



**OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS**

Lisa Madigan
ATTORNEY GENERAL

September 30, 2010

Mr. Todd Milliron
62 Cotswold Drive
Yorkville, IL 60560

Re: FOIA Request for Review – No. 9472

Dear Mr. Milliron:

This letter is to advise you that we have received the enclosed response from Eric Weis of the Kendall County State's Attorney with regard to your Request for Review.

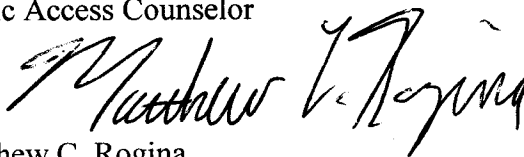
You may, but are not required to, reply in writing to the public body's enclosed response. If you choose to reply, you must submit your reply within 7 working days of the receipt of this letter. 5 ILCS 140/9.5(d). When you send your reply to our office, please also send a copy of your reply to Eric Weis.

If you have any questions about this matter, please feel free to contact me at 312-814-5383.

Sincerely,

Cara Smith
Public Access Counselor

By:


Matthew C. Rogina
Assistant Public Access Counselor

Cc: Leslie Johnson
Office of the State's Attorney
Kendall County Courthouse
807 West John Street
Yorkville, IL 60560

Eric C. Weis
State's Attorney



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VIA FACSIMILE (312) 814-3806 & U.S. MAIL

RECEIVED

September 24, 2010

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Matthew C. Rogina
Assistant Public Access Counselor
Public Access Bureau
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601

Public Access
Counselor

RE: Request for Review – 2010 PAC 9472

Dear Mr. Rogina:

I write this letter on behalf of the Kendall County Office of Administrative Services ("County") in response to your letter dated September 13, 2010 regarding the above-referenced request for review filed by Todd Milliron.

BACKGROUND

During the past two and a half months, Todd Milliron has submitted 151 FOIA requests for records relating to the Kendall County Sheriff's Office. Thousands of pages of records have been produced to Mr. Milliron during the past two and half months, and several full-time employees have devoted a majority of their work days responding to Mr. Milliron's FOIA requests. Despite the substantial burden that this has placed on the County's and the Kendall County Sheriff's Office's personnel and resources, the County and the Kendall County Sheriff's Office have responded to all 151 FOIA requests submitted by Mr. Milliron as well as numerous other FOIA requests submitted by other supporters of an independent candidate for the Kendall County Sheriff.

Although your September 13, 2010 letter stated that Todd Milliron served one Freedom of Information Act ("FOIA") request upon the County on July 30, 2010, Mr. Milliron actually served two separate FOIA requests upon the County on July 30th. The first FOIA request sought a copy of the Equal Employment Opportunity Commission ("EEOC") Charge of Discrimination filed by Amber Christoffel, a former employee of the Kendall County Sheriff's Office. The second FOIA request sought a copy of the EEOC Charge of Discrimination filed by Nicole Porus, another former employee of the Kendall County Sheriff's Office. In both of these FOIA requests, Mr. Milliron requested the County identify the case numbers assigned to each Charge

and indicate the judicial venue where the charges are being adjudicated.

On or about August 4, 2010, Assistant State's Attorney Leslie Johnson called the Public Access Counselor's ("PAC") Office and spoke with a male employee about Mr. Milliron's two FOIA requests. ASA Johnson asked the PAC whether pending EEOC Charges are subject to FOIA. The PAC's representative told her that pending EEOC Charges would be exempt from production under FOIA and provided ASA Johnson with a list of specific FOIA exemptions that would apply to prevent the disclosure of the requested records. During this telephone call, ASA Johnson specifically asked the PAC's representative to confirm that the 7(1)(d)(ii) exemption would, in fact, apply to this situation as the EEOC was investigating the Charges of Discrimination and the County was a respondent to the two pending Charges of Discrimination. The PAC's representative assured ASA Johnson that the PAC takes a broad stance on the 7(1)(d)(ii) exemption and would apply this exemption in this case even though the public body was simply a party to the pending administrative proceeding and not actually the public body conducting the administrative proceeding.

