OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

December 15, 2023

Via electronic mail
Mr. Russell Lissau
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Via electronic mail
Dr. Julia Nadler
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Wauconda Community Unit School District 118
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RE: FOIA Request for Review – 2019 PAC 58473

Dear Mr. Lissau and Dr. Nadler:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2020)).

Mr. Russell Lissau, a staff writer for the *Daily Herald*, submitted an undated FOIA request to Wauconda Community Unit School District 118 (District) seeking, in relevant part, a copy of a settlement agreement between the District and a District student's family. On June 10, 2019, the District provided a copy of the requested settlement agreement with redactions pursuant to sections 7(1)(a), 7(1)(b), and 7(1)(c) of FOIA (5 ILCS 140/7(1)(a), (1)(b), (1)(c) (2018)). Specifically, the District asserted that the redacted information constituted a "school student record" under the Illinois School Student Records Act (ISSRA) (105 ILCS 10/1

et seq. (West 2018))[1] and "education records" under the federal Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g (2018)). Later that same day, Mr. Lissau submitted this Request for Review contesting the extent of the District's redactions in the responsive settlement agreement.

This office forwarded a copy of the Request for Review to the District and asked it to provide an unredacted copy of the requested settlement agreement for our confidential review, together with a detailed explanation of the legal and factual bases for the applicability of the asserted exemptions. On June 27, 2019, the District submitted its written response, together with a confidential summary describing the content of the settlement agreement. On July 2, 2019, Mr. Lissau replied, reiterating his contentions concerning the extent of the District's redactions and asserting that the public had a right to know more information surrounding the settlement in question.

On August 23, 2019, the District provided this office with an unredacted copy of the settlement agreement for our confidential review. The District also confidentially provided additional explanation concerning the circumstances of the responsive settlement agreement and the student involved.

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 2018). 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 2018).

As an initial matter, section 2.20 of FOIA (5 ILCS 140/2.20 (West 2020)) provides that "[a]ll settlement and severance agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, provided that information exempt from disclosure under Section 7 of this Act may be redacted." Accordingly, FOIA plainly evinces a strong interest in the disclosure of the type of the settlement agreement Mr. Lissau is seeking but allows a public body to withhold any discrete portions that consist of exempt information.

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[1]The District also asserted that section 7.5(r) of FOIA (5 ILCS 140/7.5(r) (West 2018)) prohibited the release of such information.

Section 7(1)(a) and Section 7.5(r) 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." (Emphasis added.) "[R]ecords are exempt from disclosure under [FOIA] in instances where the plain language contained in a State or federal statute reveals that public access to the records was not intended." *Kibort v. Westrom*, 371 Ill. App. 3d 247, 256 (2007). Subject to certain exceptions, FERPA provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information * * *) of students without the written consent of their parents[.]" 20 U.S.C. § 1232g(b)(1) (2018). Regulations implementing FERPA[2] define "Personally Identifiable Information" to include:

> **(a)** The student's name;
> **(b)** The name of the student's parent or other family members;
> **(c)** The address of the student or student's family;
> **(d)** A personal identifier, such as the student's social security number, student number, or biometric record;
> **(e)** Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
> **(f)** Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
> **(g)** Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

Courts in other jurisdictions have reconciled the disclosure requirements of other versions of FOIA with FERPA's confidentiality provisions by permitting redaction of information that is or potentially could be linked to the identity of a student. *Pulaski County Special School District v. Arkansas Democrat-Gazette, Inc.*, 2010 Ark. 428, 371 S.W.3d 625 (2012) (approving redaction of initials and docket number in a settlement agreement which could potentially be linked to the identity of a student); *United States v. Miami University*, 294 F.3d 797, 824 (6th Cir. 2002) (newspaper "may still request student disciplinary records that do not contain

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https://plus.lexis.com/api/document/collection/cases/id/4

[2]34 C.F.R. § 99.3.

personally identifiable information. Nothing in the FERPA would prevent the Universities from releasing properly redacted records.").

Similarly, section 7.5(r) of FOIA exempts from inspection and copying information prohibited from being disclosed by the Illinois School Student Records Act (ISSRA). Section 6(a) of ISSRA (105 ILCS 10/6(a) (West 2020)) provides that "[n]o school student records or information contained therein may be released, transferred, disclosed or otherwise disseminated[.]" Section 2(d) of ISSRA (105 ILCS 10/2(d) (West 2020)) defines "school student record" as "any writing or other recorded information concerning a student and **by which a student may be individually identified**, maintained by a school or at its direction or by an employee of a school, regardless of how or where the information is stored." (Emphasis added.) "A masked record, which deletes individual identifying information, does not fall within the definition of a school student record, and is not prohibited from disclosure under [ISSRA]." *Bernie P. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 379 (1989).

https://plus.lexis.com/api/document/collection/cases/id/3RX4-2060-003D-H3R3-00000

