



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

January 26, 2023

PUBLIC ACCESS OPINION 23-002
(Request for Review 2022 PAC 73915)

FREEDOM OF INFORMATION ACT:
Employee Survey Results Used in Connection with
Preparing a Performance Evaluation Are
Exempt from Disclosure Pursuant to Section 7(1)(f)

Dr. Lee W. Eysturlid
Illinois Mathematics and Science Academy
1500 Sullivan Road
Aurora, Illinois 60506-1000

Mr. Richard Busby
FOIA Officer
Illinois Mathematics and Science Academy
1500 Sullivan Road
Aurora, Illinois 60506-1000

Dear Dr. Eysturlid and Mr. Busby:

This binding opinion is issued by the Attorney General pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2020)). For the reasons discussed below, this office concludes that the Illinois Mathematics and Science Academy (IMSA) did not violate the requirements of FOIA by partially denying Dr. Lee Eysturlid's FOIA request.

BACKGROUND

On September 20, 2022, Dr. Eysturlid and seven other IMSA faculty members submitted a FOIA request to IMSA seeking: "[t]he written replies/reaction from the most recent, past Gallop [*sic*] poll that was given at IMSA. I am asking for a) the 'raw' or unaltered written

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responses as collected, and b) the written responses as 'interpreted' or used by the Board."¹ On September 27, 2022, IMSA denied the portion of Dr. Eysturlid's request seeking "written responses" pursuant to section 7(1)(f)² of FOIA.³ IMSA also noted that "[d]ata that has been shared with the Board include Gallup survey results for Academic Program and All Campus[,]" and provided Dr. Eysturlid with copies of those results.⁴ On October 14, 2022, this office received Dr. Eysturlid's Request for Review challenging IMSA's partial denial.⁵

On October 21, 2022, the Public Access Bureau e-mailed a copy of the Request for Review to IMSA.⁶ Along with a copy of the Request for Review, the Public Access Bureau sent IMSA a letter requesting a copy of the records disclosed in response to the FOIA request and copies of the withheld records for this office's confidential review.⁷ This office also requested a detailed written explanation of the legal and factual bases for IMSA's denial of Dr. Eysturlid's request, including a description of who participated in the Gallup survey, the purpose of the survey, the deliberative process to which the survey related, if any, and the withheld survey results' role in that process.⁸

On November 1, 2022, IMSA, through its legal counsel, provided the Public Access Bureau with copies of the requested records.⁹ IMSA's submission to this office included

¹Letter from Lee W. Eysturlid, *et al.*, to Freedom of Information Officer, Illinois Mathematics and Science Academy (September 20, 2022).

²5 ILCS 140/7(1)(f) (West 2021 Supp.), as amended by Public Acts 102-791, effective May 13, 2022; 102-1055, effective June 10, 2022.

³E-mail from Richard Busby, FOIA Officer, to [Lee] Eysturlid (September 27, 2022).

⁴E-mail from Richard Busby, FOIA Officer, to [Lee] Eysturlid (September 27, 2022).

⁵E-mail from Lee W. Eysturlid to Public Access [Bureau, Office of the Attorney General] (October 14, 2022).

⁶E-mail from Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to [IMSA FOIA Officer] (October 21, 2022).

⁷Letter from Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Richard Busby, FOIA Officer, Illinois Mathematics and Science Academy (October 21, 2022), at 2.

⁸Letter from Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Richard Busby, FOIA Officer, Illinois Mathematics and Science Academy (October 21, 2022), at 2.

⁹E-mails from Rachel E. Domash, Himes Petrarca & Fester, CHTD, to [Laura] Harter (November 1, 2022).

