



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

March 31, 2022

Via electronic mail

Mr. Christopher Hansen
[REDACTED]

Via electronic mail

Ms. Patricia Robinson
Freedom of Information Officer
Champaign-Urbana Public Health District
201 West Kenyon Road
Champaign, Illinois 61820
probinson@c-uphd.org

RE: FOIA and OMA Request for Review – 2021 PAC 68452; 68453

Dear Mr. Hansen and Ms. Robinson:

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)) and section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2020)). For the reasons explained below, the Public Access Bureau concludes that the Champaign-Urbana Public Health District (District) demonstrated that it performed a reasonable search for records responsive to Mr. Christopher Hansen's April 11, 2021, FOIA request. The Public Access Bureau also concludes that the District's Board (Board) violated OMA in connection with its remote meetings on June 24, 2020; July 13, 2020; August 17, 2020; September 14, 2020; October 14, 2020; October 28, 2020; October 30, 2020; November 16, 2020; and January 11, 2021, by failing to maintain and make available to the public verbatim recordings.

BACKGROUND

On April 11, 2021, Mr. Hansen submitted a FOIA request to the District seeking a recording of every Board meeting. On April 21, 2021, Mr. Hansen e-mailed the District stating that he had not received a response to his request. On that same date, the District e-mailed Mr.

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Hansen to confirm receipt of his request and ask if he would agree to narrow his request to a specific time period within a seven year span of responsive records. On April 23, 2021, Mr. Hansen replied that he would not narrow his request. On July 20, 2021, Mr. Hansen again e-mailed the District stating that he had not received a response to his request. On July 22, 2021, the District informed Mr. Hansen that responsive records for 2020 and 2021 had been saved to a thumb drive which he could pick up from the District office. On July 30, 2021, Mr. Hansen replied to the District reiterating that he requested the responsive records for all seven years. On August 5, 2021, Mr. Hansen e-mailed the District with a schedule for provision of the remaining records, which he had apparently agreed upon with District staff. On August 9, 2021, the District e-mailed Mr. Hansen to confirm that schedule with one change. On August 27, 2021, Mr. Hansen e-mailed the District regarding certain missing videos for meetings throughout 2020 and 2021. On November 9, 2021, this office received Mr. Hansen's Request for Review contesting the adequacy and completeness of the District's search for responsive records. Specifically, Mr. Hansen alleged that he should have received video recordings of at least thirty-three additional meetings. Mr. Hansen also alleged that the Board violated section 7(e)(9) of OMA (5 ILCS 120/7(e)(9) (West 2020)) by failing to maintain and make available to the public verbatim recordings of some remote meetings during 2020 and 2021.

On November 22, 2021, this office sent a copy of the Request for Review to the District and asked it to provide a written response to Mr. Hansen's allegations. Specifically, this office asked the District to provide a detailed description of its search for responsive records. Further, this office requested a list of meetings held remotely pursuant to section 7(e) of OMA (5 ILCS 120/7(e) (West 2020)), as well as copies of the agendas, meeting minutes, and verbatim recordings of each remote meeting. On December 6, 2021, this office received the District's answer and requested materials. On December 7, 2021, this office forwarded a copy of the District's response to Mr. Hansen; on that same date, he replied. On February 23, 2022, the District provided an additional verbatim recording.

DETERMINATION

Freedom of Information Act

FOIA provides that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2020). 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 records.'" *Better Government Ass'n*, 2020 IL App (1st) 190038, ¶31, 169 N.E.3d at 1076

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(quoting *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 373 F. Supp. 3d 120, 126 (D.D.C. 2019)). However, "[a] requester is entitled only to records that an agency has in fact chosen to create and retain." *Yeager v. Drug Enforcement Administration*, 678 F.2d 315, 321 (D.C. Cir. 1982). "[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

In its response to this office, the District stated that its FOIA Officer and the Secretary of the District's Board searched its computer system, including the computers of the Public Health Administrator, Deputy Administrator, and a member of the Board, for responsive records. The response implies that the District recorded or attempted to record every meeting of Board over the seven years at issue, but failed to locate recordings for many meetings. The Board also stated that the Board attempted to record certain Zoom meetings but later discovered that the recordings were not converted into an accessible video format.

