



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

Lisa Madigan  
ATTORNEY GENERAL

November 8, 2012

[REDACTED]

Mr. Paul Castiglione  
Executive Assistant State's Attorney for Policy  
Cook County State's Attorney's Office  
69 W. Washington St.  
Ste. 3200  
Chicago, Illinois 60602

Re: FOIA Request for Review – 2012 PAC 18888

Dear [REDACTED] and Mr. Castiglione:

Pursuant to section 9.5 of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5 (West 2011 Supp.)), we have received a Request for Review of the response by the Cook County State's Attorney's Office to [REDACTED] FOIA request. We have considered the State's Attorney's response to the allegations in the Request for Review; [REDACTED] did not reply.

On March 7, 2012, [REDACTED] requested records concerning a juvenile court proceeding, Cook County Circuit Court Case No. 2011-JA-00123. On March 8, 2012, the State's Attorney denied that request, stating that [REDACTED] is a "party to that case. As a result, if you want to obtain any documents in connection with that case, you should speak to your attorney. FOIA is not a substitute for discovery in pending litigation."<sup>1</sup> In her Request for Review, which [REDACTED] also sent directly to the State's Attorney, she asserted that she is entitled to records from her file. On March 27, 2012, the Public Access Bureau forwarded a copy of the Request for Review to the State's Attorney and requested clarification of its basis for denying [REDACTED] request, including the relevant FOIA exemption. On March 28, 2012, the State's Attorney responded by asserting section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2011 Supp.)), which

<sup>1</sup>Letter from Paul Castiglione, Executive Assistant State's Attorney for Policy, Cook County State's Attorney's Office, to [REDACTED] (March 8, 2012).

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exempts "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The State's Attorney based its assertion of section 7(1)(a) on Illinois Supreme Court Rule 4.2 (Ill. S. Ct. R. 4.2 (effective January 1, 2010)).

### DETERMINATION

All public records retained by a public body are "presumed to be open to inspection and copying." 5 ILCS 140/1.2 (West 2010). 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 2010).

Supreme Court Rule 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer *in the matter*, unless the lawyer has the consent of the other lawyer *or is authorized to do so by law* or a court order. (Emphasis added.)

This rule "only applies in circumstances where the lawyer knows that the person is in fact represented *in the matter* to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances." (Emphasis added.) Ill. S. Ct. R. 4.2, Committee Comments (adopted July 1, 2009).

The State's Attorney's FOIA Officer's response to the allegations in Request for Review stated that "under Rule 4.2, I do not believe I should engage in any communication with [redacted] regarding her request for documents in her pending case. That is why I denied her FOIA request and stated that she should speak to *her attorney* regarding any documents that she wished to obtain from the State in this case."<sup>2</sup> (Emphasis in original). The response further stated that [redacted] would not be entitled to any work product or other privileged documents in the State's Attorney file. It seems to me, therefore, that [redacted] request for such documents should be made in the one forum where such issues are properly resolved – the courtroom."<sup>3</sup>

<sup>2</sup>Letter from Paul Castiglione, Executive Assistant State's Attorney for Policy, Cook County State's Attorney, to Sarah Kaplan, Assistant Attorney General, Public Access Bureau (March 28, 2012).

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In *People v. Santiago*, 236 Ill. 2d 417 (2010), the Illinois Supreme Court construed the meaning of the term "matter" in the context of Supreme Court Rule 4.2.<sup>4</sup> In that case, a woman suspected of child abuse was interviewed by police and prosecutors in connection with a criminal investigation and was subsequently charged with child endangerment. *Santiago*, 236 Ill. 2d at 422-23. At the time of the interviews, the woman was represented by an attorney in a pending child protection proceeding stemming from the same allegations that gave rise to the criminal charges; her attorney in the criminal case sought to suppress her statements, asserting that the failure of police or prosecutors to obtain the consent of her attorney in the child protection proceeding before conducting the interviews violated Supreme Court Rule 4.2. *Santiago*, 236 Ill. 2d at 423.

The court emphasized that the restriction on communications set forth in Supreme Court Rule 4.2 is limited to the "matter" in which a person is represented by an attorney. *Santiago*, 236 Ill. 2d at 430. Although the subject matter of the criminal investigation and the child protection proceeding were closely related, the court concluded that each constituted a separate "matter":

As the State argues, had the drafters of Rule 4.2 intended the parameters of the rule to be defined from a fact perspective rather than a case perspective, the drafters would have included language to that effect. In fact, other rules in the Illinois Rules of Professional Conduct do use the broader phrases "same or substantially related matter" or "the subject matter" of the representation.

