



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

December 31, 2019

PUBLIC ACCESS OPINION 19-013
(Request for Review 2019 PAC 59799)

FREEDOM OF INFORMATION ACT:
Obligation to Preserve Records
After Receiving a FOIA Request

Ms. Ginger Noel
12568 Staunton Bunker Hill Rd
Bunker Hill, Illinois 62014

The Honorable Rhonda K. Whitworth
City Clerk and FOIA Officer
City of Bunker Hill
801 South Franklin Street
Bunker Hill, Illinois 62014

Dear Ms. Noel and Ms. Whitworth:

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 2018)). For the reasons discussed below, this office concludes that the City of Bunker Hill (City) violated FOIA by failing to provide the requested record in response to a FOIA request submitted by Ms. Ginger Noel.

BACKGROUND

On September 12, 2019, Ms. Noel submitted a FOIA request to the City seeking "taped minutes from [the] Committee of [the] Whole meeting on" September 11, 2019.¹ On September 19, 2019, the City returned the Freedom of Information Request Form to Ms. Noel with the following note handwritten in the margin: "Attorney Verticchio said on 09/18/2019 that

¹Freedom of Information Request Form submitted by Ginger Noel to The City of Bunker Hill (September 12, 2019).

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meeting 09/11/2019 wasn't a meeting bc no quorum. Its [sic] all VOID. [N]o need to fulfill this request."² On September 20, 2019, Ms. Noel submitted a Request for Review to the Public Access Bureau contesting the denial of her FOIA request.³

On October 4, 2019, an Assistant Attorney General (AAG) in the Public Access Bureau spoke by telephone with Ms. Rhonda K. Whitworth, the City Clerk and FOIA Officer for the City. During that conversation, Ms. Whitworth informed the AAG that the City no longer had a copy of the requested recording because it was deleted after receiving Ms. Noel's FOIA request.⁴ On October 9, 2019, the Public Access Bureau sent a letter to the City asking whether the City currently possessed or maintained the requested recording. If it did not, the City was asked whether it possessed or maintained the requested recording at the time it received Ms. Noel's FOIA request, and to explain whether the recording was deleted after the City received the FOIA request.^{5,6} A copy of the October 9, 2019, letter to the City Clerk was also sent to Ms. Noel.

On October 10, 2019, Ms. Noel sent an e-mail informing this office that:

I submitted [a FOIA] request on 9/12, I was given a handwritten copy of the minutes from that meeting. I submitted a FOIA for the tape, and 5 business days later it was denied, stating the city attorney said their [sic] was no meeting so no need to fill the request. I was not informed that the tape was erased at that time I was given the denial. The meeting was posted as a Committee of the Whole meeting, only 3 members were present and the City

²Response from the City of Bunker Hill written on the City of Bunker Hill Freedom of Information Request Form submitted by Ginger Noel (September 19, 2019).

³E-mail from Ginger Noel to Public Access [Bureau, Office of the Attorney General] (September 20, 2019). This office notes that the propriety of the September 11, 2019, meeting under the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2018)) is not at issue here and is not addressed in this opinion.

⁴Telephone conversation between Rhonda K. Whitworth, City Clerk and FOIA Officer, and Edie Steinberg, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (October 4, 2019).

⁵Letter from Edie Steinberg, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Rhonda K. Whitworth, City Clerk and FOIA Officer, City of Bunker Hill (October 9, 2019).

⁶The Public Access Bureau inadvertently failed to attach a copy of Ms. Noel's Request for Review when it sent the City the October 9, 2019, letter of inquiry; Ms. Noel's Request for Review was forwarded to the City on October 30, 2019, see footnote 8.

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Clerk. They proceeded to have the meeting which was recorded and minutes were taken. * * * How can the City Clerk erase a recording of minutes of a meeting that was in fact held[?] * * * I believe this is a direct violation of the FOIA Act, in that my right to know was not granted nor was any part of the [A]ct noted in the denial, giving reason for the denial.^[7]

On October 11, 2019, the City Clerk responded to this office on behalf of the City. The response confirmed that: (1) on September 12, 2019, the City received Ms. Noel's FOIA request; (2) on September 18, 2019, the City Attorney stated during open session of a City Council meeting "that the Committee of the Whole Meeting on September 11, 2019 was not a meeting because there was not a quorum[;]" (3) after the September 18, 2019, City Council meeting adjourned, the City Clerk asked the City Attorney if Ms. Noel's FOIA request should be completed, and he responded "no, it's all NULL and VOID, no need to fulfill the FOIA request"; (4) the City Clerk asked the City Attorney if she could delete her recording related to the September 11, 2019, gathering that was scheduled to be a meeting of the Committee of the Whole and shred her notes related to that gathering, and "he replied yes"; (5) on September 19, 2019, the City Clerk responded to Ms. Noel (she believed by e-mail although she could not locate a copy of the e-mail in the City's files);⁸ and (6) on September 19, 2019, the City Clerk deleted the requested recording and shredded her notes related thereto.⁹

