



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

September 2, 2020

Via electronic mail
Mr. Christopher Hansen
corruptcu@gmail.com

Via electronic mail
Mr. Curt Borman
Assistant City Attorney
City of Urbana
400 South Vine Street
Urbana, Illinois 61801
c/o CityClerk@urbanaininois.us

RE: FOIA Requests for Review – 2020 PAC 63412; Urbana File No. 2020-269
2020 PAC 63421; Urbana File No. 2020-276

Dear Mr. Hansen and Mr. Borman:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2018)). For the reasons that follow, the Public Access Bureau concludes that portions of the City of Urbana's (City) responses to Mr. Hansen's May 14, 2020, and May 15, 2020, FOIA requests violated the requirements of FOIA.

On May 14, 2020, Mr. Hansen submitted a FOIA request to the City, processed as Urbana File No. 2020-269, seeking copies of all: (1) "[D]ocuments related to an incident on May 12 around 10pm involving a damaged van on the 500 block of W Illinois St[.]" including any audio or video recordings; (2) "[D]ocuments related to the Urbana CPRB regarding the resignation of Grace Mitchell, the placement of Mikhail Lyubansky as chair, and the resulting vacant board seat which the City now seeks to fill[.]" (3) "All emails to/from Council member Bill Brown from April 15 to May 15[.]" (4) "All emails to/from Vacellia Clark during 2020[.]" and (5) "All emails to/from Diane Wolfe Marlin during March and April of 2020[.]"¹ On May 30, 2020, the City e-mailed Mr. Hansen, asserting that compliance with items 3-5 of his request

¹E-mail from [Christopher Hansen] to [City of Urbana City Clerk] (May 14, 2020).

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would be unduly burdensome pursuant to section 3(g) of FOIA² and inviting him to narrow those portions of his request. On June 4, 2020, Mr. Hansen asked the City to "indicate what level of reduction would bring the request into a range that you would not label 'unduly burdensome' so that [he does not] have to guess."³ On June 8, 2020, the City replied, "suggest[ing] that [he] limit [his] request to shorter timeframes and identify the particular subjects or topics of the messages [he] would like us to locate."⁴ On June 15, 2020, the City provided an assessment of fees for records responsive to items 1-3. With respect to item 1, the City denied the request for any officer-worn body camera videos pursuant to section 7.5(cc) of FOIA.⁵ The City asserted that its police department had determined that the responsive recordings had not been flagged, and that Mr. Hansen was not the subject of the encounter captured in the footage. As to items 3-5, the City asserted that Mr. Hansen had not amended those items to manageable proportions. The City denied the request for items 4 and 5 as unduly burdensome, but stated that it would produce records responsive to item 3 upon receipt of payment.

On June 24, 2020, this office received Mr. Hansen's complete Request for Review (2020 PAC 63412) contesting the fees. He also contended that "[t]he City has denied a body worn camera video in which I personally appear."⁶ Additionally, Mr. Hansen disputed the City's claim that compliance with items 3-5 would be unduly burdensome, arguing that "[t]he City gave no specific information about what made the request burdensome."⁷ He further argued: "My records requests have been attempts to learn more about how the City handles police complaints. There is now a national movement regarding this same issue. The burden is minimal compared to the public interest."⁸

On June 25, 2020, this office forwarded a copy of the Request for Review to the City and asked it to: (1) provide a detailed explanation of the legal and factual bases for the fees,

²5 ILCS 140/3(g) (West 2018), as amended by Public Act 101-081, effective July 12, 2019.

³E-mail from [Christopher Hansen] to Charlie [Smyth] (June 4, 2020).

⁴E-mail from L. Kay Meharry, Assistant City Clerk, to [Christopher] Hansen (June 8, 2020).

⁵5 ILCS 140/7.5(cc) (West 2018), as amended by Public Acts 101-013, effective June 12, 2019; 101-027, effective June 25, 2019; 101-081, effective July 12, 2019; 101-221, effective January 1, 2020; 101-236, effective January 1, 2020; 101-375, effective August 16, 2019; 101-377, effective August 16, 2019; 101-452, effective January 1, 2020; 101-466, effective January 1, 2020; 101-600, effective December 6, 2019; 101-620, effective December 20, 2019; 101-649, effective July 7, 2020.

