



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 30, 2018

Via electronic mail

[REDACTED]

Via electronic mail

Mr. John Heidinger
FOIA Officer
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, Illinois 62702-1271
John.Heidinger@illinois.gov

RE: FOIA Request for Review – 2017 PAC 49942

Dear [REDACTED] and Mr. Heidinger:

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 that follow, the Public Access Bureau concludes that the Illinois Department of Natural Resources (Department) improperly responded to [REDACTED] September 5, 2017, FOIA request.

On September 5, 2017, [REDACTED] submitted an amended FOIA request¹ to the Department seeking copies of records concerning the gating of Griffith Cave, from January 1, 2013, to December 31, 2014, that had not already been publically released. On that same date, the Department asked [REDACTED] to submit payment for estimated fees for copies of responsive records pursuant to section 6(a-5) of FOIA (5 ILCS 140/6(a-5) (West 2016)). On September 20, 2017, the Department provided some responsive records to [REDACTED], but redacted certain information pursuant to sections 7(1)(b) and 7(1)(c) of FOIA (5 ILCS 140/7(1)(b), (1)(c) (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017). The Department also withheld other records in full pursuant to sections 7(1)(f),

[REDACTED] filed a prior Request for Review with this office on August 28, 2017, contesting the Department's unduly burdensome categorization of his August 24, 2017, request, but he withdrew that Request for Review on September 11, 2017. See 2017 PAC 49430. This Request for Review pertains to his amended request.

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7(1)(m), and 7.5(aa) of FOIA (5 ILCS 140/7(1)(f), (1)(m) (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017; 5 ILCS 140/7.5(aa) (West 2016), as amended by Public Acts 100-020, effective July 1, 2017; 100-201, effective August 18, 2017; 100-464, effective August 28, 2017; 100-465, effective August 31, 2017), as well as section 2.37 of the Wildlife Code (520 ILCS 5/2.37 (West 2016)). Additionally, the Department stated that it was extending its time to respond pursuant to section 3(e) of FOIA (5 ILCS 140/3(e) (West 2016)) with regard to several non-e-mail records where it needed to "communicate with the authors/federal government, to determine if they are exempt."²

On September 27, 2017, the Department sent an additional record to [REDACTED] and denied other information pursuant to section 7(1)(i) of FOIA (5 ILCS 140/7(1)(i) (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017). The Department also stated that [REDACTED] had previously declined an opportunity to view certain withheld information that would require signing its Data License Agreement, stating that this requirement was authorized through the Illinois Nature Preserves Commission and the Illinois Endangered Species Protection Board; the Department offered him the opportunity again. Further, the Department indicated that it was still checking whether six additional records were exempt from disclosure. On October 4, 2017, the Department appears to have provided those records to [REDACTED]. On that same date, this office received correspondence from [REDACTED] indicating that he wished to file a Request for Review contesting (1) the Department's assertion that he could not view certain responsive records without signing its Data License Agreement, and (2) the denial of records under sections 7(1)(i) and 7.5(aa) of FOIA. On October 18, 2017, [REDACTED] submitted the additional materials necessary to file a Request for Review of the Department's partial denial of his request on those grounds.

On October 19, 2017, this office forwarded a copy of the Request for Review to the Department and asked it to provide un-redacted copies of the records that it had redacted or withheld pursuant to sections 7(1)(i) or 7.5(aa) of FOIA, or its Data License Agreement, for our confidential review, together with a detailed explanation of the factual and legal bases for the applicability of those three rationales.³ On October 30, 2017, counsel for the Department responded, but did not address section 7.5(aa) of FOIA. On October 31, 2017, this office forwarded a copy of the Department's response to [REDACTED]. On November 1, 2017, [REDACTED] replied, arguing that the Department incorrectly applied the section 7.5(aa) and 7(1)(i) exemptions, and that its improperly used its Data License Agreement in place of FOIA to impose

²Letter from Diana E. Wise, FOIA Officer, Labor & Employment Counsel, Department of Natural Resources, to [REDACTED] (September 20, 2017), at 2.