Mr. Lissau has not contested the withholding of the student's name and other identifying information but rather seeks information concerning the circumstances leading up to the settlement agreement, together with information concerning the special training the District indicated it would subsequently implement for District staff. The non-confidential portion of the District's June 27, 2019, response to this office generally provided that "[t]he student information redacted included the name of the student and details related to the student and the student's education at [the] District[.]"[3] However, in portions of its June 27, 2019, response and in an August 23, 2019, response, both of which were provided to this office on a confidential basis,[4] the District described in greater detail the circumstances of the responsive settlement. This office has reviewed an unredacted copy of the settlement agreement together with the District's explanations and agrees that, due to the highly unique circumstances underlying this matter, disclosure of most of the redacted information could identify or potentially be linked to the identity of the individual student in question. However, as described further below, disclosure of certain limited information would not appear to be individually attributable to any particular student. Accordingly, the District did not prove by clear and convincing evidence that all of the redacted information was exempt from disclosure under section 7.5(r) of FOIA.

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[3]Letter from Tamara B. Starks, Engler Callaway Baasten & Sraga, LLC, to Christopher R. Boggs, Supervising Attorney, Public Access Bureau, Office of the Attorney General (June 27, 2019), at 5.

[4]Section 9.5(d) of FOIA (5 ILCS 140/9.5(d) (West 2020)) precludes this office from referencing the information provided to this office on a confidential basis.

Section 7(1)(c) of FOIA

Section 7(1)(c) of FOIA exempts from disclosure "[p]ersonal 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." Section 7(1)(c) defines "unwarranted invasion of personal privacy" as:

> [T]he 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.

A public body's contention that the release of information would constitute an unwarranted invasion of personal privacy is evaluated on a case-by-case basis. *Chicago Journeymen Plumbers' Local Union 130, U.A. v. Department of Public Health*, 327 Ill. App. 3d 192, 196 (1st Dist. 2001). The phrase "clearly unwarranted invasion of personal privacy" evinces a strict standard to claim the exemption, and the burden is on the government agency having charge of the record to prove that standard has been met. *Schessler v. Department of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994). The Illinois Supreme Court has held that if a record can be redacted to prevent identification of the subjects of records containing highly personal information, the remaining portions of those records are not exempt from disclosure pursuant to section 7(1)(c) of FOIA. *Bowie*, 128 Ill. at 381 (1989). Illinois courts consider the following factors in determining whether disclosure of information would constitute an unwarranted invasion of personal privacy: "(1) the plaintiff's interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information." *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 3d 1, 13 (1st Dist. 2010).

The non-confidential portion of the District's response to this office generally asserted that the requested settlement agreement included "personal information", the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Mr. Lissau has consistently emphasized that he does not seek the name or other personal identifiers of the student in question.

Under the first and second factors of the balancing test, Mr. Lissau, as a member of the news media, has a general interest in disclosure of information that could potentially shed light on the use of public funds by the District. Further, as noted above, there is a strong public

interest in the disclosure of settlement agreements under section 2.20 of FOIA. Therefore, Mr. Lissau's interest in the information and the public's interest are aligned.

As to the third factor—the degree of invasion of personal privacy—portions of the redacted information are of a highly personal nature. However, if that information is not attributable to a particular student, the information does not maintain its highly personal character. Finally, with respect to the fourth factor, there do not appear to be any other means of obtaining the requested information.

After carefully reviewing an unredacted copy of the settlement agreement, the District's responses to this office, and the analysis set out in *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, this office concludes that, with the student's identifying information remaining redacted, disclosure of certain information would not constitute an unwarranted invasion of the student's personal privacy nor would it be sufficient to identify a particular student. For example, a discrete portion of the agreement concerning District staff pertains to specific *categories* of students and seems unlikely to be attributable to any individual student. If this type of information could identify or potentially identify any individual students, the District has not explained how, and such a possibility is not apparent to this office. Similarly, paragraphs 9 and 10 describe one-time payments of District funds for services that are not attributable to the student or their parents provided names are redacted. Accordingly, this office concludes that, on balance, the District has not sustained its burden of demonstrating that certain discrete information is exempt from disclosure pursuant to section 7(1)(c) of FOIA. Because this office has determined that the same portions cannot potentially be linked to the identity of a student, they also are not prohibited from being disclosed by FERPA or ISSRA and therefore are not exempt from disclosure pursuant to sections 7(1)(a) or 7.5 of FOIA.

In accordance with the conclusions expressed above, this office requests that the District disclose to Mr. Lissau (1) the redacted portions of page 1 and the redacted portions of the third paragraph of page 2, with the exception of names and ages; (2) portions of a redacted sentence, which begins on page 2 and ends on page 3, under clause 2(a); and, (3) the entireties of paragraphs 9 and 10 on page 5 of the settlement agreement, excluding any reference to the first or last name (and corresponding pronouns) of the student or their parents.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. Please contact me at Christopher.Boggs@ilag.gov if you have any questions.

Very truly yours,

[redacted]

CHRISTOPHER R. BOGGS
Deputy Public Access Bureau
Public Access Bureau

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