



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

March 19, 2025

Via electronic mail

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Via electronic mail

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RE: FOIA Request for Review – 2023 PAC 75894; University No. 23-331

Dear Mr. LeRoy and Ms. Nazon:

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 2023 Supp.)). For the reasons that follow, the Public Access Bureau concludes that the University of Illinois at Urbana-Champaign (University) improperly denied Mr. Michael LeRoy's March 8, 2023, FOIA request.

On that date, Mr. LeRoy submitted a FOIA request to the University seeking a copy of "the contract that is popularly known as the 'Big Ten media rights deal[,]'" and related

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records.¹ On March 15, 2023, the University responded, stating that it searched but located no responsive records. The University indicated that the reason it possessed no responsive records is that "each Big Ten institution has given television rights to the Big Ten Conference.

Agreements are between the Conference and each respective television partner.² On March 17, 2023, Mr. LeRoy submitted the above-referenced Request for Review contesting the University's response as to the Big Ten media rights deal. He explained in detail the reasons why he believed the University possesses that contract directly or indirectly, including that University administrators such as Athletic Director Josh Whitman must have reviewed the agreement based on statements in the news media and the fiscal implications of the deal for the University.

On March 24, 2023, this office forwarded a copy of the Request for Review to the University and asked it to provide a detailed description of the measures taken to search for responsive records, including a description of the specific extranets or other shared recordkeeping systems that were searched, the method of that search, and the individuals who were consulted. This office also requested a detailed description of the relationship between the University and the Big Ten Conference (Conference) in relation to the negotiation and execution of any contract for media rights, and a copy of any foundational record(s) evincing the terms of the University's delegation of rights to the Conference and any mutual obligations.

On April 4, 2023, the University responded by submitting two versions of its answer: a complete version for this office's confidential review and a redacted version to forward to Mr. LeRoy. In its non-confidential answer, the University stated that its FOIA Office personnel had consulted with the University's Division of Intercollegiate Athletics (DIA) Associate Athletic Director for Media Relations, Kent Brown, who reported that the University did not possess the media rights deal and subsequently received confirmation of the same from DIA Chief Operating Officer Roger Denny and Athletic Director Whitman.

On April 6, 2023, this office forwarded a copy of the University's redacted answer to Mr. LeRoy; on that same date, Mr. LeRoy submitted a reply. Mr. LeRoy argued that the media rights deal meets the definition of "public record" in FOIA³ because it pertains to the transaction of public business and was prepared, in part, for the University's benefit.

On April 12, 2023, this office sent a follow-up e-mail to the University and asked it to address whether the University had entered into any type of contract with the Conference, together with an explanation of the relationship between the University and the Conference and

¹E-mail from Michael H. LeRoy, Professor, School of Labor & Employment Relations & College of Law, University of Illinois at Urbana-Champaign, to University of Illinois FOIA (March 8, 2023).

²E-mail from Kirsten Ruby, Director, External Relations and Communications and Chief Records Officer, to Michael H. LeRoy (March 15, 2023).

³5 ILCS 140/2(c) (West 2022).

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the applicability of section 7(2) of FOIA.⁴ On April 27, 2023, the University provided a supplemental written response. On May 10, 2023, this office forwarded a copy of the University's response to Mr. LeRoy; on the same date, Mr. LeRoy submitted a reply addressing the applicability of section 7(2) of FOIA.

On October 30, 2023, the University unexpectedly provided this office and Mr. LeRoy with a copy of an April 16, 2015, amended assignment of rights agreement (Assignment) between the University and the Conference.⁵ Among other things, the Assignment provides the Conference with sole authority to negotiate and execute agreements concerning the telecast and distribution rights to the University's varsity athletic games, contests, and related events.⁶ The University stated that it had recently discovered this document, which it had previously denied possessing, while cleaning out the office of an unspecified former University employee. On December 27, 2023, Mr. LeRoy submitted a supplemental answer continuing to contest the University's claim that the media rights deal is not a public record of the University.

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). 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 (West 2022).