On October 15, 2019, the Public Access Bureau forwarded a copy of the City's response to Ms. Noel.¹⁰ Ms. Noel did not provide a written reply. On November 1, 2019, at this office's request, Ms. Noel provided copies of the eight pages of handwritten notes of the gathering that she received from the City Clerk and reiterated her concern that the City Clerk,

⁷E-mail from Ginger [Noel] to [Edie] Steinberg (October 10, 2019).

⁸On October 30, 2019, an Assistant Attorney General (AAG) in the Public Access Bureau e-mailed a copy of the Request for Review to the City Clerk and asked her if the note handwritten in the margin of Ms. Noel's FOIA request form was the City's response to that FOIA request. E-mail from Edie Steinberg, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to [Rhonda] Whitworth (October 30, 2019). That same day, in an e-mail to the AAG, the City Clerk confirmed that the City's response, written by her, was noted in the margin of Ms. Noel's FOIA request. E-mail from Rhonda Whitworth to Edie Steinberg (October 30, 2019).

⁹Letter from Rhonda K. Whitworth, City Clerk, City of Bunker Hill, to Edie Steinberg, Assistant Attorney General, Public Access Bureau (October 11, 2019).

¹⁰Letter from Edie Steinberg, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Ginger Noel (October 15, 2019).

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who is also the City's FOIA officer, destroyed the recording.¹¹ On November 14, 2019, this office properly extended the time within which to issue a binding opinion by 30 business days, to January 2, 2020.¹²

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 2018). Under section 1.2 of FOIA (5 ILCS 140/1.2 (West 2018)), "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." "The 'purpose of the FOIA is to open governmental records to the light of public scrutiny.'" *Southern Illinoisan v. Illinois Dep't of Public Health*, 218 Ill. 2d 390, 415 (2006) (quoting *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 378 (1989)).

The issue raised by Ms. Noel's Request for Review is whether the City violated FOIA by failing to provide a copy of the requested recording of the City's September 11, 2019, gathering that was scheduled to be a meeting of the Committee of the Whole and which was in the City's possession at the time it received Ms. Noel's FOIA request. To resolve that issue, this office must determine whether the recording was a public record subject to the requirements of FOIA and, if so, whether the City was obligated to furnish and preserve the recording after receiving Ms. Noel's FOIA request on September 12, 2019.

The Recording was a Public Record

Section 2(c) of FOIA (5 ILCS 140/2(c) (West 2018)) defines a "public record" as:

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.)

¹¹E-mail from Ginger Noel to Edie [Steinberg] November 1, 2019).

¹²Letter from Edie Steinberg, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Ginger Noel and The Honorable Rhonda K. Whitworth, City Clerk and FOIA Officer, City of Bunker Hill (November 14, 2019).

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To qualify as a "public record" under the plain language of section 2(c), the record must: (1) "pertain[] to the transaction of public business"; and (2) must have been, among other things, "possessed by a public body." *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶30, 992 N.E.2d 629, 636 (2013).

To meet the definitional requirement of "pertaining to the transaction of public business," a record must pertain to business or community interests rather than private affairs. *City of Champaign*, 2013 IL App (4th) 120662, ¶31, 992 N.E.2d at 637. It is undisputed that three members of the City Council gathered at the municipal building on September 11, 2019, to discuss time sheets.¹³ The City Clerk's handwritten notes documenting the gathering establish that the discussion engaged in by the City Council members concerned City business, and the City Clerk has confirmed for this office that public business was discussed during the gathering.¹⁴ It is also undisputed that the City Clerk recorded the discussions at the gathering. The City Clerk's recording of a discussion of public business by City Council members unequivocally pertains to the transaction of public business; thus, the recording was a public record regardless of whether a quorum of City Council members was or should have been present during the gathering. The recording of the gathering was in the City's possession when Ms. Noel submitted her FOIA request. Because the recording pertained to the transaction of public business and was in the possession of the City when it received the FOIA request, the recording of the gathering was a public record subject to the requirements of FOIA.

