



**OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS**

Lisa Madigan
ATTORNEY GENERAL

October 9, 2018

**PUBLIC ACCESS OPINION 18-013
(Request for Review 2018 PAC 54430)**

FREEDOM OF INFORMATION ACT:
Improper Denial of a Request for Records
as Unduly Burdensome

Mr. Ted Cox
Editor
One Illinois
3923 North Marshfield Avenue
Chicago, Illinois 60613

Mr. Matthew Swift
Associate General Counsel, FOIA Officer
Office of the Governor, State of Illinois
James R. Thompson Center
100 West Randolph Street, Suite 16-100
Chicago, Illinois 60601

Dear Mr. Cox and Mr. Swift:

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 Office of the Governor (Governor's Office) violated the requirements of FOIA by improperly denying Mr. Ted Cox's July 20, 2018, FOIA request as unduly burdensome.

BACKGROUND

As background, Mr. Cox, on behalf of One Illinois, submitted a FOIA request that was received by the Governor's Office on June 14, 2018, seeking copies of "[a]ny and all emails, from a state account or a personal email account, between Gov. Rauner and Diana Rauner, Lance

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 2

Trover, Richard Goldberg, personnel at the Illinois Policy Institute, or any state employee pertaining to appointments to state boards or commissions from 2015 through the present."¹ By letter dated June 21, 2018, the Governor's Office responded that it had "conducted a search and found no records responsive to your request."²

On July 12, 2018, Mr. Cox, on behalf of One Illinois, submitted a new FOIA request to the Governor's Office seeking:

1) Any emails sent by or to any of the "identified individuals" pertaining to nominations for appointment to any of the following: (a) Business Enterprise Council for Minorities, Females, and Persons with Disabilities; (b) State Board of Education; (c) Civil Service Commission; (d) Illinois Commerce Commission; (e) Illinois Criminal Justice Information Authority; (f) Illinois Finance Authority; (g) Illinois Gaming Board; (h) Human Rights Commission; (i) Illinois Labor Relations Board; (j) Illinois Latino Family Commission; (k) Illinois Community College Board; (l) Illinois Early Learning Council; (m) Board of Higher Education; and (n) any of the Board of Trustees for public universities; and

2) Any documents prepared by or in the possession of any of the identified individuals pertaining to nominations for appointment to any of [the] boards or commissions identified in (1).

For purposes of narrowing my requests, each request is limited to the period January 1, 2016 through June 30, 2018, and the term "identified individuals" means Governor Bruce Rauner, Diana Rauner, Rodger Heaton, Rich Goldberg, Lance Trover, Ed Murphy, and Ray Marchori [*sic*]. For emails received by Governor Rauner, please include any emails deemed public records that were

¹Letter from Ted Cox, Editor, One Illinois, to Christina McClermon, FOIA Officer, Office of Gov. Bruce Rauner (undated). This request was later assigned FOIA Request #218-200 by the Governor's Office.

²Letter from Christina McClermon, Associate General Counsel/Freedom of Information Act Officer, Office of Governor Bruce Rauner, State of Illinois, to Ted Cox (June 21, 2018).

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 3

sent to/received by Holly Griff on behalf of Governor Bruce Rauner in his official capacity.^[3]

By letter dated July 19, 2018, the Governor's Office responded that the July 12, 2018, request was unduly burdensome pursuant to section 3(g) of FOIA (5 ILCS 140/3(g) (West 2016)), stating that it was "overbroad and vague. Documents may be directly or indirectly related to a nomination for a board appointment without mentioning the board or potential appointee by name."⁴ The Governor's Office offered Mr. Cox the opportunity "to narrow [his] request to more manageable proportions."⁵

On July 20, 2018, Mr. Cox submitted a narrowed FOIA request to the Governor's Office stating:

I will retract my request for item (2), which requests "Any documents prepared by or in the possession of any of the identified individuals pertaining to nominations for appointment to any of [the] boards or commissions identified in (1)." Further, I will retract my request for emails pertaining to nominations for the Civil Service Commission, Illinois Gaming Board, Illinois Community College Board, and Illinois Learning Council. I am open to any suggestions you may have for further narrowing the request if you deem that necessary.^[6]

Mr. Cox also noted in his July 20, 2018, letter that he was willing to work "out a reasonable timeline for production of all of the requested public records."