On August 4, 2010, the County denied Mr. Milliron's two FOIA requests and asserted the following exemptions based upon the PAC's specific recommendations: Sections 7(1)(a), 7(1)(b), 7(1)(d)(ii), 7(1)(d)(iii), and 7(1)(d)(iv). In its August 4th FOIA responses, the County also reminded Mr. Milliron that his request for the County to identify the case number and judicial venue are not proper requests for public records under FOIA as FOIA only requires a public body to produce public records responsive to a request and does not require the public body to answer questions raised by the requestor. On August 4, 2010, the County also sent the PAC notice of intent to deny letters requesting pre-approval to use the Sections 7(1)(c) and 7(1)(f) exemptions for both of the FOIA requests. The use of these exemptions was based solely upon the specific recommendations of the PAC. To our surprise, on August 30, 2010, the PAC denied the County's request for pre-approval to use the Section 7(1)(f) exemption to redact opinions expressed in the two Charges of Discrimination. On August 30, 2010, the PAC granted the County's request to use the Section 7(1)(c) exemption to redact dates of birth in the requested records. Upon receipt of the PAC's approval to use the Section 7(1)(c) exemption, the County sent Mr. Milliron a supplemental response to his two FOIA requests denying Mr. Milliron's FOIA requests on the additional basis that the records were exempt from production under Section 7(1)(c) of FOIA.

OBJECTIONS

In order to preserve the County's objections in the event that an administrative or judicial review of this matter is necessary, the County asserts the following objections to the request for review:

1. As explained above, the County asserted the FOIA exemptions in its August 4, 2010 response and in its September 3, 2010 FOIA response based upon the specific advice and recommendations of the PAC's Office. Therefore, the PAC has an inherent conflict of interest in investigating this matter and should be estopped from any further inquiry into Mr. Milliron's request for review in as much as the exemptions asserted were used with the advice and consent of the PAC.

2. Mr. Milliron's request for review does not comply with 5 ILCS 140/9.5(a). Therefore, the PAC should deny Mr. Milliron's request for review in its entirety. 5 ILCS 140/9.5(a) requires each request for review to "be in writing, signed by the requester, and include (i) a copy of the request for access to records and (ii) any responses from the public body." Mr. Milliron's request for review simply states that the County's intent to deny letters are "on file already". However, Mr. Milliron does not include a hard copy of the intent to deny letters with his request for review. Mr. Milliron also does not include a hard copy of the County's August 4, 2010 FOIA response and/or the September 3, 2010 supplemental FOIA response with his request for review. Because Mr. Milliron did not comply with the requirements of 5 ILCS 140/9.5(a), the PAC should deny his request for review in its entirety. In the alternative, if the PAC does not deny the request for review on this basis, the PAC's inquiry must be limited solely to the County's use of the Section 7(1)(c) exemption because Mr. Milliron's request for review only references the County's notice of intent to deny letter, which the County previously sent to the PAC.

3. In your letter dated September 13, 2010, you directed the County to provide you with "written analysis" further explaining why certain FOIA exemptions asserted by the County prevent the disclosure of the two pending EEOC Charges. However, 5 ILCS 140/9.5(c) states that the PAC "shall forward a copy of the request for review to the public body within 7 working days after receipt and *shall specify the records or other documents* that the public body shall furnish to facilitate the review." (Emphasis added.) Thus, pursuant to Section 9.5(c) of FOIA, the PAC has no statutory authority under FOIA to command the County to provide a "written analysis" on the issues raised in your letter. Without waiving this objection, the County provides the requested analysis below in an effort to cooperate in your investigation.

RESPONSE TO QUESTIONS RAISED IN PAC'S LETTER
DATED SEPTEMBER 13, 2010

Without waiving its objections, the County provides below the additional information requested in your letter dated September 13, 2010:

1. The requested records are exempt from disclosure pursuant to 5 ILCS 140/7(1)(a) because 42 U.S.C. §2000e-5 and 29 C.F.R. §1610.17 preclude the disclosure of the pending EEOC Charges of Discrimination. In your letter, you request the County provide you with a written analysis explaining how this statutory authority prohibits public bodies other than the EEOC from disclosing copies of the EEOC Charges of Discrimination. In response to your inquiry, 42 U.S.C. §2000e-5(b) states, "Charges shall not be made public by the Commission." However, 29 C.F.R. §1610.17(d) also states, "[C]ase files involved in the administrative process of the Commission are not available to the public."

