████████ records responsive to this part of the request. In his Request for Review, ██████████ asserts that the records provided by the Village include the court records in the case files of both lawsuits, and that because he is the plaintiff in those lawsuits, the Village's attorney knew that he already had copies of the court records in those cases, and therefore, he is entitled to a refund of his copying fees he paid for those pages.

On December 26, 2018, the Public Access Bureau forwarded a copy of the Request for Review to the Village and asked it to provide the Public Access Bureau with un-redacted copies of records responsive to parts six, eight, and nine of the request, together with a detailed explanation of the factual and legal bases for the applicability of a FOIA exemption to the information that was withheld and redacted. On January 3, 2019, this office received a response from the Village's outside counsel, asserting that the legal invoices responsive to part

¹FOIA Request from ██████████ to Village of Waterman, at 1 (undated).

²FOIA Request from ██████████ to Village of Waterman, at 1-2 (undated).

³Letter from Abigail Pool, Village Clerk, Village of Waterman, to ██████████ (October 17, 2018).

⁴FOIA Request from ██████████ to Village of Waterman, at 2 (undated).

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six of the request, and the correspondence responsive to parts eight and nine of the request, were redacted and withheld pursuant to section 7(1)(m) of FOIA (5 ILCS 140/7(1)(m) (West 2017 Supp.), as amended by Public Act 100-732, effective August 3, 2018). The Village furnished for our confidential review copies of the unredacted billing invoices. In a telephone conversation with an Assistant Attorney General (AAG) in the Public Access Bureau, the Village's outside counsel explained that its preliminary review indicated that there were more than 500 pieces of correspondence responsive to parts eight and nine of the request, because the law firm identified in the FOIA request represents the Village in nearly all its legal matters. On January 15, 2019, the AAG spoke with ██████████, who agreed to narrow parts eight and nine of his request to correspondence relating to the two lawsuits he brought against the Village that were identified in part six of his FOIA request. On January 25, 2019, the Village's outside counsel furnished this office with unredacted copies of records responsive to the narrowed parts eight and nine of the request, along with redacted copies of that same correspondence. The Village also provided an additional written response asserting that the records were exempt from disclosure pursuant to section 7(1)(m) of FOIA. In a telephone conversation with the AAG, the Village's outside counsel confirmed that it was willing to furnish ██████████ redacted copies of the responsive correspondence, but sought this office's review of its proposed redactions.

On February 27, 2019, this office forwarded the Village's written responses to ██████████
██████████ he replied on March 6, 2019.

DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2016). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2016)) further provides: "Each 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." The exemptions from disclosure contained in section 7 of FOIA (5 ILCS 140/7 (West 2017 Supp.), as amended by Public Act 100-732, effective August 3, 2018) are to be narrowly construed. *See Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

Copy Fee

██████████ argues that he is entitled to a refund of the \$56.70 fee he paid for paper copies of the records responsive to his request, because those copies included court records in the two lawsuits he had filed against the Village, and he already possesses copies of those records. Prior to submitting his Request for Review to the Public Access Bureau, ██████████ sent e-mails to the Village on October 17, 2018, and October 22, 2018, asking for a refund of his

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copy fee on that basis that he did not want copies of the court records. In his October 22, 2018, e-mail to the Village, ██████████ asserted that "[i]t should have been common sense that I already have those records at home and if I wanted to make copies I could make copies of the records that I have at home."⁵

Part fifteen of the FOIA request seeks "[a]ny records that the Village of Waterman has on Kendall County Case 17 L 72 and Dekalb County Case 2018 CH 139."⁶ (Emphasis added.) The Village's copies of the court filings in those two cases are responsive to that part of the request. ██████████ could have limited this part of his request to exclude court filings, or copies of filings that the Village or its counsel had served upon him in the context of the litigation. The FOIA request contained no such limitation, and the Village has no obligation to assume or consider the possibility that a requester already possesses copies of records that are unambiguously responsive to the request as written, and unilaterally modify his request without any prior indication from the requester that his request should be interpreted that way.⁷

The Village's e-mail to ██████████ states that it would provide him 50 pages of paper copies without charge, and assess a copy charge of \$0.15 for each of the remaining 378 pages of records responsive to the request. The stated copy fee does not exceed the fee authorized by section 6(b) of FOIA (5 ILCS 140/6(b) (West 2016)).⁸ Accordingly, the Village's imposition of a \$56.70 copy fee for the records ██████████ received does not violate FOIA.

Section 7(1)(m) of FOIA

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

Communications between a public body and an attorney
* * * 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

⁵E-mail from ██████████ to Abigail Pool, [Village Clerk, Village of Waterman], and Village of Waterman President Darryl Beach (October 22, 2018).

