



ILLINOIS STATE SENATE
FREEDOM OF INFORMATION ACT OFFICER
ROOM 605A STATE HOUSE
SPRINGFIELD, IL 62706

Via E-Mail

November 18, 2021

Mr. Hart Wood
American Oversight
records@americanoversight.org

Re: FOIA Request Received November 10, 2021

Dear Mr. Wood:

On November 10, 2021, this office received your letter relating to the Freedom of Information Act ("FOIA") request ("Request"), dated November 10, 2021, wherein you request the following records:

All email communications (including emails, complete email chains, calendar invitations, and attachments thereto) and text message threads/conversations between (a) any of the Illinois Senate members listed below, or anyone communicating on their behalf, and (b) any of the U.S. House of Representatives members or staff listed below.

Illinois Senate Members

- i. Senator Omar Aquino
- ii. Senator Elgie Sims, Jr.
- iii. Senator Jason Barickman
- iv. Senator Steve McClure
- v. Senator Dan McConchie
- vi. Senator Jason Plummer

U.S. House of Representatives Members and Staff

- i. Representative Mike Bost, or his Chief of Staff, Matt McCullough
- ii. Representative Rodney Davis, or his Chief of Staff, Bret Manley
- iii. Representative Mary Miller, or her Chief of Staff, Ben DeMarzo
- iv. Representative Adam Kinzinger, or his Chief of Staff, Austin Weatherford
- v. Representative Darin LaHood, or his Chief of Staff, Steve Pfrang

Please provide all responsive records from November 3, 2020, through the date search conducted.

A search of the Democratic, Republican, and Redistricting Committee email systems found zero results for emails from the individuals listed. Furthermore, the Senate does not have access to personal email or cellular phone of the Senators listed; however, the Senators listed have stated that they do not possess any communications regarding official state business with any of the individuals listed.

To the extent that other records would exist responsive to your Request, these documents would not be deemed to be “public records” under FOIA. FOIA applies only to “public records,” which are public documents and information “having been prepared, or having been or being used, received, possessed or under the control of any public body.” 5 ILCS 140/2(c). Any information you have requested that is in the possession or control of individual Senators or Senate staff was not prepared, used, received, possessed, or under the control of the Senate, but rather is in the exclusive control of individuals who are not “public bodies” under the Act. See *Quinn v. Stone*, 211 Ill.App.3d 809 (holding that individual legislators are not public bodies and are not the proper recipients of FOIA requests).

The *Quinn* decision affirms the clearly expressed intent of the sponsors of the FOIA. Representative Bowman, one of FOIA’s primary sponsors, squarely addressed this issue in the explanation of his vote during the 83rd General Assembly. After opponents of the bill expressed concern that it would require public disclosure of members’ individual records, Representative Bowman stated that the FOIA would apply only to records maintained by the General Assembly and not by individual members:

Our own personal correspondence is precisely that. It is our own personal correspondence. They are not General Assembly records. And preliminary notes and other memoranda are exempt under the provisions of this Bill. Period.

House Transcript, May 25, 1983 (Rep. Bowman).

The General Assembly passed Senate Bill 189 (codified as P.A. 96-542), a comprehensive re-write of the Freedom of Information Act. During debate, the sponsor of the bill, Senator Raoul, stated it was the intent of the General Assembly to re-affirm the *Quinn* decision:

This amendment does not change the definition of a public body to include individual persons, such as aldermen, legislators, or other public officials and employees. Nothing in this amendment is intended to change the Quinn v. Stone decision.

Senate Transcript, May 28, 2009 (Sen. Raoul).

Second, to the extent records could exist that are responsive to your Request, your Request would be denied because such records would fall under the so-called “deliberative process” exemption of FOIA. Section 7(1)(f) of the Act provides an exemption for those:

[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 exemption provided in this paragraph (f) applies to all those records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents.

5 ILCS 140/7(1)(f) (emphasis added).

The “deliberative process” exemption protects the communications process, encourages frank and open discussions within state government, and it protects deliberative communications pertaining to governmental action. *Harwood v. McDonough*, 344 Ill.App.3d 242, 248 (1st Dist. 2003).

During debate on SB 189, Senator Raoul discussed the General Assembly’s intention to re-affirm the *Harwood* decision:

For the purposes of legislative intent, nothing in this bill is intended to change, alter, modify or amend or deviate from Harwood v[.] McDonough. The bill is not intended to require the disclosure of predecisional material used by a [] public body in its deliberative process.

Senate Transcript, May 28, 2009 (Sen. Raoul).

He also stated:

The deliberative process exemption is still intended to protect the communications process and encourage frank and open discussions amongst agency employees [] before a final decision is made.

Senate Transcript, May 28, 2009 (Sen. Raoul).

The records you request fall squarely within the first sentence of the deliberative process exemption. This exemption applies to all pre-decisional records irrespective of whether the records are adopted or incorporated into a specific action or decision of an agency. *Dumke v. City of Chicago*, 2013 IL App. (1st) 121668 ¶ 15 (2013). In addition, the exemption is only lost if the head of the public body publicly cites and identifies the specific pre-decisional records. *Id.* Nowhere in your FOIA Request do you claim or demonstrate that the records you seek have been publicly cited and identified by the head of the public body.

