



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 26, 2017

PUBLIC ACCESS OPINION 17-007
(Request for Review 2017 PAC 46838)

FREEDOM OF INFORMATION ACT:
Duty to Respond to a FOIA Request
for Records of a City Appointed Board
and Related to City-Owned Property

Ms. Julie Payne-Hubler
700 West Webster
Benton, Illinois 62812

Ms. Brook Craig
FOIA Officer/City Clerk
City of Benton
1403 South Main Street
P.O. Box 640
Benton, Illinois 62812

Dear Ms. Payne-Hubler and Ms. Craig:

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 2016)). For the reasons discussed below, this office concludes that the City of Benton (City) violated section 3(d) of FOIA (5 ILCS 140/3(d) (West 2016)) by failing to comply with, deny in whole or in part, or otherwise appropriately respond to a FOIA request submitted by Ms. Julie Payne-Hubler.

BACKGROUND

On February 17, 2017, Ms. Payne-Hubler submitted a FOIA request to the City using the City's FOIA request form and seeking "[a]gendas & [m]eeting [m]inutes for Benton

Ms. Julie Payne-Hubler
Ms. Brook Craig
June 26, 2017
Page 2

Airport for calendar years 2013, 2014 & 2015."¹ Mr. Rocky Morris, an "Airport [Board] Member[]," sent a letter dated February 22, 2017, to Ms. Payne-Hubler stating "in response to your FOIA request we ask for a 5 day extension...The Airport Board has not appointed a FOIA director yet.." ² On March 11, 2017, Ms. Payne-Hubler submitted a Request for Review to this office alleging that the City had improperly denied her request by failing to respond.³ Specifically, she alleged:

At 3:43 pm on [February 17, 2017], I received a call from [Brook] Craig, city clerk stating she didn't have [the requested records] and [I should] contact the airport board FOIA officer. When I asked who that was she stated she didn't know. I then called Rocky Morris who is a board member. He stated there was not one and he would call [Brook]. I did not hear anything back until 2/22/[2017] when Mr. Morris requested a 5 day extension as the board had not appointed a FOIA officer yet. I still cannot get the materials. Please help.⁴

Ms. Payne-Hubler's initial submission did not include a copy of her FOIA request or the extension letter she received from Mr. Morris. Ms. Payne-Hubler was asked to submit the missing materials to the Office of the Attorney General; on March 13, 2017, Ms. Payne-Hubler submitted those materials to complete her Request for Review.⁵

On March 22, 2017, an Assistant Attorney General (AAG) in the Public Access Bureau telephoned Ms. Brook Craig, the City Clerk and FOIA Officer of the City of Benton, to discuss the Request for Review and to gather information to determine whether the Benton Airport was a public body separate from the City. During the conversation, Ms. Craig stated that: (1) she had advised Ms. Payne-Hubler to go to the Airport Board, but the Board did not

¹City of Benton Request for Copies of Public Records under the Illinois Freedom of Information Act form signed by Julie Payne-Hubler (February 17, 2017).

²Letter from Rocky Morris, Airport Member, to Julie [Payne-Hubler] (February 22, 2017).

³E-mail from Julie Payne-Hubler to Public Access [Bureau, Office of the Attorney General], (March 11, 2017).

⁴E-mail from Julie Payne-Hubler to Public Access [Bureau, Office of the Attorney General], (March 11, 2017).

⁵E-mail from Julie Payne-Hubler to Public Access [Bureau, Office of the Attorney General] (March 13, 2017).

Ms. Julie Payne-Hubler
Ms. Brook Craig
June 26, 2017
Page 3

have a FOIA officer; (2) she had not sent a written response to Ms. Payne-Hubler; and (3) the Benton Municipal Airport (Airport) has a Board of Directors (Airport Board) but uses the City's tax identification number.⁶ That same day the AAG telephoned Mr. Morris, who said that he was a newly elected Airport Board member and that the City Clerk had given him the key to the Airport filing cabinets but he had been unable to find the requested agendas and minutes.⁷ On March 23, 2017, this office forwarded a copy of the Request for Review to the City and asked it to advise this office whether it had responded to Ms. Payne-Hubler's FOIA request. If the City had not yet responded to the request, then this office asked the City to do so and to provide this office with a copy of its response.⁸