³Letter from Ted Cox, Editor, One Illinois, to Christina McClemon, Freedom of Information Act Officer, Office of the Governor of Illinois (July 12, 2018), [at 1].

⁴Letter from Matthew Swift, Associate General Counsel, Freedom of Information Act Officer, Office of Governor Bruce Rauner, State of Illinois, to Ted Cox (July 19, 2018), [at 2].

⁵Letter from Matthew Swift, Associate General Counsel, Freedom of Information Act Officer, Office of Governor Bruce Rauner, State of Illinois, to Ted Cox (July 19, 2018), [at 2].

⁶Letter from Ted Cox to Matthew Swift, Associate General Counsel, Freedom of Information Act Officer, Office of the Governor of Illinois (July 20, 2018).

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 4

Mr. Cox stated that on July 27, 2018, he received a letter from the Governor's Office extending the time for responding to the request by 5 business days.⁷ On August 3, 2018, the Governor's Office denied Mr. Cox's narrowed FOIA request as unduly burdensome pursuant to section 3(g) of FOIA.⁸ The Governor's Office stated that it conducted a preliminary search which "yielded more than 44,000 potentially responsive emails, many of which would likely be irrelevant [to] the subject matter you identified. A manual review of these emails for responsiveness would be necessary to fulfill your request."⁹

On August 10, 2018, the Public Access Bureau received a Request for Review from Mr. Cox contesting the Governor's Office's denial of his July 20, 2018, narrowed FOIA request as unduly burdensome.¹⁰ On August 17, 2018, the Public Access Bureau sent a copy of the Request for Review to the Governor's Office and asked it to provide a detailed explanation of its assertion that compliance with Mr. Cox's narrowed request was unduly burdensome pursuant to section 3(g) of FOIA, together with an explanation of the preliminary search it conducted to identify potentially responsive e-mails.¹¹ The Public Access Bureau did not receive a response from the Governor's Office. On August 29, 2018, the Public Access Bureau sent a second copy of the Request for Review to the Governor's Office and asked it to respond as soon as possible to this office's August 17, 2018, letter of inquiry.¹² On August 31, 2018, the Governor's Office provided this office with a written answer to Mr. Cox's Request for Review.¹³ On September 4,

⁷E-mail from Ted Cox, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (dated August 6, 2018, transmitted August 10, 2018).

⁸Letter from Matthew Swift, Associate General Counsel, Freedom of Information Act Officer, Office of Governor Bruce Rauner, State of Illinois, to Ted Cox (August 3, 2018), [at 2].

⁹Letter from Matthew Swift, Associate General Counsel, Freedom of Information Act Officer, Office of Governor Bruce Rauner, State of Illinois, to Ted Cox (August 3, 2018), [at 2].

¹⁰E-mail from Ted Cox, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (dated August 6, 2018, transmitted August 10, 2018).

¹¹Letter from Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Matthew Swift, Associate General Counsel, FOIA Officer, Office of the Governor (August 17, 2018).

¹²Letter from Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Jill M. Hutchison, Deputy General Counsel and Chief Compliance Officer, Office of the Governor (August 29, 2018), at 1.

¹³Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau (August 31, 2018).

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 5

2018, the Public Access Bureau sent a copy of the Governor's Office's answer to Mr. Cox.¹⁴ He replied on September 10, 2018.¹⁵

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). "All records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2016); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2016)) further provides: "Each 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." The exemptions from disclosure are to be narrowly construed. *See Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

Scope of Request

As an initial matter, in its responses to Mr. Cox and to this office, the Governor's Office stated that Mr. Cox's request was likely unduly burdensome on its face because the scope of the request was imprecise. In particular, in its response to Mr. Cox's July 12, 2018, request, the Governor's Office described the request as "overbroad and vague[.]" and stated that the "request d[id] not provide any search terms with which to search."¹⁶ In its response to Mr. Cox's July 20, 2018, narrowed FOIA request,¹⁷ the Governor's Office reiterated that his request "would likely be unduly burdensome[]" because it did not mention the potential appointees by name or provide search terms.¹⁸ In its answer to the Public Access Bureau, the Governor's Office stated that the request did not reasonably identify public records because "[i]t is unclear how directly or

¹⁴Letter from Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Ted Cox (September 4, 2018).