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a written answer, five exhibits it designated as non-confidential, and one confidential exhibit containing the withheld records.¹⁰ Later that day, this office sent an e-mail to IMSA's legal counsel seeking additional information to clarify IMSA's response.¹¹ On November 2, 2022, legal counsel for IMSA provided the requested information and confirmed that IMSA did not consider that additional information to be confidential.¹²

On November 2, 2022, pursuant to section 9.5(d) of FOIA (5 ILCS 140/9.5(d) (West 2020)), this office forwarded a copy of IMSA's written answer and its November 2, 2022, clarifying e-mail to Dr. Eysturlid and notified him that he could reply.¹³ On November 6, 2022, Dr. Eysturlid replied.¹⁴ In his reply, Dr. Eysturlid expressed an interest in reviewing the non-confidential exhibits IMSA included with its written answer.¹⁵ On November 10, 2022, IMSA, through legal counsel, responded to Dr. Eysturlid's reply.¹⁶ On November 15, 2022, this office forwarded IMSA's November 10, 2022, response to Dr. Eysturlid.¹⁷ On November 17, 2022, IMSA provided Dr. Eysturlid with the non-confidential exhibits it submitted to this office in connection with its November 1, 2022, answer.¹⁸ On November 18, 2022, Dr. Eysturlid submitted an e-mail to this office in reply to IMSA's November 10, 2022, response.¹⁹

¹⁰E-mails from Rachel E. Domash, Himes Petrarca & Fester, CHTD, to [Laura] Harter (November 1, 2022).

¹¹E-mail from Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to [Rachel] Domash (November 1, 2022).

¹²E-mails from Rachel E. Domash, Himes Petrarca & Fester, CHTD, to [Laura] Harter (November 2, 2022).

¹³Letter from Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Lee W. Eysturlid (November 2, 2022).

¹⁴E-mail from Lee W. Eysturlid, IMSA, to [Laura] Harter (November 6, 2022).

¹⁵E-mail from Lee W. Eysturlid, IMSA, to [Laura] Harter (November 6, 2022).

¹⁶Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 10, 2022).

¹⁷E-mail from Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to [Lee] Eysturlid and [Rachel] Domash (November 15, 2022).

¹⁸E-mail from A. Lynn Himes, Himes Petrarca & Fester CHTD, to [Lee] Eysturlid (November 17, 2022).

¹⁹E-mail from Lee W. Eysturlid to [Laura Harter] (November 18, 2022).

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On December 13, 2022, this office extended the time within which to issue a binding opinion by 30 business days, to January 27, 2023, pursuant to section 9.5(f) of FOIA.²⁰

ANALYSIS

Section 1 of FOIA (5 ILCS 140/1 (West 2020)) declares that it is "the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." Under FOIA, "[a]ll 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 2020).

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

Preliminary 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) extends to all those records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents.

Section 7(1)(f) is equivalent in most respects to the "deliberative process" exemption in the Federal FOIA,²¹ which applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). It is appropriate to consider interpretations of Federal FOIA when analyzing exemptions in the State version of the statute because of the laws' similarities. *State Journal-Register v. University of Illinois-Springfield*, 2013 IL App (4th) 120881, ¶21, 994 N.E.2d 705, 712 (2013). Section 7(1)(f) 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. "While the deliberative process privilege serves a number of related purposes, its

²⁰Letter from Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Lee W. Eysturlid and Richard Busby, FOIA Officer, Illinois Mathematics and Science Academy (December 13, 2022).

²¹Federal FOIA Exemption 5 (5 U.S.C. § 552(b)(5) (2018)) applies to "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency[.]"

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'ultimate aim' is to 'prevent injury to the quality of agency decisions.'" *Petroleum Information Corp. v. United States Dep't of Interior*, 976 F.2d 1429, 1433-34 (D.C. Cir. 1992) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151, 95 S. Ct. 1504, 1516 (1975)).

