



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

January 26, 2021

PUBLIC ACCESS OPINION 21-001
(Request for Review 2020 PAC 65160)

FREEDOM OF INFORMATION ACT:
Duty to Confer Before Denying Request
as Unduly Burdensome

Mr. Gregory Pratt
Chicago Tribune
160 North Stetson Avenue
Chicago, Illinois 60601

Ms. Dana O'Malley
General Counsel
Chicago Police Department
3510 South Michigan Avenue
Chicago, Illinois 60653-1020

Dear Mr. Pratt and Ms. O'Malley:

This binding opinion 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 discussed below, this office concludes that the Chicago Police Department (CPD) violated the requirements of FOIA by improperly denying Mr. Gregory Pratt's FOIA request as unduly burdensome without first fulfilling its obligation to confer with him about possible ways to narrow the request to manageable proportions.

BACKGROUND

On September 11, 2020, Mr. Pratt, on behalf of the *Chicago Tribune*, submitted a FOIA request to CPD seeking copies of:

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1. Any subpoenas from federal law enforcement or regulatory agencies or agents received by the Chicago Police Department, any of its departments or any of its officials. Federal law enforcement or regulatory agencies would include (but not be limited to) entities like the United States Attorney's Office, the FBI, and the SEC. This includes grand jury subpoenas.

2. Any search warrants served on the Chicago Police Department, any of its offices or any of its officials.

The timeframe for this request is August 1, 2020 through August 31, 2020.^[1]

In a letter on that same date, CPD extended its time to respond by five business days pursuant to section 3(e) of FOIA (5 ILCS 140/3(e) (West 2018), as amended by Public Act 101-081, effective July 12, 2019).² On September 25, 2020, CPD responded that it considered the request unduly burdensome under section 3(g) of FOIA (5 ILCS 140/3(g) (West 2018), as amended by Public Act 101-081, effective July 12, 2019) and denied the request.³ CPD stated that it "does not have any automated mechanism by which to track, query, or limit a search of subpoena and/or search warrant records categorically as" the request sought.⁴ CPD asserted:

In order to fulfill this request as currently written, CPD would have to manually retrieve and individually review each subpoena from August 1, 2020 to August 31, 2020 in order to determine whether or not each subpoena is responsive to your request. * * * Please be advised that CPD received 3,344 subpoenas in August 2020, which would require substantial collection, redaction, and review of records. * * * Moreover, the production of responsive subpoenas would only satisfy a portion of your multipart FOIA request as you

¹FOIA request from Gregory Pratt, Chicago Tribune, to CPDfoia@chicagopolice.org (September 11, 2020).

²Letter from Andrew Marlan, Freedom of Information Officer, Chicago Police Department, to Gregory Pratt (September 11, 2020).

³Letter from A. Marlan, Freedom of Information Act Officer, Chicago Police Department, Office of Legal Affairs, Unit 114, to Gregory Pratt, Chicago Tribune (September 25, 2020).

⁴Letter from A. Marlan, Freedom of Information Act Officer, Chicago Police Department, Office of Legal Affairs, Unit 114, to Gregory Pratt, Chicago Tribune (September 25, 2020), at [1-2].

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are also asking CPD to do the same categorical search for search warrants.^[5]

CPD then offered Mr. Pratt the opportunity to submit a new FOIA request:

Pursuant to Section 3(g) of FOIA, we would like to extend to you an opportunity to modify your request to make it more manageable. CPD encourages you to review your request to ascertain the specific details to your query. Unless and until a new FOIA request is submitted that specifies and narrows the records you are seeking, CPD will be unable to provide further records. Once this is determined, a new FOIA request can be submitted to CPD, specifying the records you would like CPD to provide.^[6]

On September 28, 2020, Mr. Pratt replied to CPD's response by asking to confer with it about narrowing his request.⁷ He stated: "I'd like to better understand how CPD performed a reasonable search, as well as confer with you about how CPD keeps these records, and particularly how it tracks incoming subpoenas."⁸ Mr. Pratt also asked: "Would it help you if I specify that I am seeking federal duces tecum subpoenas — meaning grand jury subpoenas for the production of documents — versus subpoena testificandum — which call for testimony?"⁹ Mr. Pratt emphasized that he was seeking search warrants *served on* CPD, and expressed skepticism that CPD had received many search warrants, contending that "these would be extraordinarily rare and you should be able to definitively determine: There were (1/2/3/4/5/6) search warrants in a month served on you -- then produce them if there were."¹⁰ Mr. Pratt

⁵Letter from A. Marlan, Freedom of Information Act Officer, Chicago Police Department, Office of Legal Affairs, Unit 114, to Gregory Pratt, Chicago Tribune (September 25, 2020), at [2].