Furthermore, in *Twin-Cities Broadcasting Corporation v. Reynard et al.*, the Fourth District Appellate Court stated, "FOIA explicitly recognizes that documents of one agency may be in the possession of another, and the originating agency has a continuing interest in their protection if they are exempt from disclosure." 277 Ill. App. 3d 777, 782, 661 N.E.2d 401, 404, 214 Ill. Dec. 547, 550 (4th Dist. 1996). "Mere possession of the documents, standing alone, is not determinative of an agency's ability to release documents pursuant to the FOIA if another

governmental entity has a substantial interest in asserting an exemption.” *Id.* In this case, the EEOC has asserted its substantial interest in preventing the disclosure of pending EEOC Charges as federal law and regulations specifically prohibit the EEOC from disclosing these records to anyone other than the parties to the pending cases. In fact, if a person discloses the EEOC Charges in violation of 42 U.S.C. §2000e-5, federal law mandates that the disclosing party shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. *See* 42 U.S.C. §2000e-5(b). Also, the EEOC’s own compliance manual sets forth detailed procedures that the EEOC follows in order to disclose any information contained in its case files. For example, Section 83.6(b) of the EEOC’s Compliance Manual states that the EEOC *shall* issue the following non-disclosure notice when it provides a charging party with a copy of any information from their own charge file:

“If you have asked for the enclosed documents from your charge file before you have filed a lawsuit based on your charge, by accepting these documents you agree that you will use them only in connection with contemplated litigation and will only show them to persons in a privileged relationship, such as a spouse, clergy, or medical, financial, or legal advisor.”

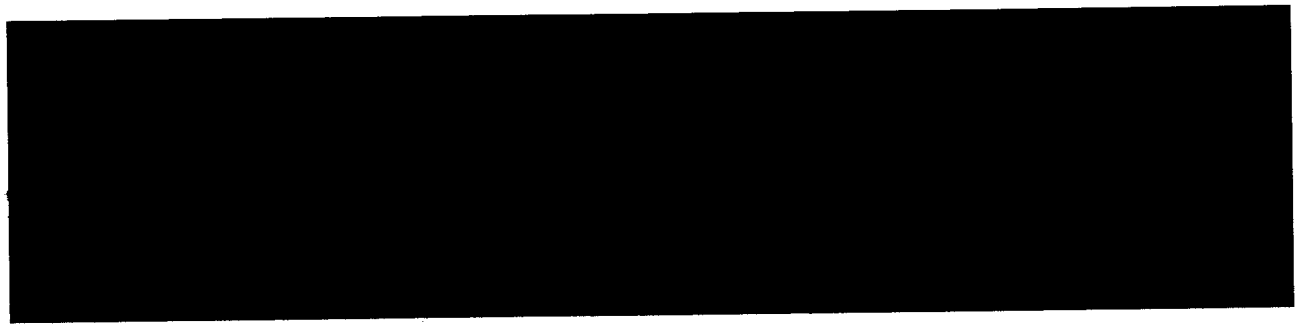
Thus, based upon all of the above, it is clear that the EEOC has a substantial interest in protecting the confidentiality of this information. If a public body such as the County were obligated to produce copies of pending EEOC Charges of Discrimination, which are merely in their possession and which the EEOC takes great steps to protect the secrecy of, such required disclosure would defeat the intent of the non-disclosure provisions in 42 U.S.C. §2000e-5, 29 C.F.R. §1610.17, and Section 83 of the EEOC’s Compliance Manual. The FOIA was clearly not intended to be a “backdoor” to obtain otherwise confidential or protected material. Thus, in light of all of the above, the County is obligated to protect the confidentiality of the pending EEOC Charges of Discrimination and should be entitled to assert the Section 7(1)(a) exemption on the EEOC’s behalf as the County is merely in possession of copies of the EEOC’s records.

2. The two EEOC Charges of Discrimination are also exempt from disclosure pursuant to Section 7(1)(d)(ii) of FOIA because disclosure of the two pending EEOC Charges would interfere with active administrative enforcement proceedings conducted by the public body that is the recipient of the request.