³This office also asked the Department to explain how it assessed the fees charged. However, in an e-mail on December 21, 2017, from [REDACTED] to an Assistant Attorney General (AAG) in the Public Access Bureau, he clarified that he is no longer interested in contesting the fee.

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conditions on access to the records. This office attempted to informally resolve parts of this Request for Review, and also received a large volume of correspondence from [REDACTED] that mostly concerned matters outside the scope of this office's review. See 15 ILCS 205/7(c) (West 2016) (limiting the Public Access Counselor's authority to reviewing disputes concerning FOIA and the Open Meetings Act (15 ILCS 205/7(c) (West 2016)).

DETERMINATION

All public records in the possession or custody 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). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2.

Section 7.5(aa) of FOIA

Section 7.5(aa) of FOIA allows a public body to withhold "[i]nformation which is exempted from disclosure under Section 2.37 of the Wildlife Code." Section 2.37 of the Wildlife Code exempts from disclosure under FOIA the locations of traps and snares authorized by the Department or another governmental body to kill wildlife responsible for property damage or causing a risk to human health or safety. The Department did not address this exemption in its response to this office. In his reply, the requester stated that he believes the Department misused the exemption.

The Department did not provide any explanation of how this provision would apply to the records [REDACTED] requested. Accordingly, the Department did not meet its burden of demonstrating that any pertinent information is exempt from disclosure pursuant to section 7.5(aa) of FOIA.

Section 7(1)(i) of FOIA

Section 7(1)(i) of FOIA allows a public body to withhold "[v]aluable formulae, computer geographic systems, designs, drawings and research data obtained or produced by any public body" in circumstances in which "disclosure could reasonably be expected to produce private gain or public loss."

In its response to this office, the Department stated that it "withholds the location of endangered or threatened species or wildlife in order to protect endangered and threatened species from poachers, etc., so that endangered or threatened species are not captured, killed, or

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otherwise removed from public lands for private gain."⁴ The Department explained that it withheld "any data obtained or used by [the Department] in conducting research that could be used to pinpoint the specific physical location"⁵ of such species, such as cave names, maps, GPS coordinates, or land descriptions. The Department also noted that it redacted the name of a cave or mine only if the record made reference to an endangered species there. On January 26, 2018, the Department further asserted that disclosure of information concerning a location in its Natural Heritage Database, which is discussed in greater detail below, would allow an individual to locate endangered species in the area and "deduce [the Department's] formula and find other areas that species could be found. If someone really wanted to, they could remove a species from Illinois using the data gathered from a database request of a specific area."⁶

In his reply, [REDACTED] argued that the Department is incorrectly applying this exemption "to withhold natural heritage data" and that it cannot exercise a blanket exemption for such records "due to concerns of 'public loss' relating to poaching."⁷

The Department did not provide sufficient information from which this office could determine whether there would be a likelihood of a private gain or public loss if the records at issue were released. The Department's sole argument about such a consequence is the possibility that releasing any information about the location of any endangered species could result in poaching or other harms to endangered species. That generalized and conclusory explanation does not establish that disclosure of the specific records that [REDACTED] is seeking "could reasonably be expected to produce private gain or public loss." Further, the Department did not identify which exemption(s) (out of the several originally cited) it asserts apply to which of the thousands of pages of records provided to this office. This precludes the Public Access Bureau from accurately assessing what records were withheld and for what reason. Accordingly, the Department did not meet its burden of demonstrating that records are exempt from disclosure pursuant to section 7(1)(i) of FOIA.

⁴Letter from Diana E. Wise, Labor & Employment Counsel, IDNR, to Marie Hollister, AAG, Public Access Bureau (October 30, 2017), at 6.

⁵Letter from Diana E. Wise, Labor & Employment Counsel, IDNR, to Marie Hollister, AAG, Public Access Bureau (October 30, 2017), at 6.

⁶E-mail from John Heidinger, Legal Counsel, IDNR, to [Marie] Hollister (January 26, 2018).