¹⁵E-mail from Ted Cox, to Matt Hartman, Assistant Attorney General, Public Access Bureau (September 10, 2018).

¹⁶Letter from Matthew Swift, Associate General Counsel, Freedom of Information Act Officer, Office of Governor Bruce Rauner, State of Illinois, to Ted Cox (July 19, 2018), [at 2].

¹⁷This FOIA request was assigned FOIA Request #218-244 by the Governor's Office.

¹⁸Letter from Matthew Swift, Associate General Counsel, Freedom of Information Act Officer, Office of Governor Bruce Rauner, State of Illinois, to Ted Cox (August 3, 2018), [at 1].

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 6

indirectly related a record must be to nominations for appointment before the record would be responsive to what Mr. Cox sought."¹⁹

FOIA requires that a request "reasonably identify a public record." *Chicago Tribune Co. v. Department of Financial and Professional Regulation*, 2014 IL App (4th) 130427, ¶33, 8 N.E.3d 11, 19 (2014). "A request reasonably describes records if 'the agency is able to determine precisely what records are being requested.'" *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) (interpreting Federal FOIA (5 U.S.C. 552 § *et seq.* (1988)) and quoting *Yeager v. Drug Enforcement Administration*, 678 F.2d 315, 326 (D.C. Cir. 1982)).²⁰ However, a requester needs only to identify the records being requested by describing their contents. *See Bocock v. Will County Sheriff*, 2018 IL App (3d) 170330, ¶50, 100 N.E.3d 649, 658 (2018) ("Plaintiff identified the documents sought based upon a description of their contents. To require a citizen seeking public records to identify those records with any greater specificity would be in complete contravention of the public policy underlying FOIA.").

Mr. Cox's July 20, 2018, request sought e-mails sent by or to the identified individuals pertaining to nominations for appointments to specific boards, councils, and commissions. His request precisely describes the e-mails that are responsive to his request as those (1) sent to or from seven named individuals, and (2) pertaining to nominations for appointments (3) to several specific entities. FOIA does not require Mr. Cox to furnish the Governor's Office with search terms to locate the requested records. *See Reporters Committee for Freedom of the Press v. Federal Bureau of Investigation*, 877 F.3d 399, 402 (D.C. Cir. 2017) (a public body bears the burden of demonstrating that it conducted a reasonable search for records by, for example, setting forth the search terms used and explaining the type of search performed). By specifically identifying both the individuals who sent or received the e-mails and the subject matter of the e-mails (nominations for appointment to a specific list of entities), Mr. Cox's request reasonably identified the public records he sought and was not impermissibly vague or overbroad.

¹⁹Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau (August 31, 2018), [at 1].

²⁰Because Illinois' FOIA statute is based on the Federal FOIA statute, decisions interpreting Federal FOIA may provide helpful and relevant precedents in construing the State Act. *Margolis v. Director, Ill. Dep't of Revenue*, 180 Ill. App. 3d 1084, 1087 (1st Dist. 1989).

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 7

Reasonable Search

As noted above, FOIA requires a public body to conduct "a reasonable search tailored to the nature of a particular request." *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). A public body must use search terms that are reasonably calculated to locate all responsive records. *Hall v. Central Intelligence Agency*, 668 F. Supp. 2d 172, 175 (D.D.C. 2009). "At all times the burden is on the [public body] to establish the adequacy of its search." *Rugiero v. United States Department of Justice*, 257 F.3d 534, 547 (6th Cir. 2001). "Any doubt about the adequacy of the search should be resolved in favor of the requester." *Negley v. Federal Bureau of Investigation*, 658 F. Supp. 2d 50, 59 (D.D.C. 2009). "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." [Citation.] The adequacy of the search, in turn, is judged by a standard of reasonableness." (Emphasis in original.) *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

