



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

May 17, 2022

Via electronic mail

Mr. David Sutherland
Organizer
Northwest Side Coalition Against Racism & Hate
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Via electronic mail

Mr. Gregory J. Pritz
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RE: FOIA Requests for Review: 2021 PAC C-0099 (2022 PAC 70344)
2021 PAC C-0102 (2022 PAC 70349)
2021 PAC C-0104 (2022 PAC 70357)
2021 PAC C-0105 (2022 PAC 70358)

Dear Mr. Sutherland and Mr. Pritz:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2020)). This office has consolidated four Requests for Review in this determination because they concern similar issues and legal arguments. For the reasons that follow, the Public Access Bureau concludes that the responses by the Niles-Maine District Library (Library) to Mr. David Sutherland's June 17, 2021, and June 18, 2021, FOIA requests violated FOIA.

BACKGROUND

2021 PAC C-0105

On June 17, 2021, Mr. Sutherland, on behalf of the Northwest Side Coalition Against Racism & Hate, submitted a FOIA request to the Library seeking copies of all "records and communications * * * regarding the 'Communications, Technology and Procedural Consultant' contract between January 1, 2021 and the date this request is processed[.]" including any communications on privately owned devices.¹ The request noted that a copy of the proposal by the consultant, Steven Yasell, had been previously furnished in response to another request but stated: "It is unclear as to how this proposal was solicited by the Niles-Maine District Library Board and why."² On June 26, 2021, the Library responded by stating it had no responsive records. On July 8, 2021, Mr. Sutherland submitted a complete Request for Review challenging the completeness of the Library's response.

2021 PAC C-0099, 2021 PAC C-0102, and 2021 PAC C-0104

On June 18, 2021, Mr. Sutherland submitted a FOIA request to the Library seeking copies of "all correspondence in Niles-Maine District Library Board Trustee Olivia Hanusiak's possession regarding library business in systems not maintained by the Niles-Maine District Library" from May 19, 2021, to the date of the request.³ That same day, Mr. Sutherland submitted two more FOIA requests similarly seeking copies of all correspondence regarding library business in the possession of two other trustees, Joe Makula and Suzanne Schoenfeldt, that were not maintained by the Library. All three requests cited *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, 992 N.E.2d 629 (2013), and Binding Opinion 16-006 issued by the Attorney General for the proposition that "[c]ommunications pertaining to the transaction of public business are public records, even on personal accounts."⁴ On June 26, 2021, the Library responded by stating that it did not possess any public records responsive to the three requests. On July 8, 2021, Mr. Sutherland submitted complete Requests for Review challenging the completeness of the Library's responses.

¹FOIA request from Northwestside Coalition to Niles-Maine District Library (June 17, 2021).

²FOIA request from Northwestside Coalition to Niles-Maine District Library (June 17, 2021).

³FOIA request from Northwestside Coalition to Niles-Maine District Library (June 18, 2021).

⁴FOIA requests from Northwestside Coalition to Niles-Maine District Library (June 18, 2021).

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On July 19, 2021, this office forwarded copies of the four Requests for Review to the Library and asked it to provide detailed descriptions of its searches for responsive records. On August 10, 2021, this office received a consolidated response to 2021 PAC C-0099, 2021 PAC C-0102, and 2021 PAC C-0104, including supporting material for this office's confidential review.⁵ On August 13, 2021, this office forwarded a copy of the Library's response to Mr. Sutherland; he submitted a reply on August 19, 2021. On August 24, 2021, this office received a written response to 2021 PAC C-0105 that consisted of both a complete version of its written response for this office's confidential review and a redacted version for this office to forward to Mr. Sutherland.⁶ On August 25, 2021, this office forwarded a copy of the redacted response to Mr. Sutherland; he did not submit a reply to that answer.

DETERMINATION

FOIA is intended to ensure public access 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[.]" 5 ILCS 140/1 (West 2020). FOIA, however, "is not intended to cause an unwarranted invasion of personal privacy[.]" 5 ILCS 140/1 (West 2020). In accordance with these policies, FOIA requires that "[e]ach public body shall make available to any person for inspection or copying all **public records**, except as otherwise provided in Sections 7 and 8.5 of this Act." (Emphasis added.) 5 ILCS 140/3(a) (West 2020).

When presented with a FOIA request, a public body is required to conduct a "reasonable search tailored to the nature of a particular request." *Campbell v. U.S. Department of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998); *see also Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir.1994) ("The question [whether a public body's search was sufficient] is not whether other responsive records may exist, but whether the search itself was adequate."). The adequacy of a public body's search for responsive records is judged by a standard of reasonableness and depends upon the particular facts of the case. *Better Government Ass'n v. City of Chicago*, 2020 IL App (1st) 190038, ¶31, 169 N.E.3d 1066, 1076 (2020). "Although a public body is not required to perform an exhaustive search of every possible location, the body must construe FOIA requests liberally and search those places that are 'reasonably likely to contain responsive

⁵See 5 ILCS 140/9.5(d) (West 2020) ("The Public Access Counselor shall forward a copy of the answer to the person submitting the request for review, with any alleged confidential information to which the request pertains redacted from the copy.").

