OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

May 30, 2024

Via electronic mail
[redacted]

Via electronic mail
Ms. Annie Righi
FOIA Officer
Chicago Public Schools
42 West Madison Street
Chicago, Illinois 60602
arighi@cps.edu

RE: FOIA Request for Review – 2023 PAC 78983; CPS no. N014319-100923

Dear [redacted] and Ms. Righi:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2022), as amended by Public Act 103-069, effective January 1, 2024). For the reasons explained below, the Public Access Bureau concludes that Chicago Public Schools (CPS) did not improperly withhold records responsive to [redacted] October 9, 2023, FOIA request.

On that date, [redacted] submitted a FOIA request to CPS seeking "[a] Backlog Trend Report for the CPS FOIA Office for the year of 2023 to date."[1] Using information from a presentation slide by GovQA, CPS's software vendor for processing FOIA requests, [redacted] explained how he believed CPS could run the report in the GovQA platform. On October 25, 2023, CPS responded that the request did not seek a record maintained in the ordinary course of business. On November 14, 2023, [redacted] submitted a Request for Review contesting that response. He argued that the record he seeks exists and simply needs to be retrieved: "[B]ecause the Backlog Trend Report is a documented feature of the system that CPS uses to manage FOIA

[1]FOIA portal message from [redacted] to Chicago Public Schools (October 9, 2023).

requests, retrieving it is trivially easy, requiring only [*sic*] them only to set the date range and click a button."[2] [redacted] attached a brief he wrote about relational databases and FOIA.

On November 20, 2023, this office sent a copy of the Request for Review to CPS and asked it to provide a detailed explanation of the legal and factual bases for asserting that it does not maintain a responsive record, addressing whether it used the method [redacted] described, or any other method, to try to furnish the record in question. To the extent CPS argued that it was not required to try to run the report/retrieve the record, this office asked CPS to address whether the data concerns CPS' transaction of public business and how retrieving the data would go beyond what the court in *Hites v. Waubonsee Community College*, 2016 IL App (2d) 150836, concluded public bodies must do with respect to processing FOIA requests for such data compilations. On January 2, 2024, CPS provided a copy of a backlog trend report for this office's confidential review and its answer. On January 18, 2024, [redacted] submitted a reply.

DETERMINATION

"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 2022); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). However, a "requester is entitled only to records that an agency has in fact chosen to create and retain." *Yeager v. Drug Enforcement Administration*, 678 F.2d 315, 321 (D.C. Cir. 1982). FOIA does not require a public body to compile data that it does not ordinarily keep. *Chicago Tribune Co. v. Department of Financial & Professional Regulation*, 2014 IL App 4th 130427, ¶ 34; *see also Kenyon v. Garrels*, 184 Ill. App. 3d 28, 32 (1989) (a public body is not required to create records in order to respond to a FOIA request); 5 ILCS 140/1 (West 2022) (FOIA "is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective[.]").

In its answer to this office, CPS maintained that it properly denied [redacted] request because the request "fails to cite an existing public record that is maintained in the normal course of business * * *, and is instead providing directions to a public body calling for the creation of a new record that contains unique calculations about and derived from public records[.]"[3] CPS argued that in contrast to a request seeking existing data points, [redacted] request calls for a calculation of the underlying data points and then the combination of the new tallies into a chart. CPS noted that "neither 'backlog' nor a count of 'backlogged' requests is an

[2]Letter from [redacted] to [Public Access Bureau] (undated; transmitted November 14, 2024).

[3]Letter from Annie Righi, Freedom of Information Act Officer, Chicago Public Schools, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 2, 2024), at [1].

existing datapoint in GovQA."[4] CPS explained that it "was, prior to this request, unaware of the Backlog Trend Report, has never prepared, received, possessed, nor controlled this report or the related backlog calculations for use in conducting business[.]"[5] Rather than seeking a public record, CPS argued, [redacted] is essentially submitting an inquiry seeking a count of how many FOIA requests the district closes, how many requests the district receives, and how many requests are 'carried over' on a monthly basis in 2023."[6] CPS further argued that while FOIA concerns copying records, meaning reproducing them,[7] "producing this record would not constitute the *reproduction* of any record, but rather the initial production of a new record, containing new data." (Emphasis in original.)[8]