\* \* \*

It is well settled that, "by employing certain language in one instance and wholly different language in another, the legislature indicates that different results were intended." [Citation] Thus, because the drafters of Rule 4.2 did not include the words "subject matter" or "same or a substantially related" matter in the rule, we presume that the omission was deliberate. We therefore decline to adopt such a broad reading of Rule 4.2. The appellate

<sup>3</sup>Letter from Paul Castiglione, Executive Assistant State's Attorney for Policy, Cook County State's Attorney, to Sarah Kaplan, Assistant Attorney General, Public Access Bureau (March 28, 2012).

<sup>4</sup>Although the court interpreted a similar version of Supreme Court Rule 4.2 that existed before the current version amended on January 1, 2010, the court noted that the "State concedes that the modifications to Rule 4.2 were not substantive, but rather were intended to clarify that Rule 4.2 applies to prosecutors prior to the filing of formal charges[.]" *Santiago*, 236 Ill. 2d at 427.

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court majority properly found that Rule 4.2 was not triggered in this case because defendant was not represented by counsel when she was questioned by the prosecutors. *Santiago*, 236 Ill. 2d at 431-32.

Similarly, [REDACTED] FOIA request and the juvenile court proceeding in which she was represented by an attorney are *separate matters* even though [REDACTED] FOIA request seeks records relating to the juvenile court proceeding. There is no indication that an attorney was representing [REDACTED] in her pursuit of information under FOIA. Neither the FOIA request nor any of [REDACTED] subsequent communications to the State's Attorney or to this office were submitted by her attorney in the juvenile court proceeding. Indeed, [REDACTED] directly replied to the State's Attorney's denial of her request and suggestion that she consult her attorney about obtaining records by asserting: "I have the right to obtain copies of my file[.]"<sup>5</sup>

Further, Supreme Court Rule 4.2 expressly exempts from its prohibition circumstances in which an attorney is authorized by law to communicate with a represented person. Clearly, responding to a FOIA request is such a communication. The State's Attorney's Office cannot decline to comply with a FOIA request simply because the requester is a party to a matter in which the State's Attorney is involved and is represented by counsel. The State's Attorney is obligated by law to respond, but the requester is not obligated to submit her request through her attorney. Accordingly, a response to a FOIA request is not a prohibited communication with a person represented by counsel, even if the request pertains to the matter in controversy.

Because Supreme Court Rule 4.2 does not specifically prohibit the State's Attorney from responding to [REDACTED] FOIA request, we conclude that the State's Attorney has not sustained its burden of demonstrating that the records in question are exempt from disclosure under section 7(1)(a).

We also reject the State's Attorney's apparent assertion that a party to litigation is foreclosed from accessing records relating to the litigation under FOIA. Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2010)) provides that "[e]ach public body shall make available to any person for inspection or copying *all* public records, except as otherwise provided in Section 7 of this Act." (Emphasis added.) Section 7 of FOIA (5 ILCS 140/7 (West 2011 Supp.), as amended by Public Acts 97-783, effective July 13, 2012; 97-813, effective July 13, 2012) does not contain an exemption for records sought by a party to litigation simply because the same records potentially could be obtained through discovery. *See Playboy Enterprises Inc. v. U.S. Dep't. of*

<sup>5</sup>E-mail from [REDACTED] to Public Access Bureau, Office of the Attorney General, and Paul Castiglione, Executive Assistant State's Attorney for Policy, Cook County State's Attorney's Office (March 13, 2012).

  
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*Justice*, 677 F.2d 931, 936 (D.C. Cir. 1982) ("the issues in discovery proceedings and the issues in the context of a FOIA action are quite different. That for one reason or another a document may be exempt from discovery does not mean that it will be exempt from a demand under FOIA."). Had the General Assembly intended to carve out such an exemption in FOIA, it would have done so expressly. Therefore, we conclude that the State's Attorney is obligated to provide records responsive to Ms. Smith's FOIA request, subject to appropriate redactions pursuant to section 7 of FOIA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at 312-814-6756. This correspondence shall serve to close this matter.

Very truly yours,

  
STEVE SILVERMAN  
Assistant Attorney General  
Public Access Bureau

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