



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 21, 2014

Via electronic mail

Mr. Joseph Wiszowaty
268 Fieldstone
Hebron, Indiana 46341
saukvillager@yahoo.com

Via electronic mail

Mr. Matthew J. Byrne
Odelson & Sterk, Ltd.
3318 West 95th Street
Evergreen Park, Illinois 60805
mbyrne@odelstonsterk.com

RE: FOIA Request for Review – 2013 PAC 25892

Dear Mr. Wiszowaty and Mr. Byrne:

This determination letter 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 that follow, the Public Access Bureau concludes that records responsive to Mr. Joseph Wiszowaty's FOIA request which are in the possession of the Village of Sauk Village (Village), including the Village Clerk, are public records under FOIA. This office further concludes that the Village did not conduct a reasonable search for those records.

On August 15, 2013, Mr. Wiszowaty submitted a FOIA request to the Village seeking records relating to the attendance of the Village Clerk and a Village Trustee at the Build One America Summit in Washington D.C. Specifically, Mr. Wiszowaty requested the Village Clerk's correspondence concerning the trip, information about the Village Attorney's billing costs for discussions with the Village Clerk and any investigation of the trip, a list of Village contractors; employees, or vendors who made contributions for the Village Clerk and a Village Trustee to attend the summit and the amount of each donation, and any correspondence in which the Village Clerk or a Village Trustee requested or solicited sponsorships or donations for the

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trip. On August 22, 2013, the Village informed Mr. Wiszowaty that it possessed no records responsive to his request.

On August 26, 2013, Mr. Wiszowaty sent this office a Request for Review together with information previously posted on the Village's website which referenced the Washington D.C. trip together with an audio recording of a meeting of the Village Board of Trustees at which the trip was discussed. On September 19, 2013, this office sent a letter to the Village and asked it to provide "a written explanation of how the Village searched for responsive records."¹

On October 8, 2013, counsel for the Village reiterated the Village's assertion that it does not possess the records that Mr. Wiszowaty seeks. The response explained that upon receipt of the request, the Village contacted the Mayor and its records department and confirmed that the Village did not sponsor the Village Clerk's trip and did not possess records regarding the Village Clerk's travel expenses, itinerary, or schedule. The response further explained that:

The matter was brought to our attention at a Village Board meeting prior to receiving Mr. Wiszowaty's August 15, 2013, correspondence. During that meeting, the Village Clerk briefly explained that this was a personal trip which she organized herself. *We briefly discussed this matter with the Village Clerk and she informed us that she received an invitation to attend the Building One American Summit (sic) from the event organizers.* It appears that this invitation was extended to all members of the Village Board, including the Mayor. The Village Clerk informed us that she did not seek any authorization or approval from the Corporate Authorities or the Village Mayor with regards to attending the summit. This was confirmed by the Village Mayor, who stated that her attendance was not requested or endorsed by the Village. The Village Clerk was also not required to make any formal report of her activities while at the summit.² (Emphasis added.)

In addition, the response stated that "we do not believe that any records that would be in [the Village Clerk's] possession would be public records under the Act due to the fact that [the Village Clerk's] trip did not relate to official business and she was not involved in the transaction

¹Letter from Matthew C. Rogina, Assistant Attorney General, Public Access Bureau, to Michael McGrath, Village Attorney, Village of Sauk Village (September 19, 2013).

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

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of public business or affairs."³ The Village did, however, provide Mr. Wiszowaty with a spreadsheet of legal bills related to the Village's investigation into this matter. The spreadsheet indicated that the Village was billed \$907.50 in legal fees for 5.5 hours of investigation between July 29, 2013, and August 29, 2013.

Mr. Wiszowaty replied on October 15, 2013, asserting that the Village should possess investigative records that are responsive to his request. This office then requested additional information concerning the Village's efforts to locate responsive records. On November 27, 2013, counsel for the Village issued a supplemental response to this office stating that the "Mayor informed us that he would not have any records. *Invitations to the summit were received by the Village Trustees, Mayor and Village Clerk.* However, no action was taken by the Village with regards to selecting or sending a Village representative to the summit."⁴ (Emphasis added.) The response further stated that counsel "received no indication that the Village Clerk was required to submit any documentation regarding the Building One America Summit" and, therefore, "we concluded our investigation and search for records and responded to Mr. Wiszowaty that the Village did not have any records responsive to his request."⁵

DETERMINATION

FOIA provides that "all records in the custody or possession of a public body" are "presumed to be open to inspection and copying." 5 ILCS 140/1.2 (West 2012). *See also Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill. 2d 390, 415, 844 N.E.2d 1, 14 (2006). Public records include "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*[".]" (Emphasis added). 5 ILCS 140/2(c) (West 2012).

The information provided to this office by Mr. Wiszowaty includes a message from the Village Clerk concerning the trip which was previously posted on the Village's website. The message stated, in pertinent part:

³Letter from Matthew J. Byrne, Odelson Sterk, LTD., to Matthew Rogina, Assistant Attorney General, Public Access Bureau (October 8, 2013).