⁶FOIA Request from ██████████ to Village of Waterman, at 2 (undated).

⁷Moreover, the Village's October 16, 2018, e-mail to ██████████ notifying him that his records would be available the next day states that the Village Clerk attempted to call him at the telephone number listed on his FOIA request, but did not reach him and was unable to leave a voicemail message.

⁸Section 6(b) of FOIA provides: "The fee for black and white, letter or legal sized copies shall not exceed 15 cents per page."

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administrative proceeding upon the request of an attorney advising
the public body[.]

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 confidential communication 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 (2d Dist. 2006); see also *In re General Instrument Corp. Securities Litigation*, 190 F.R.D. 527, 531 (N.D. Ill. 2000), quoting *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) ("To be privileged, the documents must not only exhibit attorney involvement, but must involve a 'legal adviser acting in his capacity as such.'"); *Illinois Education Association v. Illinois State Board of Education*, 204 Ill. 2d 456, 470 (2003) (A public body that withholds records under section 7(1)(m) must provide a supporting factual basis for the application of the exemption, including "some **objective** indicia that the exemption is applicable under the circumstances."). (Emphasis in original.) 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.").

Additionally, the Public Access Bureau has previously determined that the section 7(1)(m) exemption encompasses records excluded from discovery under the Illinois work product doctrine. See, e.g., Ill. Att'y Gen. PAC Req. Rev. Ltr. 32087, issued June 9, 2015, at 2. The parameters of "work product" are set out in Illinois Supreme Court Rule 201(b)(2) (effective July 30, 2014), which provides that material prepared "by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Attorney work product is limited to records that "reveal the shaping process by which the attorney has arranged the available evidence" for trial. *Monier v. Chamberlain*, 35 Ill. 2d 351, 359-60 (1966); *Waste Management, Inc., v. International Surplus Lines Ins. Co.*, 144 Ill.2d 178, 196 (1991) (contrasting "ordinary work product, which is any relevant material generated in preparation for trial which does not disclose 'conceptual data' is freely discoverable," from "core" work product, which are materials generated in preparation for litigation "which reveal the mental impressions, opinions, or trial strategy of an attorney").

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Correspondence between the Village and Outside Counsel

The Village withheld all records responsive to parts eight and nine of the request, which sought copies of all correspondence between Village officials and employees, and the Village's outside counsel. After receiving this office's letter of inquiry, and after [REDACTED] agreed to narrow those parts of his request to correspondence relating to the lawsuits he has filed against the Village, the Village conducted a supplemental review of the responsive correspondence. The Village argued that its original denial of this part of the request was proper.

[N]ot all communications between attorney and client are exempt from disclosure in response to a FOIA request. [REDACTED] request, however, is unique as he is seeking communications related to active litigation to which he is party.

In any other litigation matter, it is inconceivable to me to imagine that an attorney's correspondence file could be discoverable and turned over to the opposing party. For this reason, the Village maintains that the documents were properly withheld from [REDACTED]⁹

Nevertheless, the Village stated that it was willing to make a supplemental response to [REDACTED] providing copies of the responsive correspondence with redactions. The Village furnished for this office's review a copy of its proposed redactions, along with unredacted copies of the same records.

This office has reviewed the unredacted correspondence, and disagrees with the Village that its initial decision to withhold all the responsive correspondence between the Village and its outside counsel was proper. The responsive records include some correspondence between the Village and its outside counsel that do not contain requests for or the provision of confidential legal advice, and did not disclose the theories, mental impressions, or litigation plans of the party's attorney.

The Village's proposed redactions are more limited, and with one exception, cover only communications "made to an attorney acting in his legal capacity for the purpose of securing legal advice," *Cangelosi*, 366 Ill. App. 3d at 228, or communications in which the attorney provided legal advice to Village officials or employee. These communications are

⁹Letter from Heath M. Neveu, Chilton Yambert Porter LLP, to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General, at 1 (January 25, 2019).

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protected by the attorney-client privilege, and there is no indication that the Village has shared the records with outside parties or otherwise waived the attorney-client privilege.

Our review of the proposed redactions indicates that the Village also proposed redacting a cellular telephone number, which appears to be a personal telephone number exempt from disclosure pursuant to section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2017 Supp.), as amended by Public Act 100-732, effective August 3, 2018). Accordingly, this office concludes that the Village has sustained its burden of demonstrating that information it proposes redacting from its supplemental response to [REDACTED] is exempt from disclosure pursuant to sections 7(1)(m) and 7(1)(b) of FOIA. This office requests that the Village provide to [REDACTED] copies of the redacted correspondence that it furnished for this office's review.