⁶Letter from A. Marlan, Freedom of Information Act Officer, Chicago Police Department, Office of Legal Affairs, Unit 114, to Gregory Pratt, Chicago Tribune (September 25, 2020), at [2].

⁷E-mail from Gregory Pratt, Chicago Tribune, to Chicago Police FOIA office and General Counsel O' Malley (September 28, 2020).

⁸E-mail from Gregory Pratt, Chicago Tribune, to Chicago Police FOIA office and General Counsel O' Malley (September 28, 2020).

⁹E-mail from Gregory Pratt, Chicago Tribune, to Chicago Police FOIA office and General Counsel O' Malley (September 28, 2020).

¹⁰E-mail from Gregory Pratt, Chicago Tribune, to Chicago Police FOIA office and General Counsel O' Malley (September 28, 2020).

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concluded by asking "to discuss [the FOIA request] with your law, tech and records people"¹¹ by a specified day.

On October 2, 2020, Mr. Pratt followed up with an e-mail to CPD:

I have not heard back. Are we going to discuss this?

Per the law, I'd like to better understand how CPD performed a reasonable search in this matter, as well as confer with you about how CPD keeps these records, and particularly how it tracks incoming subpoenas. I'd like to discuss it with technical and legal staff that knows what the actual processes are in a specific way. Let me know. I am trying to work with you.^{12]}

Additionally, on October 6, 2020, Mr. Pratt e-mailed CPD: "Hi, per FOIA, I am trying to work with you on this request. I haven't heard back from anybody."¹³

In an e-mail sent on October 12, 2020, Mr. Pratt submitted a Request for Review contesting CPD's failure to confer with him before denying his request as unduly burdensome.¹⁴ He alleged that "CPD not only failed to confer in good faith with me. It quite simply failed to confer at all with me, even after I repeatedly reached out."¹⁵ Mr. Pratt explained that he assumed CPD had a system for tracking incoming subpoenas and that information about the tracking system could be used to narrow his request. He cited *Sargent Shriver National Center on Poverty Law, Inc. v. Board of Education of City of Chicago*, 2018 IL App (1st) 171846, ¶34, 122 N.E.3d 729, 737 (2018) for its guidance that "[a] plaintiff seeking to test a claim of undue burden under section 3(g) will—if the public body has engaged in the **good-faith dialogue required** by that section—have more information at its disposal." (Emphasis added.)

¹¹E-mail from Gregory Pratt, Chicago Tribune, to Chicago Police FOIA office and General Counsel O' Malley (September 28, 2020).

¹²E-mail from Gregory Pratt, Chicago Tribune, to Chicago Police FOIA office and General Counsel O' Malley (October 2, 2020).

¹³E-mail from Gregory Pratt, Chicago Tribune, to CPDfoia@chicagopolice.org and dana.omalley@chicagopolice.org (October 6, 2020).

¹⁴E-mail from Gregory Pratt, Chicago Tribune, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (October 12, 2020).

¹⁵E-mail from Gregory Pratt, Chicago Tribune, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (October 12, 2020).

