August 25, 2015

Ms. Julie Wurth
The News-Gazette
jwurth@news-gazette.com

Re: FOIA Request 15-665

Dear Ms. Wurth:

I write to respond to your Freedom of Information Act request dated and received in my office on August 11, 2015, in which you requested:

“…a copy of the contract with Jones Day for its recent investigation into the use of personal emails for university business, as well as any supporting documents explaining the scope of the firm’s work.

I would also like copies of all communications with the firm from President Killeen or the UI legal counsel’s office regarding the investigation.”

Information responsive to point 1 of your request is available and attached hereto. These are public documents numbering 14 pages. A tax identification number was redacted from these documents pursuant to section 7(1)(b) of the Act.

In response to point 2, we ask that you clarify the scope of your request. As it stands now, compliance with your request is unduly burdensome to the University because the request calls for the University to review the email accounts of President Killeen and all the employees of the Office of University Counsel and Jones Day to gather responsive records. As you are no doubt aware, the Office of University Counsel has many employees, not all of whom consult on all cases. Likewise, Jones Day is comprised of numerous employees uninvolved in matters concerning the University. However, to comply fully with your request as it is now written, our office would have to check all possible email accounts. Further, even if the University were to undertake such a search, it is believed that there would be thousands of potentially responsive pages of records to be reviewed. The short response time allowed by the FOIA makes the task of identifying, collecting and reviewing potentially responsive records in a timely manner unduly burdensome upon the University. As a result, the University has determined that compliance with your request is unduly burdensome and that the University’s burden to process these requests outweighs the public interest.

Pursuant to Section 3(g) of the Act, we would like to extend to you an opportunity to modify your request to make it of more manageable proportions. To efficiently process your request, we propose you limit your request to email communications during a specified one to two week period between President Killeen, Thomas Bearrows and Mark Henss from the Office of University Counsel, or Ted Chung and Leigh Krahenbuhl of Jones Day regarding the investigation of the use of personal emails for University business.
While you are invited to narrow your request as detailed above, please be advised that it is our belief that most, if not all, of the records responsive to your request would be exempt from production for the following reasons.

First, we believe the vast majority of the emails responsive to your request are communications between University employees or officials and its in-house and outside legal counsel, in which legal advice is sought or provided. These emails are exempt from disclosure pursuant to Sections 7(1)(a) and (m) of the FOIA. Section 7(1)(a) exempts from disclosure “[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law” (i.e., the Illinois Rules of Professional Conduct, the attorney-client privilege, and the attorney work product doctrine). Section 7(1)(m) exempts from disclosure:

“Communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies.” 5 ILCS 140/7(1)(m).

In the present case, any emails between University employees or officials and its legal counsel that would constitute privileged communications as defined by Illinois law would be exempt from disclosure.

Next, we expect that many of the emails responsive to this request would be between University employees or officials and the University Ethics Officer. The investigation in question was conducted at the direction of the Office of University Ethics and Compliance. Section 7.5(h) of the Act exempts from production:

“Information, the disclosure of which is exempted under the State Officials and Employees Ethics Act [5 ILCS 430/1-1, et seq.], and records of any lawfully created State or local inspector general’s office that would be exempt if created or obtained by an Executive Inspector General’s office under that Act.” 5 ILCS 140/7.5(h)

In this instance, we believe that the emails responsive to your FOIA request would be exempt from production pursuant to 5 ILCS 430/20-95(a) of the State Officials and Employees Ethics Act, which provides that “[d]ocuments generated by an ethics officer under this Act, except Section 5-50 [5 ILCS 430/5-50], are exempt from the provisions of the Freedom of Information Act [5 ILCS 140/1 et seq.].” It should be noted that the University Ethics Officer is an ethics officer under the provisions of the State Officials and Employees Ethics Act (see 5 ILCS 430/20-23). Accordingly, all documents generated by the University’s Ethics Officer under the State Officials and Employees Ethics Act are exempt from the provisions of the Freedom of Information Act.

Finally, emails containing draft documents, the drafter’s opinions and/or that are regarding the formulation of policies or actions would be exempt from production under Section 7(1)(f), which allows public bodies to withhold:

“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.” 5 ILCS 140/7(1)(f).
We expect that many of the emails responsive to your request contain deliberative communications exempt from production under this section of the Act.

Once again, you are free to resubmit your request as detailed above. However, given the nature of the investigation and the employees from whom you are seeking records, there is a chance that most, if not all, of the records you are seeking – or significant portions thereof -- would be exempt pursuant to one or more the exemptions cited above. We wanted to alert you of this possibility in the event you wish to redirect the focus of your request.

You have a right, under the law, to seek a review of this response by the Public Access Counselor (PAC) in the Office of the Attorney General. The PAC may be reached by phone at 217-782-1396, by email to publicaccess@atg.state.il.us, or by postal mail at the Public Access Bureau, 500 S. 2nd Street, Springfield, Illinois 62706. You also have the right to seek judicial review under section 11 of this Act.

If you have questions for our office, please contact 217-333-6400.

Sincerely,

Thomas P. Hardy
Executive Director
and Chief Records Officer