According to CPS, the data compilations the court in *Hites v. Waubonsee Community College* concluded must be disclosed are distinguishable because [redacted] request seeks not information generated and stored by a public body, but a calculation derived from that information. CPS analogized this matter to two cases on which the *Hites* court relied, *Chicago Tribune Co. v. Department of Financial & Professional Regulation*, 2014 IL App (4th) 130427, ¶ 33, and *National Security Counselors v. Central Intelligence Agency*, 898 F. Supp. 2d 233, 271 (D.D.C. 2012). Just as the request in *Chicago Tribune Co.* asked the public body "to perform an action (a review of its investigative files) in order to prepare a new record (a tally as to the number of claims)," CPS argued, the Backlog Trend Report would be a new record and '[redacted] requested that the district perform an action, in giving specific directions to the FOIA Office to follow in order to prepare a new record that contains backlog calculations."[9] Similarly, just as the federal district court in *National Security Counselors* "held that producing a 'listing' of a database search, such as a listing of the first 100 FOIA requests in a given year, constituted the creation of a new record * * * because the request sought information *about* public records" rather than "the records themselves" (emphasis added), "the Backlog Trend

[4]Letter from Annie Righi, Freedom of Information Act Officer, Chicago Public Schools, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 2, 2024), at [2].

[5]Letter from Annie Righi, Freedom of Information Act Officer, Chicago Public Schools, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 2, 2024), at [2].

[6]Letter from Annie Righi, Freedom of Information Act Officer, Chicago Public Schools, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 2, 2024), at [2].

[7]Section 2(d) of FOIA (5 ILCS 140/2(d) (West 2022)) defines "copying" as "the reproduction of any public record by means of any photographic, electronic, mechanical or other process, device or means now known or hereafter developed and available to the public body."

[8]Letter from Annie Righi, Freedom of Information Act Officer, Chicago Public Schools, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 2, 2024), at [3].

[9]Letter from Annie Righi, Freedom of Information Act Officer, Chicago Public Schools, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 2, 2024), at [4].

Report is akin to seeking information *about* public records, rather than the public records (meaning the underlying data points) themselves." (Emphasis added.)[10] Returning to *Hites*, CPS highlighted that the court concluded that a request for the total numbers of students in certain categories improperly sought the creation of new records because the public body did not maintain the requested totals in its databases; CPS argued that like *Chicago Tribune Co.*, such a request improperly asks a public body to perform a calculation, and like *National Security Counselors*, such a request seeks information about public records rather than records themselves. *Hites*, 2016 IL App (2d) 150836, ¶ 79.

Acknowledging that raw data in a database is subject to disclosure, CPS suggested that [redacted] "consider requesting only underlying data within GovQA (such as a report reflecting the open and closed date of all requests received in a certain timeframe) from which he can conduct his own calculations."[11] CPS additionally asserted:

> [A]ssuming arguendo that the Backlog Report is an existing public record subject to release, this request still fails to cite a specific public record for review. The slide referenced by [redacted] details a multitude of options surrounding the production of the Backlog Trend Report, such as viewing the backlog by request type, assigned department, assigned staff, or the option to include only past due requests. Accordingly, as there are variations on how this report can be pulled, the request fails to cite a specific record for review in failing to specify what filters to apply or data to include. This is particularly true because the district has not created and does not utilize such a report, so there is no uniform or already established format that can be presumed to be requested here.[12]

In his reply, [redacted] did not address *Hites*, but argued that the federal appellate court in *Center for Investigative Reporting v. United States Department of Justice*, 14 F.4th 916 (9th Cir. 2021) rejected CPS's position on what constitutes the creation of a new record and "specifically overturn[ed]" *National Security Counselors*.[13] In *Center for Investigative*

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[10]Letter from Annie Righi, Freedom of Information Act Officer, Chicago Public Schools, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 2, 2024), at [5].

[11]Letter from Annie Righi, Freedom of Information Act Officer, Chicago Public Schools, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 2, 2024), at [6].

[12]Letter from Annie Righi, Freedom of Information Act Officer, Chicago Public Schools, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 2, 2024), at [6].

[13]Letter from [redacted] to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 18, 2024), at [2].

Reporting, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) argued that it was not required to disclose "the '[t]otal number of weapons traced back to former law enforcement ownership, annually from 2006 to the present,' because FOIA establishes a right of access to existing agency records only, and searching its trace database would require the creation of a new record." *Center for Investigative Reporting*, 14 F.4th at 937. As with the court in *Hites*, the court in *Center for Investigative Reporting* concluded that "using a query to search for and extract a particular arrangement or subset of data already maintained in an agency's database does not amount to the creation of a new record[.]" *Center for Investigative Reporting*, 14 F.4th at 938. ATF acknowledged that its relevant database "include[d] 'close-out codes' for each trace, including those related to law enforcement and government agencies[,]" and that it could search the database to identify those law enforcement traces, but had not searched the database in response to the request for aggregate data. *Center for Investigative Reporting*, 14 F.4th at 939-40. The court explained:

> ATF can theoretically respond to [the] request in at least two ways. First, it could search the [relevant] database for records tagged with the relevant close-out codes and produce the resulting traces or list of traces, with any necessary redactions, for [the requester] to tabulate. * * * Second, ATF could produce the precise statistical aggregate data that [the requester] seeks, with no further counting or analysis required, if, for example, a query or queries for the relevant close-out codes produces a "hit count" reflecting the number of records involving a firearm traced to law enforcement, the number of matching records is contained in [the database's] metadata, or if the database produces an otherwise responsive result separate from the trace data itself. *Center for Investigative Reporting*, 14 F.4th at 940.

