



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 7, 2018

Via electronic mail
Ms. Alison McCook
Editor, *Retraction Watch*
alisonmccook@gmail.com

Via electronic mail
Mr. Thomas P. Hardy
Executive Director and Chief Records Officer
University of Illinois
1737 West Polk Street, Suite 414
Chicago, Illinois 60612
foia@uillinois.edu

RE: FOIA Request for Review – 2016 PAC 45284

Dear Ms. McCook and Mr. Hardy:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons that follow, the Public Access Bureau concludes that the University of Illinois (University) did not violate FOIA by withholding an investigative report responsive to Ms. Alison McCook's November 7, 2016, FOIA request, but improperly redacted a line from a responsive letter.

On that date, Ms. McCook, on behalf of *Retraction Watch*, submitted a FOIA request to the University, which narrowed a prior request, seeking three categories of records relating to an investigation of Dr. Mani Pavuluri: "[t]he letter sent to the 350 research study subjects"; "[t]he letters sent to research journals explaining the retractions"; and "[t]he investigative report on Mani Pavuluri without attachments."¹ On November 21, 2016, the University denied the request in part by redacting and withholding records under sections 7(1)(a), 7(1)(b), 7(1)(c), 7(1)(d)(iv), 7(1)(f), 7(1)(i), and 7(1)(n) of FOIA (5 ILCS 140/7(1)(a), (1)(b), (1)(c), (1)(d)(iv), (1)(f), (1)(i), (1)(n) (West 2016)). Specifically, the University redacted

¹E-mail from Kathleen McCarthy, Associate Director, FOIA Administration, to Alison McCook (November 7, 2016).

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one line from a June 30, 2014, letter sent to the research subjects, and withheld the investigative report in its entirety.

On December 12, 2016, this office sent a copy of the Request for Review to the University and requested that it furnish a copy of the withheld records for our confidential review and a detailed explanation of the factual and legal bases for the asserted exemptions. On January 6, 2017, the University submitted a written answer.

In its answer, the University continued to assert that the requested investigative report was exempt in its entirety under section 7(1)(a), and primarily cited section 8-2101 of the Illinois Medical Studies Act (MSA) (735 ILCS 5/8-2101 (West 2016)) as the basis for that assertion. In addition, the University asserted that the single line that was redacted from the June 30, 2014, letter was exempt under sections 7(1)(f) and 7(1)(n) of FOIA. The University also further explained the background of this matter:

Dr. Mani Pavuluri serves as a tenured professor of psychiatry at the University of Illinois Chicago's (UIC) College of Medicine. As part of her employment, Dr. Pavuluri conducted several research studies that focused on pediatric bipolar disorder and mania. Approximately four years ago, UIC became aware of a series of issues associated with Dr. Pavuluri's research.

* * *

In Dr. Pavuluri's case, an investigation panel comprised of academic peers was convened and charged with reviewing the allegations and providing a written report of the investigation process, findings, and recommendations. During the investigation, witnesses were interviewed, evidence was reviewed, and Dr. Pavuluri was questioned with her counsel present.

The panel presented their findings and recommendations in a written report to UIC's Vice-Chancellor for Research (VCR). Per UIC's Policy and Procedure on Integrity in Research and Publication (the "Policy") the report does not contain any final outcomes, only recommendations for administrative actions. After reviewing the report and consulting with others, the VCR made a recommendation for appropriate actions to the UIC's Chancellor. The Chancellor reviewed the matter and conveyed the recommended institutional actions to [the federal authority].

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However, no final actions have been taken by UIC or [the federal authority] to date.^[2]

On January 10, 2017, this office forwarded a copy of the University's answer to Ms. McCook; she did not furnish a written reply.