⁶See 5 ILCS 140/9.5(d) (West 2020) ("The Public Access Counselor shall forward a copy of the answer to the person submitting the request for review, with any alleged confidential information to which the request pertains redacted from the copy.").

records.'" *Better Government Ass'n*, 2020 IL App (1st) 190038, ¶31, 169 N.E.3d at 1076 (quoting *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 373 F. Supp. 3d 120, 126 (D.D.C. 2019)).

Section 2(c) of FOIA (5 ILCS 140/2(c) (West 2020)) defines "public records" as "all records * * * pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body." A record pertains to the transaction of public business when it "pertain[s] to 'business or community interests as opposed to private affairs.' Indeed, FOIA is not concerned with an individual's private affairs." *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶31, 992 N.E.2d 629, 637 (2013).

In *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶64, 992 N.E.2d 629, 643 (2013), the Illinois Appellate Court affirmed a trial court's decision to uphold a binding opinion⁷ in which the Attorney General concluded that e-mails and text messages concerning public business that were sent or received by city council members on their personal devices during a public meeting were "public records" subject to the requirements of FOIA. The court held that the communications were in the possession of the city council because a quorum was present and acting collectively as a public body at the time. *City of Champaign*, 2013 IL App (4th) 120662, ¶¶40, 42-43, 992 N.E.2d at 639-40. The court also stated that "[u]nder this interpretation, a message from a constituent 'pertaining to the transaction of public business' received at home by an individual city council member on his personal electronic device would not be subject to FOIA" unless "it was forwarded to enough members of the city council to constitute a quorum for that specific body[.]" *City of Champaign*, 2013 IL App (4th) 120662, ¶41, 992 N.E.2d at 639. That reasoning, however, was not part of the court's holding as records from individual constituents were not at issue in the case.

In *Better Government Ass'n v. City of Chicago*, 2020 IL App (1st) 190038, ¶36, 169 N.E.3d 1066, 1078 (2020), the Illinois Appellate Court upheld the lower court's finding that the defendants did not perform a reasonable search for responsive records because they did not include searches of the personal e-mails and text messages of the relevant officials. In that case, the plaintiff submitted two FOIA requests to the City of Chicago Mayor's Office and Department of Public Health seeking copies of certain communications involving specified officials. *Better Government Ass'n*, 2020 IL App (1st) 190038, ¶3, 169 N.E.3d at 1069. The Mayor's Office acknowledged that four officials named in the request used their personal e-mail accounts for public business, but argued that it was not required, nor did it have the ability, to search those accounts for responsive records. *Better Government Ass'n*, 2020 IL App (1st) 190038, ¶4, 169 N.E.3d at 1070. The defendants contended, in part, that those communications were not subject

⁷Ill. Att'y Gen. Pub. Acc. Op. No. 11-006, issued November 15, 2011.

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to FOIA because they "lack the requisite nexus to a public body." *Better Government Ass'n*, 2020 IL App (1st) 190038, ¶19, 169 N.E.3d at 1073. The court rejected that argument:

Although we agree with defendants that the individual officials identified in the requests are not themselves public bodies under FOIA, this does not mean that their communications about public business cannot be public records. Instead, it is sufficient that the communications were either prepared for, used by, received by, or in the possession of a public body. *Better Government Ass'n*, 2020 IL App (1st) 190038, ¶19, 169 N.E.3d at 1073.

The court also observed that the officials in question, unlike the city council in *City of Champaign*, were not limited by quorum requirements in conducting public business and could make unilateral decisions on behalf of their public bodies. *Better Government Ass'n*, 2020 IL App (1st) 190038, ¶19, 169 N.E.3d at 1073. The court thus concluded that "the e-mails and text messages from those officials' personal accounts are 'in the possession of' a public body within the meaning of FOIA. It is also reasonable to conclude that, at a minimum, many such communications are prepared for or eventually used by the public body." *Better Government Ass'n*, 2020 IL App (1st) 190038, ¶19, 169 N.E.3d at 1073. Because the defendants did not make an inquiry into whether the personal text messages and e-mail accounts of the officials contained any responsive records, the court affirmed the lower court's order directing the defendants to make that inquiry. *Better Government Ass'n*, 2020 IL App (1st) 190038, ¶36, 169 N.E.3d at 1078.