The Governor's Office's response to this office explained that it requested that the Department of Innovation and Technology conduct a search for electronically stored information in the e-mail accounts of the seven identified individuals for all e-mails containing any of the following 40 keywords:

- BEP
- "Business Enterprise Council"
- ISBE
- "Board of Education"
- ICC
- "Commerce Commission"
- ICJIA
- ILFC
- LFC
- "Latino Family"
- IBHE
- "Board of Higher Education"
- "Board of Trustees"
- "Chicago State University"
- CSU
- "Eastern Illinois University"
- EIU
- "Governors State University"
- GSU
- "Illinois State University"
- "Criminal Justice Information Authority"
- IFA
- "Finance Authority"
- HRC
- "Human Rights Commission"
- LRB
- "Labor Relations Board"
- ISU
- "Northeastern Illinois University"
- NEIU
- "Northern Illinois University"
- NIU
- "Southern Illinois University"
- SIU
- "University of Illinois"
- UIC
- UIS

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 8

- UIUC
- "Western Illinois University"
- WIU²¹

The Governor's Office stated that the search "yielded 44,536 potentially responsive emails[.]"²²

Based on its terms, this search captured all e-mails involving the seven identified individuals and pertaining in any way to the identified entities. The search was not limited in any way to e-mails pertaining to appointments to those entities. In its response to this office, the Governor's Office asserted that this very broad search was "a reasonable first step toward identifying responsive documents."²³ It stated: "a search instead only for 'appoint' or similar terms would be both over- and under-inclusive, capturing many emails regarding appointments to many other boards and commissions, or to 'appointments' in the sense of scheduled meetings, but missing a great deal of responsive communications."²⁴ The Governor's Office then explained that its "decision not to further limit the search was also reasonable. Adding other required terms would certainly exclude many relevant emails, and in any event could still yield an unduly burdensome volume of records."²⁵

However, the Governor's Office noted that it did, in fact, conduct a subsequent search by narrowing the results of the initial search to only those e-mails that also included the word "appoint." That search yielded 1,783 e-mails, a significantly smaller number than the initial search.²⁶ In its letter to Mr. Cox denying his narrowed FOIA request as unduly

²¹Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau (August 31, 2018), at 2-3.

²²Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau (August 31, 2018), at 3.

²³Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau (August 31, 2018), at 3.

²⁴Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau (August 31, 2018), at 3.

²⁵Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau (August 31, 2018), at 3.

²⁶Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau (August 31, 2018), at 3.

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 9

burdensome, the Governor's Office did not inform him that a search limited to e-mails involving the identified individuals and including both (1) the names of the entities, and (2) the word "appoint" yielded 1,783 potentially responsive e-mails. In its letter to this office, the Governor's Office explained its decision to put aside the narrowed search results by stating that "[m]anually reviewing this volume of records for Mr. Cox's request – let alone 44,536 emails – would impose an undue burden on the Office."²⁷ In his reply to this office, Mr. Cox stated that the "more targeted search result[ing] in 1,783 potentially responsive records[] * * * appears to have captured the potentially responsive records I am seeking, and as a result, those 1,783 records should be reviewed and the relevant records produced."²⁸

The appellate court has stated that a public body asserting the unduly burdensome exemption in section 3(g) of FOIA is not "required to show the adequacy of its search where * * * the breadth of plaintiff's request is evident from the face of the plaintiff's request." *Shehadeh v. Madigan*, 2013 IL App (4th) 120742, ¶30, 996 N.E.2d 1243, 1248 (2013). As discussed below, Mr. Cox's request is not facially overbroad because it identifies a specific subset of custodians and a particular subject matter. Thus, the Governor's Office must demonstrate the adequacy of its search for records responsive to Mr. Cox's request. The e-mails identified in the Governor's Office's initial search would include any e-mail sent or received by the seven custodians concerning any of the boards, councils, and commissions specified by Mr. Cox on any topic, not just those e-mails pertaining to nominations for appointment. Because of its breadth, a significant number of the e-mails identified in the Governor's Office's initial search are likely irrelevant to Mr. Cox's purpose in submitting the request. As a result, the Governor's Office's initial search was unreasonably broad and therefore inadequate.