⁷E-mail from [REDACTED] to the Public Access Bureau (November 1, 2017).

Data License Agreement

Section 3(b) of FOIA (5 ILCS 140/3(b) (West 2016)) provides:

Subject 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.)

When the language of a statute is clear and unambiguous, it must be given effect as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

The language of section 3(b) 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 upon payment of any applicable fees. Section 3(b) does not provide a public body with the option to decline to provide copies when copies are requested. Although a public body may offer a requester the opportunity to inspect and make copies and the requester may elect to do so, a public body is required to provide copies if requested to do so. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 10-001, issued March 29, 2010.

In its response to this office, the Department stated that its "Data License Agreement * * * allows persons to access [the Department's] research data, including the names of caves that house endangered or threatened species, while still protecting the location of endangered species."⁸ In a January 23, 2018, telephone call with an Assistant Attorney General (AAG) from the Public Access Bureau, the Department confirmed that the Natural Heritage Database was not searched for responsive records because the Department maintained that individuals need to sign the data license agreement to view the records. The Department confirmed the requester's claim that it prohibits individuals who sign the data license agreement from copying the records. The agreement also states that it is revocable, requires the licensee to acknowledge that the data is exempt under FOIA, and requires the licensee to take reasonable precautions to keep the data confidential.

⁸Letter from Diana E. Wise, Labor & Employment Counsel, IDNR, to Marie Hollister, AAG, Public Access Bureau (October 30, 2017), at 6.

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In his reply, the requester argued that the Department cannot "facilitate the use of a data license agreement and an alternative means of records release that is to be used in place of FOIA."⁹

The Department seems to have asserted that FOIA does not require it to provide copies of, or even search for, responsive records in its Natural Heritage Database. On January 26, 2018, the Department provided a sample "unredacted snapshot" of the Natural Heritage Database.¹⁰ This office's review of the sample indicates that it is, on its face, a public record subject to the requirements of FOIA as it is in the possession of the Department and unequivocally pertains to the transaction of public business.¹¹ Section 3(b) of FOIA clearly requires public bodies to furnish copies of public records in response to a request for copies.

The Department, however bypassed FOIA's procedures and unilaterally established separate requirements for obtaining information from the Natural Heritage Database. Section 6.01 of the Natural Areas Preservation Act (525 ILCS 30/6.01 (West 2016)) authorizes the Department to:

compile and maintain inventories, registers and records of nature preserves, other natural areas and features, and species of plants and animals and their habitats and establish a fee, by rule, to be collected to recover the actual cost of collecting, storing, managing, compiling, and providing access to such inventories, registers, and records. All fees collected under this Section shall be deposited into the Natural Areas Acquisition Fund. The monies deposited into the Natural Areas Acquisition Fund under this Section shall not be subject to administrative charges or chargebacks unless otherwise authorized by this Act.

Although that statute authorizes the Department to "compile and maintain" rather than withhold records, the Department implemented an administrative rule that provides: "Natural heritage data are exempt from disclosure as valuable formulae, computer geographic systems, designs,

⁹E-mail from ██████████ to the Public Access Bureau (November 1, 2017).

¹⁰E-mail from John Heidinger, Legal Counsel, Illinois DNR, to Marie Hollister (January 26, 2018).

¹¹Section 2(c) of FOIA (5 ILCS 140/2(c) (West 2016)) defines "public records" as "all records * * * and 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."

drawings and research data obtained or produced by any public body when disclosure could reasonably be expected to produce private gain or public loss, as allowed by Section 7[1](i) of the Freedom of Information Act." 17 Ill. Adm. Code §4020.230(c) (2018), adopted at 38 Ill. Reg. 2879, effective January 10, 2014. A related rule permits requesters to seek natural heritage data by providing the Department with certain information, including an "[e]xplanation of how the data will be used and who will have access to the data[.]" 17 Ill. Adm. Code §4020.230(b)(4) (2018), adopted at 38 Ill. Reg. 2879, effective January 10, 2014. In addition, the Department requires:

All persons requesting and receiving natural heritage data via written request shall first be required to sign a one-year Data Licensing Agreement that dictates the conditions for use of the data. Fees shall be paid in full before natural heritage data is provided unless alternate arrangements are made. Licensing agreements may be renewed on a yearly basis. Distribution of data to third parties, including that from a consultant to client or subcontractor to contractor, is prohibited. 17 Ill. Adm. Code §4020.220(c) (2018), adopted at 38 Ill. Reg. 2879, effective January 10, 2014.

