



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 15, 2015

PUBLIC ACCESS OPINION 15-014
(Request for Review 2015 PAC 37249)

FREEDOM OF INFORMATION ACT:
Duty to Disclose Public Records in
the Possession of a Public Body

Mr. M. Kevin Flynn
707 North Vermilion
Danville, Illinois 61832

Mr. David B. Wesner
Corporation Counsel
City of Danville
17 West Main Street
Danville, Illinois 61832

Dear Mr. Flynn and Mr. Wesner:

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 City of Danville (City) violated the requirements of FOIA by improperly withholding records responsive to Mr. M. Kevin Flynn's FOIA request relating to the Danville Housing Task Force.

BACKGROUND

On August 31, 2015, Mr. Flynn submitted a FOIA request to the City asking it to:

1. Please provide all meeting times, locations and meeting notices for the Danville Housing Task Force that completed the July 24, 2015 report.

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2. Provide copies of all minutes, notes and documents created during the meetings.
3. Provide all communication, electronic or otherwise, between any member of said task force and any city of Danville employee, city staff or elected official.^[1]

The same day, the City responded to Mr. Flynn that "Corporation Counsel Wesner has stated that the Housing Task Force is not a Public Body and therefore not subject to FOIA."² The City did not furnish Mr. Flynn with the requested records.

On September 1, 2015, Mr. Flynn submitted a Request for Review to the Public Access Counselor contesting the denial.³ Mr. Flynn enclosed a copy of a memorandum from the City of Danville, Engineering and Urban Services Department to the Danville City Council Members dated July 22, 2015, prefacing the Danville Housing Task Force's Housing Strategy Report for the City of Danville, IL (Report). The first paragraph of the memorandum provides:

As a result of long-voiced concerns regarding housing in Danville, 18 community members were asked to participate in a citywide Housing Task Force (HTF) for the purpose of identifying issues, and developing policies and strategies for meeting citywide housing goals. With the assistance of city staff, we have extensively reviewed existing data associated with our neighborhoods, our public housing authority, and our city's policies. This document is not intended to be a comprehensive housing analysis; rather, it is a conglomeration of current issues, goals, and recommendations to alleviate said issues.^[4]

¹FOIA request from M. Kevin Flynn to City of Danville, Illinois (August 31, 2015).

²Facsimile from Megan Mudd, Deputy City Clerk, City of Danville, to M. Kevin Flynn (August 31, 2015).

³Request for Review from M. Kevin Flynn to Public Access Counselor (September 1, 2015). Mr. Flynn's submission also alleged violations of the Open Meetings Act (OMA) (5 ILCS 120/1 *et seq.* (West 2014)) which were processed as a separate Request for Review (*see* Ill. Att'y Gen. PAC Req. Rev. Ltr. 37250, issued September 22, 2015).

⁴Memorandum from City of Danville, Engineering and Urban Services Department, to Danville City Council Members (July 22, 2015).

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Mr. Flynn also enclosed a copy of the cover sheet of the Report, dated July 24, 2015, entitled "Housing Strategy Report For the City of Danville, IL."⁵ Further, Mr. Flynn enclosed a page of the Report that lists the Housing Task Force members, which includes four members of the Danville City staff: the DATS (Danville Area Transportation Study) Director; the City of Danville Planner; the City of Danville Urban Services Manager; and the City of Danville Engineering & Urban Services Director. The Housing Task Force also includes fifteen "Community Representatives"; among those are two City aldermen, the City of Danville Director of Public Works, and two members of the Danville Housing Authority.⁶

On September 15, 2015, this office sent a copy of the Request for Review to the City and asked it to provide this office with copies of the responsive records in its possession for our confidential review. This office also requested a detailed explanation of the City's legal and factual bases for withholding the records.⁷ On September 24, 2015, the City provided a written response stating its position that the Housing Task Force is not a public body and enclosing a copy of the full Report. The City did not, however, provide copies of the records on September 24, 2015, because the records had just been made available to the City's Corporation Counsel and required review.⁸ On that date, this office sent a copy of the City's response to Mr. Flynn;⁹ he did not submit a reply.

On September 29, 2015, the City provided this office with copies of the records responsive to parts 1 and 2 of Mr. Flynn's request and asked for clarification of whether part 3 included only communications specifically related to the Housing Task Force.¹⁰ On October 2, 2015, after conferring with Mr. Flynn, an Assistant Attorney General in the Public Access Bureau advised the City that part 3 of the request was limited to communications related to the

⁵The Report has been made publicly available on the internet. See http://www.news-gazette.com/sites/all/files/pdf/2015/09/04/Housing_Task_Force_Report-_FINAL_07-24-15.pdf (last visited November 5, 2015).

⁶Danville Housing Task Force, Report (July 24, 2015), at 1.

⁷Letter from Joshua M. Jones, Supervising Attorney, Public Access Bureau, Office of the Attorney General, to Dave Wesner, Corporation Counsel, City of Danville (September 15, 2015).

⁸Letter from David B. Wesner, Corporation Counsel, City of Danville, to Joshua Jones, Public Access Bureau (September 24, 2015).