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On October 14, 2020, the Public Access Bureau sent a copy of the Request for Review to CPD. The Public Access Bureau also sent CPD a letter asking for "a detailed written answer to the allegation that CPD improperly refused to confer with Mr. Pratt about narrowing his request under section 3(g) of FOIA."¹⁶ Additionally, the letter asked CPD to explain the legal and factual bases for denying Mr. Pratt's request as unduly burdensome, addressing how it tracks subpoenas and search warrants it receives and how it searched for them.¹⁷

In the interim, on October 20, 2020, CPD's General Counsel, Ms. Dana O'Malley, responded to Mr. Pratt's October 2, 2020, e-mail as follows:

I understand from discussions with the FOIA unit that they have worked with you in the past to fill FOIA requests such as this one. As a preliminary matter, it is important to note that FOIA does not require answering questions in the manner you pose below. FOIA generally requires information to be provided unless there is an exception asserted by the Agency. That said, the Department strives to constantly improve its transparency, so I have worked with the FOIA and Records units to obtain information responsive to your email below. First, you inquired about both subpoenas and search warrants which are maintained entirely separately. The 3,344 number you cite below is a response of the number of subpoenas. Therefore, I worked to obtain information related to subpoenas. The Subpoena unit receives subpoenas and utilizes GovQA to enter and maintain that information. It was from this database that the number 3,344 was pulled. **This database maintains whether a subpoena is issued in state or federal court** and the Subpoena unit can further differentiate between criminal and civil subpoenas. As a final note, grand jury records including subpoenas issued by the grand jury are exempt under 7(1)(a). (Emphasis added.)

¹⁶Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Dana O'Malley, General Counsel, Chicago Police Department (October 14, 2020), at [2].

¹⁷Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Dana O'Malley, General Counsel, Chicago Police Department (October 14, 2020), at [2].

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I hope you find this information helpful in your **future FOIA requests**. (Emphasis added.)^[18]

In reply, Mr. Pratt copied this office and notified Ms. O'Malley about this Request for Review in case she was not aware.¹⁹ Mr. Pratt argued that although FOIA generally does not require a public body to answer questions, section 3(g) does require a public body to work with a requester on narrowing a request before denying it as unduly burdensome. He also noted that CPD's FOIA unit had not responded to his questions aimed at narrowing previous FOIA requests that CPD had treated as unduly burdensome. Additionally, Mr. Pratt stated that he appreciated the information about GovQA, but sought information about the fields in that records management system to "help me, and you, negotiate this down to manageable levels further."²⁰ Mr. Pratt also noted that Ms. O'Malley did not respond to his question about the search warrants, stating that he was "skeptical that, on any given month, the CPD receives many search warrants, if any **at all**." (Emphasis in original.)²¹ Furthermore, Mr. Pratt disputed CPD's new claim about grand jury subpoenas being exempt, citing *Better Government Ass'n v. Blagojevich*, 386 Ill. App. 3d 808 (4th Dist. 2008).

On that same date, an Assistant Attorney General (AAG) in the Public Access Bureau e-mailed the parties, noting a potential discrepancy in CPD's stated positions.²² CPD's initial response to Mr. Pratt's FOIA request asserted that CPD "does not have any automated mechanism by which to track, query, or limit a search of subpoena and or search warrant records categorically" and therefore would have to review all subpoenas from August to determine which are responsive (i.e. federal).²³ Ms. O'Malley, however, indicated in her e-mail that the subpoena database could distinguish Federal subpoenas. Nonetheless, it does not appear that Ms. O'Malley attempted to identify the number of responsive (Federal) subpoenas, as she again cited 3,344 as the number of subpoenas received in August.

¹⁸E-mail from Dana O' Malley, General Counsel, Chicago Police Department, Office of the Superintendent, to [Gregory] Pratt (October 20, 2020).

¹⁹E-mail from Gregory Pratt, Chicago Tribune, to Dana [O'Malley] (October 21, 2020).

²⁰E-mail from Gregory Pratt, Chicago Tribune, to Dana [O'Malley] (October 21, 2020).

²¹E-mail from Gregory Pratt, Chicago Tribune, to [Dana O'Malley] (October 21, 2020).

²²E-mail from Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Gregory Royal Pratt and Dana O'Malley (October 21, 2020).

²³Letter from A. Marlan, Freedom of Information Act Officer, Chicago Police Department, Office of Legal Affairs, Unit 114, to Gregory Pratt, Chicago Tribune (September 25, 2020), at [1-2].