"There will be a base fee for each request in addition to spatial data and report fees. The base fee is \$75 per request." 17 Ill. Adm. Code § 4020.240(a) (2018), adopted at 38 Ill. Reg. 2879, effective January 10, 2014.

The \$75 base fee and additional fees for spatial and report data are fixed by an administrative rule—not a statute. The plain language of section 6(c) of FOIA (5 ILCS 140/6(c) (West 2016)) provides that the fee provisions of FOIA apply "[e]xcept when a fee is otherwise fixed by **statute**[.]" With respect to records maintained in electronic format, section 6(a) of FOIA (5 ILCS 140/6(a) (West 2016)) further provides:

When a person requests a copy of a record maintained in an electronic format, the public body shall furnish it in the electronic format specified by the requester, if feasible. If it is not feasible to furnish the public records in the specified electronic format, then the public body shall furnish it in the format in which it is maintained by the public body, or in paper format at the option of the requester. A public body may charge the requester for the actual cost of purchasing the recording medium, whether disc, diskette, tape, or other medium. **If a request is not a request for a**

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commercial purpose or a voluminous request, a public body may not charge the requester for the costs of any search for and review of the records or other personnel costs associated with reproducing the records. Except to the extent that the General Assembly expressly provides, statutory fees applicable to copies of public records when furnished in a paper format shall not be applicable to those records when furnished in an electronic format." (5 ILCS 140/6(a) (West 2016)). (Emphasis added.)

"By its own terms, the current version of section 6 of the FOIA does not allow a fee in excess of the cost of the electronic medium for the reproduction of electronic records unless another statute expressly provides that the fees for producing paper records also apply to electronic copies." *Sage Information Services v. Humm*, 2012 IL App (5th) 110580, ¶18, 977 N.E.2d 895, 900 (2012); *Sage Information Services v. Suhr*, 2014 IL App (2d) 130708, ¶¶17-20, 10 N.E.3d 241, 245-46 (2014) (copying fees for electronic copies are limited to the cost of the recording medium unless a statute expressly authorizes a public body to charge additional fees for electronic copies). The Public Access Bureau has previously determined that copying fees established by administrative rules rather than statutes do not supersede the fees set out in section 6 of FOIA. Ill. Att'y Gen. PAC Req. Rev. Ltr. 17989, issued February 5, 2014, at 2) ("If the General Assembly had intended for fees fixed by both statutes and administrative rules to apply to records requested under FOIA, it would have done so expressly as it did in crafting the section 7(1)(a) exemption to apply to records that statutes, as well as administrative rules implementing statutes, prohibit from being disclosed."). Because the Department has not identified a statute that fixes the fees that the Department assessed [REDACTED], those fees are inapplicable to his request.

Further, courts in other jurisdictions have found restrictions on the use of public records similar to the Department's data license agreement incompatible with their versions of FOIA. In *County of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1309, 89 Cal. Rptr. 3d 374, 379 (Cal. Ct. App. 2009), *as modified* (Feb. 27, 2009), the California Court of Appeals rejected a county's assertion that it could require a requester to sign an end user agreement imposing restrictions on the use of a Geographic Information Systems (GIS) "basemap." The court emphasized that section 6257.5 of the California Public Records Act (CPRA) (GOVT. CODE § 6257.5 (West 2008)) "does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure." *Santa Clara*, 170 Cal. App. 4th at 1335, 89 Cal. Rptr. 3d at 399. The court concluded that the CPRA's public policy of ensuring access to records maintained by government agencies "would be undercut by permitting the County to place extra-statutory