In contrast, the Governor's Office's subsequent search using the term "appoint" appears to encompass all of the relevant custodians of the e-mail accounts and all of the relevant boards, commissions, and councils together with the particular subject matter of the e-mails. Although the Governor's Office noted that "[a]dding other required terms would certainly exclude many relevant emails," it did not discuss how the addition of the word "appoint" would have made the search so under-inclusive as to be inadequate. As noted above, a public body is not required to actually locate all responsive records to fulfill its obligation to perform a reasonable search. Additionally, it is important to note that when Mr. Cox learned that the narrowed search yielded a significantly smaller number of potentially responsive e-mails, he

²⁷Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau (August 31, 2018), at 3.

²⁸E-mail from Ted Cox to Matt Hartman, Assistant Attorney General, Public Access Bureau, (September 10, 2018).

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 10

stated that he wished to receive the responsive e-mails identified in that search. Thus, to the extent that the subsequent search excludes potentially responsive e-mails, Mr. Cox's response addresses the Governor's Office's concerns that the search was under-inclusive. Accordingly, this office concludes that the subsequent search using the term "appoint" was reasonably calculated to discover all relevant e-mails responsive to Mr. Cox's request. Consequently, the 1,783 potentially responsive e-mails identified in the subsequent search are the set of records by which the Governor's Office's claim of undue burden under section 3(g) of FOIA should be measured.

Section 3(g) of FOIA

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.)

Illinois courts have employed a balancing test to determine under section 3(g) whether the public interest in disclosure of the requested records outweighs the burden of compliance on the public body. In *National Ass'n of Criminal Defense Lawyers v. Chicago Police Dep't*, 399 Ill. App. 3d 1, 15 (1st Dist. 2010), the appellate court explained that "[i]n order for the exemption to apply, compliance must be unduly burdensome, there must be no way to narrow the request, and the burden on the public body must outweigh the public interest in the information." The court in *National Ass'n* analyzed whether the production of records concerning a study on eyewitness identification procedures would pose an undue burden to the Chicago Police Department (CPD). Counsel for CPD estimated that redacting the responsive records would take 150 hours, equating to 20 personnel days. *National Ass'n*, 399 Ill. App. 3d at 14. The court found that there was a significant public interest in disclosing records concerning

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 11

examining eyewitness identification procedures. *National Ass'n*, 399 Ill. App. 3d at 15. Moreover, the court found that the request was "specifically target[ed]" and that "the information requested [was] essential to a meaningful review of" the study on eyewitness identification procedures, distinguishing requests which necessitate extensive review of extraneous materials: "A request that is overly broad and requires the public body to locate, review, redact and arrange for inspection of a vast quantity of material that is largely unnecessary to the appellants' purpose constitutes an undue burden." *National Ass'n*, 399 Ill. App. 3d at 17 (citing *American Federation of Gov't Employees, Local 2782 v. United States Dep't of Commerce*, 907 F. 2d 203, 208-09 (D.C. Cir. 1990)). The court concluded that the burden of identifying and redacting the responsive records, although significant, did not outweigh the vital public interest in their disclosure. *National Ass'n*, 399 Ill. App. 3d at 17.

Similarly, in *Hites v. Waubensee Community College*, 2018 IL App (2d) 170617, ___ N.E.3d ___ (2018), the appellate court determined that the burden of complying with seven FOIA requests for data concerning the zip codes, city, county, and citizenship status of students from two databases maintained by Waubensee Community College (College) did not outweigh the public's interest in the information. The court determined that compliance with the requests would entail writing programs to extract the data from the databases which would require one person "at most, seven days of actual work." *Hites*, 2018 IL App (2d) 170617, ¶66, ___ N.E.3d at ___. The court balanced the burden on the College to comply with the request against the public's "legitimate interest in how [the College] is benefitting the community in which it operates and from which it receives benefits[.]" and concluded that the College did not satisfy the requirements to deny a request under section 3(g) of FOIA. *Hites*, 2018 IL App (2d) 170617, ¶66, ___ N.E.3d at ___.

