



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 9, 2015

PUBLIC ACCESS OPINION 15-011
(Request for Review 2015 PAC 36548)

FREEDOM OF INFORMATION ACT:
Failure to Timely Respond to FOIA Request
Precludes Denial as Unduly Burdensome;
Disclosure of Certified Payroll Records

Mr. Tim Ryan
IL LECET, Market Representative
1 North Old State Capitol Plaza, Suite 525
Springfield, Illinois 62701

Mr. Matthew Dougherty
Assistant Chief Counsel/Acting FOIA Officer
Illinois Department of Transportation
2300 South Dirksen Parkway
Springfield, Illinois 62764

Dear Mr. Ryan and Mr. Dougherty:

This is a binding opinion issued by the Attorney General pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons discussed below, this office concludes that the Illinois Department of Transportation (IDOT) violated the requirements of FOIA by its denial of Mr. Tim Ryan's June 22, 2015, FOIA request for copies of certified payroll records.

BACKGROUND

On June 22, 2015, Mr. Ryan, on behalf of the Illinois Laborers-Employers Cooperation and Education Trust (IL LECET), submitted a FOIA request to IDOT seeking copies of "[a]ll certified payrolls for projects awarded within Christian County from June

Mr. Tim Ryan
Mr. Matthew Dougherty
November 9, 2015
Page 2

2014 to Present."¹ (Emphasis in original.) On July 22, 2015, IDOT responded to Mr. Ryan that it had received his request on July 11, 2015, but that compliance with the request as submitted would be unduly burdensome because "fulfilling this request would take a substantial number of labor hours and produce thousands of pages of records."² Pursuant to section 3(g) of FOIA (5 ILCS 140/3(g) (West 2014)), IDOT offered Mr. Ryan an opportunity to narrow his request by suggesting that he: (1) request certified payroll records by individual contract number; (2) request certified payrolls for only two contracts at a time; and (3) make the modified requests once per week.

On July 28, 2015, the Public Access Bureau received Mr. Ryan's Request for Review of IDOT's denial of his FOIA request.³ On July 30, 2015, the Public Access Bureau forwarded a copy of Mr. Ryan's Request for Review to IDOT and asked it to provide this office with "representative samples of the records responsive to Mr. Ryan's request along with a detailed summary for the applicability of section 3(g) of FOIA."⁴ This office also asked IDOT to provide "an approximate count of the number of pages of responsive records as well as an approximate accounting of the amount of time to collect, review, and redact those pages of records[.]" and an explanation of the extent of "the potential interruption to IDOT's operations if it were required to collect and provide the requested records to Mr. Ryan."⁵

On August 10, 2015, this office received IDOT's written response together with one representative sample of a certified transcript of payroll consisting of 32 pages.⁶ IDOT

¹Letter from Tim Ryan, IL LECET, Market Representative, to FOIA Officer, Illinois Department of Transportation (June 22, 2015).

²Letter from Matthew Dougherty, Acting Freedom of Information Officer, Illinois Department of Transportation, to Tim Ryan, IL LECET (July 22, 2015).

³E-mail from Tim Ryan, LiUna! Midwest Region, to Ms. [Sarah] Pratt, Public Access (July 28, 2015).

⁴Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, to Matthew Dougherty, Assistant Chief Counsel/Acting FOIA Officer, Illinois Department of Transportation (July 30, 2015), at 2.

⁵Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, to Matthew Dougherty, Assistant Chief Counsel and Acting FOIA Officer, Illinois Department of Transportation (July 30, 2015), at 2.

⁶E-mail from Matthew Dougherty, Acting FOIA Officer, Assistant Chief Counsel, to Shannon Barnaby (August 10, 2015).

Mr. Tim Ryan
Mr. Matthew Dougherty
November 9, 2015
Page 3

indicated in its written response that the provided record represented one of the 15 projects that are responsive to Mr. Ryan's request.⁷ IDOT's written response further stated, in pertinent part:

The CTPs [Certified Transcripts of Payroll] are required to be maintained by the contractor(s) who have contracted with the Department to complete a construction project for IDOT[.]