To be exempt from disclosure under section 7(1)(f), records "must be both (1) inter or intra agency and (2) predecisional and deliberative." *Fisher v. Office of the Illinois Attorney General*, 2021 IL App (1st) 200225, ¶19, 195 N.E.3d 719, 726 (2021), *appeal denied*, 175 N.E.3d 142 (Ill. 2021)). "In order to qualify for the deliberative process exemption, a document must be both predecisional in the sense that it is actually antecedent to the adoption of an agency policy, and deliberative in the sense that it is actually related to the process by which policies are formulated." *Chicago Tribune Co. v. Cook County Assessor's Office*, 2018 IL App (1st) 170455, ¶28, 109 N.E.3d 872, 880 (2018).

No Illinois reviewing courts have ruled whether employee survey results may be withheld pursuant to section 7(1)(f) of FOIA, but Federal courts have examined the applicability of the corresponding Federal FOIA deliberative process exemption to survey results.

In *Times Journal Co. v. Dep't of Air Force*, 793 F. Supp. 1, 4 (1991), *rev'd sub nom. Army Times Publishing Co. v. Dep't of Air Force*, 998 F.2d 1067 (D.C. Cir 1993), the United States District Court for the District of Columbia concluded that the Air Force properly asserted the deliberative process privilege to withhold the aggregate survey results of employees' responses to a series of questions about working conditions. The court explained that "[b]ecause the release of CATI survey results, whether in the form of subjective opinions or objective statistics, is likely to hamper the flow of candid opinions from Air Force personnel to policymakers, it will impair the policy formulation and decisionmaking processes." *Times Journal Co.*, 793 F. Supp. at 4. However, on appeal, the United States Court of Appeals for the District of Columbia reversed the lower court's decision that the survey results were exempt in their entirety. *Army Times Publishing Co. v. Dep't of Air Force*, 998 F.2d 1067, 1072 (D.C. Cir. 1993). The appellate court emphasized that the Air Force had voluntarily disclosed selected aggregate survey results prior to receiving the FOIA request, which "suggests that other information in the surveys could also be released. By releasing certain poll results and withholding others, the Air Force itself has demonstrated that all the surveys, taken together, are not worthy of a blanket claim of privilege under Exemption 5." *Army Times Publishing Co.*, 998 F.2d at 1071. The court stated that it was possible that the withheld poll results contained sensitive information, the disclosure of which would interfere with the Air Force's deliberative process, but based on the case record, the Air Force had failed to distinguish "between the 'innocuous' material and that which is potentially harmful." *Army Times Publishing Co.*, 998 F.2d at 1071. The court remanded the case and explained that to sustain its burden, "the Air Force must demonstrate that, unlike the released poll results, the withheld poll results would

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actually inhibit candor in the decision-making process if made available to the public." *Army Times Publishing Co.*, 998 F.2d at 1072.

In *Ludlam v. United States Peace Corps*, 934 F. Supp. 2d 174, 190 (D.D.C. 2013), the United States District Court for the District of Columbia held that the Peace Corps had not established that certain aggregated results from annual volunteer surveys were exempt deliberative material. Specifically, the court concluded that the Peace Corps had not identified a specific deliberative process associated with its use of the survey results. The court noted that "[a]lthough the government need not pinpoint a specific decision or policy in connection with which predecisional material is prepared, the deliberative process must be capable of some definition." *Ludlam*, 934 F. Supp. 2d at 189. The court explained that the Peace Corps' description of its deliberative process was too vague, claiming to include

the agency's processes for ongoing, continuous appraisals and improvements in all manner of agency activities, from strategic planning, to program improvement, to assessment of agency performance and beyond. [Citations.] To permit the Defendant to assert the deliberative process privilege for every piece of information which could be used, in some way or another, in the continuous process of improving the Agency would set virtually no limit on the privilege. Exemption 5's protections do not reach nearly this far. *Ludlam*, 934 F. Supp. 2d at 189.

Like the *Army Times Publishing Co.* court, the *Ludlam* court also highlighted the agency's failure to explain why disclosure of the withheld information would harm its deliberative process while the agency's prior disclosure of other portions of the aggregate survey results would not. *Ludlam*, 934 F. Supp. 2d at 189-190.