DETERMINATION

All public records in the possession or custody of a public body "are presumed to be open to inspection and 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 7(1)(f) of FOIA

Section 7(1)(f) of FOIA exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body." The section 7(1)(f) exemption is equivalent to the deliberative process exemption in the federal FOIA (5 U.S.C. §552(b)(5) (West 2014)), which applies to "inter- and intra-agency predecisional and deliberative material." (Emphasis added.) *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). The exemption is "intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." *Harwood*, 344 Ill. App. 3d at 248. "[P]urely factual material" is not exempt from disclosure under section 7(1)(f) unless "inextricably intertwined" with predecisional material. *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶36, 980 N.E.2d 733, 743 (2012) (quoting *Enviro Tech Intern., Inc. v. United States Environmental Protection Agency*, 371 F.3d 370, 374 (7th Cir. 2004)). A record that "reflects a final decision, * * * clearly is not part of the predecisional, deliberative process." *State Journal-Register v. University of Illinois Springfield*, 2013 IL App (4th) 120881, ¶31, 994 N.E.2d 705, 714 (2013).

The University asserts that the withheld investigative report is exempt under section 7(1)(f). The University explained that "[t]he report not only contains the panel's opinions, evaluations and recommendations, but it was written for the purpose of assisting the

²Letter from Thomas P. Hardy, Executive Director and Chief Records Officer, University of Illinois, to Neil Olson, Public Access Bureau, Illinois Attorney General's Office (January 6, 2017), at 2.

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VCR and the Chancellor in the decision-making process."³ This office has reviewed the investigative report, and while it contains some factual material, that factual material is inextricably intertwined with the panel's evaluative analysis. Therefore, the report containing the investigative panel's opinions and recommendations is within the scope of section 7(1)(f) of FOIA. Accordingly, the University did not improperly withhold this record under FOIA.⁴

The University also asserts that the small portion of the June 30, 2014, letter to research subjects is exempt under section 7(1)(f) of FOIA. The University primarily rests this assertion on the basis that new or additional disciplinary measures could be implemented as the result of a federal review of the University's findings. However, based on this office's confidential review of the redacted portion of this record, the material does not appear to be deliberative or pre-decisional. Indeed, the un-redacted portion of the record preceding the redacted portion reads: "Further, as a consequence of these findings * * *."⁵ Accordingly, this office concludes that the University has not demonstrated by clear and convincing evidence that the redacted portion of the June 30, 2014, letter is exempt from disclosure under section 7(1)(f) of FOIA.

Section 7(1)(n) of FOIA

Section 7(1)(n) exempts from disclosure "[r]ecords relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed."

In addition to section 7(1)(f), the University also asserts that section 7(1)(n) is a basis to redact the line from the June 30, 2014, letter. As described above, that portion does not appear to communicate a qualified or provisional remedy, but rather a final action, even if additional actions might be imposed after further review by the relevant federal authority. Section 7(1)(n) does not "extend to the final outcome of cases in which discipline is imposed." Accordingly, this office concludes that the University has not demonstrated that the redacted portion of the June 30, 2014, letter is exempt from disclosure under section 7(1)(n) of FOIA.

³Letter from Thomas P. Hardy, Executive Director and Chief Records Officer, University of Illinois, to Neil Olson, Public Access Bureau, Illinois Attorney General's Office (January 6, 2017), at 6.

⁴All of the other asserted exemptions to disclosure, with the exception of section 7(1)(n), exclusively relate to the investigative report. Because this office has determined that section 7(1)(f) is a basis for withholding the report, we do not address these other asserted exemptions.

⁵Letter from Dimitri Azar, M.D., Ph.D., Dean, College of Medicine, and James Fischer, PharmD, Human Protections Administrator, Executive Chair, UIC Institutional Review Board, to "Parent or Guardian or Adult Subject" (June 30, 2014), at 2.

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In accordance with the conclusions of this letter, this office requests that the University furnish Ms. McCook with an un-redacted copy of June 30, 2014, letter at issue. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at (217) 782-9078 or nolson@atg.state.il.us.

Very truly yours,



NEIL P. OLSON
Deputy Public Access Counselor
Assistant Attorney General, Public Access Bureau

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