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restrictions on the records that it must produce, through the use of end user agreements." *Santa Clara*, 170 Cal. App. 4th at 1335, 89 Cal. Rptr. 3d at 400; *see also Microdecisions, Inc., v. Skinner*, 889 So.2d 871, 875-76 (Fla. Dist. Ct. App. 2004) (county property appraiser prohibited from requiring commercial requester to enter into licensing agreement to obtain GIS maps because a "requester's motive for a seeking a copy of documents is irrelevant[]" and because "the fact that a person seeking access to public records wishes to use them in a commercial enterprise does not alter his or her rights under Florida's public records law."); *but see County of Suffolk, New York v. First American Real Estate Solutions*, 261 F.3d 179, 192 (2d Dist. 2001) ("an agency's choice to notify the recipient that a portion of the record is protected by copyright law or an agency's requirement that the recipient enter into a licensing agreement if it wishes to distribute the record commercially does not restrict initial access but only what the recipient may do once it acquires access.").

Illinois FOIA provides that "it is declared to be the public policy of the State of Illinois that **all persons** are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." (Emphasis added.) 5 ILCS 140/1 (West 2016). A requester's purpose in seeking records is only relevant to obtaining access in limited circumstances that do not apply to [REDACTED].¹² There is no indication that [REDACTED] is seeking records for a commercial purpose. Even if he was, having a commercial purpose would not diminish his right to obtain the records, though the Department would have additional time to respond (5 ILCS 140/3.1 (West 2016)) and could potentially assess higher fees under section 6(f) of FOIA (5 ILCS 140/6(f) (West 2016)).

Section 1 of FOIA also provides: "This Act shall be the **exclusive State statute on freedom of information**, except to the extent that other State statutes might create additional restrictions on disclosure of information or other laws in Illinois might create additional obligations for disclosure of information to the public." (Emphasis added.) Notably, section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017) exempts "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." FOIA does not, however, authorize a public body to create administrative rules that declare records exempt under other exemptions, such as section 7(1)(i), or that condition an individual's access to records on entering into agreements that restrict their use for limited purposes. Section 6.01 of the Natural Areas Preservation Act authorizes the Department to compile and maintain natural heritage data—not prohibit or limit disclosure of that data.

¹²For example, section 3(g) of FOIA (5 ILCS 140/3(g) (West 2016)) permits a public body to deny a request as unduly burdensome after fulfilling certain procedural requirements if "there is no way to narrow the request and the burden on the public body outweighs the public interest in the information."

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Although this office recognizes that the Department's use of data license agreements may be intended to further the public interest in protecting endangered species, it serves to improperly restrict public access to copies of records that are subject to disclosure under FOIA. Because the Department has not demonstrated that the records are exempt from disclosure under FOIA, the Department has no basis for withholding them. The Act does not permit a public body to unilaterally set up an alternative system separate from FOIA that imposes conditions on the use of public records and empowers a public body to refuse to provide access unless a requester agrees to its terms.

Accordingly, this office concludes that the Department improperly responded that it is not required to provide the requester with copies of public records from the Natural Heritage Database and that he may not inspect the records unless he signs a data license agreement. In accordance with this determination, this office asks the Department to provide [REDACTED] with copies of the responsive records from the Natural Heritage Database, subject to the payment of any fee properly imposed pursuant to FOIA and redactions pursuant to any exemptions that apply to discrete portions of the records.¹³

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, please contact me at (312) 793-0865 or the Chicago address listed on the bottom of the first page of this letter. This letter serves to close this matter.

Very truly yours,

[REDACTED]
MARIE HOLLISTER
Assistant Attorney General
Public Access Bureau

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¹³Based on the explanation provided by the Department as to the contents of the database, specifically as stated in the January 26, 2018, e-mail from the Department to this office that contained the sample database record, section 7(1)(i) may still be applicable to portions of records in the database.