By letter dated March 29, 2017, the City's FOIA Officer responded to this office, and sent a copy of that letter to Ms. Payne-Hubler.⁹ The City's response stated that the City had responded to multiple FOIA requests from Ms. Payne over the years, but her February 17th FOIA request pertained to the Airport, and therefore should be directed to the Airport. The response further asserted that "the Benton Municipal Airport is a separate entity"¹⁰ that was formed under Ordinance #506 on April 7, 1947. The Benton Municipal Airport has its own board and, more importantly, adopts its own laws, rules, and regulations for the guidance and government of said Airport.¹¹ The City's response also included a document entitled "Benton City Code, Chapter 2, Airport Board."¹² The document contains ordinance provisions related to, among other things, the appointment, removal, and powers of the Airport's Board of Directors and provides:

⁶Telephone conversation between Edie Steinberg, Assistant Attorney General, Public Access Bureau and Brook Craig, FOIA Officer and City Clerk, City of Benton (March 22, 2017).

⁷Telephone conversation between Edie Steinberg, Assistant Attorney General, Public Access Bureau and Rocky Morris, Airport Board member (March 22, 2017).

⁸Letter from Edie Steinberg, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Brook [] Craig, FOIA Officer/City Clerk (March 23, 2017).

⁹Letter from Brook Craig, FOIA Officer, City of Benton, to [Edie] Steinberg, Office of the Attorney General (March 29, 2017).

¹⁰The City of Benton's website provides that the "Benton Municipal Airport (FAA LID: H96) is a city-owned public-use airport." http://bentonil.com/?page_id=180 (last viewed May 2, 2017).

¹¹Letter from Brook Craig, FOIA Officer, City of Benton, to [Edie] Steinberg, Office of the Attorney General (March 29, 2017).

¹²Benton, Ill., City Code § 2-1-1 (effective April 7, 1947).

2-1-1 BOARD ESTABLISHED. The Mayor shall, with the advice and consent of the City Council, appoint a board of **six (6) directors** for the Municipal Airport and the Commissioner of Finance shall automatically be the **seventh (7th) member** of said Board. Not more than **one (1) member** of the City Council shall, at any one time, be a member of the Airport Board. (Ord. No. 09-08; 04-27-09)

2-1-2 TERM. The Directors shall hold office for **four (4) years** from the **first (1st) day** of May following their appointment. The Mayor shall, on or before the **first (1st) day** of May in each year, appoint **two (2) Directors** who shall hold their office for **four (4) years** and until their successors are appointed and qualified. The Mayor may, with the advice and consent of the City Council, remove and discharge any Director for misconduct or neglect-of-duty.

2-1-3 VACANCIES. Vacancies in the Board of Directors shall be reported to the City Council and shall be filed in like manner as this Chapter provides. No director shall receive compensation as a member of the Airport Board.

2-1-4 OFFICERS. The Directors shall elect **one (1)** of their members as President and other such officers as they may deem necessary. They shall meet and adopt such laws, rules and regulations for their own guidance and for the government of the Municipal Airport as will be expedient and not inconsistent with this Chapter.

2-1-5 EXPENDITURES. The Board of Directors shall have exclusive control of the expenditures of all moneys collected to the credit of the Municipal Airport Fund, provided that all moneys received for such Municipal Airport Fund shall be deposited in the Treasury of the City, to the credit of such fund, and shall be kept separate and apart from other moneys of the City and drawn upon by the proper officers of the Board of Directors, upon the properly authenticated vouchers of the Municipal Airport Board. The Board shall have the power to appoint any necessary committees, and remove such appointees; and in general to carry out the spirit and intent of this Chapter in maintaining a Municipal Airport.

2-1-6 ANNUAL REPORTS. The Municipal Airport Board shall make on or before the **first (1st) Monday** in May, annual reports to the City Council, stating the condition of the Municipal Airport Fund, and showing the various sums of money received from all sources; the sums of money disbursed and the purposes therefor, and such other information and suggestions as they may deem of general interest. All such portions of the report as relate to the receipt and expenditure of money shall be verified by affidavit. (Emphasis in original)^[13]