Nonetheless, the court acknowledged that "these are only theoretical possibilities" because the record in the case was insufficient to determine whether the requested data "could be produced by a reasonable search of the [relevant] database or would require more significant human analysis"; the court remanded the case to the lower court "to provide ATF the opportunity to better explain the nature of the [relevant] database, and determine whether [the requester's] search query will yield the responsive information it seeks." *Center for Investigative Reporting*, 14 F.4th at 940.

[redacted] argued that in *Center for Investigative Reporting*, "[t]he only uncertainty * * * was whether the data was structured in a way that would readily permit" the type of aggregation needed to produce the responsive data, "not whether aggregation was

appropriate."[14] In contrast, [redacted] argued, "[t]he report requested from CPS is a feature built by their software provider, based on fields which the database is known to possess; in short, we know that it can be run, because the software platform they use has documented and advertised its ability to do so."[15] [redacted] noted that the court in *Center for Investigative Reporting* took issue with *National Security Counselors*, 898 F. Supp. 2d at 271, as follows:

> We reject the bright-line distinction some courts have made between producing "particular points of data" and producing a "listing or index" of a database. [Citation.] It cannot be that some arrangements of data available through a query of a database are "records" created and obtained by an agency, while others are not. *Center for Investigative Reporting*, 14 F.4th at n.21.

[redacted] argued that *National Security Counselors* ultimately signifies that "any information the system can produce is a public record."[16] Yet, [redacted] conceded that CPS was correct that his request did not specify parameters for the Backlog Trend Report among different available parameters. [redacted] stated: "I would like the report as it is shown on the slide I included: for all request types, for all assigned departments and staff, without restricting it to past due requests, viewed by month."[17]

The court in *Center for Investigative Reporting*, though critical of certain analysis in *National Security Counselors,* did not overturn that case because it is from a different judicial circuit. More significantly, the federal appellate court in *Center for Investigative Reporting* did not, and could not have, overturned *Hites*, because *Hites* is an Illinois appellate decision construing Illinois' FOIA. *See Kauffman v. Wren*, 2015 IL App (2d) 150285, ¶ 44 (lower federal court decisions are not binding on Illinois courts). *Hites* remains good law in Illinois and is the controlling precedent for this Illinois FOIA matter.

Again, the *Hites* court concluded that a public body was not required to provide certain requested aggregate data, such as "the total number of all out-of-district students in the fall of 2011," because although it possessed underlying data, it "did not maintain the requested

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[14]Letter from [redacted] to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 18, 2024), at [2].

[15]Letter from [redacted] to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 18, 2024), at [2].

[16]Letter from [redacted] to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 18, 2024), at [3].

[17]Letter from [redacted] to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 18, 2024), at [3].

totals in its databases." *Hites*, 2016 IL App (2d) 150836, ¶ 79. The court emphasized that the "requests went beyond a search for records—that is, the data in the databases—and instead improperly sought information about those records." *Hites*, 2016 IL App (2d) 150836, ¶ 79. CPS similarly possesses underlying data about its FOIA response times, but had not performed calculations using those response times to produce sums not set forth in the source data. [redacted]t about how aggregating data does not constitute the creation of a record is contrary to the applicable precedent of *Hites*. Although a public body may choose to create a record that it is capable of generating, FOIA does not require it to do so. *Hites*, 2016 IL App (2d) 150836, ¶ 79. Moreover, [redacted] FOIA request did not reasonably identify public records, as he acknowledged that the language of his request did not contain the parameters necessary to determine precisely what information he was seeking. Under these circumstances, CPS's response to [redacted] request did not violate FOIA. [redacted]r may wish to take CPS up on its suggestion to "consider requesting only underlying data within GovQA (such as a report reflecting the open and closed date of all requests received in a certain timeframe) from which he can conduct his own calculations[,]"[18] in alignment with the first of the two "theoretical possibilities" in *Center for Investigative Reporting*, 14 F.4th at 940.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this file. If you have any questions, please contact me at joshua.jones@ilag.gov.

Very truly yours,

[redacted]

JOSHUA M. JONES
Deputy Bureau Chief
Public Access Bureau

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[18]Letter from Annie Righi, Freedom of Information Act Officer, Chicago Public Schools, to Joshua Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 2, 2024), at [6].