Invoices from Outside Counsel

In its response to [REDACTED], the Village relied on section 7(1)(m) of FOIA to redact from legal invoices certain descriptions and parts of descriptions of attorney work performed. In *Stukel*, 294 Ill. App. 3d at 203-04, the Illinois Supreme Court held that "information regarding a client's fees generally is not a 'confidential communication' between an attorney and client, and thus is not protected by the attorney client privilege. [Citations.] The payment of fees is merely incidental to the attorney-client relationship and typically does not involve the disclosure of confidential communications arising from the relationship." The Court, however, acknowledged that "[c]ertain types of billing records may contain explanations for legal fees and may indicate the type of work done or matters discussed between the attorney and client. As such, they *could* reveal the substance of confidential attorney-client discussions, and be subject to valid claims of attorney-client privilege or exemption under [FOIA]." (Emphasis added.) *Stukel*, 294 Ill. App. 3d at 201. Because the records at issue "made no reference to the pending litigation other than to name the payee law firm, and designate the amount and the date of each payment[.]" (*Stukel*, 294 Ill. App. 3d at 201), the Court did not further elaborate on the type of information that could be properly redacted from legal billing invoices based on the attorney-client privilege.

In analyzing whether legal billing invoices were subject to disclosure pursuant to an administrative subpoena, a Federal appeals court distinguished privileged material from general information concerning legal services:

Not all communications between attorney and client are privileged. Our decisions have recognized that the *identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client*

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privilege. [Citations.] However, correspondence, bills, ledgers, statements, and time records which also reveal the **motive** of the client in seeking representation, litigation strategy, or the **specific nature of the services provided, such as researching particular areas of law**, fall within the privilege. (Emphasis added.) *Clarke v. American Commerce National Bank*, 974 F.2d 127, 130 (9th Cir. 1992).

See also *Hampton Police Association v. Town of Hampton*, 162 N.H. 7, 15, 20 A.3d 994, 1001 (N.H. 2011) ("Courts generally agree that billing statements that provide only general descriptions of the nature of the services performed and do not reveal the subject of confidential communications with any specificity are *not* privileged." (Emphasis in original.)); *U.S. v. Naegele*, 468 F.Supp.2d 165, 171 (D.D.C. 2007) (billing statements that are "general and do not reveal any litigation strategy or other specifics of the representation or any confidential client communications[] * * * are not protected by the attorney-client privilege."). To be privileged, billing invoices must "include *detailed* entries which advise, analyze or discuss privileged communications." (Emphasis in original.) *Tipton v. Barton*, 747 S.W.2d 325, 332 (Mo. Ct. App. 1988); see also *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999) (billing invoices that identified the specific federal statutes that an attorney researched were privileged because disclosure "would divulge confidential information regarding legal advice").

This office has reviewed the unredacted invoices and concludes that nearly all the information redacted from the descriptions of work performed by attorneys are protected by the attorney-client privilege. Because the disclosure of this information would reveal litigation strategy, specifics of the representation, or confidential client communications, it falls within the scope of section 7(1)(m) of FOIA, and was not improperly redacted prior to the disclosure of the bills to [REDACTED]

However, the Village also redacted some information that would not reveal legal strategy or confidential attorney-client communications. In particular, the Village's redactions included an individual's name or title from some descriptions of work performed. In some cases, the name is the only redaction made; in others, the name is redacted along with some information describing attorney work performed. As stated in *Clarke*, the identity of a client generally is not privileged. See *Clarke*, 974 F.2d at 130 ("The identity of the client [is] * * * usually not protected from disclosure by the attorney-client privilege.") The Village has not described how the disclosure of the identity of these individuals would reveal the substance of litigation strategy or confidential communications, and this office cannot discern how these details are protected by the attorney-client privilege. Accordingly, this office finds that the Village improperly relied on section 7(1)(m) of FOIA to redact names from descriptions dated 10/31/17, 11/1/17, 11/14/17, 11/17/17, 1/2/18, 1/30/18, and 4/20/18. This office requests that the Village furnish [REDACTED]


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with copies of these pages of the redacted legal bills with the names (or titles) of the individuals in these entries displayed. To the extent the entries on these dates also contain redactions of information that is not names or titles, the Village may maintain those redactions.

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 (312) 814-6437 or lbartelt@atg.state.il.us.

Very truly yours,


LEAH BARTELT
Assistant Attorney General
Public Access Bureau

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