In *Hardy v. Bureau of Alcohol*, 243 F. Supp. 3d 155, 171-73 (D.D.C. 2017), the court used similar reasoning to conclude that the United States Department of Justice's Office of the Inspector General (OIG) did not establish that certain aggregate and narrative survey responses received from Bureau of Alcohol, Tobacco, and Firearms (ATF) inspectors were exempt from disclosure as deliberative material. The relevant surveys were solicited by the OIG in connection with the preparation of a published OIG report about the ATF's National Firearms Registration and Transfer Record (NFRTR), a database containing records on weapons regulated by the National Firearms Act. *Hardy*, 243 F. Supp. 3d at 160. Citing *Army Times Publishing Co.*, the *Hardy* court stated that because the OIG had previously disclosed in the public report some of the aggregate survey data and direct quotations from some narrative responses, "to withhold the remaining survey results and data, OIG must explain how the withheld information is 'different from those released in any relevant respect.'" *Hardy*, 243 F. Supp. 3d at 172

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(quoting *Army Times Publishing Co.*, 998 F.2d at 1068). The court also emphasized that many of the survey questions sought factual responses and concluded that the nature of the withheld survey results was "quintessentially factual information that reveals little about an agency's deliberative process." *Hardy*, 243 F. Supp. 3d at 171. The court concluded that the OIG did not establish that the "materials ... bear on the formulation or exercise of agency policy-oriented judgment[.]" (Emphasis in original.) *Hardy*, 243 F. Supp. 3d at 173 (quoting *Petroleum Information Corp.*, 976 F.2d at 1435). See also *Ryan v. Department of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980) (noting that factual responses to some portions of a questionnaire would not reveal aspects of a deliberative process, while responses to other portions may contain the expressions of personal views or recommendations and may be exempt from disclosure).

By contrast, the court in *Heffernan v. Azar*, 317 F. Supp. 3d 94, 131-32 (D.D.C. 2018) distinguished the facts of *Hardy* and concluded that the United States Department of Health and Human Services (HHS) established that withheld survey responses were exempt from disclosure as pre-decisional deliberative material. The survey at issue was given to members of an intra-agency focus group assembled to assist the leadership of the National Institutes of Health (NIH) in reorganizing the Department of Spiritual Care (SMD) and potentially altering the scope of SMD's services. *Heffernan*, 317 F. Supp. 3d at 130. In reaching its conclusion, the court noted that HHS had not disclosed any part of the survey results. *Heffernan*, 317 F. Supp. 3d at 132. It also explained that the results of the survey were not factual, but rather consisted of recommendations and suggestions. The court concluded that disclosure of the survey results "would certainly have a chilling effect on the SMD personnel freely exchanging advice, opinions, and recommendations on policy and departmental changes." *Heffernan*, 317 F. Supp. 3d at 132.

Returning to the survey results at issue in this matter, IMSA explained in its answer to this office that on June 6, 2022, a representative from its Human Resources Department sent an e-mail to IMSA employees inviting them to participate in the Spring 2022 Engagement Survey.²² The e-mail included a link to the survey and explained that "to be successful, we must understand how you're feeling about your work and why you're feeling the way you do. As with last spring's engagement survey, once we have that data, not only will you see the results, but you will have the opportunity to help us do something to bring about positive outcomes. This is your opportunity to BE HEARD."²³ The e-mail noted that "[s]urvey

²²Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), at 2.

²³Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), Exhibit A, e-mail from Joseph Mastrocola, HR Generalist, IMSA, to IMSA Employees (June 6, 2022). (Emphasis in original.)

