



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 8, 2014

PUBLIC ACCESS OPINION 14-010
(Request for Review 2014 PAC 29590)

FREEDOM OF INFORMATION ACT:
Duty to Conduct a Reasonable Search for
Responsive Records; Repeat Requests Under
Section 3(g)

Mr. Joseph Wiszowaty
Sauk Villager News
268 Fieldstone Drive
Hebron, Indiana 46341

The Honorable David Hanks
Office of the Mayor
21801 Torrence Avenue
Sauk Village, Illinois 60411

Dear Mr. Wiszowaty and Mayor Hanks:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2012)). For the reasons discussed below, this office concludes that Sauk Village (Village) violated FOIA by: (1) failing to conduct a reasonable search for records responsive to Mr. Joseph Wiszowaty's FOIA request, received by the Village on April 4, 2014; (2) improperly asserting that the request was unduly burdensome; and (3) withholding responsive records in its possession.

BACKGROUND

Prior Related FOIA Request and Request for Review

This Request for Review is related to a previous FOIA request and Request for Review (2013 PAC 25892) involving the same parties. On August 15, 2013, Mr. Wiszowaty submitted a FOIA request to the Village seeking records related to the Village Clerk's and one of

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the Village Trustee's participation in an event known as the Building One America Summit (Summit) in Washington, D.C.¹ Specifically, Mr. Wiszowaty requested the Village Clerk's correspondence concerning the Summit and her resulting "personal trip" to attend the Summit; information about the Village Attorney's billing costs for discussions with the Village Clerk regarding the Summit and any investigation of the trip; a list of Village contractors, employees, or vendors who made contributions that enabled the Village Clerk and/or the Village Trustee to attend the Summit and the amount of each donation; and any correspondence in which the Village Clerk or the Village Trustee requested or solicited sponsorships or donations for the trip. On August 22, 2013, the Village responded that it did not possess any responsive public records.²

In a letter dated August 26, 2013, and received by this office on September 3, 2013, Mr. Wiszowaty filed a Request for Review of the Village's response.³ On September 19, 2013, this office forwarded Mr. Wiszowaty's Request for Review to the Village and requested a written explanation of the Village's search for responsive records.⁴ On October 8, 2013, the Village's attorney responded that the Village did not sponsor the Village Clerk's trip and thus did not possess records regarding her travel expenses, itinerary, or schedule.⁵ In addition, the Village asserted that any records concerning the trip that were in the Village Clerk's possession would not be public records because the "trip did not relate to official actions and she was not involved in the transaction of public business or affairs."⁶ On October 21, 2013, this office received Mr. Wiszowaty's reply maintaining that the Village possesses undisclosed responsive records.⁷

¹E-mail from Sauk Villager News to Sauk Village FOIA Officer (August 15, 2013).

²Letter from Michael J. McGrath, Village Attorney, to Joseph Wiszowaty, *Sauk Villager News* (August 22, 2013).

³Letter from Joseph Wiszowaty to Sarah Pratt, Public Access Counselor, Office of the Attorney General (August 26, 2013).

⁴Letter from Matthew C. Rogina, Assistant Attorney General, Public Access Bureau, to Michael McGrath, Village Attorney, Odelson & Sterk, Ltd. (September 19, 2013).

⁵Letter from Matthew J. Byrne, Odelson & Sterk, LTD., to Matthew Rogina, Assistant Attorney General, Public Access Bureau (October 8, 2013).

⁶Letter from Matthew J. Byrne, Odelson & Sterk, LTD., to Matthew Rogina, Assistant Attorney General, Public Access Bureau (October 8, 2013) at 2.

⁷Letter from Joseph Wiszowaty, *Sauk Villager News*, to Matthew C. Rogina, Assistant Attorney General, Office of the Attorney General (October 15, 2013).

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On March 21, 2014, after reviewing both parties' submissions and the available evidence, this office determined that the requested records would pertain to the transaction of public business because the Village Clerk participated in the Summit in her official capacity as a representative of the Village, she solicited input from Village officials regarding the substance of her presentation at the Summit,⁸ and she used her Village e-mail account and the Village's website to seek supporting documentation from Village residents on issues that they face pertinent to her Summit presentation.⁹ Accordingly, this office concluded that the Village Clerk's records and any other responsive records in the possession of the Village concerning the Summit are "public records"¹⁰ under FOIA and that the Village had failed to conduct a reasonable search for them.¹¹ This office directed the Village to:

search all recordkeeping systems — including the Village Clerk's records — that are likely to contain responsive information concerning the summit and to provide those records to Mr. Wiszowaty, subject to appropriate redactions under section 7 of FOIA (5 ILCS 140/7 (West 2012), as amended by Public Acts 98-463, effective August 16, 2013; 98-578, effective August 27, 2013).¹²

The Village, however, did not comply with that directive and did not provide Mr. Wiszowaty with responsive records or otherwise respond.