In addition, the Attorney General has issued a binding opinion concluding that e-mails pertaining to the transaction of public business that were sent to or from the personal e-mail accounts of Chicago Police Department (CPD) employees are subject to the requirements of FOIA. Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, issued August 9, 2016. CPD contended that the e-mails were not public records because they were prepared and possessed by individual officers but were not received and used by CPD. Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, at 7. This office rejected that argument as "undercut[ing] the principle that public bodies act through their employees" and as "erroneously focus[ing] not on the content of a communication but on the method by which it is transmitted." Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, at 7. The Attorney General further concluded:

Interpreting the definition of "public records" in FOIA to exclude communications pertaining to the transaction of public business which were sent from or received on personal e-mail accounts of **public officials and public employees** would be contrary to the General Assembly's intent of ensuring full and complete

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information regarding the affairs of government. Such an interpretation would yield an absurd result by enabling **public officials** to sidestep FOIA and conceal how they conduct their public duties simply by communicating via personal electronic devices. Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, at 7. (Emphasis added.)

Parties' Arguments

In its response to this office, the Library maintained that the "communications involving the personal accounts and devices of Library trustees" do not constitute "public records" subject to FOIA's requirements.⁸ Specifically, the Library argued that, based on *City of Champaign*, a communication on a trustee's private device is not subject to FOIA unless it is sent to a quorum of Board members or sent during a public meeting. The Library further argued that the court's ruling in *Better Government Ass'n* did not overturn *City of Madigan*, including "the premises that an individual trustee cannot bind a public body or take any action individually[.]"⁹ The Library asserted that its trustees did not have individual authority under the Public Library District Act of 1991 to make decisions on behalf of the Library. Specifically, the trustees could "only function as a public body when a majority of a quorum is present."¹⁰ Additionally, the Library contended that Binding Opinion 16-006 is not applicable because the binding opinion only addressed whether employee communications are subject to FOIA, whereas Mr. Sutherland's requests concerned communications involving elected officials who did not have individual decision-making powers. Consistent with this position, the Library explained that to search for records responsive to the June 18, 2021, requests, it had "asked all of the trustees at issue whether or not they had any responsive records to this FOIA request that would meet the *City of Champaign* public records exceptions for private trustee communications, and they all searched their records and stated in writing that they have no responsive records[.]"¹¹ The Library noted, however, that the proposal in the e-mail that was the subject of Mr. Sutherland's June 17, 2021, request "was ultimately considered and approved by the Library Board and

⁸Letter from Mallory Milluzzi, Klein, Thorpe and Jenkins, Ltd., to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 24, 2021), at 2.

⁹Letter from Mallory Milluzzi, Klein, Thorpe and Jenkins, Ltd., to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 24, 2021), at 2.

¹⁰Letter from Mallory Milluzzi, Klein, Thorpe and Jenkins, Ltd., to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 24, 2021), at 2.

¹¹Letter from Mallory A. Milluzzi, Klein, Thorpe & Jenkins, Ltd., to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 10, 2021), at 2.

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[because] there [are] so many questions surrounding this proposal, we are providing it in good faith as part of this PAC review."¹²

In his reply to this office, Mr. Sutherland expressed skepticism that the Library had no records responsive to his June 18, 2021, requests. He contended that the Library "ignores what has happened in the State of Illinois and nationwide and worldwide since City of Champaign was decided on July 16, 2013: pandemic and virtual meetings of public bodies attended by public officials on personal devices."¹³ He asserted that "[i]t is not only conceivable but practical that public officials join the 'public body' via their personal devices during this time; conceivable that public officials can communicate about 'public business' on their personal devices during any meeting of the 'public body' while off screen[.]" and that public officials might otherwise engage in public business outside of physical meetings without the public being aware of those activities.¹⁴ Mr. Sutherland stated that in response to prior FOIA requests to the Library, he had learned that the Library's Board president had "proposals and letters of agreement that were never received via the Library network" but instead sent to her "only through her own private email account."¹⁵ He questioned how those documents could not constitute public records: "There is surely no requirement that a quorum of the body have also received these documents for them to be considered public records."¹⁶ Mr. Sutherland also questioned the adequacy of the Library's method of asking the named trustees to search their accounts for responsive records.

Conclusion

This office concludes that the Library did not perform an adequate search for records responsive to Mr. Sutherland's requests. Although it was reasonable for the Library to

¹²Letter from Mallory Milluzzi, Klein, Thorpe and Jenkins, Ltd., to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 24, 2021), at 3.

¹³E-mail from David Sutherland, Northwest Side Coalition Against Racism and Hate, to [Teresa] Lim (August 19, 2021).

¹⁴E-mail from David Sutherland, Northwest Side Coalition Against Racism and Hate, to [Teresa] Lim (August 19, 2021).

¹⁵E-mail from David Sutherland, Northwest Side Coalition Against Racism and Hate, to [Teresa] Lim (August 19, 2021).