The adequacy of a public body's search for responsive records is judged by a standard of reasonableness and depends upon the particular facts of the case. *Better Government Ass'n v. City of Chicago*, 2020 IL App (1st) 190038, ¶ 31. "Although a public body is not required to perform an exhaustive search of every possible location, the body must construe FOIA requests liberally and search those places that are 'reasonably likely to contain responsive records.'" *Better Government Ass'n*, 2020 IL App (1st) 190038, ¶ 31 (quoting *Judicial Watch, Inc. v. U.S. Department of Justice*, 373 F. Supp. 3d 120, 126 (D.D.C. 2019)).

In its non-confidential answers in this matter and in the information it submitted confidentially, the University described measures it took to search the records in its possession for the Big Ten media rights deal and other related records. In particular, the University explained that it conferred with Athletic Director Whitman and DIA Chief Operating Officer

⁴5 ILCS 140/7(2) (West 2023 Supp.).

⁵Amended and Restated Assignment of Rights Agreement between The Big Ten Conference, Inc. and University of Illinois (April 16, 2015).

⁶Amended and Restated Assignment of Rights Agreement between The Big Ten Conference, Inc. and University of Illinois, §§ 1, 2(a) (April 16, 2015).

Denny, who are the personnel most likely to have knowledge of the University's possession of the Big Ten media rights deal, and they confirmed that the University did not have that record in its possession. Although, as discussed further below, Mr. LeRoy strenuously disputes the University's claim that it does not possess the media rights deal via section 7(2) of FOIA, this office has not received information from which it could conclude that the University failed to adequately search the records in its physical custody.

The remaining question is whether any media rights contract the Conference entered into for the University's benefit, that is not in the University's physical custody, is considered the University's public record for purposes of FOIA.

Section 7(2) of FOIA

Section 7(2) of FOIA provides:

A public record that is not in the possession of a public body but is in the possession of a party with whom the agency has **contracted to perform a governmental function** on behalf of the public body, and that **directly relates to the governmental function** and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act. (Emphasis added.)

Therefore, the applicability of section 7(2) in this matter depends on whether: (1) the University has contracted the Conference to perform a "governmental function"; and (2) whether the agreement at issue "directly relates" to a governmental function.

The Illinois Supreme Court has construed the term "governmental function" for purposes of section 7(2) in accordance with the Black's Law Dictionary definition of that term: "'a government agency's conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general public.'" *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121124, ¶ 63 (quoting Black's Law Dictionary 812 (10th ed. 2014)). The Illinois Supreme Court explained that "section 7(2) was the legislature's response to 'the privatization of government responsibilities and its impact on the right of public information access and transparency' and that this section 'ensures that governmental entities must not be permitted to avoid their disclosure obligations by contractually delegating their responsibility to a private entity.'" *Rushton v. Department of Corrections*, 2019 IL 124552, ¶ 28 (quoting *Better Government Ass'n*, 2017 IL 121124, ¶ 62).

The University's non-confidential response described its relationship with the Conference:

[The] University granted its rights to monetize any display of sports- related competition to the Conference decades ago. This is the case for conferences across the country. In each conference, the member- institutions grant their conference media rights to negotiate with broadcasting companies. Logistically, a system where each and every university and college across the country negotiates their own media contracts would quickly become unmanageable. Correspondingly, the Conference enters into deals and media rights agreements in furtherance of a revenue- sharing pool.^[7]

The University also provided Mr. LeRoy and this office with a copy of the Assignment confirming that it had in fact contracted with the Conference. This office's review of the Assignment between the two entities reflects that the University has transferred to the Conference "the right, title and interest that the [University], directly or indirectly, has or may hereafter acquire to telecast or distribute, live or delayed, throughout the universe"⁸ all varsity athletic games, matches, contests, or events, among other things.⁹ Additionally, the Conference agreed to negotiate and enter into agreements to telecast or distribute games and ancillary programming, and to distribute to the University revenue derived from those agreements.¹⁰ News media reports indicate that the Big 10 generated almost \$880 million in revenue in fiscal year 2023, and distributed more than \$60 million to the University.¹¹

Both the plain language of section 7(2) of FOIA and Illinois Appellate Court opinions interpreting that provision support the conclusion that the Conference was contracted to perform a governmental function on behalf of the University in carrying out the media rights deal. As referenced above, "[g]overnmental function" is defined as "[a] government agency's conduct that is expressly or impliedly mandated or **authorized by** constitution, **statute**, or other

⁷Letter from Kristen Ruby, Director of External Relations and Communications and Chief Records Officer, University of Illinois System, to Matthew G. Goodman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (April 4, 2023, at 2-3).