On April 7, 2017, this office forwarded a copy of the City's response to Ms. Payne-Hubler.¹⁴ On April 10, 2017, this office received a reply from Ms. Payne-Hubler stating that she sent her FOIA request to the City's FOIA Officer because there was no FOIA officer for the Airport or Airport Board; she asserted that the City had treated her FOIA request like a "ping pong ball."¹⁵ As of the date of this binding opinion, this office has not received any information indicating that either the City or the Airport Board has responded to Ms. Payne-Hubler's FOIA request. On May 9, 2017, this office extended the time within which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.¹⁶

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 2016). Under section 1.2 of FOIA (5 ILCS 140/1.2 (West 2016)), "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2016)) provides that "[e]ach public body shall

¹³A review of the City's website indicates that the Benton City Code provided for this office's consideration may have been recodified. The website's version of the Benton City Code related to the Airport may be found in Chapter 4 of the Revised Code of Ordinances of the City of Benton, Illinois of 2015 (2015 Benton City Code), § 4-8-1 *et seq.* (effective April 7, 1947).

¹⁴Letter from Edie Steinberg, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Ms. Julie Payne-Hubler (April 7, 2017).

¹⁵Letter from Julie Payne-Hubler to Edie Steinberg, Assistant Attorney General, Public Access Bureau (March 31, 2017).

¹⁶Letter from Edie Steinberg, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Julie-Payne Hubler and Brook[] Craig, FOIA Officer/City Clerk, City of Benton (May 9, 2017).

Ms. Julie Payne-Hubler
Ms. Brook Craig
June 26, 2017
Page 6

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." To that end, section 3.5 of FOIA (5 ILCS 140/3.5) (West 2016)) provides that:

Each public body shall designate one or more officials or employees to act as its Freedom of Information officer or officers. Except in instances where records are furnished immediately, Freedom of Information officers, or their designees, shall receive requests submitted to the public body under this Act, ensure that the public body responds to requests in a timely fashion, and issue responses under this Act. (Emphasis added.)

Additionally, section 3(d) of FOIA provides:

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.

Section 3(e) of FOIA (5 ILCS 140/3(e) (West 2016)) permits a public body to extend its time for response by not more than 5 business days if, for any of seven enumerated reasons, the public body cannot comply with the request within the first 5 business days after its receipt. Section 3(e) also provides that a "person making a request and the public body may agree in writing to extend the time for compliance for a period to be determined by the parties."

The City did not provide Ms. Payne-Hubler with the requested records or respond in writing to her FOIA request. Although an Airport Board member sent a letter requesting additional time for response because of the lack of a designated FOIA officer, section 3(e) of

Ms. Julie Payne-Hubler
Ms. Brook Craig
June 26, 2017
Page 7

FOIA does not allow a public body to unilaterally extend the time for response for this reason.¹⁷ While a public body can ask a FOIA requester to agree to an extension of time for response based on any reason, Ms. Payne-Hubler did not agree in writing to an extension of time. Accordingly, the time for response was not properly extended pursuant to section 3(e) of FOIA. The Airport Board did not communicate further with Ms. Payne-Hubler with respect to her FOIA request.

The City responded to this office's inquiry by asserting that the Airport is a separate entity and, as a result, Ms. Payne-Hubler should have submitted her request to the Airport. However, section 11-103-1 of the Illinois Municipal Code (65 ILCS 5/11-103-1 (West 2016)) authorizes a municipality with a population of less than 500,000, like the City of Benton, to establish and maintain an airport and landing fields. No information provided to this office indicates that the Airport was established under any other statutory provisions governing air transportation. Instead, the available information indicates that rather than being a "separate entity" as the City states, the Airport is City-owned property. The City created the Airport Board

¹⁷Section 3(e) of FOIA permits public bodies to unilaterally extend the time for response to a FOIA request for the following reasons:

- (e) The time for response under this Section may be extended by the public body for not more than 5 business days from the original due date for any of the following reasons:
 - (i) the requested records are stored in whole or in part at other locations than the office having charge of the requested records;
 - (ii) the request requires the collection of a substantial number of specified records;
 - (iii) the request is couched in categorical terms and requires an extensive search for the records responsive to it;
 - (iv) the requested records have not been located in the course of routine search and additional efforts are being made to locate them;
 - (v) the requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are exempt from disclosure under Section 7 of this Act or should be revealed only with appropriate deletions;
 - (vi) the request for records cannot be complied with by the public body within the time limits prescribed by paragraph (c) of this Section without unduly burdening or interfering with the operations of the public body;
 - (vii) there is a need for consultation, which shall be conducted with all practicable speed, with another public body or among two or more components of a public body having a substantial interest in the determination or in the subject matter of the request.