The Duty to Preserve and Furnish Records

Section 1 of FOIA (5 ILCS 140/1 (West 2018)) provides that "[t]he General Assembly hereby 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." Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2018), as amended by Public Act 101-081, effective July 12, 2019) 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." (Emphasis added.) Additionally, section 3(b) of FOIA (5 ILCS 140/3(b) (West 2018), as amended by Public Act 101-081, effective July 12, 2019) provides "[s]ubject to the fee provisions of Section 6 of this Act, each public body **shall promptly provide, to any person who submits a request, a copy of any public record required to be disclosed by subsection (a) of this Section** and shall certify such copy if so requested." (Emphasis added.)

¹³City Council of the City of Bunker Hill, Committee of the Whole Meeting, Agenda Item 4, Time Sheet Discussion (September 11, 2019).

¹⁴E-mail correspondence between Rhonda Whitworth and Edie Steinberg (October 30, 2019).

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"The primary goal in construing a statute is to determine and effectuate the intent of the legislature." *People v. Amigon*, 239 Ill. 2d 71, 84 (2010). In determining legislative intent, clear and unambiguous statutory language must be given effect as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). Additionally, all provisions of a statutory enactment must be viewed as a whole, in light of the other relevant provisions of the statute. *Southern Illinoisan*, 218 Ill. 2d at 415. "In construing a statute, we presume that the legislature, in its enactment of legislation, did not intend absurdity, inconvenience or injustice." *Southern Illinoisan*, 218 Ill. 2d at 415.

The language of section 3(a) is clear and unambiguous: it is the duty of a public body to provide a requester who seeks copies of public records with copies of any responsive records that are not exempt from disclosure or published on its website.¹⁵ Although FOIA does not contain express requirements detailing a public body's duty to preserve records either before or after receiving a FOIA request,¹⁶ construing FOIA to permit destruction of records to avoid complying with a request would lead to an unjust and absurd result -- defeating FOIA's purpose of opening governmental records to the light of public scrutiny. No provision of FOIA authorizes a public body to circumvent the disclosure requirements of section 3(a) by intentionally disposing of the requested records. If a public body wishes to deny a request for a public record in its possession, it must issue a proper notice of denial in accordance with section 9(a) of FOIA (5 ILCS 140/9(a) (West 2018)).¹⁷

¹⁵Subsection 8.5(a) of FOIA (5 ILCS 140/8.5(a) (West 2018)) provides that "a public body is not required to copy a public record that is published on the public body's website."

¹⁶The Local Records Act (50 ILCS 205/1 *et seq.* (West 2018)) provides requirements for recordkeeping activities of local governments. Section 7 of the Local Records Act (50 ILCS 205/7 (West 2018)) provides "[e]xcept as otherwise provided by law, no public record shall be disposed of by any officer or agency unless the written approval of the appropriate Local Records Commission is first obtained." The propriety of the disposal of the requested record will not be addressed in this binding opinion because the authority of the Public Access Counselor is limited to reviewing alleged violations of FOIA and OMA.

¹⁷Section 9(a) of FOIA provides:

Each public body denying a request for public records shall notify the requester in writing of the decision to deny the request, the reasons for the denial, including a detailed factual basis for the application of any exemption claimed, and the names and titles or positions of each person responsible for the denial. Each notice of denial by a public body shall also inform such person of the right to review by the Public Access Counselor and provide the address and phone number for the Public Access Counselor. Each notice of denial shall inform such person of his right to judicial review under Section 11 of this Act.

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This interpretation is in accord with the public policy in Illinois against improperly destroying government records that are required to be retained for the benefit of the public. *See City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7*, 2019 IL App (1st) 172907, ¶¶ 27-34, 126 N.E.3d 662, 668-670 (2019), *appeal allowed*, No. 124831 (Ill. September 25, 2019) (affirming the circuit court's vacation of an arbitration award that ordered the City of Chicago to destroy records of alleged police misconduct, because "[t]he statutory framework the General Assembly constructed in the Local [Records] Act, the State [Records] Act,^[18] and FOIA establishes a well-defined public policy favoring the proper retention of important public records for access by the public.").

In addition, decisions by courts in other jurisdictions have recognized that a public body has a duty to preserve records for which it has received a FOIA request. For example, in *Walloon Lake Water System, Inc. v. Melrose Township*, 163 Mich. App. 726, 732, 415 N.W.2d 292, 295 (Mich. Ct. App. 1987), the Michigan Court of Appeals held that the Michigan FOIA¹⁹ imposes a "duty to provide access" to those public records that have been created and that this obligation "inherently includes the duty to preserve and maintain such records until access has been provided or a court executes an order finding the record to be exempt from disclosure." In that case, the plaintiff submitted a request to a township for a copy of a letter but, instead of furnishing the letter or providing a written explanation for denying that request, the township supervisor "merely relinquished possession of the document, thereby defeating the purposes of the FOIA." *Walloon Lake Water System*, 163 Mich. App. at 732-33, 415 N.W.2d at 295-96. The court observed that "[t]he Legislature could not have intended for a public body which seeks to prevent disclosure to take justice into its own hands in such a manner." *Walloon Lake Water System*, 163 Mich. App. at 733, 415 N.W.2d at 296; *see also Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 34 F. Supp. 2d 28, 44-46 (D.D.C. 1998) (ordering supervised discovery aimed at "identifying instances of unlawful destruction and removal of documents by" agency after receiving a FOIA request); *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) ("If the agency is no longer in possession of the document, **for a reason that is not itself suspect**, then the agency is not improperly withholding that document." (Emphasis added.)); *Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) ("an agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act.").