* * * The CTP requirement stems from the Illinois Prevailing Wage Act. The payrolls are kept and certified in order to ensure compliance with that Act. The CTPs are also used for, in part, tracking compliance with Disadvantaged Business Enterprise ("DBE") employment diversity goals. Therefore, the CTPs contain the work hours, name, partial social security number, and in some cases, the racial background and ethnicity of contractor employees.
* * *

The need to identify exempt data and then redact this information, line by line, page by page, is very labor intensive, and is a significant reason that responding to Mr. Ryan's request, as written, would create an undue burden on the operations of IDOT.
* * *

The CTP records for a single project, depending on how many weeks the project has been active and how many employees are working on the project, are often over one hundred pages, or multiple hundreds of pages.^[8]

IDOT's written response only was forwarded to Mr. Ryan on August 10, 2015;⁹ he did not reply. On September 22, 2015, this office properly extended the time within which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.¹⁰

⁷E-mail from Matthew Dougherty, Acting FOIA Officer, Assistant Chief Counsel, to Shannon Barnaby (August 10, 2015), at 1.

⁸E-mail from Matthew Dougherty, Acting FOIA Officer, Assistant Chief Counsel, to Shannon Barnaby (August 10, 2015), at 1.

⁹Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, to Tim Ryan, IL LECET, Market Representative (August 10, 2015).

¹⁰Letter from Shannon Barnaby, Assistant Attorney General, Public Access Bureau, to Tim Ryan, IL LECET, Market Representative, and Matthew Dougherty, Assistant Chief Counsel /Acting FOIA Officer, Illinois Department of Transportation (September 22, 2015).

Mr. Tim Ryan
Mr. Matthew Dougherty
November 9, 2015
Page 4

ANALYSIS

FOIA requires 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." 5 ILCS 140/3(a) (West 2014). The limited exceptions to access to public records are to be construed narrowly. *See* 5 ILCS 140/1 (West 2014). Further, all public records in the possession or custody of a public body "are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2014); *see also Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill. 2d 390, 415 (2006).

Sections 3(d) and 3(g) of FOIA

IDOT classified Mr. Ryan's request as unduly burdensome pursuant to section 3(g) of FOIA, which provides, in pertinent part:

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 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.*** (Emphasis added.)

Section 3(d) of FOIA (5 ILCS 140/3(d) (West 2014)), however, provides that:

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

Mr. Tim Ryan
Mr. Matthew Dougherty
November 9, 2015
Page 5

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. ***A public body that fails to respond to a request received may not treat the request as unduly burdensome under subsection (g).*** (Emphasis added.)

Thus, asserting that a FOIA request is unduly burdensome and denying it unless the requester agrees to narrow it is a permissible response, but only if the public body made that response within the timeframes provided by FOIA. Further, if a public body extends the time for responding to a request pursuant to section 3(e) of FOIA (5 ILCS 140/3(e) (West 2014)),¹¹ then the public body must "notify the person making the request of the reasons for the extension and the date by which the response will be forthcoming." 5 ILCS 140/3(f) (West 2014).

Mr. Ryan submitted his FOIA request to IDOT in a letter dated June 22, 2015. IDOT's response to the request indicates that it received the request on July 11, 2015. IDOT's letter denying the request as unduly burdensome is dated July 22, 2015, more than five business days after IDOT acknowledges receiving Mr. Ryan's request. This office has been provided with nothing indicating that IDOT properly extended the time for response as provided for in sections 3(e) and 3(f) of FOIA (5 ILCS 140/3(f) (West 2014)). Moreover, Mr. Ryan has stated that he did not receive any notification that IDOT was extending the time for responding.¹² Therefore, because IDOT failed either to respond or to extend the time for responding to Mr. Ryan's request within 5 business days after its receipt, IDOT is precluded by section 3(d) of FOIA from treating the request as unduly burdensome. Accordingly, IDOT must respond to the FOIA request in its entirety as submitted.

This office notes, however, that IDOT's response asserting 3(g) and inviting Mr. Ryan to narrow his request would have been permissible had it been issued within the applicable period. IDOT explained that review and redaction of hundreds of pages of documents would be necessary to fulfill the request, and provided specific suggestions for how to make the request more manageable. The letter appears to be an attempt to find a less burdensome method of providing copies of the records, rather than to avoid furnishing them. As provided in section 3(e) of FOIA (5 ILCS 140/3(e) (West 2014)) a requester and a public body may agree in writing to extend the time for compliance. Public bodies and requesters are free to negotiate the scope of a request and the time period for compliance, which often provides the most convenient and

¹¹Section 3(e) of FOIA enumerates seven reasons for which a public body may extend the time for responding to a request by an additional 5 business days.