⁹Letter from Joshua M. Jones, Supervising Attorney, Public Access Bureau, Office of the Attorney General to M. Kevin Flynn (September 24, 2015).

¹⁰E-mail from David Wesner, Corporation Counsel, City of Danville, to Joshua Jones (September 29, 2015).

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Housing Task Force.¹¹ On October 28, 2015, this office properly extended the time in which to issue a binding opinion by 30 business days, to December 15, 2015, pursuant to section 9.5(f) of FOIA.¹² On October 30, 2015, this office received from the City copies of records responsive to part 3 of Mr. Flynn's request.

ANALYSIS

"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 2014). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2014)) 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 (5 ILCS 140/2(c) (West 2014), as amended by Public Act 99-78, effective July 20, 2015) defines "public records" to include:

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.)

In support of its argument that "the records sought are not those of a public body[.]" the City's Corporation Counsel asserted:

The Housing Task Force was a group of individuals who met voluntarily in an effort to provide thoughts and input to certain city staff members concerning an issue that they were working on. The Danville City Council did not create this group, nor did they appoint any individual to the group. The Mayor of Danville did not create this group, nor did he appoint any individual to the group. Less than one-third of the group was City employees. And,

¹¹E-mail from Joshua Jones, Supervising Attorney, Public Access Bureau, to [David] Wesner (October 2, 2015).

¹²Letter from Joshua Jones, Supervising Attorney, Public Access Bureau, to M. Kevin Flynn, and Dave Wesner, Corporation Counsel, City of Danville (October 28, 2015).

no single City department was represented in the group. In City of Champaign v. Madigan, 992 N.E.2d 629, 372 Ill.Dec. 787 (4th Dist. 2013), the court held that a single alderman was not a public body for purposes of the Act. Only if a document was possessed by a quorum of aldermen would the document be held to be in the possession of a public body. Clearly, the Fourth District Appellate Court reasoned that a single individual could not be said to make up a "public body" for purposes of the Act. Therefore, a single employee could not be considered a "public body". The court in City of Champaign went on to hold that the definition of "public body" within the Act does not include individual members of the bodies described in the definition. The court focused on the "body" and not on the individuals. While this group had several city employees take part in the meetings, I don't believe that transforms the group in to a "public body" for purposes of the Act. The definition of "public body" in the Act also does not make reference to City departments as being considered a "public body" for purposes of the Act. The Act and City of Champaign also do not indicate or suggest that by having members of the general public meet with staff that that transforms it into a "public body."^[13]

Mr. Flynn submitted his FOIA request to the City, which is a public body subject to the requirements of FOIA.¹⁴ Accordingly, the issue to be resolved here is whether the City, which is a "public body," improperly withheld records in its possession that pertain to the transaction of City business. It is not necessary to address whether the Housing Task Force is a public body for purposes of FOIA, and this opinion will make no findings with respect to that issue.

In its response, the City relied on the *City of Champaign* decision. That decision is not applicable here, however. In *City of Champaign*, a reporter sought copies of electronic communications exchanged between members of a city council during city council meetings, including messages from both their city-issued devices and accounts and their personal devices and accounts. *City of Champaign*, 2013 IL App (4th) 120662, ¶4, 992 N.E.2d at 631. The city

¹³Letter from David B. Wesner, Corporation Counsel, City of Danville, to Joshua Jones, Supervising Attorney, Public Access Bureau (September 24, 2015), at 1-2.

¹⁴"Public body" means all legislative, executive, administrative, or advisory bodies of * * * cities, villages [and] incorporated towns * * * ." 5 ILCS 140/2 (2014), as amended by Public Act 99-78, effective July 20, 2015.

argued that the communications on privately-owned electronic devices were not "public records" because individual city council members do not constitute public bodies. *City of Champaign*, 2013 IL App (4th) 120662, ¶30, 992 N.E.2d at 636. The court stated that to qualify as a "public record" for purposes of FOIA, a record "must first pertain to 'business or community interests as opposed to private affairs'" and then must have "been either (1) prepared by a public body, (2) prepared for a public body, (3) used by a public body, (4) received by a public body, (5) possessed by a public body, or (6) controlled by a public body." *City of Champaign*, 2013 IL App (4th) 120662, ¶32, 992 N.E.2d at 637 (quoting Merriam-Webster's Collegiate Dictionary 941 (10th ed. 2000)). Thus, the court had to look further to determine whether the communications of individual council members were records of the "public body" when those records were not physically in the possession of the city but were contained on the city officials' personally owned devices. In reaching its decision, the court did not question the principle that a record in the possession of a public body that pertains to the transaction of public business is a public record subject to disclosure pursuant to FOIA.

Here, the Introduction to the Report (which has been released to the public and may, therefore, be referred to in this opinion without violating confidentiality requirements) states that the Housing Task Force was initiated when "the City of Danville Engineering & Urban Services Department gathered a diverse group of community stakeholders in order to discuss how to best address the City's housing issues while affirmatively furthering fair housing."¹⁵ It further provides:

Together, these goals, objectives and recommendations are intended to comprise the City's housing strategy for the 2015-2020 planning period, and will guide daily decision-making by City officials and staff, while equipping citizens with the awareness of the housing programs that the City will be initiating to meet its overall housing goals.