Moreover, the records you seek would fall squarely within the second sentence of Section 7(1)(f), which separately exempts from disclosure all records that pertain to the preparation of legislative documents. Correspondence and meetings are vital elements to the legislative process. In sum, the disclosure is not authorized by FOIA and is inimical to, and disruptive of, the legislative and governing process, and of representative democracy.

Third, the disclosure of the information requested could constitute a “clearly unwarranted invasion of personal privacy” of persons who would be identified directly by their inclusion in correspondence in violation of the Section 7(c) of the Act. The Act provides that it is “not intended to cause an unwarranted invasion of personal privacy.” 5 ILCS 140/1.

The Supreme Court of New Jersey has refused to permit disclosure of telephone records, stating that “to interpret the Right-To-Know Law to require unqualified disclosure of the identity of the persons whom public officials have called is incorrect.” *North Jersey Newspapers Co. v. Passaic Co. Bd. of Chosen Freeholders*, 601 A.2d 693, 697 (N.J. 1992) (emphasis added). The California Supreme Court has refused to allow the public disclosure of the Governor’s appointment calendar on the basis that such action would disclose the identity of the persons with whom the Governor has consulted. *Times Mirror Co.*, 53 Cal.3d at 1343 (stating “such information would indicate which interests or individuals [the Governor] deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent.”)

This same reasoning applies to the disclosure of the correspondence that you seek since it might involve disclosure of the identity of persons petitioning their legislator. Additionally, there might be individuals named in the correspondence who do not want to be associated with a particular party affiliation or caucus. Disclosure of the requested information might bring public scrutiny on such persons and would constitute an unwarranted invasion of personal privacy.

Fourth, the Illinois Constitution guarantees citizens the rights of freedom of speech. (Ill. Constitution of 1970, Article 1, Section 4). The Illinois Constitution also provides for the right of the people to assemble, make known their opinions to their representatives, and petition for redress of grievances:

The people have the right to assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representatives and to petition for the redress of grievances.

Ill. Constitution of 1970, Article I, Section 5.

Disclosure of the information that you requested would have a chilling effect on the exercise of these rights. The Illinois Supreme Court has recognized that “[p]ublic officials must be able to gather a maximum of information and discharge their official duties without infringing on the rights of privacy.” *Lopez v. Fitzgerald*, 76 Ill.2d 107, 120 (1979). In *Lopez*, the court noted that it “is important to consider ... whether [disclosure] would discourage frankness and whether it would cut off sources of information upon which a government relies,” in addition to whether the disclosure would constitute an invasion of privacy. *Id.* at 120. (quoting *People ex rel. Better Broadcasting Council, Inc. v. Keanem*, 17 Ill.App.3d 1090, 1092-93 (1st Dist. 1973)).

Speaking to the chilling effect on public participation in government resulting from disclosure of private correspondence to legislators, the Iowa Supreme Court wrote of the need to protect the following:

a citizen's right to contact a legislator in person, by mail, or by telephone without any fear or suspicion that doing so would subject the citizen to inquiries from the press or anyone else regarding the nature of the conversation. Apart from the inconvenience or possible harassment generated, a citizen subjected to inquiry about contacting a [legislator] may, on refusing to discuss the content, find negative inferences are drawn from that fact alone.

Des Moines Register and Tribune Co. v. Dwyer, 542 N.W.2d 491, 501 (Iowa 1996) (upholding Iowa Senate's decision not to disclose its itemized telephone records).

Disclosure of a legislator's correspondence would have the effect of discouraging citizens from exercising their Constitutional right to consult for the common good, make their opinions known to their representatives and petition for the redress of grievances, and would burden their rights of free speech. As a result, legislators would be unable to gather the maximum amount of information possible in evaluating legislation and in the discharge of their many other official duties. The chilling effect would be palpable.

Furthermore, the information you seek is protected by legislative immunity pursuant to Article IV, Section 12 of the Illinois Constitution. Legislative immunity has roots in the Federal Speech and Debate Clause, which seeks "to prevent indirect impairment" of the legislative process. *Gravel v. United States*, 408 U.S. 606, 625 (1972) (internal citations omitted). Furthermore, the Supreme Court has held that legislators and their staff shall be treated as one, lest the privilege be "diminished and frustrated." *Id.* at 616-17. The communications between legislators, staff, and constituents are vital elements of the legislative process, and are thus protected by legislative immunity. ("The protections of this clause have long been held to extend beyond mere discussion or speechmaking on the legislative floor." *Reeder v. Madigan*, 780 F.3d 799, 803 (7th Cir. 2015)). Disclosure of records integral to the legislative process would undoubtedly inhibit the lawmaking process.

There may be additional exemptions or defenses that are not discussed herein and the Senate reserves the right to raise any such exemptions or defenses in the future.

As required by Section 9(a) of FOIA, the identities of the persons who were consulted regarding your FOIA request are: Giovanni R. Randazzo, FOIA Officer and Josh Horeled, Assistant FOIA Officer. You have the right to judicial review of this decision pursuant to Section 11 of FOIA.

Thank you for your cooperation. With kindest personal regards, I remain

Sincerely yours,



Giovanni R. Randazzo
FOIA Officer

GRR:sjg