In contrast, in *Shehadeh*, the appellate court concluded that the burden of compliance with a request outweighed the public interest in disclosure of the records. In that case, the requester sought any and all records that could be used for guidance on complying with FOIA. *Shehadeh*, 2013 IL App (4th) 120742, ¶5, 996 N.E.2d at 1245. The Attorney General's Office responded that compliance with the request as submitted would be unduly burdensome because its search identified 9,200 potentially responsive files that would have to be reviewed manually to confirm whether or not the records were responsive to the request, and then those that were responsive would have to be reviewed again for permissible redactions. *Shehadeh*, 2013 IL App (4th) 120742, ¶5, 996 N.E.2d at 1245. The court found the request to be "patently broad on its face, as it sought *any* publication or record that would or could be used by *any* public body to comply with Illinois's FOIA provisions." (Emphasis in original.) *Shehadeh*, 2013 IL App (4th) 120742, ¶28, 996 N.E.2d at 1248. The court also emphasized that the requester failed to identify a public interest that outweighed the burden of compliance on the Attorney General's Office. *Shehadeh*, 2013 IL App (4th) 120742, ¶35, 996 N.E.2d at 1249. Thus, the

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 12

court concluded that the Attorney General's Office did not violate FOIA by denying the request as unduly burdensome. *Shehadeh*, 2013 IL App (4th) 120742, ¶35, 996 N.E.2d at 1249.

In its answer to this office, the Governor's Office, focusing on the 44,536 e-mails identified in its initial search, stated that compliance with Mr. Cox's request would require it to "manually review each email prior to release. The massive quantity of documents would require significant analysis on the part of the FOIA officer not only to exclude nonresponsive documents, but also examine the responsive documents for information that may be protected from disclosure under one of FOIA's many exemptions."²⁹ The Governor's Office also asserted that it "cannot properly review 44,536 records for responsiveness and exemptions while also performing its other duties in a timely fashion."³⁰ In particular, the Governor's Office stated that as of August 30, 2018, it had received "279 FOIA requests, many of which are on matters of equal or greater public interest[.]"³¹ Although the impact of complying with a request on the ability of a public body to respond to other FOIA requests and perform its other duties may be considered when balancing the burden on the public body against the public's interest in the information (*see Shehadeh*, 2013 IL App (4th) 120742, ¶35, 996 N.E.2d at 1249), a reviewing court must not "conflate [the public body's] alleged burden with its normal operations." *Hites*, 2018 IL App (2d) 170617, ¶57, ___ N.E.3d at ___. Processing FOIA requests is part of the Governor's Office's normal operations. Moreover, the Governor's Office's reference to the 279 FOIA requests that it had received as of August 30, 2018, is not necessarily helpful in this analysis. Presumably, in light of the strict time limitations for compliance imposed by FOIA, the Governor's Office would have already responded to many (if not most) of the FOIA requests it received before Mr. Cox submitted his narrowed request on July 20, 2018. Thus, the total number of requests received by the Governor's Office prior to its receipt of Mr. Cox's request is not relevant in determining the extent to which compliance with Mr. Cox's request would burden the operations of the Governor's Office.

The Governor's Office's answer to the Public Access Bureau was based on its assertion that Mr. Cox's request was unduly burdensome on its face because compliance would require the review and redaction of 44,536 e-mails that were identified by its initial search. As

²⁹Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau (August 31, 2018), at 4.

³⁰Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau (August 31, 2018), at 5.

³¹Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau (August 31, 2018), at 5.

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 13

discussed above, this office has concluded that the proper measure of the potential burden on the Governor's Office is the review of 1,783 e-mails—not 44,536 e-mails. While the review and redaction of 1,783 e-mails will undoubtedly involve a substantial effort by the Governor's Office, neither its response to Mr. Cox's request nor its response to this office explained with specificity how the review and redaction of the 1,783 potentially responsive e-mails would unduly burden the Governor's Office's operations. This failure to present a factual basis for the claim of undue burden is a sufficient basis for concluding that the Governor's Office has not demonstrated that the section 3(g) exemption applies.