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Later still on October 21, 2020, Ms. O'Malley responded to Mr. Pratt by stating:

I was not aware that you were using my correspondence for a pending legal proceeding. Given that I want to clarify that my email was not in response to the PAC appeal but rather was my response to what I understood to be a media inquiry. Going forward any responses to the issues before the PAC will come from [CPD's Office of Legal Affairs] to the PAC.^[24]

Mr. Pratt replied: "Whether through the PAC as in your law folks communicate with the PAC and then me or we all talk, I'm hopeful we can work together here. I think there's a reasonable discussion to be had, and I've been trying to have it since September 28."²⁵

On November 30, 2020, CPD provided a written answer to this office's letter of inquiry.²⁶ Later on that same date, this office forwarded a copy of CPD's answer to Mr. Pratt and notified him of his opportunity to reply.²⁷ On December 2, 2020, this office extended the time within which to issue a binding opinion by 30 business days, to January 27, 2021, pursuant to section 9.5(f) of FOIA.²⁸ On December 4, 2020, Mr. Pratt submitted a reply to CPD's response to this office.²⁹

²⁴E-mail from Dana O' Malley, General Counsel, Chicago Police Department, Office of the Superintendent, to [Gregory] Pratt (October 21, 2020).

²⁵E-mail from Gregory Pratt, Chicago Tribune, to Dana [O'Malley] (October 21, 2020).

²⁶Letter from Vaughn C. Ganiyu, Associate Staff Attorney, Legal Affairs Division – Unit 114, Chicago Police Department, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (November 30, 2020).

²⁷Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Gregory Pratt, *Chicago Tribune* (November 30, 2020).

²⁸Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Gregory Pratt, *Chicago Tribune*, and Dana O'Malley, General Counsel, Chicago Police Department (December 2, 2020).

²⁹E-mail from Gregory Pratt, Chicago Tribune, to Public Access [Bureau, Office of the Attorney General] (December 4, 2020).

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ANALYSIS

Section 1 of FOIA (5 ILCS 140/1 (West 2018)) declares that "it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government." Under FOIA, "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2018).

Section 3(g) of FOIA 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.)

The emphasized language imposes "a specific requirement for the party seeking to exempt disclosure as unduly burdensome[.]" *Martinez v. Cook County State's Attorney's Office*, 2018 IL App (1st) 163153, ¶20, 103 N.E.3d 351, 356 (2018) (noting that extending an opportunity to confer after denying a request is procedurally improper).

In its answer to this office, CPD argued that "it properly denied Mr. Pratt's request as unduly burdensome pursuant to Section 3(g) and fulfilled its obligations to notify Mr. Pratt of an opportunity to modify or narrow his request pursuant to Section 3(g)."³⁰ Addressing the heart of this matter, CPD asserted:

³⁰Letter from Vaughn C. Ganiyu, Associate Staff Attorney, Legal Affairs Division – Unit 114, Chicago Police Department, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (November 30, 2020), at [2].

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Importantly, CPD informed Mr. Pratt of an opportunity to modify his present request in an attempt to make it more manageable. CPD, in its first response letter, proposed to Mr. Pratt to submit a revised FOIA request to CPD that narrows and specifies the records he initially requested. The subsequent communications CPD received from Mr. Pratt focused on questions directed at CPD concerning the tracking and records management processes utilized by CPD for tracking different types of subpoenas. Mr. Pratt also asked CPD to describe the specific mechanisms utilized by CPD to identify subpoenas it had received. CPD contends that these subsequent communications were not specific requests by the requester to narrow his initial FOIA request, instead they were communications that directed specific inquiries and questions to CPD regarding the Department's subpoena management process. "FOIA does not compel the agency to provide answers to questions posed by the inquirer." *Kenyon v. Garrels*, 184 Ill. App. 3d 28, 32 (Ill. App. Ct. 1989). These questions posed by Mr. Pratt in his subsequent communications did not constitute a proper FOIA request aimed and [sic] narrowing records, but were instead general inquiry questions concerning CPD's subpoena management process. As such, CPD was not obligated under FOIA to answer such general inquiry questions under the rationale set forth in *Kenyon*.^[31]

Thus, CPD argued that once it notified Mr. Pratt that it considered his request to be unduly burdensome, Mr. Pratt's only option under section 3(g) was to submit a narrowed version of the request. CPD did not expressly address the meaning of the language "an opportunity to confer."