¹⁶E-mail from David Sutherland, Northwest Side Coalition Against Racism and Hate, to [Teresa] Lim (August 19, 2021).

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request that the specified trustees search their own records,¹⁷ limiting the parameters of the search to only those communications forwarded to a quorum of its trustees or transmitted during a Library Board meeting was too narrow to locate all responsive public records. The Library's argument relies on comments in *City of Champaign* about hypothetical records that were not at issue in that case, and the Library conflates the meanings of "final action" pursuant to the Open Meetings Act (OMA) (5 ILCS 120/1 *et seq.* (West 2020)) and "public business" under FOIA by asserting that e-mails that do not involve a quorum of Library Board members are not public records because individual Library Board members do not have authority to make decisions for the Library Board under the Public Library District Act of 1991. OMA is intended "to ensure that the actions of **public bodies** be taken openly and that their deliberations be conducted openly." (Emphasis added.) 5 ILCS 120/1 (West 2020). Because an individual trustee cannot take final action attributable to the Library Board, an e-mail reflecting an individual Library Board member's decision outside of a meeting would not constitute improper final action by a public body under section 2(e) of OMA.¹⁸ Nevertheless, a trustee can transact "public business" either through unilateral actions or by communicating on behalf of the Board to pursue its objectives. The definition of "public records" in FOIA is not limited to those records that document final actions collectively taken by public bodies; FOIA defines "public records" to broadly encompass "all records * * * pertaining to the transaction of public business, * * * having been or being used by, received by, in the possession of, or under the control of any public body." 5 ILCS 140/2(c) (West 2020).

To construe the phrase "possession of * * * any public body" so narrowly would be contrary to FOIA's purpose of ensuring full and complete information concerning the affairs of government. Under the Library's narrow interpretation, elected officials could conceal records documenting how they conducted their public duties by simply electing not to use their public bodies' electronic devices, e-mail accounts, and recordkeeping systems. FOIA cannot reasonably be construed as giving elected officials the option to withhold communications concerning public business simply because the communications are maintained on personal e-mail accounts and do not involve a quorum of the public body's members. To conclude otherwise would be to determine that it is permissible for elected officials to communicate on behalf of the public body

¹⁷*See Nissen v. Pierce County*, 183 Wash. 2d 863, 886-87, 357 P.3d 45, 57 (Wash. 2015) ("[A]gency employees are responsible for searching their files, devices, and accounts for records responsive to a relevant [public records] request. * * * When done in good faith, this procedure allows an agency to fulfill its responsibility to search for and disclose records without unnecessarily treading on the constitutional rights of its employees.").

¹⁸Section 2(e) of OMA (5 ILCS 120/2(e) (West 2020), as amended by Public Act 102-558, effective August 20, 2021; 102-237, effective January 1, 2022) provides: "Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted."

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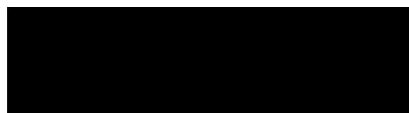
they represent in secret so long as they use personal devices and accounts and do not copy a sufficient number of their fellow members. *See* Ill. Att'y Gen. Req. Rev. Ltr. 49623, issued February 14, 2018 (concluding that e-mail communications sent by a county board member on his personal account would be subject to FOIA if they pertained to the transaction of the county's business).

Although the Library has now provided Mr. Sutherland with a copy of the e-mail in which Mr. Yasell sent a proposal to the Board President and it is therefore no longer at issue, the record nevertheless illustrates how communications on trustees' private accounts can be public records. On May 18, 2021, Mr. Yasell sent an e-mail to the Board President's personal e-mail with a proposal that indicated it was "From: Yissilmissil Productions" and "To: Niles-Maine District Library[.]"¹⁹ Even though the e-mail conveying the proposal was sent to the Board President's personal e-mail address and did not copy a quorum of Board members, it was clearly prepared for the Library. The Board President received the communication because of her role with the Board, and it would be absurd to conclude that the transmittal e-mail was not a public record solely because the Board President could not act alone in approving the proposal. Further, it is reasonable to conclude that any preliminary communications with individual trustees and other documents prepared for and used by the Board are public records subject to FOIA, regardless of how they were transmitted.

This office requests that the Library ask the trustees to perform additional searches of their personal accounts and devices for any responsive communications pertaining to Library business within the specified time period. The Library should disclose copies of any responsive records to Mr. Sutherland, subject to any permissible redactions.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at the Chicago address listed on the first page of this letter.

Very truly yours,



TERESA LIM
Assistant Attorney General
Public Access Bureau

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¹⁹E-mail from Steve Yassell to Joe Makula and Carolyn Drblik (May 18, 2021).

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cc: *Via electronic mail*
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