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responses are confidential. Gallup collects the survey results and will only allow us to report information on one of the demographic levels at a time (Operational Location, Years of Service, Gender, or Race/Ethnicity). Individual responses can not be reported. So be honest...and BE HEARD!"²⁴

IMSA's answer further explained that the survey consisted of "twelve 5-point scale questions, two Gallup Ladder questions, and three free response questions."²⁵ It stated that Gallup, Inc., "a global analytics and advice firm," "collected and anonymized" the survey results.²⁶ "Gallup analyzed the data from the scale and ladder questions and provided two data summary documents to IMSA regarding results for Academic Programming and All Campus."²⁷ IMSA provided the two data summary documents to Dr. Eysturlid in response to his FOIA request; it withheld the responses to the three free response questions.²⁸ The three free response questions sought answers to the following queries:

- What are the best aspects of working at IMSA?
- What are the biggest challenges of working at IMSA?
- Is there anything additional you would like to share?^[29]

In its response to this office, IMSA stated that the withheld survey responses were solicited by and answered by IMSA staff and are therefore intra-agency records.³⁰ It also stated that the withheld results were pre-decisional and deliberative because its president used the

²⁴Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), Exhibit A, e-mail from Joseph Mastrocola, HR Generalist, IMSA, to IMSA Employees (June 6, 2022). (Emphasis in original.)

²⁵Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), at 1.

²⁶Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), at 1.

²⁷Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), at 1.

²⁸Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), at 2.

²⁹Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), Exhibit B.

³⁰Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), at 3.

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results of the free response questions "to inform the performance component of" the Principal and Chief Academic Officer's evaluation, but did not use the other survey results for this purpose.³¹ IMSA also noted that the survey results "were to help the school understand how its staff was feeling about work and why so that it could improve in certain areas and engage better with its staff. * * * It is clear that the purpose of soliciting IMSA employee[s]' written feedback was to use it to determine what future policies IMSA needs and how to better the school."³² IMSA argued that "withholding the written comments was nothing more than what was promised to IMSA's staff members" in the June 6, 2022, survey invitation e-mail, which stated that "[s]urvey responses are confidential."³³

In his reply, Dr. Eysturlid stated that IMSA did not inform the survey takers that the purpose of the written survey responses would "be part of the decision on the retention or consideration of" the principal.³⁴ He also challenged why only certain parts of the survey were used for the principal's evaluation and therefore withheld, while other portions of the survey were not used as part of the evaluation process. He questioned whether that "decision was made AFTER the fact when the answers were not what was wanted, and the materials shared in the past were now considered embarrassing[.]"³⁵ Dr. Eysturlid explained that in past years, under different leadership, IMSA released all results of the employee surveys. He noted that this past practice "set a precedent for and therefore an expectation of receiving both the numbered survey and the written responses."³⁶ He questioned "[h]ow can faculty/staff understand the disposition of their colleagues to leadership and the reality of the institution without knowing what it appears now only senior leadership is allowed to know[.]" adding that "this breeds even further distrust

³¹Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), at 3-4; e-mail from Rachel E. Domash, Himes Petrarca & Fester, CHTD, to [Laura] Harter (November 2, 2022).

³²Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), at 4.

³³Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), at 2.

³⁴Letter from Lee W. Eysturlid to [Laura Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General] [(November 6, 2022)], at [1].

³⁵Letter from Lee W. Eysturlid to [Laura Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General] [(November 6, 2022)], at [1]. (Emphasis in original.)

³⁶Letter from Lee W. Eysturlid to [Laura Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General] [(November 6, 2022)], at [2].

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and a feeling that opinions only count if they say what those giving the survey want to hear."³⁷ Dr. Eysturlid also pointed to the last sentence in section 7(1)(f) of FOIA, which states "[t]he exemption provided in this paragraph (f) extends to all those records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents[.]" and questioned whether the exemption applied to IMSA or only to the General Assembly.³⁸