In his reply, Mr. Pratt reiterated that CPD did nothing to confer with him when he inquired about how CPD tracks subpoenas in order to try to narrow his request. Mr. Pratt disputed CPD's claim that asking questions about how records are kept in an attempt to narrow a request under section 3(g) qualifies as a new, improper FOIA request. Mr. Pratt argued that CPD effectively claims it can respond to a FOIA request as follows:

1) What you're asking us to do is hard. Here's a big number to show you that it's hard.

³¹Letter from Vaughn C. Ganiyu, Associate Staff Attorney, Legal Affairs Division – Unit 114, Chicago Police Department, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (November 30, 2020), at [3].

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- 2) You figure out, on your own, how to narrow your request, without help from us.
- 3) Otherwise, go away.
- 4) Wait? You want us to actually explain how we keep the records you want, so that you can therefore narrow your request? Nope. That's a *new* FOIA, and improper one at that.
- 5) See #3. (Emphasis in original.)^[32]

Mr. Pratt asked this office to rule on CPD's failure to confer and order it to confer, among other things.

In construing a statutory provision such as section 3(g) of FOIA, the primary objective is to ascertain and give effect to the intent of the General Assembly. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). "[T]he surest and most reliable indicator of" legislative intent "is the statutory language itself, given its plain and ordinary meaning." *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, ¶24, 77 N.E.3d 625, 630 (2017). A reviewing body is "not at liberty to depart from the plain language and meaning of a statute by reading into it exceptions, limitations or conditions that the legislature did not express." *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n*, 2015 IL 117418, ¶21, 30 N.E.3d 288, 294 (2015).

As Mr. Pratt noted, the Illinois Appellate Court in *Sargent Shriver* advised that section 3(g) requires a public body to engage in a "good-faith dialogue" when the requester seeks "an opportunity to confer" about narrowing a request to manageable proportions. *Sargent Shriver*, 2018 IL App (1st) 171846, ¶34, 122 N.E.3d at 737. "Opportunity" is defined as "[a] chance for progress or advancement[.]" The American Heritage Dictionary 872 (2d coll. ed. 1982). Black's Law Dictionary defines "confer" as "[t]o hold a conference; to consult with one another." Black's Law Dictionary (11th ed. 2019), available at Westlaw BLACKS. Thus, the plain and ordinary meaning of "an opportunity to confer" is a chance to engage in dialogue. There can be no chance to engage in dialogue with a public body when a requester repeatedly requests the opportunity to do so but does not receive a response from the public body. Section 3(g) unambiguously provides that a prerequisite for denying a request as unduly burdensome is to offer to communicate with the requester about possibilities for reducing the scope of the request to manageable proportions. That provision would be meaningless if a public body could refuse to follow through on an offer to confer when the requester asks to do so. *People v. Jones*, 223 Ill. 2d 569, 581 (2006) (statutes must be construed "as a whole, so that no part is rendered meaningless or superfluous."). Although FOIA does not specify the extent of dialogue required

³²E-mail from Gregory Pratt, Chicago Tribune, to Public Access [Bureau, Office of the Attorney General] (December 4, 2020).

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between the parties, refusal to participate in any exchange with a requester clearly does not fulfill that condition.

In this matter, CPD did not fulfill its obligation to confer with Mr. Pratt before denying his request as unduly burdensome. CPD's response to Mr. Pratt's request omitted any mention of an opportunity to confer, instead merely inviting him to submit a new, narrowed request. Mr. Pratt's repeated requests to confer went unanswered. In its answer to this office, CPD defended this practice, disregarding the plain language of section 3(g). If the General Assembly had intended to authorize a public body to deny a FOIA request as unduly burdensome without first providing a meaningful opportunity for communication with a requester to attempt to reduce the request to manageable proportions, it would not have imposed the requirement of first providing "an opportunity to confer with" the public body. Ms. O'Malley's October 20, 2020, e-mail to Mr. Pratt clearly was not the sort of communication contemplated by section 3(g), as Ms. O'Malley made clear that CPD had already denied Mr. Pratt's request as unduly burdensome and was treating his communications as media inquiries pertaining to any future FOIA requests.