Ms. Julie Payne-Hubler
Ms. Brook Craig
June 26, 2017
Page 8

by ordinance; Airport Board members are appointed and may be removed by the City's mayor with the advice and consent of the City Council. Airport funds are maintained in the City treasury, and the Airport Board is required to submit annual reports to the City. The Airport Board is listed on the City's websites as one of several City Boards and Commissions,¹⁸ and some recent Airport Board meeting agendas are contained on the City's website.¹⁹

Therefore, based on the available information, the City is the public body ultimately responsible for responding to Ms. Payne-Hubler's FOIA request, just as it is for other municipal departments and divisions.²⁰ The 2015 Benton City Code specifically provides that its FOIA officer "shall receive requests submitted to the City under the Freedom of Information Act, insure that the City responds to requests in a timely fashion, and issue responses under the Freedom of Information Act." Benton, Ill., City Code, § 22-3-2 (2015). Notably, while the 2015 Benton City Code enumerates the duties of numerous departments, boards, and commissions, it also provides that FOIA requests "shall be submitted to the City Clerk or to the Mayor." Benton, Ill., City Code, § 22-3-4 (2015).²¹

Where, as here, a FOIA request is directed to the City regarding a board that oversees City property, the City must fulfill its fundamental obligation under FOIA to provide records. Any other outcome would be "at odds with the purpose of FOIA, which is to open governmental records to the light of public scrutiny." *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶ 19, 7 N.E.3d 741, 746 (1st Dist. 2014) (internal quotation marks and citations omitted); see also *Detroit Free Press, Inc. v. City of Southfield*, 713 N.W.2d 28, 37 (Mich. Ct. App. 2005) (rejecting city's argument that it was the wrong public body to grant plaintiff's FOIA request and that the request should have been addressed to its retirement system, because the city failed to demonstrate that it lacked the ability to produce the records). The City does not assert that it lacked the ability to search for and access the requested records. In fact, Airport Board member Morris advised this office that the City had given him a key to the Airport's filing

¹⁸See https://bentonil.com/?page_id=110 (last viewed June 20, 2017).

¹⁹See <https://bentonil.com/?cat=27> (last viewed June 20, 2017).

²⁰Even if the City had received a FOIA request that should have been directed to a separate public body, the City would still have been obligated to directly respond to the requester. 5 ILCS 140/3(d), 9(a) (West 2016). If the City had chosen to deny the request, section 9(a) requires a public body to provide a written denial that explains the reason for the denial, lists the names and titles or positions of each person responsible for the denial, informs the requester of the right to review by the Public Access Counselor and provides her address and phone number, and informs the requester of her right to judicial review under section 11 of FOIA (5 ILCS 140/11 (West 2016)).

²¹The City's website contains only one form for all FOIA requests: FOIA Request Form available on the City's website "Forms" page at http://bentonil.com/?page_id=69 (last viewed 5/17/17).

Ms. Julie Payne-Hubler
Ms. Brook Craig
June 26, 2017
Page 9

cabinets, presumably so that he could respond to the request. The City's failure to properly respond to Ms. Payne-Hubler's request violated section 3(d) of FOIA.²²

FINDINGS AND CONCLUSIONS

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

1) On February 17, 2017, Ms. Payne-Hubler submitted a FOIA request to the City of Benton seeking copies of agendas and meeting minutes for the City Airport for three specified calendar years. The City did not respond to the FOIA request. Instead, the City's FOIA Officer advised Ms. Payne-Hubler that the Airport and the City are separate entities, and referred her to the Airport Board.

2) On February 22, 2017, a member of the Airport Board sent a letter to Ms. Payne-Hubler requesting to extend the time for response by 5 business days because the Airport did not have a FOIA officer. Under section 3(e) of FOIA, the lack of a designated FOIA officer does not provide a basis for a public body to unilaterally extend the time for response and Ms. Payne-Hubler did not agree to extend the response time. Therefore, the time for response was not properly extended. Further, Ms. Payne-Hubler did not subsequently receive a substantive response to her request from the City or the Airport Board.

