OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 21, 2018

Via electronic mail
[redacted]

Via electronic mail
Ms. Erin Davis
Freedom of Information Officer
Illinois State Police
801 South Seventh Street, Suite 1000-S
Springfield, Illinois 62703
erin_davis@isp.state.il.us

RE: FOIA Request for Review – 2014 PAC 31244; ISP FOIR No. [redacted]

Dear [redacted] and Ms. Davis:

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 2016)). For the reasons that follow, the Public Access Bureau concludes that that the Illinois State Police (ISP) improperly assessed fees in response to [redacted] FOIA request.

On July 25, 2014, [redacted] submitted a FOIA request to ISP by e-mail seeking copies of various records including videos of a traffic stop taken earlier that day.[1] On August 4, 2014, ISP asserted that it received [redacted] response on July 28, 2014, and extended its time to respond by five business days, to August 11, 2014, pursuant to section 3(e) of FOIA (5 ILCS 140/3(e) (West 2014)).[2] On August 12, 2014, ISP partially denied [redacted] FOIA request pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(d)(vi) of FOIA (5 ILCS 140/7(1)(b), (1)(c), (1)(d)(vi) (West 2014)) and informed [redacted] that it has "one DVD of in-car video available

[1]E-mail from [redacted] to FOIA_Officer@isp.state.il.us (July 25, 2014, 10:29 a.m.).

[2]E-mail from Lieutenant Steve Lyddon, FOIA Officer, [Illinois State Police] to [redacted] (August 4, 2014).

for release. Please remit a check in the amount of $20.00 for the DVD, made payable to the Illinois State Police[.]"[3] [redacted] objected to the fee but paid ISP the $20.00 and received the DVD. In his Request for Review, [redacted] disputes the $20.00 fee.

On October 7, 2014, this office forwarded a copy of the Request for Review to ISP and asked it to explain its receipt and handling of [redacted] FOIA request in light of section 3(d) of FOIA (5 ILCS 140/3(d) (West 2014)). This office specifically requested that ISP respond to [redacted] assertion that ISP was precluded from charging fees because ISP did not provide a timely response to his FOIA request. On October 10, 2014, ISP provided this office with a written response but did not address whether it was precluded from charging fees due to its untimely response; rather ISP asserted that it had authority to charge a $20.00 fee for the disc under section 6(b) of FOIA (5 ILCS 140/3(d) (West 2014)) and section 1298.40(b) of the Illinois Administrative Code (20 Ill. Adm. Code § 1298.40(b) (West 2014), last amended at 37 Ill. Reg. 8041, effective June 3, 2013). On October 21, 2014, this office forwarded a copy of ISP's response to [redacted]; he did not reply.

DETERMINATION

"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 2016); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). Section 3(d) of FOIA provides, in pertinent part:

> 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. Failure to comply with a written request, extend the time for response, or deny a request within 5 business days after its receipt shall be considered a denial of the request. ***A public body that fails to respond to a request within the requisite periods in this Section but thereafter provides the requester with copies of the requested public records may not impose a fee for such copies.*** (Emphasis added.)

While ISP claims that it did not receive the FOIA request until July 28, 2014, [redacted] submitted his FOIA request to ISP by e-mail on July 25, 2014, at 10:29 a.m. ISP has not

[3]E-mail from Lieutenant Steve Lyddon, FOIA Officer, [Illinois State Police] to [redacted] (August 12, 2014).

documented for this office that there was a delay in transmission of the e-mail that prevented it from receiving the request until July 28, 2014. Accordingly, based on the available information, ISP was required to respond by August 1, 2014, or properly extend its response time by that date, which it did not do. Moreover, even assuming that ISP had received [redacted] FOIA request on July 28, 2014, and properly extended its time to respond by 5 business days, ISP's response would have been due on August 11, 2014. However, ISP did not provide [redacted] a response to his FOIA request until August 12, 2014. Section 3(f) of FOIA (5 ILCS 140/3(f) (West 2014)) provides that "[a] public body that fails to respond to a request within the time permitted for extension but thereafter provides the requester with copies of the requested public records ***may not impose a fee for those copies***." (Emphasis added.) ISP's response to this office appears to contend that such restrictions are limited to fees imposed under FOIA's fee provisions, not those fixed by other statutes. *See* 5 ILCS 140/6(b) (West 2016). The plain language of sections 3(d) and 3(f), however, prohibits a public body from imposing a fee—regardless of its source—for copies if it fails to issue a timely response to a request. Because ISP failed to issue its response or extend the time for its response within the requisite time periods, section 3(d) of FOIA prohibits it from charging [redacted] the $20.00 fee.

Even supposing that ISP had provided a timely response to [redacted] it would not have been allowed to charge [redacted] the $20.00 fee set forth in the Administrative Code. Section 6 of FOIA sets forth the permissible fees for copying records requested pursuant to FOIA, which apply "[e]xcept when a fee is otherwise fixed by ***statute***." (Emphasis added.) 5 ILCS 140/6(b) (West 2014). Instead of citing a *statute* authorizing the fee that it assessed, ISP cited a provision of the *Administrative Code* that authorizes a copying fee of $20.00 for a video tape. If the General Assembly had intended for fees fixed by both statutes and administrative rules to apply to records requested under FOIA, it would have done so expressly as it did in crafting the section 7(1)(a) exemption to apply to records that statutes, as well as administrative rules implementing statutes, prohibit from being disclosed. The Public Access Bureau has consistently determined that a fee set forth in the Administrative Code does not supersede the fee provisions of FOIA because that fee was not fixed by statute. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 39015, issued January 6, 2016; Ill. Att'y Gen. PAC Req. Rev. Ltr. 17989, issued February 5, 2014.

In accordance with the conclusions expressed in this letter, we request ISP to reimburse [redacted] the $20.00 he paid to ISP for the DVD.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, please contact me at 312-814-5201 or at the Chicago address listed on the first page of this letter.

Very truly yours,

[redacted]

EDIE STEINBERG
Assistant Attorney General
Public Access Bureau

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