¹²E-mail from Tim Ryan, LiUNA! Midwest Region, to Shannon Barnaby (September 3, 2015).

Mr. Tim Ryan
Mr. Matthew Dougherty
November 9, 2015
Page 6

expedient result for both parties. As a result, IDOT's attempt to negotiate the scope of the request and the time period for compliance with Mr. Ryan was permissible.

In this instance, however, Mr. Ryan declined to modify his request and, instead, submitted a Request for Review explaining that "[w]e feel that the amount of paperwork that we are requesting is not burdensome[.]"¹³ Although IDOT's late response precludes it from treating the request as unduly burdensome, to provide guidance in this area, we have elected to address the issue of whether section 3(g) would allow IDOT to deny this request unless it was narrowed on the basis that the burden of compliance outweighs the public interest in disclosure of the records. Illinois courts have employed a balancing test in determining whether the public interest in disclosure of requested records outweighs the burden that compliance would impose on a public body. In *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 3d 1 (1st Dist. 2010), the Illinois Appellate Court analyzed whether the production of records concerning a study on eyewitness identification procedures would pose an undue burden on the Chicago Police Department (CPD). Counsel for CPD estimated that redacting the responsive records would take 150 hours, equating to 20 personnel days. *National Ass'n*, 399 Ill. App. 3d at 14. The court found that there was a vital public interest in examining eyewitness identification procedures. *National Ass'n*, 399 Ill. App. 3d at 17. Moreover, the court found that the request was "specifically target[ed]" and that "the information requested [was] essential to a meaningful review of" the study on eyewitness identification procedures, distinguishing it from requests that require extensive review of extraneous materials. *National Ass'n*, 399 Ill. App. 3d at 17 ("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 appellants' purpose constitutes an undue burden."). The court concluded that the burden of identifying and redacting the responsive records, although significant, did not outweigh the public interest in disclosure of the records. *National Ass'n*, 399 Ill. App. 3d at 17.

In contrast, in *Shehadeh v. Madigan*, 2013 IL App (4th) 120742, 996 N.E.2d 1243 (2013), the court weighed the public interest against the burden of compliance but concluded that a request was unduly burdensome. In that case, the requester sought any and all records that could be used for guidance on complying with FOIA. The Attorney General's Office responded that compliance with the request as written would be unduly burdensome because its search identified 9,200 potentially responsive files. *Shehadeh*, 2013 IL App (4th) 120742, ¶5, 996 N.E.2d at 1245. The Attorney General's Office invited the requester to narrow his request to more manageable proportions, but he declined to do so. *Shehadeh*, 2013 IL App (4th) 120742, ¶¶5-6, 996 N.E.2d at 1245. The court found the request to be "patently broad on its face, as it sought *any* publication or record that would or could be used by *any* public body to comply with Illinois's FOIA provisions." (Emphasis in original.) *Shehadeh*, 2013 IL App (4th) 120742, ¶28,

¹³E-mail from Tim Ryan, LiUna! Midwest Region, to Ms. [Sarah] Pratt, Public Access (July 28, 2015).

Mr. Tim Ryan
Mr. Matthew Dougherty
November 9, 2015
Page 7

996 N.E.2d at 1248. Additionally, the court found that the requester failed to identify a public interest that outweighed the burden of compliance on the Attorney General's Office. *Shehadeh*, 2013 IL App (4th) 120742, ¶35, 996 N.E.2d at 1249. Thus, the court concluded that the Attorney General's Office did not violate FOIA by denying the request as unduly burdensome. *Shehadeh*, 2013 IL App (4th) 120742, ¶35, 996 N.E.2d at 1249.

IDOT's response to this office asserts that compliance with Mr. Ryan's request would create an undue burden on IDOT's operations because it would need "to identify exempt data and then redact this information, line by line, page by page[.]"¹⁴ While IDOT would be required to redact certain information, the General Assembly has specifically defined certified payroll records as public records that are subject to inspection and copying by statute. Section 2.10 of FOIA (5 ILCS 140/2.10 (West 2014)) provides:

Payrolls. Certified payroll records submitted to a public body under Section 5(a)(2) of the Prevailing Wage Act are public records subject to inspection and copying in accordance with the provisions of this Act; except that contractors' employees' addresses, telephone numbers, and social security numbers must be redacted by the public body prior to disclosure.

Clearly, the General Assembly recognized that there would be a need to redact certain information from certified payroll records, but nonetheless expressly provided that these records are subject to disclosure. Further, the General Assembly did not provide an extended period for the records' production. Enactment of this provision reflects the significant public interest in disclosure of these records.