Moreover, *Kenyon v. Garrels* offers no support for CPD's argument that it was not required to engage with Mr. Pratt after he requested to confer about how to narrow his request. That case did not involve section 3(g) of FOIA; it concerned a purported FOIA request that posed questions concerning rates of payment to a public body's attorney. *Kenyon*, 184 Ill. App. 3d at 32. Because FOIA applies to requests to inspect or obtain copies of public records, the requester's "general inquiry questions" were "not in proper form[]" under FOIA, and therefore the public body was not required to respond. *Kenyon*, 184 Ill. App. 3d at 32-33. Mr. Pratt's September 28, 2020, e-mail to CPD was unquestionably a request to confer under section 3(g) rather than a new FOIA request that improperly posed questions. A conferral process inherently involves an exchange of information which might narrow a request to manageable proportions. Because CPD failed to confer or engage with Mr. Pratt about narrowing his request, CPD's denial of his request as unduly burdensome violated FOIA.

While CPD's failure to confer with Mr. Pratt is dispositive of its improper denial, this office will briefly address CPD's substantive rationale. In its answer to this office, CPD maintained that it "would have to manually retrieve and individually review 3,344 subpoenas" from August 2020 in order to determine whether each was responsive to Mr. Pratt's request.³³ Yet, as in Ms. O'Malley's October 20, 2020, e-mail to Mr. Pratt, CPD acknowledged that one of

³³Letter from Vaughn C. Ganiyu, Associate Staff Attorney, Legal Affairs Division -- Unit 114, Chicago Police Department, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (November 30, 2020), at [1].

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the fields in the GovQA recordkeeping system is "federal."³⁴ Although the AAG's October 21, 2020, response to Ms. O'Malley's e-mail expressly questioned how to reconcile CPD's assertion that it would have to review all 3,344 subpoenas with its acknowledgement that it could limit a search to Federal subpoenas, CPD provided no clarification. In his reply, Mr. Pratt correctly noted that CPD did not clearly specify how many Federal subpoenas it received during August 2020. Mr. Pratt argued that, regardless of any automated search processes, CPD's FOIA unit could consult with the CPD personnel who are responsible for overseeing compliance with Federal subpoenas to identify any potentially responsive subpoenas. It is at least plausible that, through consultation with the relevant personnel, CPD's FOIA unit could locate any responsive subpoenas, and that there could be relatively few of those records. CPD did not provide information indicating that such a consultation would likely be unavailing, nor did it prove that such an effort would pose an undue burden.

CPD also did not prove that all responsive grand jury subpoenas are exempt from disclosure under section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019). That exemption applies to "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." In connection with section 7(1)(a), CPD cited section 112-6(b) of the Code of Criminal Procedure of 1963 (the Criminal Procedures) (725 ILCS 5/112-6(b) (West 2018)), which specifically prohibits a State's Attorney from disclosing matters occurring before a grand jury of the State of Illinois.³⁵ This provision is not applicable to police departments and it does not encompass Federal grand jury subpoenas. Further, as Mr. Pratt noted, the court in *Better Government Ass'n v. Blagojevich* held that Federal grand jury subpoenas served on then-Governor Rod Blagojevich in his official capacity were not exempt from disclosure under section 7(1)(a) based on the Federal analogue of section 112-6 of the Criminal Code: Federal

³⁴Letter from Vaughn C. Ganiyu, Associate Staff Attorney, Legal Affairs Division – Unit 114, Chicago Police Department, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (November 30, 2020), at [3].

³⁵Section 112-6(b) provides that "[m]atters other than the deliberations and vote of any grand juror shall not be disclosed by the State's Attorney," with limited exceptions.

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Rule of Criminal Procedure 6(e)(2).³⁶ *Blagojevich*, 386 Ill. App. 3d at 818. Because that rule, by its plain language, does not specifically prohibit a recipient from disclosing the receipt of a grand jury subpoena, the court held that section 7(1)(a) of FOIA was inapplicable. *Blagojevich*, 386 Ill. App. 3d at 815-16.