On several occasions, Mr. Milliron has posted the information that he has received in response to his numerous FOIA requests on his website located at <http://www.yorkvilleinsider.org>. Mr. Milliron’s website includes political propaganda in support of his own campaign for County Board member. In addition to regularly posting the information on his website, Mr. Milliron frequently cites to information he has obtained in response to his FOIA requests during County Board meetings and frequently copies local news media on matters relating to his FOIA requests. Although the County does not dispute that Mr. Milliron has the right to free speech and may use the disclosed records as he sees fit, it is clear based upon the requestor’s past practice that these two EEOC Charges would be displayed on Mr. Milliron’s website, in the newspapers and read during County Board meetings. However, Ms. Christoffel and Ms. Porus submitted their Charges of Discrimination to the EEOC with the clear understanding that the information they

provided to the EEOC would be kept confidential and *not* disclosed to the public. Public disclosure of the allegations in their pending EEOC Charges will deter the charging parties from participating in the pending investigations. See *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) (“Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses ‘Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.’”) Currently, the EEOC investigators have not yet completed witness interviews in these pending investigations. Knowing that your name and personal information will likely be splattered over the internet and local newspapers, like the complainants will be if Mr. Milliron receives a copy of these EEOC Charges, other potential alleged victims and the witnesses in these two cases will be hesitant to come forward and to provide truthful and complete information to the EEOC. Thus, Mr. Milliron’s public disclosure of these pending EEOC Charges will substantially interfere with the County’s and the County Sheriff’s Office ability to locate and obtain the cooperation of witnesses to publicly dispute the Charging Parties’ allegations made in these pending Charges.

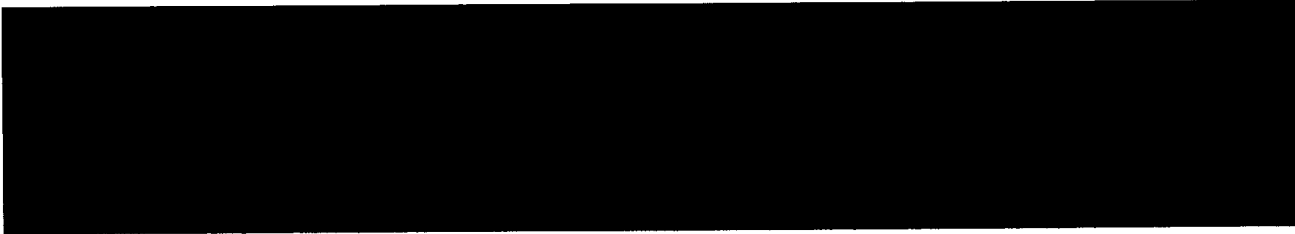
PURSUANT TO 5 ILCS 140.9.5(D), WE HEREBY REQUEST THAT THE BELOW ITALICIZED CONFIDENTIAL INFORMATION BE REDACTED PRIOR TO DISCLOSING THIS RESPONSE TO MR. MILLIRON.



For the foregoing reasons, the Section 7(1)(d)(ii) exemption should apply to prevent disclosure of the two pending EEOC Charges because disclosure would interfere with active administrative enforcement proceedings conducted by the public body that is the recipient of the request.

3. Disclosure of the two EEOC Charges of Discrimination would also create a substantial likelihood that the County and the County Sheriff’s Office would be deprived of a fair trial. Therefore, the EEOC Charges should be exempt from production under 5 ILCS 140/7(1)(d)(iii). In May of 2010, the County Board approved the settlement of a federal district court lawsuit filed by a former employee of the Kendall County Sheriff’s Office who alleged sexual harassment. If these two pending EEOC Charges were produced, it would unfairly imply to the public that there is some alleged continuing pattern of sexual harassment in the Sheriff’s Office, even though the women worked in different areas of the Sheriff’s Office.

PURSUANT TO 5 ILCS 140.9.5(D), WE HEREBY REQUEST THAT THE BELOW ITALICIZED CONFIDENTIAL INFORMATION BE REDACTED PRIOR TO DISCLOSING THIS RESPONSE TO MR. MILLIRON.