This office's review of the withheld records confirmed that they reflect IMSA employees' anonymous opinions and recommendations, not factual information. IMSA explained that the president used the results from the free response questions as part of the specific pre-decisional deliberative process of evaluating the principal's performance. Although IMSA disclosed the results of the 5-point scale and ladder questions from the survey, it has explained that the president did not use those results in his evaluation of the principal; therefore, the disclosed results were not part of the deliberative process IMSA seeks to protect in this matter. As Dr. Eysturlid noted, the June 6, 2022, e-mail announcing the survey did not state that one of the uses of the survey would be to evaluate the principal's performance, making only the general statement that the survey was intended to "understand how you're feeling about your work and why you're feeling the way you do."³⁹ Although a public body that withholds records under section 7(1)(f) must identify "what deliberative process is involved, and the role played by the documents at issue in the course of that process[.]"⁴⁰ the exemption does not require the public body to provide advance notice of all possible uses of information it gathers before incorporating the information into its decision-making.

It is not clear under the circumstances of this matter whether withholding the anonymous free response survey results would be necessary to encourage candor from the survey participants. As Dr. Eysturlid explained, the participants may have expected their comments to be disclosed based on IMSA's disclosures in prior years. Further, the e-mail that accompanied the survey link did not promise that the results would never be released. To the contrary, it stated that employees would "see the results" and explained that the survey results could be

³⁷Letter from Lee W. Eysturlid to [Laura Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General] [(November 6, 2022)], at [2].

³⁸Letter from Lee W. Eysturlid to [Laura Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General] [(November 6, 2022)], at [23]

³⁹Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), Exhibit A, e-mail from Joseph Mastrocola, HR Generalist, IMSA, to IMSA Employees (June 6, 2022).

⁴⁰*Coastal States Gas Corp. v. Dep't of Energy*, 617 F. 2d 854, 868 (D.C. Cir. 1980).

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reported on one demographic level at a time, presumably to protect anonymity.⁴¹ However, the deliberative process analysis considers not only the implications of disclosure on the individuals providing the opinions, but also the implications on the policy-makers who consider those opinions as part of their decision-making. *See Heffernan*, 317 F. Supp. 3d at 132 (disclosure of suggestions and recommendations in survey results would result in an intrusion that "would certainly have a chilling effect" on internal exchanges of "advice, opinions, and recommendations on policy and departmental changes." Disclosing the free response survey results would make public the specific materials the president gathered and relied upon to evaluate the principal. *See Harwood*, 344 Ill. App. 3d at 247. This could be injurious to the deliberative process by subjecting the president to second-guessing, for example by questioning whether all comments were considered or whether certain survey comments carried more significance in the evaluation than others. Consequently, IMSA could be discouraged from soliciting employees' opinions in the future on sensitive and substantive matters, which would diminish the overall quality of the evaluation process because the president would no longer have the valuable insight revealed by the employees' perceptions of the school. Moreover, there is no indication that the president, as head of IMSA, has disclosed publicly the content of the freeform survey responses.

Finally, although the last sentence of the section 7(1)(f) exemption states that it "extends" to "records concerning the officers and agencies of the General Assembly that pertain to the preparation of legislative documents[.]" the word "extend" means "to increase the scope, meaning, or application of[.]"⁴² As such, the scope of section 7(1)(f) includes—but is not limited to—records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents. Thus, "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated[]" are exempt from disclosure under section 7(1)(f), regardless of their relationship to any legislative process.

Accordingly, IMSA has sustained its burden of proving by clear and convincing evidence that the responsive records are exempt from disclosure under section 7(1)(f) of FOIA.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the information submitted, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

⁴¹Letter from A. Lynn Himes, Himes Petrarca & Fester, CHTD, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (November 1, 2022), Exhibit A, e-mail from Joseph Mastrocola, HR Generalist, IMSA, to IMSA Employees (June 6, 2022).

⁴²Webster's Third New International Dictionary 804 (1993).

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1) On September 20, 2022, Dr. Lee Eysturlid and seven other IMSA faculty members submitted a FOIA request to IMSA seeking copies of the written answers provided in response to the most recent Gallup survey administered at the school and the interpretation of the written responses used by IMSA's Board.