Further, there is a significant public interest in the disclosure of information concerning appointments to governmental bodies that perform important public functions. The Governor's Office conceded that there is public interest in e-mails reflecting the process used to make appointments to boards, councils, and commissions, but asserted that:

Mr. Cox has not identified a strong public interest in the particular emails he seeks in this request, much less a public interest that would outweigh the immense burden required to disclose all email correspondence of the named custodians pertaining to any nominated candidate for nearly twenty boards and commissions over more than two years.^[32]

Mr. Cox, however, argued that there was a "strong public interest" in the e-mails he requested by stating that the Governor:

[M]ake[s] appointments to dozens of boards and commissions, and many of those appointed receive some type of compensation and all are paid for with taxpayer dollars. The public has a strong interest in learning about the process for making these appointments, including the names of those individuals who play a role in the process or who make successful recommendations to boards and commissions.^[33]

³²Letter from Matthew Swift, Associate General Counsel, FOIA Officer, Office of Governor Bruce Rauner, State of Illinois, to Matt Hartman, Assistant Attorney General, Public Access Bureau, (August 31, 2018), at 5.

³³E-mail from Ted Cox, to Matt Hartman, Assistant Attorney General, Public Access Bureau, (September 10, 2018).

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 14

The boards and commissions named in the request create or exert influence on a wide range of public policies, including those concerning education, the economy, regulation of utilities, and human rights. The actions taken by appointees on these matters directly relate to the State's use and receipt of public funds. *See Hites*, 2018 IL App (2d) 170617, ¶66, ___ N.E.3d at ___ (concluding that the plaintiff's interest in enrolled student data was related to the public's legitimate interest in oversight of the College, which received public funds, and the City of Aurora, which provided benefits to the College); *see also* 5 ILCS 140/2.5 (West 2016) ("All records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public.").

Compliance with any FOIA request entails an administrative burden, but "[t]he issue is whether the public interest in disclosure justifies the burden." Ill. Att'y Gen. Pub. Acc. Op. No. 15-011, issued November 9, 2015, at 8. In these circumstances, the Governor's Office has not demonstrated that compliance with Mr. Cox's request would be "*unduly* burdensome," for purposes of asserting section 3(g) of FOIA. Given the strong public interest in the disclosure of correspondence of senior employees and officials in the Governor's Office concerning nominations for appointments to boards, councils, and commissions that create or exert influence over a wide range of public policies, coupled with the failure of the Governor's Office to demonstrate with specificity how the process of retrieving and reviewing these records would constitute an undue burden on its operations, this office finds that the Governor's Office has not shown that the burden of compliance with Mr. Cox's request outweighs the public interest in the disclosure of the requested records. Accordingly, this office concludes that the Governor's Office violated FOIA by improperly denying Mr. Cox's July 20, 2018, FOIA request as unduly burdensome pursuant to section 3(g) of FOIA.

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 15

FINDINGS AND CONCLUSIONS

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

1) On July 12, 2018, in FOIA Request #2018-244, Mr. Cox, on behalf of One Illinois, submitted a FOIA request to the Office of the Governor seeking e-mails sent or received by seven current and former employees and officials with the Governor's Office pertaining to nominations for appointment to any of thirteen specific boards, councils, and commissions and any of the Boards of Trustees for the State's public universities. Mr. Cox also sought any documents prepared by or in the possession of the seven individuals pertaining to nominations for appointment to the boards, councils, and commissions that he had identified.

2) In a letter dated July 19, 2018, the Governor's Office responded that compliance with the request would be unduly burdensome pursuant to section 3(g) of FOIA. The Governor's Office extended to Mr. Cox the opportunity to narrow his request to manageable proportions.

3) On July 20, 2018, Mr. Cox submitted a narrowed request to the Governor's Office withdrawing his request for documents pertaining to nominations for appointments and eliminating four boards and councils from his request.