Because these cases are still pending confidential EEOC investigations, the County and the County Sheriff's Office would be unable to publicly respond to any negative attacks that Mr. Milliron would surely make when he displayed these EEOC Charges on his website, in his political propaganda, in the local newspapers, and/or during public comment at the County Board meetings. The County's inability to defend itself to the public will unfairly taint the jury pool in this area and would create a substantial likelihood that the County and the County Sheriff's Office would be deprived of a fair trial. *See Equal Employment Opportunity Commission v. Associated Dry Goods Corporation*, 449 U.S. 590, 599, 101 S. Ct. 817, 823, 66 L. Ed. 2d 762 (1980) (explaining that the purpose of Title VII's limited disclosure provisions was to "prevent wide or unauthorized dissemination of unproved charges".) As noted above, disclosures would additionally interfere with the County's and the Kendall County Sheriff's Office's ability to locate and obtain the cooperation of witnesses further hindering the respondents' right to a fair trial. Thus, the Section 7(1)(d)(iii) exemption applies, and the two pending EEOC Charges of Discrimination should not be produced.

4. The disclosure of the EEOC Charges of Discrimination would unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source or person who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies. In *Copley Press, Inc. v. City of Springfield et al.*, the Fourth District Appellate Court held that the city and the state police's case file and summary regarding their investigation into sexual harassment allegations against the city's former police chief were exempt under FOIA as disclosure of the requested records would unavoidably disclose the identity of a confidential source or confidential information furnished only by a confidential source. 266 Ill. App. 3d 421, 426-427, 639 N.E.2d 913, 916-917, 203 Ill. Dec. 354, 357-358 (4th Dist. 1994). In reaching this conclusion, the appellate court relied upon federal court authority, which stated that a "source should be deemed confidential if the source furnished information with the understanding that the [agency] would not divulge the communication except to the extent the [agency] though necessary for law enforcement purposes." *Id.* at 426, 639 N.E.2d at 916, 203 Ill. Dec. at 357, quoting *United States Dept. of Justice v. Landano*, 113 S. Ct. 2014, 2020, 124 L.Ed.2d 84, 95-96 (1993).

Like the witnesses who provided information as part of the state police's harassment investigation, Amber Christoffel and Nicole Porus submitted their EEOC Charges with the understanding that the information they provided to the EEOC would not be disclosed to the public, as mandated under federal law, federal regulations, and the EEOC's own compliance

manual. See *EEOC v. Associated Dry Goods Corporation*, 449 U.S. at 599, 101 S. Ct. at 823, 66 L. Ed. 2d at 762 (explaining that the purpose of Title VII's limited disclosure provisions was to "prevent wide or unauthorized dissemination of unproved charges".) In fact, pursuant to the EEOC's own procedures, if Ms. Porus or Ms. Christoffel requested a copy of their own case files, they would be required to sign non-disclosure agreements, which prohibit them from sharing any information in their files with any third party. With these procedural safeguards, it is clear that Ms. Christoffel and Ms. Porus furnished information to the EEOC with the understanding that the information would not be divulged to the public. Further, Ms. Christoffel, Ms. Porus and the EEOC have not entered their consent to the release of this information. Because the Charges of Discrimination cannot be meaningfully redacted to avoid disclosure of the confidential information, the EEOC Charges should be exempt from disclosure under Section 7(1)(d)(iv) of FOIA.

5. Per your request, an unredacted copy of Amber Christoffel's EEOC Charge is enclosed. **PURSUANT TO 5 ILCS 140/9.5(D), THE COUNTY REQUESTS THAT THE UNREDACTED EEOC CHARGE NOT BE DISCLOSED TO MR. MILLIRON.**

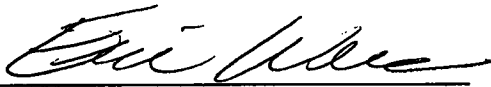
6. Per your request, an unredacted copy of Nicole Porus' EEOC Charge is enclosed. **PURSUANT TO 5 ILCS 140/9.5(D), THE COUNTY REQUESTS THAT THE UNREDACTED EEOC CHARGE NOT BE DISCLOSED TO MR. MILLIRON.**

CONCLUSION

For all of the above reasons, and without waiving the County's objections, the County requests that the PAC deny Todd Milliron's request for review in its entirety and affirm that no violations have occurred.

If you require any additional information to assist you in your inquiry, please contact Assistant State's Attorney Leslie Johnson or the undersigned at (630) 553-4157.

Very truly yours,



Eric Weis
State's Attorney
Kendall County, Illinois

Enclosures (2)