⁸Ill. Att'y Gen. PAC Req. Rev Ltr. 25892, issued March 21, 2014, at 4.

⁹Letter from Joseph Wiszowaty to Sarah Pratt, Public Access Counselor, Office of the Attorney General (August 26, 2013), Exhibit B.

¹⁰Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2012)) defines "public records" as:

all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials 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.

¹¹Ill. Att'y Gen. PAC Req. Rev Ltr. 25892, issued March 21, 2014, at 5-6.

¹²Ill. Att'y Gen. PAC Req. Rev Ltr. 25892, issued March 21, 2014, at 6.

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April 4, 2014, FOIA Request and Request for Review

On April 4, 2014, the Village received an undated, five-part FOIA request from Mr. Wiszowaty seeking records concerning the Village Clerk's participation in the Summit.¹³ The April 4, 2014, FOIA request is somewhat similar to the request that Mr. Wiszowaty submitted in April 2013. Specifically, Mr. Wiszowaty sought:

PART I: Please provide documentation sufficient to show *all communications* by and between Village Clerk Debra Williams (either from dlw1633@aol.com and/or the Village of Sauk Village's domain @saukvillage.org) *concerning the matter of the Building One America organization* including but not limited to copies of any and all correspondence to and from all parties.

Additionally, provide any U.S. Mail, memorandums, electronic mails between Village Clerk Debra Williams (from either Mrs. Williams[] emails dlw1633@aol.com and/or the Village of Sauk Village's domain @saukvillage.org), village officials, village employees, village attorney, village vendors and or private citizens with respect to the Building One America organization or summit. This should include but not be limited to any correspondence by and between the Village's Attorney with respect to what she has called a "personal trip" at a Village Board Meeting to Washington D.C. taken in July, 2013 and any documents, attachments or other material information contained in the emails.¹⁴ (Emphasis in original.)

The request also sought, in summary: **PART II:** legal billing records related to the Summit and related matters, and documentation of that legal/investigatory work as well any communications between the Village Clerk and the Village Attorney concerning the investigative findings; **PART III:** documentation of all contributions for the trip to the Summit; **PART IV:** documentation of all communications in which the Village Clerk or a Village Trustee solicited "sponsorships" or

¹³Freedom of Information Act Request from Joseph Wiszowaty, Sauk Villager News, to Village of Sauk Village, FOIA Officer (undated). For ease of reference, this FOIA request will be referred to as the April 4, 2014, FOIA request.

¹⁴Freedom of Information Act Request from Joseph Wiszowaty, Sauk Villager News, to Village of Sauk Village, FOIA Officer (undated).

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contributions for their trip to the Summit; and **PART V**: documentation of all expenses incurred on that trip.¹⁵

The Village's April 18, 2014, response noted that it had received Mr. Wiszowaty's request on April 4, 2014, and had on April 11, 2014, extended the time for responding by five business days pursuant to section 3(e)(v) of FOIA (5 ILCS 140/3(e)(v) (West 2012)) "because some of the requested records required examination by personnel having the necessary competence and discretion to determine if the records are exempt from disclosure under section 7 of FOIA or should be released only with appropriate redactions."¹⁶ The Village's April 18, 2014, response, however, asserted that it "has no records" responsive to any of the five parts of the request. The Village also asserted that three portions of the request (Part I seeking the Village Clerk's communications, Part III seeking documentation of contributions for the Summit, and Part IV seeking correspondence soliciting sponsorships), were unduly burdensome under section 3(g) of FOIA (5 ILCS 140/3(g) (West 2012)) because the requests were unchanged or identical to Mr. Wiszowaty's August 15, 2013, FOIA request, and the Village had properly asserted that it had no records responsive to those portions of the earlier request.

In response to the Village's assertion that the request was "unduly burdensome," on April 24, 2014, Mr. Wiszowaty submitted correspondence to the Village in an attempt to "simplify" his April 4, 2014, FOIA request.¹⁷ The Village did not respond to Mr. Wisowaty's correspondence.

On May 28, 2014, the Public Access Bureau received Mr. Wisowaty's Request for Review contesting the Village's response to the April 4, 2014, request and alleging that the Village failed to respond to his April 24, 2014, revised request.¹⁸

On May 30, 2014, this office forwarded a copy of the Request for Review to the Village's legal counsel and asked it to provide: (1) the responsive records for this office's confidential review; (2) a detailed explanation of the Village's handling of Mr. Wiszowaty's April 4 and April 24, 2014, requests; and (3) a detailed description of the Village's search for

¹⁵Letter from Joseph Wiszowaty to Village of Sauk Village, FOIA Officer (undated).