3) On March 11, 2017, Ms. Payne-Hubler asked the Public Access Counselor to review the City's denial of her FOIA request. On March 13, 2017, Ms. Payne-Hubler submitted the additional materials required to complete her Request for Review, which was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2016)).

4) On March 23, 2017, the Public Access Bureau forwarded a copy of Ms. Payne-Hubler's Request for Review to the City, together with a letter asking the City to advise this office whether it had responded to Ms. Payne-Hubler's February 17, 2017, FOIA request.

5) On March 29, 2017, the City responded to this office that Ms. Payne-Hubler's FOIA request should be directed to the Airport rather than to the City because the Airport is a separate entity.

²²In the future, the City may wish to consider posting all Airport Board meeting agendas and minutes on its website. Under section 8.5(a) of FOIA (5 ILCS 140/8.5(a) (West 2016)), a public body is not required to copy a public record that is published on the public body's website, unless a requester is unable to reasonably access the records online.

Ms. Julie Payne-Hubler
Ms. Brook Craig
June 26, 2017
Page 10

6) On April 7, 2017, the Public Access Bureau forwarded a copy of the City's response to Ms. Payne-Hubler. On April 10, 2017, this office received Ms. Payne-Hubler's reply.

7) On May 9, 2017, this office extended the time within which to issue a binding opinion by 30 business days, to June 26, 2017, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

8) The information available indicates that the City owns the Airport and appoints the directors of the Airport Board; the Airport Board does not have its own FOIA officer.

9) Section 22-3-2 of the 2015 Benton City Code provides that the City's FOIA Officer "shall receive requests submitted to the City under the Freedom of Information Act, insure that the City responds to requests in a timely fashion, and issue responses under the Freedom of Information Act."

10) Although the City may designate "one or more officials or employees" to be FOIA officers for its various departments and boards, it appears that only one FOIA officer has been designated. Accordingly, the City's FOIA Officer was obligated to respond to the FOIA request seeking records concerning the Airport; referring Ms. Payne-Hubler to the Airport Board did not satisfy the requirements of section 3 of FOIA.

Therefore, it is the opinion of the Attorney General that the City has violated section 3(d) of FOIA by failing, within 5 business days after receiving Ms. Payne-Hubler's February 17, 2017, FOIA request, to provide the requested records, to deny the request in whole or in part, or to enter into a written agreement with Ms. Payne-Hubler to extend the time for responding. Accordingly, the City is hereby directed to take immediate and appropriate action to comply with this opinion by providing Ms. Payne-Hubler with all records responsive to her February 17, 2017, request, subject only to permissible redactions under section 7 of FOIA (5 ILCS 140/7 (West 2016)).²³ If the City determines that any portion of the responsive records are exempt from disclosure under section 7, the City is directed to issue a written denial that fully complies with the requirements of section 9(a) of FOIA (5 ILCS 140/9(a) (West 2016)).

²³Because the City did not comply with the statutory requirements for responding to Ms. Payne-Hubler's FOIA request, the City is precluded from treating the request as unduly burdensome or imposing copying fees for the responsive records. 5 ILCS 140/3(d) (West 2016) ("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).").

Ms. Julie Payne-Hubler
Ms. Brook Craig
June 26, 2017
Page 11

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 2016). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review with the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Ms. Julie Payne-Hubler as defendants. *See* 5 ILCS 140/11.5 (West 2016).

Sincerely,

LISA MADIGAN
ATTORNEY GENERAL

By:


Michael J. Luke
Counsel to the Attorney General

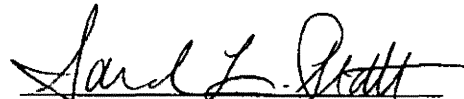
CERTIFICATE OF SERVICE

Sarah L. Pratt, Public Access Counselor, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 17-007) upon:

Ms. Julie Payne-Hubler
700 West Webster Street
Benton, Illinois 62812
jphlbh070@gmail.com

Ms. Brooke Craig
FOIA Officer/City Clerk
City of Benton
1403 South Main Street
P.O. Box 640
Benton, Illinois 62812
via facsimile (618) 435-2610

by causing a true copy thereof to be sent electronically or by facsimile to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Springfield, Illinois on June 26, 2017.


SARAH L. PRATT
Public Access Counselor

SARAH L. PRATT
Public Access Counselor
500 South Second Street
Springfield, Illinois 62706
(217) 785-5526