4) On August 3, 2018, the Governor's Office denied Mr. Cox's July 20, 2018, narrowed request pursuant to section 3(g) of FOIA. The Governor's Office offered Mr. Cox the opportunity to narrow his request and notified him of his right to have the denial of his FOIA request reviewed by the Public Access Counselor or seek judicial review, in accordance with section 9(a) of FOIA.

5) On August 10, 2018, the Public Access Bureau received a Request for Review from Mr. Cox, on behalf of One Illinois, contesting the Governor's Office's denial. The Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA. Therefore, the Attorney General may issue a binding opinion with respect to this matter.

6) On August 17, 2018, the Public Access Bureau sent a copy of the Request for Review to the Governor's Office and asked it to provide a detailed explanation for its assertion that compliance with Mr. Cox's narrowed FOIA request was unduly burdensome. The Public Access Bureau did not receive a response from the Governor's Office.

7) On August 29, 2018, the Public Access Bureau sent the Governor's Office a second copy of Mr. Cox's Request for Review and asked it to respond. On August 31, 2018, the

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 16

Governor's Office provided the Public Access Bureau with a written answer to Mr. Cox's Request for Review. On September 4, 2018, this office sent a copy of the Governor's Office's answer to Mr. Cox for comment. Mr. Cox submitted a reply on September 10, 2018.

8) Mr. Cox's FOIA request sought e-mails of seven named individuals relating to nominations for appointment to a specific list of boards, councils, and commissions. By identifying the individuals involved in sending or receiving the e-mails and describing the particular subject matter of the e-mails, Mr. Cox's request reasonably identified public records in the possession of the Governor's Office.

9) According to the Governor's Office, its initial search for e-mails, which was not limited to the subject of appointments, yielded 44,536 potentially responsive e-mails. The Governor's Office has not demonstrated that its initial search was a reasonably adequate search for responsive e-mails. In contrast, the Governor's Office's subsequent search for e-mails containing the term "appoint" was reasonably calculated to identify the records responsive to Mr. Cox's request. The subsequent search identified 1,783 potentially responsive e-mails.

10) Section 3(g) of FOIA provides: "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."

11) The Governor's Office stated that compliance with Mr. Cox's request would require it to review the e-mails identified in its search to determine responsiveness and whether any exemptions may apply. The Governor's Office, however, did not provide a specific factual basis to support its claim that conducting such a review of the 1,783 potentially responsive e-mails would unduly burden the Governor's Office's operation.

12) Further, the Governor's Office has not demonstrated that the burden of reviewing and redacting the responsive e-mails would outweigh the significant public interest in the records. The responsive e-mails concern the appointment of individuals to State boards, councils, and commissions that create and exert influence over a wide range of public policies relating to the State's receipt and use of public funds.

For the reasons stated above, it is the opinion of the Attorney General that the Governor's Office's denial of Mr. Cox's Freedom of Information Act request violated the requirements of FOIA. Accordingly, the Governor's Office is directed to take immediate and appropriate action to comply with this binding opinion by providing Mr. Cox with copies of the requested e-mails, subject to appropriate redactions under section 7 of FOIA (5 ILCS 140/7 (West 2017 Supp.)).

Mr. Ted Cox
Mr. Matthew Swift
October 9, 2018
Page 17

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 Mr. Ted Cox as defendants. *See* 5 ILCS 140/11.5 (West 2016).

Very truly yours,

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 18-013) upon:

Mr. Ted Cox
Editor
One Illinois
3923 North Marshfield Avenue
Chicago, Illinois 60613
tcx@oneillinois.com

Mr. Matthew Swift
Associate General Counsel, FOIA Officer
Office of the Governor, State of Illinois
James R. Thompson Center
100 West Randolph Street, Suite 16-100
Chicago, Illinois 60601
gov.foia@illinois.gov

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 October 9, 2018.


SARAH L. PRATT
Public Access Counselor

SARAH L. PRATT
Public Access Counselor
Office of the Attorney General
500 South Second Street
Springfield, Illinois 62701
(217) 557-0548