⁶E-mail from Christopher Hansen to Public Access Counselor Pratt (June 16, 2020).

⁷E-mail from Christopher Hansen to Public Access Counselor Pratt (June 16, 2020).

⁸E-mail from Christopher Hansen to Public Access Counselor Pratt (June 16, 2020).

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together with any relevant supporting documentation; (2) copies of the responsive body camera footage for this office's confidential review, together with a detailed explanation of the legal and factual bases for the applicability of the asserted exemption to that footage; and (3) a detailed explanation of the legal and factual bases for the applicability of section 3(g) to items 3-5, including an estimate of the number of responsive e-mails. On July 7, 2020, this office received the requested materials. On July 13, 2020, this office forwarded a copy of the City's response to Mr. Hansen; he replied on July 20, 2020.

On May 15, 2020, Mr. Hansen submitted a separate FOIA request to the City, processed as Urbana File No. 2020-276, seeking copies of: (1) all documents pertaining to an April 11, 2020, incident; (2) all e-mails sent to or received by Vacellia Clark for the time frame of September 1, 2019, through December 31, 2019; (3) an unredacted copy of the City's police department policies; and (4) all documents pertaining to a May 14, 2020, incident. On June 16, 2020, the City provided an assessment of fees for records responsive to items 1-3 and denied item 4 pursuant to section 7(1)(d)(iii) of FOIA.⁹ On July 5, 2020, this office received Mr. Hansen's complete Request for Review (2020 PAC 63421) contesting the fees.

On July 16, 2020, this office forwarded a copy of the Request for Review to the City and asked it to provide a written response addressing the assessment of fees. Specifically, this office asked the City to clarify whether the bases for the fees were the same as the bases described in the City's response to 2020 PAC 63412. On July 24, 2020, this office received the requested response and forwarded a copy of that response to Mr. Hansen on July 29, 2020. In its response, the City confirmed that the bases were the same and that it incorporated its response to 2020 PAC 63412 into its response to 2020 PAC 63421. Accordingly, this office has consolidated 2020 PAC 63412 and 2020 PAC 63421 in this determination because the City's arguments for charging fees for the May 14, 2020, and May 15, 2020, requests are the same.

DETERMINATION

Authority for Fees

Section 6 of FOIA (5 ILCS 140/6 (West 2018)) provides the authority for a public body to charge fees for certain records. Section 6(a) of FOIA (5 ILCS 140/6(a) (West 2018)) provides, in pertinent part:

When a person requests a copy of a record maintained in an electronic format, the public body shall furnish it in the electronic

⁹5 ILCS 140/7(1)(d)(iii) (West 2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019).

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format specified by the requester, if feasible. If it is not feasible to furnish the public records in the specified electronic format, then the public body shall furnish it in the format in which it is maintained by the public body, or in paper format at the option of the requester. **A public body may charge the requester for the actual cost of purchasing the recording medium, whether disc, diskette, tape, or other medium.** (Emphasis added.)

Section 6(a-5) of FOIA (5 ILCS 140/6(a-5) (West 2018)) further provides:

If a **voluminous request** is for electronic records and those records are not in a portable document format (PDF), the public body may charge up to \$20 for not more than 2 megabytes of data, up to \$40 for more than 2 but not more than 4 megabytes of data, and up to \$100 for more than 4 megabytes of data. If a voluminous request is for electronic records and those records are in a portable document format, the public body may charge up to \$20 for not more than 80 megabytes of data, up to \$40 for more than 80 megabytes but not more than 160 megabytes of data, and up to \$100 for more than 160 megabytes of data. If the responsive electronic records are in both a portable document format and not in a portable document format, the public body may separate the fees and charge the requester under both fee scales. (Emphasis added.)