2) On September 27, 2022, IMSA provided Dr. Eysturlid with summaries of the survey results shared with the Board, which included the results of the survey's 5-point scale questions and Gallup ladder questions, but denied his request for the written responses to the survey's three free-response questions pursuant to section 7(1)(f) of FOIA.

3) On October 14, 2022, Dr. Eysturlid submitted a Request for Review to the Public Access Counselor disputing IMSA's partial denial. The Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2020)).

4) On October 21, 2022, the Public Access Bureau sent a copy of the Request for Review to IMSA and requested copies of the disclosed and withheld records for this office's confidential review and a detailed written explanation of the legal and factual bases for IMSA's denial of the request.

5) On November 1, 2022, this office received the requested materials from IMSA, including a written answer, five non-confidential exhibits, and one confidential exhibit.

6) On November 2, 2022, the Public Access Bureau forwarded to Dr. Eysturlid a copy of IMSA's written answer and notified him of his opportunity to reply. On November 6, 2022, Dr. Eysturlid replied. On November 10, 2022, IMSA responded to Dr. Eysturlid's reply. On November 15, 2022, this office forwarded to Dr. Eysturlid IMSA's November 10, 2022, correspondence. On November 17, 2022, IMSA provided Dr. Eysturlid with copies of the five non-confidential exhibits it submitted to this office on November 1, 2022. On November 18, 2022, Dr. Eysturlid submitted a response to IMSA's November 10, 2022, correspondence.

7) On December 13, 2022, this office properly extended the time within which to issue a binding opinion by 30 business days, to January 27, 2023, pursuant to section 9.5(f) of FOIA. Accordingly, the Attorney General may properly issue a binding opinion with respect to this matter.

8) 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[.]" IMSA has demonstrated that employees' responses to survey questions soliciting opinions were used in the pre-decisional, deliberative process of evaluating the school's principal.

Dr. Lee W. Eysturlid
Mr. Richard Busby
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9) IMSA has sustained its burden of proving by clear and convincing evidence that the responsive records qualify as pre-decisional, deliberative intra-agency communications that are exempt from disclosure pursuant to section 7(1)(f) of FOIA.

Therefore, it is the opinion of the Attorney General that the Illinois Mathematics and Science Academy did not violate the requirements of FOIA by partially denying Dr. Lee W. Eysturlid's Freedom of Information Act request.

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2020). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review with the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Illinois Mathematics and Science Academy as defendants. *See* 5 ILCS 140/11.5 (West 2020).

Sincerely,

KWAME RAOUL
ATTORNEY GENERAL

By: 
Brent D. Stratton
Chief Deputy Attorney General

cc: Ms. Rachel Domash
Mr. A. Lynn Himes
Himes, Petrarca & Fester, CHTD
180 North Stetson, Suite 3100
Chicago, Illinois 60601

CERTIFICATE OF SERVICE

Steve Silverman, Bureau Chief, Public Access Bureau, hereby certifies that he has served a copy of the foregoing Binding Opinion (Public Access Opinion 23-002) upon:

Dr. Lee W. Eysturlid
Illinois Mathematics and Science Academy
1500 Sullivan Road
Aurora, Illinois 60506-1000
leystur@imsa.edu

Mr. Richard Busby
FOIA Officer
Illinois Mathematics and Science Academy
1500 Sullivan Road
Aurora, Illinois 60506-1000
foia@imsa.edu

Ms. Rachel Domash
Himes, Petrarca & Fester, CHTD
180 North Stetson, Suite 3100
Chicago, Illinois 60601
rdomash@edlawyer.com

Mr. A. Lynn Himes
Himes, Petrarca & Fester, CHTD
180 North Stetson, Suite 3100
Chicago, Illinois 60601
ahimes@edlawyer.com

by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Chicago, Illinois on January 26, 2023.



Steve Silverman
Bureau Chief

Steve Silverman
Bureau Chief
Public Access Bureau
Office of the Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-6756