* * * The recommendations will be reviewed periodically and prioritized, where necessary, to reflect funding limitations and the City's objectives.^[16]

The Report then analyzes City conditions and data before arriving at recommendations:

¹⁵Danville Housing Task Force, Report (July 24, 2015), at 3.

¹⁶Danville Housing Task Force, Report, (July 24, 2015), at 3.

* * * Many of the recommendations in this report are general and will require more work before being implemented. Some work will be delegated to City staff; other items will require the involvement of other individuals and entities represented on the Housing Task Force. Instead of relying solely on City staff to see the recommendations of this report to implementation, the hope is the Housing Task Force can be reconvened approximately every 12 months to evaluate, refine and monitor implementation of this report.^[17]

Thus, the Housing Task Force was organized by a City department to assist that department in planning the City's five-year housing strategy.¹⁸ The City's Corporation Counsel has confirmed that the City's DATS Director coordinated the Housing Task Force using City resources during business hours. Based on these facts, it is clear that records relating to the activities of City officials and employees who convened the Housing Task Force and who continue to work on its objectives pertain to the transaction of public business of the City. The City acknowledged that it possesses numerous records relating to the Housing Task Force and has provided copies of those records for our review.

Because the records requested by Mr. Flynn pertain to public business of the City and are in the City's possession, they are public records subject to disclosure under FOIA, unless an exemption in section 7 of FOIA (5 ILCS 140/7 (West 2014), as amended by Public Act 99-298, effective August 6, 2015) applies. Accordingly, this office concludes that the City failed to comply with FOIA by denying Mr. Flynn's August 31, 2015, request for records relating to the Danville Housing Task Force.

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) On August 31, 2015, Mr. M. Kevin Flynn submitted a three-part FOIA request to the City seeking documents concerning the Danville Housing Task Force.

¹⁷ Danville Housing Task Force, Report (July 24, 2015), at 12.

¹⁸ See *MOVE! Danville, PLANNING ENGINEERING DEVELOPMENT*, City of Danville, <http://www.cityofdanville-eus.org/projects.html> (last visited November 5, 2015) (listing the Housing Task Force as a project of the Department of Engineering & Urban Services). We note that article 11 of the Illinois Municipal Code (65 ILCS 5/11-1-1 *et seq.* (West 2014)) provides for cities to conduct planning, zoning, and urban rehabilitation efforts (Divisions 11-15.3) as well as govern public works, buildings, and property (Divisions 61-152).

2) On that same date, the City denied the request stating that the Housing Task Force is not a public body subject to FOIA.

3) On September 1, 2015, Mr. Flynn submitted a Request for Review disputing the denial of his 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 September 15, 2015, the Public Access Bureau sent a copy of Mr. Flynn's Request for Review to the City and asked it to provide copies of the responsive records for this office's confidential review, together with a detailed explanation of the City's legal and factual bases for withholding them.

5) On September 24, 2015, the City provided this office with a written response stating its position that the withheld records are not subject to disclosure because the Housing Task Force is not a public body. The City also provided this office with a copy of the Housing Task Force's Report. On September 29, 2015, the City provided this office with copies of records responsive to parts 1 and 2 of Mr. Flynn's request. On October 30, 2015, the City provided this office with copies of records responsive to part 3 of Mr. Flynn's request.

6) On October 28, 2015, the Public Access Bureau properly extended the time in which to issue a binding opinion by 30 business days, to December 15, 2015, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) Under section 2(c) of FOIA, a record that (a) has either been prepared by, prepared for, used by, received by, or is in the possession or control of a public body, and (b) which pertains to the transaction of public business is a "public record" that is subject to disclosure under FOIA. Because the records requested by Mr. Flynn pertain to public business of the City and are in the City's possession, they are public records subject to disclosure under FOIA.

8) The City has not asserted that the responsive records are exempt from inspection or copying in whole or in part pursuant to section 7 of FOIA.

Therefore, it is the opinion of the Attorney General that the City of Danville improperly denied Mr. Flynn's Freedom of Information Act request in its entirety in violation of the requirements of the Act. Accordingly, the City is directed to take immediate and appropriate action to comply with this opinion by disclosing the requested records to Mr. Flynn, subject only to permissible redactions pursuant to exemptions contained in section 7 of FOIA. If the City

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withholds or redacts any portion of the records, it must issue a written denial that provides a "detailed factual basis for the application of any exemption claimed," and otherwise complies with the requirements of section 9 of FOIA (5 ILCS 140/9 (West 2014)). If the City issues such a denial for a portion of the records and Mr. Flynn believes that the City has not properly complied with FOIA, he can submit a Request for Review to this office.

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. M. Kevin Flynn as defendants. *See* 5 ILCS 140/11.5 (West 2014).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Michael J. Luke", written in a cursive style.

By:
Michael J. Luke
Counsel to the Attorney General