⁴Letter from Matthew J. Byrne, Odelson Sterk, LTD., to Matthew Rogina, Assistant Attorney General, Public Access Bureau (November 27, 2013).

⁵ Letter from Matthew J. Byrne, Odelson Sterk, LTD., to Matthew Rogina, Assistant Attorney General, Public Access Bureau (November 27, 2013).

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I will be preparing a five minute presentation on Sauk Village water. I believe that the majority of Sauk Village residents feel that the quality, quantity and cost of our water is the **MAIN** issue. I will do my level best in the time I am allotted to speak on behalf of each and every Sauk Village resident.

In order to help me speak for you, I am asking residents to take pictures, to copy your water bill (hopefully one from last year at this time and your current bill) and write letters to show how the water crisis has affected you and your family. I can supply facts or figures for five minutes or testimony from residents or a little of both. Either way, I will make it crystal clear that we need help. I do not know what to expect but my expectations are high.⁶ (Emphasis in original.)

This office has also reviewed the audio recording of the Board of Trustees' discussion of the trip during its July 23, 2013, Board meeting. The discussion focused on ethical concerns related to questions about how the trip was funded. Although the Village Clerk asserted that the trip was a personal endeavor, she and other Village officials acknowledged that the Village Clerk attended the summit in her capacity as a Village official. Moreover, the Village Clerk stated that she consulted with the Village's Public Works Director about what to include in her presentation about water issues facing the Village, and that she submitted a draft of the presentation to the Mayor, Village Engineer, and Village Attorney for proofreading and revisions.

Even if no public funds were spent on the trip, the Village Clerk's attendance at the summit as a representative of the Village pertained to the transaction of public business. Notably, the Village Clerk solicited feedback from Village residents for the purpose of speaking on their behalf at the summit. Further, she presented information concerning water issues facing the Village, which is a matter of substantial public interest, based on consultations with the Mayor and other high ranking Village officials. Because the trip pertained to the Village's transaction of public business, the Village Clerk's records and any other records in possession of the Village concerning the summit – including records related to the funding of the trip – are "public records" under the definition of that term in section 2(c) of FOIA.

FOIA requires a public body to conduct a "reasonable search tailored to the nature of a particular request." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). A public body is not required to "search every record system[.]" but it "cannot limit its search to

⁶Request for Review, Exhibit B, submitted by Joseph Wiszowaty to Sarah Pratt, Public Access Counselor, Office of the Attorney General (August 26, 2013).

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only one record system if there are others that are likely to turn up the requested information." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (1990).

This office twice asked the Village to describe the measures it took to search for responsive records, and the only substantive information provided was that the Mayor indicated that the Village does not possess any responsive records, that the Village Clerk was not required to submit documentation concerning the trip, and that the records department reported that it does not possess records of the Village Clerk's travel expenses, itinerary, or schedule. Mr. Wiszowaty's request is substantially broader than those topics, and the Village has not demonstrated that it searched any recordkeeping systems likely to contain responsive records such as the Village Clerk's e-mail account or paper correspondence records. The Village Clerk publicly stated that she submitted a draft of her presentation to other Village officials, yet the Village's response to this office did not account for that draft or communications related to the draft. Likewise, it is unclear whether the Village possesses the invitation that it acknowledges that the Village Clerk received for the summit.

In addition, a billing spreadsheet provided to Mr. Wiszowaty indicates that the Village was billed 5.5 hours in legal fees for an investigation related to the summit. Presumably, the spreadsheet is based on invoices or other records documenting the services for which the Village was billed; it also appears likely that the investigation generated records that the Village has neither provided to Mr. Wiszowaty nor denied in accordance with section 9(a) of FOIA⁷ (5 ILCS 140/9(a) (West 2012)). To the extent that the law firm that conducted the investigation may possess investigative records that are not in the physical custody of the Village, FOIA provides:

A public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act. 5 ILCS

⁷Section 9(a) of FOIA provides:

Each public body denying a request for public records shall notify the requester in writing of the decision to deny the request, the reasons for the denial, including a detailed factual basis for the application of any exemption claimed, and the names and titles or positions of each person responsible for the denial. Each notice of denial by a public body shall also inform such person of the right to review by the Public Access Counselor and provide the address and phone number for the Public Access Counselor. Each notice of denial shall inform such person of his right to judicial review under Section 11 of this Act.

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140/7(2) (West 2012), as amended by Public Acts 98-463,
effective August 16, 2013; 98-578, effective August 27, 2013.

Thus, any records concerning the investigation in the possession of the law firm that the Village contracted to perform that governmental function are considered public records of the Village pursuant to section 7(2) of FOIA.

The Village has not demonstrated that it conducted a reasonable search for responsive records, and the available information strongly suggests that such records may be in the Village's possession. Accordingly, this office directs 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).

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This correspondence shall serve to close this file. If you have any questions, you may contact me at (312) 814-5383.

Very truly yours,



STEVE SILVERMAN
Assistant Bureau Chief
Public Access Bureau

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