⁸Amended and Restated Assignment of Rights Agreement between The Big Ten Conference, Inc. and University of Illinois, § 2 (April 16, 2015).

⁹Amended and Restated Assignment of Rights Agreement between The Big Ten Conference, Inc. and University of Illinois, § 2(a) (April 16, 2015).

¹⁰Amended and Restated Assignment of Rights Agreement between The Big Ten Conference, Inc. and University of Illinois, § 8 (April 16, 2015).

¹¹Steve Berkowitz, *Big Ten outpaced SEC with \$880 million in revenue for 2023 fiscal year with most schools getting \$60.5 million*, USA Today, (May 21, 2024), <https://www.usatoday.com/story/sports/college/2024/05/20/big-ten-sec-revenue-2023-fiscal-year/73772300007/>.

law and that is carried out for the **benefit of the general public.**" (Emphasis added.) Black's Law Dictionary 840 (11th ed. 2019). Section 1 of the Televised University Athletics Act¹² grants the governing boards or administration of State-supported universities the authority to contract for the highest and best offers for television rights agreements for intercollegiate athletics games and contests that are not under contract for exclusive showing on a national television network. The Assignment is a contract that plainly grants the Conference the right to engage in conduct on behalf of the University that is expressly authorized by law. The Assignment also reflects that negotiating and entering into telecast and distribution rights agreements is not a corporate or business undertaking merely for the University's corporate benefit, but an act involving a recreational benefit for the general public of making University athletic contests of interest to the public widely viewable while also remitting large sums of money to the public body.

Further, the University's response to this office acknowledged that it entered into the agreement to simplify the process of negotiating media contracts. In *College of DuPage*, the court held that a foundation conducting fundraising activities for the college was performing a governmental function for the college for purposes of section 7(2) of FOIA. In so concluding, the court emphasized that "[i]f the Foundation did not undertake these responsibilities, the College would necessarily do so itself[.]" *College of DuPage*, 2017 IL App (2d) 160274, ¶ 50. And, in *Metropolitan Pier*, the court noted that if the Metropolitan Pier and Exposition Authority (MPEA)—a public body created to develop Navy Pier—had itself entered into the leases and other agreements sought by the FOIA requester, MPEA would have had a duty to disclose them; the fact that the leases and other agreements were entered into by the non-profit entity MPEA had contracted with to operate Navy Pier for the benefit of the public did not remove MPEA from responsibility for those records under FOIA. *Metropolitan Pier*, 2020 IL App (1st) 190697, ¶¶ 23, 27. Similarly, if the University had not assigned to the Conference its right to telecast or distribute its sporting events, the University undoubtedly would have sought to monetize such rights itself, and any such media rights agreement would plainly be subject to disclosure pursuant to FOIA. See 5 ILCS 140/2.5 (West 2022) ("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.").

Having concluded that the University has contracted the Conference to perform a "governmental function", it next must be determined whether the agreement at issue "directly relates" to a governmental function. A public body that contracts with another entity to perform a governmental function on its behalf has a duty to request and obtain any responsive record that "directly relates" to the governmental function which is in the physical custody of the other entity, and to provide the requester with a copy of the record unless it falls within one or more of FOIA's exemptions. See Ill. Att'y Gen. Pub. Acc. Op. No. 20-006, issued July 27, 2020, at 7 (concluding that policies and data pertaining to head injuries in possession of the healthcare

¹²110 ILCS 75/1 (West 2022).

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vendor for the Illinois Department of Corrections (IDOC) were public records of IDOC because they directly related to the governmental function of providing medical care to inmates). FOIA does not define the term "directly relates." The Illinois Appellate Court has explained that "[t]his requirement makes clear the legislature's intention that the general public may not access all of a third party's records merely because it has contracted with a public body to perform a governmental function. FOIA is not concerned with private affairs." *Chicago Tribune v. College of DuPage*, 2017 IL App (2d) 160274, ¶ 53. Still, "the term 'directly relates' must be liberally construed in light of FOIA's purpose." *Rushton*, 2019 IL App (4th) 180206, ¶ 30.

