

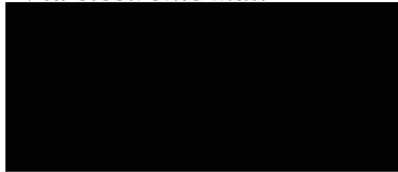


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

October 5, 2023

Via electronic mail



Via electronic mail

Ms. Erica Schroeder
Freedom of Information Officer
Chicago Department of Transportation
2 North LaSalle Street, Suite 1110
Chicago, Illinois 60602
erica.schroeder@cityofchicago.org
cdotfoia@cityofchicago.org

RE: FOIA Request for Review – 2022 PAC 72761

Dear [REDACTED] and Ms. Schroeder:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2022)).

On that date, [REDACTED] submitted a FOIA request to the Chicago Department of Transportation (Department) seeking copies of documents, including e-mails and text messages, sufficient to show the Department's communications with 45th Ward aldermanic staff concerning updated maintenance agreements for plantings on Milwaukee Avenue (Northwest Highway to Peterson). He included a timeframe of approximately three years and eight keywords/key phrases. [REDACTED] also provided background information to the Department with his request, stating that he had requested the maintenance agreements submitted to the Department by then-45th Ward Alderman Arena in May 2019 and that the Department responded that it could not locate those records but would work with the newly-elected Alderman Gardiner to secure the agreements. Later on June 23, 2022, the Department responded by stating the FOIA request was unduly burdensome under section 3(g) of FOIA (5 ILCS

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140/(3)(g) (West 2022)) and asked [REDACTED] to narrow the request by providing e-mail accounts to search, keywords, and a timeframe (even though he had already provided two of those three things). The Department also invited [REDACTED] to reach out if he sought assistance with how to narrow his request. Later still on that same date, [REDACTED] e-mailed the Department and provided the name of a Department employee—Mr. Leonard Aluisse—and current and past 45th Ward office staff members. On July 7, 2022, [REDACTED] e-mailed the Department's FOIA Office and requested "a 'conference to narrow' to straighten out the hastily made Department FOIA Office's mistakes of the recent past."¹ On July 18, 2022, the Department responded by stating it did not possess any responsive maintenance agreements. The Department also stated that for the e-mail portion of the request, it needed [REDACTED] to identify the e-mail addresses of the accounts to be searched.

On July 25, 2022, this office received [REDACTED] Request for Review contesting the Department's response. He noted that his request was not limited to e-mails and argued that the Department had an improper habit of requiring requesters to identify e-mail accounts to be searched.

On July 29, 2022, this office forwarded a copy of the Request for Review to the Department and asked it to provide to this office a detailed written answer to the allegations in the Request for Review by describing any search it performed for the documents, including who was consulted, which recordkeeping systems were searched, and the method(s) used to search. This office also asked the Department to explain the legal basis for asserting that [REDACTED] must identify specific e-mail accounts for the Department to process the FOIA request. On August 22, 2022, the Department responded by defending its practice of requiring requesters to identify e-mail accounts to search, indicating that the city's e-mail search system does not allow limiting a search to a department as a whole. The Department also stated that it overlooked [REDACTED] e-mail supplying the staff member's name but would perform a search of that staff member's e-mails using the data range and keywords [REDACTED] had supplied. The Department also reiterated that it had been unable to locate responsive documents regarding the updated maintenance agreement at issue.

On August 23, 2022, this office forwarded a copy of the Department's August 22, 2022, correspondence to [REDACTED] who responded by asserting:

Only CDOT would have the knowledge to determine who was delegated to contact the 45th Ward Office regarding securing maintenance agreements. * * * [T]he onus is on the CDOT to find not only these communications to the 45th Ward Office but also to

¹E-mail from [REDACTED] to CDOT FOIA Officer [Erica] Schroeder (July 7, 2022).

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search the project files for the salient documents. I would suggest contacting the CDOT Project Manager for the construction contract that built the planting areas in question as a starting place. My FOIA is not limited to an email search.^[2]

[REDACTED] also stated that he had since been informed that a former Department employee, [REDACTED] was involved in the design phase of constructing the planting areas; he suggested that records could be sought from the design engineer who took over the former employee's files.

On September 2, 2022, the Department provided [REDACTED] with a supplemental response consisting of copies of seven e-mail exchanges in which Department employees discuss how to handle [REDACTED] FOIA requests, and a letter describing its search for responsive records only as to e-mails. On September 6, 2022, [REDACTED] replied to that response.

DETERMINATION

Under FOIA, "[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); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). 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 (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). "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).

As an initial matter, the Department's June 23, 2022, and July 18, 2022, responses improperly sought to require [REDACTED] to provide several parameters in order for the Department to conduct a search. The Public Access Counselor has issued a binding opinion concluding:

²E-mail from [REDACTED] to [Matt] Goodman (June 23, 2022).