CPD's citation of *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶64, 129 N.E.3d 1181, 1196 (2019) is unavailing as well. The Court did not conclude that all grand jury subpoenas received by a public body are specifically prohibited from disclosure under Federal Rule of Criminal Procedure 6(e)(2) or section 112-6 of the Criminal Procedures. Rather, the subpoenas were exempt from disclosure because the criminal court had placed them under a protective order. *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶7, 129 N.E.3d at 1185. Following the United States Supreme Court's analysis in *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 100 S. Ct. 1194 (1980), the Illinois Supreme Court concluded "that a lawful court order takes precedence over the disclosure requirements of FOIA." *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶66, 129 N.E.3d at 1196. CPD has not demonstrated that a court order prohibits disclosure of any responsive Federal grand jury subpoenas.

³⁶That rule states:

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

³⁷Letter from Vaughn C. Ganiyu, Associate Staff Attorney, Legal Affairs Division – Unit 114, Chicago Police Department, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (November 30, 2020), at [4].

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CPD's answer to this office concerning the portion of the request seeking search warrants further illustrates that CPD improperly denied the request as unduly burdensome. CPD stated that, pursuant to this Request for Review, its FOIA unit contacted its Legal Affairs and Records Divisions. Personnel in those divisions "with knowledge of search warrant records were contacted and requested to search all of their files within their custody and control to determine if any potentially responsive records regarding search warrants served on CPD could be located."³⁷ According to CPD, both divisions returned negative reports, so there are no search warrants responsive to Mr. Pratt's request. In reply, Mr. Pratt noted that CPD has now performed the search that it had previously claimed was too burdensome to perform. He argued:

The fact is, a search warrant being served on the department or any of its officials is going to be rare – and maybe even unheard of – for the feds to execute a search warrant **on** CPD. It's almost certainly rarer than them serving a subpoena on CPD, which is also going to be rare. That CPD just threw its hands up on that matter in its initial FOIA response reflects the lack of seriousness and good faith with which they've handled this whole issue. (Emphasis in original.)^[38]

CPD's initial response to Mr. Pratt that it had no automated mechanism for tracking, querying, or categorically limiting a search for search warrants, even if accurate, did not demonstrate that searching for responsive search warrants posed an undue burden. Although section 3(g) of FOIA requires "specifying the reasons why [a request] would be unduly burdensome and the extent to which compliance will so burden the operations of the public body[.]" CPD set forth no facts about what the manual search would require. Moreover, CPD did not explain how much effort was required to generate its November 30, 2020, response that it possesses no responsive search warrants. There also is a substantial public interest in disclosure of search warrants, if any, that were served on CPD. CPD's denial of the request as unduly burdensome is unsupported for all of these reasons.

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:

³⁷Letter from Vaughn C. Ganiyu, Associate Staff Attorney, Legal Affairs Division – Unit 114, Chicago Police Department, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (November 30, 2020), at [4].

³⁸E-mail from Gregory Pratt, Chicago Tribune, to Public Access [Bureau, Office of the Attorney General] (December 4, 2020), at 4-5.

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1) On September 11, 2020, Mr. Gregory Pratt, on behalf of the *Chicago Tribune*, submitted a FOIA request to CPD seeking, for the month of August 2020, copies of any subpoenas received from Federal law enforcement or regulatory agencies or their agents, and any search warrants served on CPD.

2) On that same date, CPD sent a letter to Mr. Pratt extending the time for its response by five business days under section 3(e) of FOIA.

3) On September 25, 2020, CPD responded to Mr. Pratt by asserting that the request was unduly burdensome under section 3(g) of FOIA and denied the request. CPD invited Mr. Pratt to submit a new, narrower FOIA request, stating that it would be unable to provide records unless he did so.

4) On September 28, 2020, October 2, 2020, and October 6, 2020, Mr. Pratt e-mailed CPD asking to confer about narrowing his request under section 3(g) of FOIA. CPD did not respond.

5) In an e-mail sent on October 12, 2020, Mr. Pratt submitted a Request for Review contesting CPD's failure to confer with him before denying his request as unduly burdensome. The Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2018)).