¹⁶Letter from Village of Sauk Village by Sara Gallagher, one of the Village's attorneys, to Mr. Joseph Wiszowaty, *Sauk Villager News* (April 18, 2014), at 1-2.

¹⁷Letter from Joseph Wiszowaty to Village of Sauk Village, FOIA Officer (April 24, 2014).

¹⁸Letter from Joseph Wiszowaty, *Sauk Villager News*, to Sarah Pratt, Public Access Counselor, Office of Attorney General (May 28, 2014).

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responsive records.¹⁹ On June 20, 2014, this office received copies of some responsive records and the Village's written response. The Village provided the records and its response under a claim of confidentiality pursuant to section 9.5(d) of FOIA (5 ILCS 140/9.5(d) (West 2012)), which prohibits this office from forwarding both the responsive records and the Village's response to Mr. Wiszowaty or disclosing that information in this binding opinion.²⁰

On July 25, 2014, the Public Access Bureau properly extended the time in which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.²¹

ANALYSIS

"It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act." 5 ILCS 140/1 (West 2012). Under section 1.2 of FOIA (5 ILCS 140/1.2 (West 2012)), "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2012)) 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." A public body that asserts 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 2012).

Duty to Search for Responsive Records

Under FOIA, a public body is required to conduct a "reasonable search tailored to the nature of a particular request." *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). A public body's search must be "reasonably calculated to uncover all relevant documents." *Weisberg v. Department of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Although a public body is not required to "search every record system[,] it "cannot limit its search to only one record system if there are others that are likely to turn up the requested information." *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (C.A.D.C. 1990).

¹⁹Letter from Josh Jones, Assistant Attorney General, Public Access Bureau, to Sara Gallagher, Odelson Sterk, LTD (May 30, 2014).

²⁰Letter from Burt Odelson, Odelson Sterk, LTD, to Josh Jones, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (June 19, 2014).

²¹Letter from Josh Jones, Assistant Attorney General, Public Access Bureau, to Joseph Wiszowaty and Sherry Jasinski, Freedom of Information Officer, Village of Sauk Village (July 25, 2014).

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The Village's response to Mr. Wiszowaty's April 4, 2014, FOIA request contains no indication that it conducted any search or made any effort to locate records responsive to that request. The response, which the Village termed its "final response,"²² addressed each of the five parts of the request separately and stated that the Village had no responsive records.²³ This response was issued even though this office's previous opinion concluded that the Village was likely to possess records responsive to the earlier, similar request, and directed the Village to conduct a search for those records.²⁴ Moreover, the Village did not demonstrate to the Public Access Bureau that it had undertaken a search for pertinent records before responding to the April 4, 2014, request. Therefore, this office concludes that the Village has violated the requirements of FOIA by failing to demonstrate that it conducted a reasonable search for records responsive to Mr. Wiszowaty's request. *See Moore v. F.B.I.*, 366 Fed.Appx. 659, 661-62 (7th Cir. 2010) (a public body that does not locate a requested record must demonstrate that it conducted a reasonable search.)

Section 3(g) of FOIA

In addition to asserting that it does not possess responsive records, the Village also asserted that three parts of Mr. Wiszowaty's April 4, 2014, FOIA request were unduly burdensome because the Village had already advised the requester, in response to his August 15, 2013, FOIA request for the same records, that it had no responsive records. Section 3(g) of FOIA provides that "[r]epeat requests from the same person for the same records that are unchanged or identical to records previously provided **or properly denied** under this Act shall be deemed unduly burdensome under this provision." (Emphasis added.) The Village argued that it had properly denied the earlier request because it had no responsive records to provide. However, this office had concluded that the Village had *not* properly denied the prior FOIA request because it appeared that there were responsive public records in both the Village Clerk's possession and the Village's possession, and directed the Village to conduct a reasonable search for those records. Ill. Att'y Gen. PAC Req. Rev Ltr. 25892, issued March 21, 2014. The Village did not comply with that earlier directive and it has failed to demonstrate that it conducted a reasonable search for responsive records before it denied the April 4, 2014, FOIA request. In fact, the Village provided 13 pages of responsive records to this office in conjunction with this Request for Review. It also has not demonstrated that it has searched all records systems likely

²²Letter from Sara Gallagher, Odelson & Sterk, Ltd, to Mr. Joseph Wiszowaty, Sauk Villager News (April 18, 2014), at 3.

²³Because the Village made no reasonable search for responsive records prior to its April 18, 2014, response, its extension of time for response under section 3(e)(v) of FOIA, claiming that it needed to review the responsive records to determine whether they were exempt, was improper.

²⁴Ill. Att'y Gen. PAC Req. Rev Ltr. 25892, issued March 21, 2014, at 6.

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to contain responsive records. The Village's assertion of 3(g) under these circumstances violates the requirements of FOIA.

