OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
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February 15, 2018

Via electronic mail
Mr. Steve Stecklow
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London, SE16 7TA
United Kingdom
steve.stecklow@thomsonreuters.com

Via electronic mail
Thomas P. Hardy
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RE: FOIA Request for Review – 2017 PAC 50347

Dear Mr. Stecklow and Mr. Hardy:

This determination letter is issued 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 University of Illinois (University) did not improperly deny Mr. Steve Stecklow's October 23, 2017, FOIA request because the e-mails in question were not public records subject to the requirements of FOIA.

BACKGROUND

On October 23, 2017, Mr. Stecklow, on behalf of Reuters, submitted a FOIA request to the University seeking copies of all e-mails sent to or from a particular university e-mail address during the period from October 18, 2017, through the date that the University

processed the FOIA request, containing the words "Tezos or Reuters."[1] On November 3, 2017, the University responded by stating that it had identified nine pages of responsive e-mails. The University, however, contended that the e-mails were not subject to the requirements of FOIA because they did not pertain to the transaction of public business, and therefore, did not fall within the definition of a "public record" as defined in section 2(c) of FOIA (5 ILCS 140/2(c) (West 2016)). Mr. Stecklow's Request for Review disputes the University's response. Specifically, Mr. Stecklow asserts that "[t]his is a case of a university professor who I believe may be consulting privately to a highly controversial cryptocurrency venture called Tezos using university resources – including its email system."[2]

On November 8, 2017, this office sent a copy of the Request for Review to the University and asked it to provide copies of the responsive e-mails for this office's confidential review, together with a detailed explanation of the factual and legal bases for the University's assertion that the e-mails in question are not public records subject to the requirements of FOIA. On November 22, 2017, the University provided those materials. Later that day, this office forwarded the University's response to Mr. Stecklow; he replied on November 29, 2017.

DETERMINATION

"All 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 2016). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2016)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act." FOIA defines "[p]ublic records" 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.)

The Public Access Bureau has previously determined that records related to a trustee's personal conversations on the trustee's personal cell phone that took place during a public meeting were not public records. This office noted that the fact that the personal conversations took place at a public meeting did not mean that those conversations pertained to

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[1]E-mail from Steve Stecklow, Senior Correspondent, Reuters, to foia@uillinois.edu (October 22, 2017).

[2]E-mail from Steve Stecklow, Reuters, London, to Public Access Counselor (November 3, 2017).

the transaction of public business. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 35374, issued June 30, 2015, at 3; *see also* Ill. Att'y Gen. Pub. Acc. Op. No. 11-006, issued November 15, 2011, at 7 ("[o]nly those communications on private equipment that pertain to public business are subject to disclosure under the requirements of FOIA[.]"); *accord City of Champaign v. Madigan*, 2013 IL App. (4th) 120662, ¶31, 992 N.E.2d 629, 637 (2013) ("to qualify as a public record a communication must first pertain to business or community interests as opposed to private affairs") (internal quotation omitted).

In *Madigan*, the Illinois Appellate Court noted that FOIA does not define the term "public business." 2013 IL App (4th) 120662, ¶ 31, 992 N.E.2d at 636. Turning then to the dictionary's definition of "public," the court stated "to qualify as a public record a communication must first pertain to business or community interests as opposed to private affairs. Indeed, FOIA is not concerned with an individual's private affairs." Madigan, 2013 IL App (4th) 120662, ¶ 31, 992 N.E.2d at 637 (internal quotation omitted). Therefore, the threshold determination of whether a communication is a "public record" for the purposes of FOIA is whether that communication pertains to "public business." Only if this threshold is met does the analysis proceed to whether the communication was "(2) prepared by, (3) prepared for, (4) used by (5) received by, (6) possessed by, or (7) controlled by a public body." *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶ 42, 992 N.E.2d 629, 639-40 (2013).

In his reply to this office, Mr. Stecklow contends that the communications are related to the transaction of public business. Specifically, Mr. Stecklow asserted that the professor's activities as a consultant to Tezos is interconnected with his duties as a public employee because the professor used the University's e-mail system and because Tezos used the professor's affiliation with the University in its marketing materials, which Mr. Stecklow states helped Tezos "raise millions of dollars."[3]

The University's response to this office acknowledged that the e-mails in question were created using public resources—the professor's University e-mail address – and are in the possession of the University. However, citing a Michigan Appellate Court case, *Howell Education Association MEA/NEA v. Howell Board of Education*, 287 Mich. App. 228, 789 N.W. 2d 495 (2010), the University contended that the e-mails do not fall within the above definition of "public records" because the e-mails are related to the professor's private outside consulting work, rather than the transaction of any University business. Specifically, the University asserted:

> In this situation, Professor [name] is a technical advisor for Tezos and provides consulting on cryptography and cryptocurrency design and implementation. Professor [name]

[3]E-mail from Steve Stecklow, Reuters, London, to Shannon Barnaby, [Assistant Attorney General], [Public Access Bureau] (November 29, 2017).

> discloses this outside consulting work on his faculty website and on his economic disclosure form. [Footnote.] Professor [name] also uses a private email for outside consulting activities. Notwithstanding, between October 17 and October 19, Professor [name] received a series of unsolicited emails to his account and participated in a brief email exchange. This exchange does not constitute the definition of a public record under FOIA simply because Professor [name] responded. [4]

In *Howell*, the Michigan Appellate Court determined that e-mails sent by public-school teachers using their school district e-mail addresses to communicate about union matters were not public records subject to disclosure under Michigan's FOIA because they did not relate to the furtherance of the teachers' performance of official functions. *Howell,* 287 Mich. App. at 246. The Court stated:

> Such communications do not involve teachers acting in their official capacity as public employees, but in their personal capacity as HEA members or leadership. Thus, any e-mail sent in that capacity is personal. This holding is consistent with the underlying policy of FOIA, which is to inform the public "regarding the affairs of government and the official acts of . . . public employees." [citation omitted]. The release of e-mail involving internal union communications would only reveal information regarding the affairs of a labor organization, which is not a public body. *Howell,* 287 Mich. App. at 244.

This office has reviewed the withheld communications and can confirm that the requested records appear to relate to the professor's outside consulting work, which is neither related to his performance of an official function in his capacity as an employee of the University nor to the transaction of any University business. The fact that the professor, in his personal capacity, acts as a consultant to a particular startup company and the fact that the startup company uses the professor's affiliation with the University as marketing tool, does not convert his personal endeavors into the business of the University. Likewise, the fact that the personal e-mails were received and created on the professor's university e-mail address does not transform them into public records. Accordingly, we conclude that the requested records are not "public records" as defined by section 2(c) of FOIA, and that the University did not improperly respond to Mr. Stecklow's request.

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[4]Letter from Thomas P. Hardy, Executive Director and Chief Records Officer, University of Illinois, to Shannon Barnaby, Assistant Attorney General, Office of the Illinois Attorney General (November 20, 2017).

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, you may contact me by mail at the Chicago address listed on the first page of this letter or by e-mail at sbarnaby@atg.state.il.us. Thank you.

Very truly yours,

[redacted]

SHANNON BARNABY
Assistant Attorney General
Public Access Bureau

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