6) On October 14, 2020, the Public Access Bureau sent CPD a copy of the Request for Review and a letter asking it to provide a written answer to the allegation that it improperly denied the request as unduly burdensome without first conferring with Mr. Pratt. The letter also asked CPD to explain the legal and factual bases for denying Mr. Pratt's request as unduly burdensome, addressing how it tracks subpoenas and search warrants received and how it searched for them.

7) On October 20, 2020, CPD's General Counsel e-mailed Mr. Pratt, providing information that she stated she hoped would be helpful for "future FOIA requests." Mr. Pratt replied by notifying her about this Request for Review. She responded that she was not aware of the Request for Review and instead believed she had responded to a media inquiry.

8) On November 30, 2020, this office received CPD's written answer.

9) Later on that same date, the Public Access Bureau forwarded to Mr. Pratt a copy of CPD's answer and notified him of his opportunity to reply.

10) On December 2, 2020, this office extended the time in which to issue a

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binding opinion by 30 business days pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

11) On December 4, 2020, Mr. Pratt submitted a reply to CPD's answer.

12) Section 3(g) of FOIA provides that before denying a FOIA request as unduly burdensome, "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." The plain and ordinary meaning of "an opportunity to confer" is a chance to engage in dialogue. Section 3(g) requires a public body that considers a request to be unduly burdensome to offer to confer with the requester about narrowing the scope of the request to manageable proportions, and then to follow through in good faith if the requester accepts the public body's offer.

13) CPD failed to fulfill its obligation to confer with Mr. Pratt before denying his request as unduly burdensome. CPD neither offered Mr. Pratt the opportunity to confer nor communicated with him when he asked to confer for the purpose of narrowing his request to manageable proportions.

14) CPD did not set forth facts sufficient to demonstrate that complying with Mr. Pratt's FOIA request would be unduly burdensome.

15) CPD did not prove that all responsive grand jury subpoenas are exempt from disclosure under section 7(1)(a) of FOIA. Section 7(1)(a) exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." CPD did not demonstrate that any Federal or State law, rule, or regulation specifically prohibits disclosure of any responsive grand jury subpoenas.

Therefore, it is the opinion of the Attorney General that CPD violated the requirements of FOIA by denying Mr. Pratt's Freedom of Information Act request as unduly burdensome without first offering him the opportunity to confer about reducing his request to manageable proportions and without granting his request to confer for that purpose. It is also the opinion of the Attorney General that CPD proved neither that the request posed an undue burden nor that any responsive subpoenas are specifically prohibited from disclosure for purposes of section 7(1)(a) of FOIA. Accordingly, CPD is hereby directed to take immediate and appropriate action to comply with this opinion by providing Mr. Pratt with copies of any subpoenas responsive to his September 11, 2020, FOIA request.

CPD may properly redact information that meets the plain language of the definition of "private information" pursuant to section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b))

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(West 2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019).³⁹ If CPD chooses to redact any information from the copies of the records it provides to Mr. Pratt, it must include a written notice of the denial that identifies the basis for each redaction and which otherwise complies with the requirements of section 9(a) of FOIA (5 ILCS 140/9(a) (West 2018)). CPD is further directed to comply with section 3(g) of FOIA by extending a requester an opportunity to confer with it in an attempt to reduce a request to manageable proportions, and by engaging in appropriate good-faith dialogue with the requester, prior to denying any FOIA request as unduly burdensome.

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 2018). 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 Mr. Gregory Pratt as defendants. *See* 5 ILCS 140/11.5 (West 2018).

Very truly yours,

KWAME RAOUL
ATTORNEY GENERAL

By:


Brent D. Stratton
Chief Deputy Attorney General

³⁹Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2018)) provides:

"Private information" means unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.

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 21-001) upon:

Mr. Gregory Pratt
Chicago Tribune
160 North Stetson Avenue
Chicago, Illinois 60601
gpratt@chicagotribune.com

Ms. Dana O'Malley
General Counsel
Chicago Police Department
3510 South Michigan Avenue
Chicago, Illinois 60653-1020
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by causing a true copy thereof to be sent electronically 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 January 26, 2021.


SARAH L. PRATT
Public Access Counselor

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