Duty to Disclose Responsive Records

The Village has provided this office with records responsive to the FOIA requests which have not been disclosed to Mr. Wiszowaty. Because the Village has neither asserted nor demonstrated by clear and convincing evidence that those records are exempt from disclosure, this office concludes that the Village violated section 3(a) of FOIA by failing to disclose those records to Mr. Wiszowaty.

Failure to Respond to April 24, 2014, "Narrowed" Request

Mr. Wiszowaty's Request for Review also asserts that the Village violated FOIA by failing to respond to his April 24, 2014, correspondence within the statutory timeframe. Section 3(d) of FOIA (5 ILCS 140/3(d) (West 2012)) provides:

Each public body shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request, unless the time for response is properly extended under subsection (e) of this Section. Denial shall be in writing as provided in Section 9 of this Act.

The issue here is whether Mr. Wiszowaty's letter of April 24, 2014, constituted a new FOIA request for purposes of triggering a duty to respond within five days.

In its response to his April 4, 2014, request, the Village asserted that it had no responsive records, but also asserted that three of the items constituted unduly burdensome requests under section 3(g). Mr. Wiszowaty apparently interpreted this assertion as an invitation to narrow his request and consequently submitted a "simplified" version of it. FOIA, however, does not expressly provide that a narrowed request offered in response to an assertion of section 3(g) is considered a new request for purposes of section 3(d) of FOIA.

Here, the Village denied having any responsive records and therefore production of records could not have constituted an undue burden. Thus, the Village appears to have asserted section 3(g) based solely on its position that the April 4, 2014, FOIA request was a *repeat* of his August 15, 2013, FOIA request and not because of any burden caused by production of the records. Under these circumstances, it is not clear that the Village was under any obligation to respond to the letter. Although the Village might have avoided this confusion by responding to the April 24, 2014, correspondence or otherwise communicating with Mr.

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Wiszowaty, under these circumstances we cannot conclude that its failure to respond to the April 24, 2014, letter constituted a violation of FOIA.

FINDINGS AND CONCLUSIONS

- 1) On April 4, 2014, Mr. Joseph Wiszowaty submitted a FOIA request to the Village of Sauk Village seeking records pertaining to the Village Clerk's participation in an event known as the Building One America Summit.
- 2) On April 18, 2014, the Village responded, through its attorney, that it did not possess any responsive records, and further, that three portions of the request were unduly burdensome under section 3(g) of FOIA.
- 3) On May 28, 2014, Mr. Wiszowaty submitted a Request for Review of the Village's response to his April 4, 2014, request, and its lack of response to his April 24, 2014, "simplified" request. Mr. Wiszowaty's 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 2012)).
- 4) On May 30, 2014, the Public Access Bureau determined that further action was warranted and asked the Village to provide this office with unredacted copies of all responsive records together with a written explanation of its handling of Mr. Wiszowaty's April 4, 2014, request and April 24, 2014, correspondence.
- 5) On June 20, 2014, the Public Access Bureau received certain responsive records and the Village's written response under a claim of confidentiality pursuant to section 9.5(d) of FOIA.
- 6) On July 25, 2014, the Public Access Bureau properly extended the time in which to issue a binding opinion by 30 business days, to September 8, 2014, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.
- 7) Upon receipt of a FOIA request, a public body must conduct a reasonable search by making efforts reasonably calculated to locate all responsive records. The Village did not demonstrate that it conducted any search for responsive records before responding to the April 4, 2014, FOIA request.
- 8) The Village was precluded from asserting section 3(g) in denying the April 4, 2014, FOIA request because it had not properly denied a prior request for the same records from Mr. Wiszowaty.

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9) Under the plain language of section 1.2 of FOIA, a public body that withholds a responsive record must prove by clear and convincing evidence that the record is exempt from disclosure. The Village did not provide any basis for withholding responsive records pursuant to FOIA. Therefore, the Village violated section 3(a) of FOIA by failing to furnish those records to Mr. Wiszowaty.

Therefore, it is the opinion of the Attorney General that Sauk Village has violated the requirements of FOIA by failing to conduct a reasonable search for records responsive to Mr. Joseph Wiszowaty's April 4, 2014, FOIA request, by improperly asserting section 3(g) of FOIA, and by improperly withholding public records. Accordingly, the Village is hereby directed to take immediate and appropriate action to comply with this opinion by conducting a reasonable search for records responsive to each and every portion of Mr. Wiszowaty's FOIA requests, and by providing him with all responsive records, subject only to permissible redactions under section 7 of FOIA (5 ILCS 140/7 (West 2013 Supp.)).

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 2012). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Mr. Joseph Wiszowaty as defendants. *See* 5 ILCS 140/11.5 (West 2012).

Very truly yours,

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