In its response to 2020 PAC 63412, the City stated that it had treated the underlying request as one from a recurrent requester pursuant to section 2(g) of FOIA (5 ILCS 140/2(g) (West 2018)) and noted that this office had previously determined in 2020 PAC 62547 that Mr. Hansen qualified as a recurrent requester. The City contended that section 3.2(a) of FOIA (5 ILCS 140/3.2(a) (West 2018)) permitted it "to charge fees to recurrent requesters and to require full payment before copying the requested records."¹⁰ The City explained that it relied on section 6(a) to assess fees for the actual costs of a USB flash drive and DVDs on which to furnish the records and section 6(a-5) to assess fees based on the quantity of data and format of the records.

Mr. Hansen's request sought copies of e-mails and other records that are maintained in electronic format. Section 6(a) permits a public body to charge a requester for the

¹⁰Letter from Curt Borman, Assistant City Attorney, Freedom of Information Officer, City of Urbana, Legal Division, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (July 7, 2020), at 1.

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actual cost of a recording medium for records that are maintained in electronic format. Therefore, the City's fees for a USB flash drive and DVDs did not violate FOIA.

However, section 6(a-5) of FOIA only pertains to requests identified as "voluminous requests," as defined in section 2(h) of FOIA (5 ILCS 140/2(h) (West 2018)):

a request that: (i) includes more than 5 individual requests for more than 5 different categories of records or a combination of individual requests that total requests for more than 5 different categories of records in a period of 20 business days; or (ii) requires the compilation of more than 500 letter or legal-sized pages of public records unless a single requested record exceeds 500 pages. "Single requested record" may include, but is not limited to, one report, form, e-mail, letter, memorandum, book, map, microfilm, tape, or recording.

Section 3.6 of FOIA sets forth the procedure for complying with or denying a voluminous request. Section 3.6(a) of FOIA (5 ILCS 140/3.6(a) (West 2018)) provides that "[n]otwithstanding any provision of this Act to the contrary, a public body shall respond to a voluminous request within 5 business days after receipt." That provision further provides, in pertinent part:

The response shall notify the requester: (i) that the public body is treating the request as a voluminous request; (ii) the reasons why the public body is treating the request as a voluminous request; (iii) that the requester must respond to the public body within 10 business days after the public body's response was sent and specify whether the requester would like to amend the request in such a way that the public body will no longer treat the request as a voluminous request; (iv) that if the requester does not respond within 10 business days or if the request continues to be a voluminous request following the requester's response, the public body will respond to the request and assess any fees the public body charges pursuant to Section 6 of this Act[.] (Emphasis added.)

The City confirmed that it did not treat the May 14, 2020, or May 15, 2020, requests as voluminous requests, and it is apparent from the City's responses to Mr. Hansen that it did not follow the notification procedures described in section 3.6. Because the City did not designate Mr. Hansen's requests as voluminous, the City may not charge the fees for data set

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forth in section 6(a-5). This office notes that if the City determines that a future request submitted by Mr. Hansen qualifies as a voluminous request as defined in section 2(h), it must follow the notification procedures in section 3.6 of FOIA.

Law Enforcement Officer-Worn Body Camera Act

"All 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 2018); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body that withholds a record "has the burden of proving by clear and convincing evidence" that the record is exempt from disclosure. 5 ILCS 140/1.2 (West 2018). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

Section 7.5(cc) of FOIA exempts from disclosure "[r]ecordings made under the Law Enforcement Officer-Worn Body Camera Act [Body Camera Act], except to the extent authorized under that Act." Section 10-20(b) of the Body Camera Act (50 ILCS 706/10-20(b) (West 2018)) provides, in relevant part:

Recordings made with the use of an officer-worn body camera are not subject to disclosure under the Freedom of Information Act, except that:

(1) if the subject of the encounter has a reasonable expectation of privacy, at the time of the recording, any recording which is flagged, due to the filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm, shall be disclosed in accordance with the Freedom of Information Act if:

(A) the subject of the encounter captured on the recording is a victim or witness; and

(B) the law enforcement agency obtains written permission of the subject or the subject's legal representative;

(2) except as provided in paragraph (1) of this subsection (b), any recording which is flagged due to the filing of a complaint, discharge of a firearm, use of force,

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arrest or detention, or resulting death or bodily harm shall be disclosed in accordance with the Freedom of Information Act; and

(3) upon request, the law enforcement agency shall disclose, in accordance with the Freedom of Information Act, the recording to the subject of the encounter captured on the recording or to the subject's attorney, or the officer or his or her legal representative.

