OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Kwame Raoul
ATTORNEY GENERAL

January 16, 2020

Via electronic mail
The Honorable J.R. Patton
Alderman
City of Calumet City
[redacted]

Via electronic mail
Mr. McStephen O.A. Solomon
Attorney at Law
17541 South Kedzie Avenue, Suite 888
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RE: FOIA Request for Review – 2019 PAC 59166

Dear Mr. Patton and Mr. Solomon:

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 the Calumet Memorial Park District (District) failed to conduct a reasonable search for records responsive to a FOIA request submitted by Mr. J.R. Patton.

On July 22, 2019, Mr. Patton sent an e-mail to Mr. Charles L. Dockery, Executive Director of the Calumet Memorial Park District, asking, "[W]ho at the park handles FOIA requests? I'd like to submit a request but don't know where to send it."[1] Later that day, Ms. Dockery responded, "You can send it to me. I am currently the FOIA Agent for the district."[2] Mr. Patton sent a return e-mail to Mr. Dockery that evening stating: "Thanks Charles! I would

[1]E-mail from J.R. Patton to Charles L. Dockery, Calumet Memorial Park District, Executive Director (July 22, 2019).

[2]E-mail from Charles L. Dockery, Calumet Memorial Park District, Executive Director to J.R. Patton (July 22, 2019).

like to submit an [sic] FOIA for text messages from Yvette's phone (the new commissioner) during the time of meetings for every meeting she's attended so far."[3] The next day, Mr. Dockery stated: "J.R., I don't know how you would go about that, she is using her personal phone and not a park district issued phone. I'm not sure but I think you will have to FOIA her for her phone records and not the Park District. Make it a great day!"[4] Mr. Patton responded by asserting: "As a member of the board she is required to comply with any request sent through the park district. My understanding is that as the FOIA person at the park you can submit a copy of the request to her and then she can comply or not comply from there – but I would check with the parks attorney."[5]

In the copy of this e-mail exchange that Mr. Patton provided this office, the next e-mail in the chain is a response from Mr. Dockery on July 31, 2019, stating, in pertinent part:

> In My last email I asked you did your email serve as a FOIA request or was it just an email. You never replied.
>
> However, I spoke with Commissioner Williams about your FOIA Inquiry for her text message records for every meeting that she has been a commissioner. She replied that she has no cell phone in her name and she can't provide you those records.
>
> I have no problem providing you information, however, it needs to be in the form of a formal FOIA request and not an email.[6]

On August 1, 2019, Mr. Patton submitted a Request for Review to the Public Access Bureau contesting the District's response to his FOIA request, and asserting that the Commissioner identified in the FOIA request was in possession of and using a cell phone during at least one public meeting of the District's Board of Commissioners.

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[3]E-mail from J.R. Patton to Charles L. Dockery, Calumet Memorial Park District, Executive Director (July 22, 2019).

[4]E-mail from Charles L. Dockery, Calumet Memorial Park District, Executive Director to J.R. Patton (July 23, 2019).

[5]E-mail from J.R. Patton to Charles L. Dockery, Calumet Memorial Park District, Executive Director (July 23, 2019).

[6]E-mail from Charles L. Dockery, Calumet Memorial Park District, Executive Director to J.R. Patton (July 31, 2019).

On August 6, 2019, this office forwarded the Request for Review to the District asked it to provide a detailed description of the measures take to locate records responsive to the request. Specifically, this office asked the District to explain whether it asked the Commissioner identified in the FOIA request (Ms. Yvette Pierce-Williams) to search for responsive text messages concerning District business on any personal communication devices that were in her possession at the time of District Board meetings, and to describe her response to that inquiry. On August 19, 2019, the District's outside counsel provided a response on the District's behalf, arguing: (1) Mr. Patton had not submitted a proper FOIA request to the District; (2) Mr. Patton's correspondence did not request copies of public records of the District because a Commissioner's texts are not records in the custody or possession of the District; and (3) the District inquired with the Commissioner about Mr. Patton's request and notified Mr. Patton of the Commissioner's response. Mr. Patton replied on August 21, 2019.

DETERMINATION

"It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with [FOIA]." 5 ILCS 140/1 (West 2018). Under section 1.2 of FOIA (5 ILCS 140/1.2 (West 2018)), "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." As discussed above, the District provided several responses to Mr. Patton's allegation that it did not properly respond to his FOIA request.

Form of FOIA Request

The District first argues that Mr. Patton's e-mail to Mr. Dockery "did not meet **a request for inspection or copying** of public records under the FOIA Act. This is supported by the fact that Mr. Patton's email was not directed to the Calumet Memorial Park District – the public body in this case."[7] (Emphasis in original.) However, as described above, Mr. Patton submitted his FOIA request to the District by sending an e-mail to the District e-mail address of Mr. Dockery, the District's designated FOIA Officer, who had just told Mr. Patton that the process for submitting a FOIA request to the District was to "send it to [him.]"[8] Mr. Patton's e-mail expressly indicated that he wanted to submit a "FOIA" for text messages. It is unclear what other process Mr. Patton should have followed to submit a FOIA request to the District other than following the FOIA Officer's express direction to send it to him and invoking FOIA.