Records that reflect the governmental function an entity has been contracted to perform and that shed light on its performance directly relate to the governmental function and therefore are subject to disclosure under section 7(2) of FOIA. *College of DuPage*, 2017 IL App (2d) 160274, ¶ 55 (affirming trial court decision that a federal grand jury subpoena in a foundation's possession directly related to the governmental function that the foundation was contracted to perform for college of managing all of college's private donations because college never asserted that the subpoena concerned matters other than those donation management obligations). In *Rushton*, the Illinois Appellate Court concluded that a settlement agreement between IDOC's contractor for inmate medical care and the estate of a prisoner who allegedly died from inadequate medical care directly related to a governmental function because prisons are charged with ensuring inmates receive adequate medical care and the settlement agreement arose out of such medical care. *Rushton*, 2019 IL App (4th) 180206, ¶¶ 31-33.

Although the Conference's media rights contract has not been provided for this office's confidential review, it necessarily directly relates to the governmental function of negotiating and entering into agreements for television rights to University athletic games and events. Section 7(2) applies to records in the possession of a third party "that are truly related to its exercise of a government function and not those records that are only incidentally or tangentially related to the contract." *Rushton*, 2019 IL 124552, ¶ 29. The media rights agreement cannot be "only incidentally or tangentially related to the contract" between the University and the Conference given that the Assignment grants the Conference the right to negotiate and enter into telecast and distribution agreements pertaining to the University's sporting events.

In its April 27, 2023, response to this office concerning section 7(2) of FOIA, the University stated:

Presumably, the need to consider the applicability of Section 7(2) is to determine whether the University is obligated to attempt to retrieve any responsive records from the Big Ten. As a matter of good faith, and in the spirit of transparency, the University has taken it upon itself to request the Media Rights Deal * * * from the Big Ten once again. The University was again

denied. Please note, this action is not intended to be interpreted as any explicit or implicit acceptance of the applicability of Section 7(2) here.

The University recently experienced a similar situation, where the University did not possess requested records. An outside organization was asked to provide the University with the requested records to produce to the requestor, but the organization declined. Under these circumstances, the University was found to have appropriately searched for and requested records.
[Citation.]^[13]

The University relied upon determination letter Ill. Att'y Gen. PAC Req. Rev. Ltr. 74112, issued March 21, 2023, to support its argument that it had satisfied its obligations under FOIA when it requested the media rights contract from the Conference but was denied. The University's reliance, however, is misplaced because the records that were the subject of that determination letter, which were in the possession of an academic honor society, were not considered the University's public records under section 7(2) of FOIA. Ill. Att'y Gen. PAC Req. Rev. Ltr. 74112, at n.3. ("Because the Society is not performing a governmental function on behalf of the University, the Society's records relating to the University are not the University's public records."). In this matter, the media rights contract is considered the University's public record because it directly relates to a governmental function that the Conference was contracted to perform on behalf of the University.

For the reasons expressed above, the Public Access Bureau concludes that the University improperly denied Mr. LeRoy's FOIA request. This office requests that the University take additional measures to obtain the media rights agreement from the Conference and provide a copy to Mr. LeRoy. In particular, the University should alert the Conference to the requirements of section 7(2) of FOIA, and provide the Conference with a copy of this determination detailing the University's disclosure obligations. Going forward, the University should ensure that any contract it enters into with a third party to perform a governmental function includes a mechanism for the University to obtain its own public records from the contractor.

¹³Letter from Kirsten Ruby, Director of External Relations and Communication and Chief Records Officer, to [Matt] Goodman, Assistant Attorney General, Public Access Bureau (April 27, 2023), at 2.

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The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. Please contact me at matthew.goodman@ilag.gov if you have questions or would like to discuss this matter. Thank you.

Very truly yours,



MATT GOODMAN
Assistant Attorney General
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