The City maintained that it properly denied the request for body camera videos pursuant to section 7.5(cc). The City stated that it withheld three responsive body camera videos:

Video No. 1 was recorded with Officer Fink's body camera and shows him issuing a ticket to a traffic violator. Video No. 2 also was recorded with Officer Fink's body camera and contains additional footage showing Officer Fink issuing the ticket to the violator. Video No. 3 was recorded with Officer Vogt's body camera and captures her interactions with persons at the accident scene. According to the Police Department, Mr. Hansen was a bystander who was not directly involved in Officer's Vogt's interactions and was not the subject of any of the videos.¹¹

The City asserted that the recordings had not been flagged due to the filing of a complaint, an arrest, or for any of the other reasons listed in the Body Camera Act. Additionally, the City argued that "Mr. Hansen is not the subject of the encounters captured on the recordings[.]"¹²

In reply to that answer, Mr. Hansen asserted that "since Mr. Borman's letter, a police complaint has been filed regarding the incident. Also, as Officer Vogt's body camera video will show, she spoke directly to me, addressing me by my last name. That makes me a subject of the video."¹³

¹¹Letter from Curt Borman, Assistant City Attorney, Freedom of Information Officer, City of Urbana, Legal Division, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (July 7, 2020), at 4.

¹²Letter from Curt Borman, Assistant City Attorney, Freedom of Information Officer, City of Urbana, Legal Division, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (July 7, 2020), at 4.

¹³E-mail from Christopher Hansen to Assistant Attorney General Lim (July 30, 2020).

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This office's review of Videos 1 and 2 confirmed that those two recordings reflect Officer Fink issuing a traffic ticket to a violator. Mr. Hansen does not appear in those two videos. The footage does not reveal any arrest, and there is no indication that Videos 1 and 2 were flagged for any other reason, such as bodily harm, at the time of the request. Accordingly, the City did not improperly withhold those videos pursuant to section 7.5(cc).

This office's review of Video 3 determined that the video captures a brief interaction between Officer Vogt and Mr. Hansen. During the interaction at issue, Officer Vogt asked Mr. Hansen to step away from the damaged van that was the subject of the police department's investigation; she did not ask him any questions or otherwise speak with him regarding the incident involving the damaged van. The interaction lasted approximately 30 seconds. The remaining footage does not reflect any other interactions between officers and Mr. Hansen. The City's response to this office stated that the recordings had not been flagged at the time of the request. Because Video 3 captures Officer Vogt's encounters with subjects other than Mr. Hansen, and because the incident involving the damaged van had not been flagged at the time of the request, the City was not permitted to disclose Video 3 in its entirety to Mr. Hansen pursuant to the Body Camera Act. However, Mr. Hansen was the "subject of the encounter" during his limited interaction with Officer Vogt. The Attorney General has issued a binding opinion concluding that the Body Camera Act requires a body camera recording to be disclosed to the subject of the encounter even if the recording has not been flagged. Ill. Att'y Gen. Pub. Acc. Op. No. 20-001, issued January 9, 2019, at 10. Accordingly, the City has not demonstrated by clear and convincing evidence that footage of that brief encounter is exempt from disclosure pursuant to section 7.5(cc).

Section 3(g) of FOIA

Section 3(g) of FOIA provides:

Requests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information. Before invoking this exemption, the public body shall extend to the person making the request an opportunity to confer with it in an attempt to reduce the request to manageable proportions. If any public body responds to a categorical request by stating that compliance would unduly

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burden its operation and the conditions described above are met, it shall do so in writing, specifying the reasons why it would be unduly burdensome and the extent to which compliance will so burden the operations of the public body. Such a response shall be treated as a denial of the request for information.