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[7]Letter from McStephen O.A. Solomon, Attorney at Law, to Leah Bartelt, Assistant Attorney General, Public Access Bureau, at 2 (undated).

[8]E-mail from Charles L. Dockery, Calumet Memorial Park District, Executive Director to J.R. Patton (July 22, 2019).

The District further characterizes Mr. Patton's correspondence to Mr. Dockery as a "personal email."[9] Section 3(c) of FOIA (5 ILCS 140/3(c) (West 2018), as amended by Public Act 101-081, effective July 12, 2019) states that written requests for inspection of copies of records "may be submitted to a public body via personal delivery, mail, telefax, or other means available to the public body," and that "[a] public body may not require that a request be submitted on a standard form[.]" Given that Mr. Patton had been corresponding by sending e-mails to the District's FOIA Officer at his Park District e-mail address, it was apparent that e-mail delivery of his FOIA request was a "means available to the public body."

Finally, the District alleges that Mr. Patton's e-mail "merely informs Mr. Dockery that he 'would like to submit [a] FOIA,'"[10] rather than requesting inspection or copying of records. This statement mischaracterizes the e-mail. Mr. Patton's e-mail both states that he would like to submit a "FOIA" and specifically identifies the records he is seeking—text messages from a particular commissioner's phone sent or received during meetings. Furthermore, Mr. Patton sent this e-mail after he had already asked and received an answer to his general question about the process for submitting a FOIA request to the District. The District further alleges that Mr. Dockery sought clarification from Mr. Patton as to whether his request for a Commissioner's text messages was a FOIA request, and that Mr. Patton did not respond to that request for clarification. Regardless, Mr. Patton's e-mail was directed to the FOIA officer, specifically invoked FOIA, and asked for a particular set of records. This e-mail leaves no room for ambiguity as to whether Mr. Patton was seeking information under FOIA. The e-mail was a valid FOIA request to which Mr. Patton is entitled to receive either responsive records or a proper denial.

Definition of Public Records

Alternatively, the District argues that Mr. Patton's request for any text messages Commissioner Pierce-Williams sent or received during a public meeting does not seek public records of the District. Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2018)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." Section 2(c) of FOIA defines "public records" as:

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[9]Letter from McStephen O.A. Solomon, Attorney at Law, to Leah Bartelt, Assistant Attorney General, Public Access Bureau, at 2 (undated).

[10]Letter from McStephen O.A. Solomon, Attorney at Law, to Leah Bartelt, Assistant Attorney General, Public Access Bureau, at 2 (undated).

> 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. (Emphasis added.)

Specifically, the District argues:

> [T]he information/records requested by Mr. Patton were not 'records in the custody or possession' of the Calumet Memorial Park District, which, under the FOIA Act, would have been 'open to inspection or copying.'" See 5 ILCS 140/1.2. Nothing in the Illinois FOIA Act vests duty or responsibility upon a public body to investigate or seek information/records that are not in its custody or possession for the purpose of responding to a FOIA request.[11] (Citation in original.)

The Illinois Appellate Court specifically rejected a similar argument seeking the same type of records in *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶38, 992 N.E.2d 629, 638 (2013). There, the City argued that electronic communications sent or received by City Council members during a City Council meeting were not the City's "public records" if they were sent or received on the personal communication devices of the City Council members. *City of Champaign*, 2013 IL App (4th) 120662, ¶19. In rejecting that argument, the appellate court explained:

> [O]nce the individual city council members have convened a city council meeting * * *, it can reasonably be said they are acting in their collective capacity as the "public body" during the time the meeting is in session. * * * Thus, if the communication, which pertains to the transaction of public business, was sent or received during the time a city council meeting was in session, i.e., during the time the individual city council members were functioning collectively as the "public body," then the communication is a

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[11]Letter from McStephen O.A. Solomon, Attorney at Law, to Leah Bartelt, Assistant Attorney General, Public Access Bureau, at 2-3 (undated).

"public record" and thus subject to FOIA. *City of Champaign*, 2013 IL App (4th) 120662, ¶42.

Likewise, Mr. Patton requested any text messages from the phone of a public body member sent or received during meetings. His Request for Review makes clear that he is contesting the District's denial of his request only with respect to "any and all text message *relating to the business of the board meeting*[.]"[12] Accordingly, to the extent that the Commissioner Pierce-Williams sent or received text messages during a Board meeting that concerned the public business of the District or Board, those messages are the District's public records and are subject to FOIA.[13]

Adequacy of the Village's Search for Responsive Records

Finally, the District's response to the Request for Review asserts that Mr. Dockery "in good faith, did speak with the identified Commissioner to inquire about the subject of Mr. Patton's 'FOIA request.' Her response was relayed to Mr. Patton. Again, neither Mr. Dockery, nor the Calumet Memorial Park District, under the Illinois FOIA Act, is under any legal obligation or duty to conduct any investigation or inquiry into the response of the Commissioner."[14] Mr. Dockery had responded to Mr. Patton's FOIA request by asserting that the commissioner reported she has no cell phone in her name.