The information provided by the District indicates that it performed a reasonable search. The search was conducted by the District's FOIA Officer and the Board's Secretary, who are knowledgeable about how meetings are recorded and how recordings are maintained as recordings of numerous meetings were located and provided. The search included attempting to locate recordings on computers of high-ranking District officials, but it appears that recordings of at least some of the meetings could not be provided because the Board inadvertently failed to record them. The measures described by the District were reasonably calculated to locate responsive recordings, and this office has not received information indicating that the District possesses but is withholding additional recordings.

However, we note that section 3(d) of FOIA (5 ILCS 140/3(d) (West 2020)) provides that "[e]ach 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." It is undisputed that the District did not provide a timely response to Mr. Hansen's request. This office recognizes that the COVID-19 pandemic has caused significant challenges to gathering responsive records pursuant to FOIA. Nonetheless, the District should be mindful of its obligation to issue timely responses to FOIA requests by all persons in accordance with section 3(d) of FOIA, which remains unchanged.

This office also notes that the Public Access Counselor's authority to resolve disputes is limited to alleged violations of FOIA and the Open Meetings Act (OMA) (5 ILCS 120/1 *et seq.* (West 2020)). *See* 15 ILCS 205/7(c)(3) (West 2020). FOIA governs the disclosure of existing public records; unlike the Local Records Act (50 ILCS 205/1 *et seq.* (West 2020)), it does not govern the retention of records that are not subject to a pending request, nor does it dictate how public bodies are to dispose of records. Accordingly, this office is not authorized to

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review a public body's compliance with the Local Records Act or claims concerning whether a public body should have retained certain records.

Open Meetings Act

"The Open Meetings Act provides that public agencies exist to aid in the conduct of the people's business, and that the intent of the Act is to assure that agency actions be taken openly and that their deliberations be conducted openly." *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989).

Remote Meeting Recordings

Based on the materials the Board submitted with its response to this office, it appears that because of the COVID-19 public health emergency, it held most meetings between March 2020 and the date of this Request for Review by Zoom videoconference. Section 7(e) of OMA (5 ILCS 120/7(e) (West 2020)) permits public bodies to conduct meetings remotely when the Governor or the Director of the Illinois Department of Public Health has issued a disaster declaration related to public health concerns, as long as certain conditions are met.¹ Section 7(e)(9) of OMA² requires that "public bodies holding open meetings under this subsection (e) must also keep a verbatim record of all their meetings in the form of an audio or video recording. Verbatim records made under this paragraph (9) shall be made available to the public under, and are otherwise subject to, the provisions of Section 2.06." As this requirement went into effect on June 12, 2020, with the enactment of Public Act 101-640, section 7(e)(9) of OMA did not require earlier open sessions of the Board to be recorded and made available to the public.

In its response, the Board acknowledged that it had not recorded some of these meetings in an accessible video format. The Board provided this office with all available recordings and a list of meetings held remotely since March 2020. Comparing the list to available videos indicates that the Board failed to record and maintain verbatim recordings following the effective date of section 7(e) for meetings on June 24, 2020; July 13, 2020; August 17, 2020; September 14, 2020; October 14, 2020; October 28, 2020; October 30, 2020; November 16, 2020; and January 11, 2021. Accordingly, this office concludes that the Board violated section 7(e)(9) of OMA. Although there is no remedy available and the violation appears to have been inadvertent, this office reminds the Board that when it conducts a remote

¹Since March 9, 2020, the Governor has issued a number of Gubernatorial Disaster Proclamations and Executive Orders related to the COVID-19 pandemic; the Governor had issued a disaster declaration related to public health concerns covering each date of the meetings at issue in this Request for Review.

²5 ILCS 120/7(e)(9) (West 2020).

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meeting pursuant to section 7(e) of OMA, it must take measures to ensure the entire meeting is recorded in an accessible format that can be made available to the public.

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 the Chicago address on the first page of this letter, benjamin.silver@ilag.gov, or (773) 590-7878. This letter serves to close this file.

Very truly yours,



BENJAMIN J. SILVER
Assistant Attorney General
Public Access Bureau

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