Accordingly, this office concludes that the City violated section 3(a) of FOIA by failing to provide the requested recording of the gathering that was scheduled to be a meeting of the City's Committee of the Whole, after receiving Ms. Noel's request for that record. Further,

¹⁸5 ILCS 160/1 *et seq.* (West 2018).

¹⁹M.C.L. §15.231 *et seq.* (West 1984).

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the City violated section 9(a) of FOIA by failing to provide a response to Ms. Noel's request that met the requirements of that section.

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 September 12, 2019, Ms. Ginger Noel submitted a FOIA request to the City of Bunker Hill seeking a copy of the taped minutes from the City's September 11, 2019, Committee of the Whole gathering.

2) On September 12, 2019, the City received Ms. Noel's FOIA request. At the time it received Ms. Noel's FOIA request, the City possessed the requested recording.

3) On September 19, 2019, upon the advice of counsel, the City deleted the recording, thereby denying Ms. Noel's FOIA request.

4) On September 20, 2019, Ms. Noel submitted a Request for Review and asked the Public Access Bureau to review the City's denial. 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)).

5) On October 9, 2019, the Public Access Bureau sent a letter to the City asking whether the City currently possessed or maintained the requested recording, and, if not, to explain whether the City possessed or maintained the requested recording at the time it received the FOIA request.

6) On October 11, 2019, this office received the City's written answer, stating that it received Ms. Noel's FOIA request on September 12, 2019, and on September 19, 2019, it responded to her FOIA request. The written answer also stated that the City deleted the recording on September 19, 2019.

7) On October 15, 2019, the Public Access Bureau forwarded a copy of the City's written answer to Ms. Noel. Ms. Noel did not provide a written reply.

8) On November 14, 2019, this office properly extended the time within which to issue a binding opinion by 30 business days, to January 2, 2020. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

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9) The requirements of FOIA apply to "public records," which section 2(c) of FOIA defines to include all records, including recordings and other documentary materials in the possession of a public body, which pertain to the transaction of public business.

10) Because the City possessed the recording of the September 11, 2019, gathering that was scheduled to be a Committee of the Whole meeting at the time it received Ms. Noel's request and because the recording pertains to the transaction of public business, the recording was a public record subject to the requirements of FOIA.

11) Section 3(a) of FOIA 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."

12) No provision of FOIA authorizes a public body to destroy responsive records after receiving a FOIA request.

13) If a public body is in possession of responsive public records at the time it receives a FOIA request, section 3(a) of FOIA requires the public body to either provide those records to the requester or issue a proper denial in accordance with section 9(a) of FOIA.

Therefore, it is the opinion of the Attorney General that the City has: (1) violated section 9(a) of FOIA by replying that it was not required to fulfill Ms. Noel's September 12, 2019, FOIA request rather than by providing Ms. Noel with a copy of the recording or issuing a denial in keeping with the requirements of that section; and (2) destroying the recording of the gathering after it was requested by Ms. Noel. Accordingly, the City is hereby directed to take immediate and appropriate action to comply with this opinion by: (1) ascertaining whether it can retrieve the deleted recording, and if so, providing a copy to Ms. Noel; (2) creating protocols to ensure that in the future (a) the City appropriately complies with a request for public records by providing records or denying records in the manner set forth in the Act, and (b) the City preserves responsive records after receiving a FOIA request for those records.

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

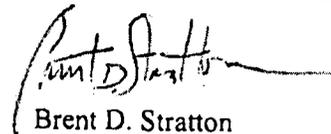
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complaint for administrative review with the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Ms. Ginger Noel as defendants. *See* 5 ILCS 140/11.5 (West 2018).

Sincerely,

KWAME RAOUL
ATTORNEY GENERAL

By:



Brent D. Stratton
Chief Deputy 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 19-013) upon:

Ms. Ginger Noel
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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 December 31, 2019.



SARAH L. PRATT
Public Access Counselor

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