IDOT acknowledges in its response to this office that the certified payroll records in question were submitted to IDOT pursuant to the Prevailing Wage Act (820 ILCS 130/0.01 (West 2014))¹⁵ and are therefore subject to section 2.10 of FOIA. Further, the specific information that may properly be redacted from the records is expressly described by statute. Unlike information that might be exempt as preliminary under section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2014), as amended by Public Act 99-298, effective August 6, 2015) or attorney-client privileged information that is exempt under section 7(1)(m) (5 ILCS 140/7(1)(m) (West 2014), as amended by Public Act 99-298, effective August 6, 2015), addresses, telephone

¹⁴E-mail from Matthew Dougherty, Acting FOIA Officer Assistant Chief Counsel to Ms. Barnaby (August 10, 2015).

¹⁵E-mail from Matthew Dougherty, Acting FOIA Officer Assistant Chief Counsel to Ms. Barnaby (August 10, 2015).

Mr. Tim Ryan
Mr. Matthew Dougherty
November 9, 2015
Page 8

numbers, and social security numbers are readily identifiable. Accordingly, compliance with the request should not require specialized review of the records by IDOT.

This office recognizes that the need for IDOT to review hundreds of pages of certified payroll records, in order to redact information pursuant to section 2.10 and to determine whether any other portions of those records are exempt from disclosure, will impose a burden upon IDOT. That does not mean, however, that compliance with the request would be "*unduly* burdensome," for purposes of section 3(g) of FOIA. Compliance with any FOIA request imposes some administrative burden on a public body. The issue is whether the public interest in disclosure justifies the burden. Here, in light of the strong public interest in disclosure as established by the specific inclusion in FOIA of section 2.10, this office finds that the production of the certified payroll records responsive to Mr. Ryan's request would not so burden the operations of IDOT's office as to outweigh the public interest in their dissemination.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the arguments submitted, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) In a letter dated June 22, 2015, Mr. Tim Ryan, on behalf of IL LECET, submitted a FOIA request to IDOT seeking copies of all "certified payrolls for projects awarded within Christian County from June 2014 to Present."

2) On July 22, 2015, IDOT denied Mr. Ryan's request pursuant to section 3(g) of FOIA, stating that Mr. Ryan's request was unduly burdensome because it "would take a substantial number of labor hours and produce thousands of pages of records." IDOT's response indicated that it had received Mr. Ryan's request on July 11, 2015.

3) On July 28, 2015, Mr. Ryan submitted a Request for Review to the Public Access Counselor that was received on the same date, in which he disputed the denial of his FOIA request. The Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2014)).

4) On July 30, 2015, the Public Access Bureau forwarded a copy of Mr. Ryan's Request for Review to IDOT and requested a written explanation of the factual and legal bases for its assertion of section 3(g) of FOIA, together with a representative sample of the records responsive to Mr. Ryan's request for this office's confidential review.

5) On August 10, 2015, IDOT sent a written response to this office, which included a sample of one representative certified transcript payroll record.

Mr. Tim Ryan
Mr. Matthew Dougherty
November 9, 2015
Page 9

6) Pursuant to section 9.5(f) of FOIA, on September 22, 2015, this office properly extended the time in which to issue a binding opinion by 30 business days to November 9, 2015. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) Because IDOT failed to respond to Mr. Ryan's FOIA request within 5 business days after its receipt, IDOT is precluded from asserting that the request is unduly burdensome under section 3(g) of FOIA.

8) Even assuming that IDOT's response was timely, however, the burden of compliance on IDOT's operations would be outweighed by the significant public interest in the dissemination of certified payroll records, as reflected by the General Assembly's enactment of section 2.10 of FOIA, which expressly requires the disclosure of these records.

Therefore, it is the opinion of the Attorney General that IDOT improperly denied Mr. Ryan's Freedom of Information Act request in violation of the requirements of the Act. Accordingly, IDOT is directed to take immediate action to comply with this binding opinion by disclosing the requested certified payroll records, subject only to permissible redactions under section 2.10 and section 7 of FOIA (5 ILCS 140/7 (West 2014), as amended by Public Act 99-298, effective August 6, 2015).

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2014). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Mr. Tim Ryan as defendants. *See* 5 ILCS 140/11.5 (West 2014).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 

Michael J. Luke
Counsel to the Attorney General