Because a public body rather than a member of the public is typically in a better position to know the names and e-mail addresses of public employees who would maintain records pertaining to specific topics, a requester is not required to identify specific employees or employee e-mail addresses in order to reasonably describe e-mails concerning a particular subject matter. The failure to provide such information does not render a FOIA request unduly burdensome. Ill. Att'y Gen. Pub. Acc. Op. No. 23-007, issued May 26, 2023, at 11.

Citing case law, the binding opinion also explained that "FOIA generally does not require a requester to provide keywords[,]" and that "[p]ublic bodies are obligated to devise reasonable search terms." Ill. Att'y Gen. Pub. Acc. Op. No. 23-007, at n.12. Further, the Department's June 23, 2022, response claimed that [REDACTED] needed to provide parameters that he had already provided. This office cautions the Department to refrain from requiring requesters to provide specific search parameters in the future, and instead to formulate its own reasonable search parameters.

The Department asserted that, pursuant to [REDACTED] Request for Review, it searched Mr. Aluisse's e-mail account for e-mails containing any of the keywords [REDACTED] listed over the timeframe he provided. According to the Department:

This search produced more than 10,100 items. In order to produce these emails, each email would need to be reviewed and information exempt under FOIA would need to be redacted. One reason why the search result was so large is that some of the terms, such as "Gardiner" and "45th" are commonly used in email signatures of 45th Ward staff members. Other terms, like "Milwaukee", are also common. Therefore, this search pulled thousands of emails that would have no relation to [REDACTED] FOIA request. It would be unduly burdensome to review more than 10,000 emails.

In an effort to narrow the search and provide more relevant results (communication concerning maintenance agreements on Milwaukee Avenue), CDOT adjusted the search in the following ways:

Searched for emails of three relevant CDOT staffers whose accounts are reasonably likely to contain responsive records

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(Leonard Aluise, Ben Reynoso, and David Smith) for the following search terms: "plantings", "Gardiner", "45th", "Milwaukee", "curb extension", AND "maintenance agreement".^[3]

The Department stated that the only e-mails this search produced are the e-mails provided to ██████████ in which employees discuss how to respond to his requests. Six of the e-mail threads are from April 2022, while the seventh is from August 2020. The Department also stated that its "staff also searched for relevant files and documents and found no records regarding maintenance agreements for plantings on Milwaukee Avenue (North Highway to Peterson)."⁴

In his reply, ██████████ disputed the adequacy of the search on the basis that the records he received did not reflect any communication with Alderman Gardiner or his staff. He argued that the Department failed to confer with him about narrowing his request and failed to search the account of ██████████.

Although this office expressly asked the Department to address who was consulted during its search for responsive records, which recordkeeping systems were searched, and the methods used to search, the Department addressed documents other than e-mails by merely stating that its staff searched relevant files and documents; the Department did not identify any staff members consulted, which recordkeeping systems were searched, or anything specific about any search methods. It is not evident from the Department's communications in this matter how the Department maintains any file folders or otherwise maintains non-e-mail documents involving maintenance agreements of the kind at issue or involving 45th Ward matters.

As to the e-mails, the information the Department provided indicates that the Department appropriately searched Mr. Aluise's e-mail account for the relevant time period and appropriately identified two other employees whom the Department believed were reasonably likely to have sent or received responsive e-mails. Additionally, the Department made use of the keywords ██████████ supplied in formulating a focused search query that did not encompass unrelated matters. On the other hand, the Department did not indicate why it did not search the account of ██████████ despite ██████████ identifying him as an involved party in his June 23, 2022, correspondence. Similarly, the Department did not indicate why it did not use any of

³Letter from Erica Schroeder, Director of Public Information, Chicago Department of Transportation, to Matthew G. Goodman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (September 1, 2022), at 1-2.

⁴Letter from Erica Schroeder, Director of Public Information, Chicago Department of Transportation, to Matthew G. Goodman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (September 1, 2022), at 2.

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the 45th Ward staff member information [REDACTED] provided in response to the Department's request when it conducted its search.

Under these circumstances, the Public Access Bureau is unable to conclude that the Department responded properly to [REDACTED] FOIA request. This office asks the Department to conduct a new search that includes [REDACTED] e-mail account and 45th Ward staff contact information, as well as communicating with the staff members who are reasonably likely to have sent or received responsive correspondence. The Department should then disclose any responsive records it locates or, if it locates no other records, provide a description of its search containing the information asked about in this office's July 29, 2022, inquiry letter.

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,

[REDACTED]

MATT GOODMAN
Assistant Attorney General
Public Access Bureau

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