"The adequacy of [a public body's] search for requested documents is judged by a standard of reasonableness[.]" *Miller v. U.S. Department of State*, 779 F.2d 1378, 1383 (8th Cir. 1985). "At all times the burden is on the [public body] to establish the adequacy of its search." *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 547 (6th Cir. 2001). In Binding Opinion 16-006

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[12]E-mail from J.R. Patton, 6th Ward Alderman, City of Calumet City to Public Access (August 1, 2019).

[13]The District also argues that the requested records were "personal, and thus, may be subject to the exemption provisions of the FOIA Act," citing "section 7(b)" of FOIA. The District's argument on this point is not well developed and its intent is unclear. Certainly, texts concerning personal matters that are unrelated to the transaction of public business are not subject to the requirements of FOIA. 5 ILCS 140/2(c) (West 2018) (limiting the definition of "public records" to "all records, * * * pertaining to the transaction of public business[.]"); *City of Champaign*, 2013 IL App (4th) 120662, ¶31, 992 N.E.2d at 637 ("to qualify as a public record a communication must first pertain to 'business or community interests as opposed to private affairs.' Indeed, FOIA is not concerned with an individual's private affairs."). However, to the extent that the District is arguing that communications that pertain to public business but sent on a personal device are exempt from disclosure, the District is incorrect, for the reasons explained above.

[14]Letter from McStephen O.A. Solomon, Attorney at Law, to Leah Bartelt, Assistant Attorney General, Public Access Bureau, at 3 (undated).

(Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, issued August 9, 2016), this office analyzed whether the Chicago Police Department (CPD) violated FOIA by failing to attempt to ascertain whether its personnel possessed e-mails in their private e-mail accounts that were responsive to a request seeking e-mails about a police shooting from both public and private accounts. With respect to the parameters of the search that CPD was obligated to perform under FOIA, the Attorney General stated: "an automated search of the entirety of a personal e-mail account using a search term is not necessarily required. Depending on the circumstances, ordering CPD officers to produce any responsive records may satisfy the requirement that CPD conduct a reasonable search." Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, at 10. The Attorney General also cited *Brophy v. U.S. Department of Defense*, No. CIV.A. 05-360 (RMC), 2006 WL 571901, at *8 (D.D.C. 2006) for the principle that "absent evidence of a lack of good faith, a public employee's search of his personal e-mail account and confirmation that he did not locate responsive records satisfied the public body' s obligation to conduct a reasonable search of that account." Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, at 11.

The District did not demonstrate it conducted a reasonable search for the records Mr. Patton requested. In one of his initial e-mails to Mr. Patton, Mr. Dockery stated that the commissioner was "using her personal phone and not a park district issued phone,"[15] and then later responded that the commissioner told him she does not have a cell phone in her name. Mr. Patton asserted to this office that Commissioner Pierce-Williams was seen using a cell phone at a meeting. Given these conflicting statements, this office requested that the District clarify whether it had asked the commissioner to search for responsive text messages concerning public business on *any personal communication devices that were in her possession* at the time of District Board meetings. Instead of providing this simple clarification, the District instead responded to this office by referencing Mr. Dockery's imprecise statement to Mr. Patton and arguing it had no duty to ask the commissioner any additional questions. For that reason, this office is unable to conclude that the District performed a reasonable search for public records responsive to Mr. Patton's request.

Accordingly, this office has determined that the District violated FOIA by failing to conduct a reasonable search for responsive records. This office requests that the District inquire with the commissioner identified in the FOIA request as to whether she possesses any responsive text messages concerning public business on any personal communication devices that were *in her possession* at the time of District Board meetings. Following that search, the District should issue a supplemental response to Mr. Patton, providing him with copies of any public records responsive to his request, subject only to permissible redactions under section 7 of FOIA (5 ILCS 140/7 (West 2018)). If the District determines that there are no public records

[15]E-mail from Charles L. Dockery, Calumet Memorial Park District, Executive Director to J.R. Patton (July 23, 2019).

responsive to Mr. Patton's request, its supplemental response should describe how it reached that conclusion in sufficient detail to allow for adversarial testing.

The Public Access Counselor has determined that resolution of this issue does not require the issuance of a binding opinion. This letter shall serve to close the matter. If you have any questions, you may contact me at (312) 814-6437 or lbartelt@atg.state.il.us

Very truly yours,

[redacted]

LEAH BARTELT
Deputy Public Access Counselor
Public Access Bureau

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