This office has previously determined that a request seeking all records in a category over an extended period of time, which would require the public body to conduct an extensive search for and review of responsive records, is unduly burdensome under section 3(g) of FOIA in the absence of an identifiable public interest in disclosure of all of the records that outweighs the burden of compliance with the request. *See, for example*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 60425, issued November 5, 2019 (a request that would have required the public body to copy, review, and redact 920 potentially responsive e-mails would be unduly burdensome); Ill. Att'y Gen. PAC Req. Rev. Ltr. 35213, issued February 2, 2016 (a request for all e-mails sent or received by an identified employee in one month, totaling more than 2,000 e-mails, was unduly burdensome). *See also National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 3d 1, 17 (1st Dist. 2010) ("A request that is overly broad and requires the public body to locate, review, redact and arrange for inspection a vast quantity of material that is largely unnecessary to the [requester's] purpose constitutes an undue burden.").

The City asserted that it located 764 pages of e-mails responsive to item 3, but that it did not deny those records as unduly burdensome. Rather, the City contended that it had provided a fee assessment to Mr. Hansen and was awaiting payment of fees before copying those records. The City maintained, however, that compliance with items 4 and 5 would be unduly burdensome. The City stated that its search for e-mails responsive to item 4 of the request resulted in 3,529 pages. The City contended that "[i]f Urbana takes just one minute to examine each page and redact exempt information, Urbana would need over 58 hours to complete the necessary review."¹⁴ The City further stated that its search for e-mails responsive to item 5 of the request identified 12,706 pages. The City contended that it would take another 211 hours to review those records. The City argued that Ms. Clark and Ms. Marlin perform a variety of duties as the City's Human Relations Officer and Mayor, respectively, and that the scope of the two items are "so extensive and far-reaching as to be largely irrelevant to Mr. Hansen's purpose."¹⁵ In particular, the City argued that a substantial number of the responsive e-mails were likely to

¹⁴Letter from Curt Borman, Assistant City Attorney, Freedom of Information Officer, City of Urbana, Legal Division, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (July 7, 2020), at 5.

¹⁵Letter from Curt Borman, Assistant City Attorney, Freedom of Information Officer, City of Urbana, Legal Division, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (July 7, 2020), at 7.

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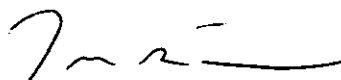
be unrelated to Mr. Hansen's stated interest in the issue of the City's handling of police complaints. Additionally, the City asserted that Mayor Marlin often communicates with residents and that it would have to review the records for any personal or private information that may be exempt from disclosure under FOIA.

Items 4 and 5 are categorical requests in that they seek copies of all e-mails sent to and from Ms. Clark and Ms. Marlin over the course of an extended period of time without any subject matter limitation. It is clear that compliance with the request would impose a significant burden on the City's operations, as the responsive records total more than 16,000 pages, which the City would be entitled to review for redactions. Although there is a public interest in information concerning the handling of police complaints, the scope of Mr. Hansen's request is not limited to that subject. The burden of disclosing all of the responsive e-mails, many of which likely are not related to police complaints, outweighs Mr. Hansen's stated interest in the records. Therefore, this office concludes that the City did not improperly deny those portions of his request as unduly burdensome pursuant to section 3(g).

In accordance with the conclusions expressed in this determination, this office requests that the City provide Mr. Hansen with a reassessment of fees for the responsive records. The City may request receipt of payment for the actual cost of the USB drive and DVDs, but may not charge for data under section 6(a-5) or for postage if the records are to be mailed to him. *See Ill. Att'y Gen. PAC Req. Rev. Ltr. 41192, issued September 8, 2017, at 4 (concluding that "FOIA requires a public body to mail copies of records when the requester has provided the public body with a mailing address; the public body may not impose a fee for the cost of the regular postage.")*. This office also requests that the City provide Mr. Hansen with a copy of the portion of Officer's Vogt's body camera footage reflecting her limited interaction with Mr. Hansen at the scene of the May 12, 2020, incident; the City may withhold any remaining body camera footage. This office also requests that the City provide Mr. Hansen with a copy of the squad car dashboard video.

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,



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