



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

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ATTORNEY GENERAL

March 3, 2020

Via electronic mail

Mr. Jon Styf

Editor

Northwest Herald

jstyf@shawmedia.com

Via electronic mail

Ms. Lisa Reynolds

Active Freedom of Information Officer

Illinois Department of Public Health

535 West Jefferson, 5th Floor

Springfield, Illinois 62761

Lisa.Reynolds@illinois.gov

RE: FOIA Request for Review – 2019 PAC 61017

Dear Mr. Styf and Ms. Reynolds:

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 2018)). For the reasons discussed below, the Public Access Bureau concludes that the Illinois Department of Public Health (Department) failed to conduct a reasonable search for records responsive to Mr. Jon Styf's FOIA request.

BACKGROUND

On November 18, 2019, Mr. Styf, on behalf of the *Northwest Herald*, submitted a FOIA request to the Department following up on his prior FOIA request regarding vaping-related deaths, which the Department had deemed vague. This time, he specified that he was seeking copies of any documents related to the four deaths referenced in a Department press

Mr. Jon Styf
Ms. Lisa Reynolds
March 3, 2020
Page 2

release: "Fourth Illinois Resident Dies After Vaping Related Lung Injury."¹ On December 4, 2019, the Department responded that it was unable to identify any responsive records. On December 18, 2019, Mr. Styf submitted the above-captioned Request for Review contesting that response. He argued that the Department clearly possessed location information pertaining to the vaping-related lung injury deaths.

On December 19, 2019, the Public Access Bureau sent a copy of the Request for Review to the Department, together with a letter requesting a detailed written explanation of how it searched for responsive records. In particular, this office asked the Department to explain the source materials it used in announcing four vaping-related lung injury deaths, and to provide copies of any such records for this office's confidential review. On January 14, 2020, the Department submitted a written response and copies of certain records that it said it did not consider responsive when responding to Mr. Styf's FOIA request. The Department asserted that these records, from its Office of Health Protection, are medical records that are exempt from disclosure under sections 7(1)(a), 7(1)(b), and 7(1)(c) of FOIA (5 ILCS 140/7(1)(a), (1)(b), (1)(c) (West 2018), as amended by Public Act 101-455, effective August 23, 2019). The Department also stated that it did not have its Information Technology (IT) Section perform an e-mail search because Mr. Styf had not identified search terms or a timeframe. On January 17, 2020, Mr. Styf submitted a reply to the Department's response, maintaining his objections.

ANALYSIS

Under FOIA, "[a]ll 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 2018). A public body that receives a FOIA request is required to conduct a "reasonable search tailored to the nature of [that] particular request." *Campbell v. U.S. Department of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). A public body is not required to "search every record system[.]" but it "cannot limit its search to only one record system if there are others that are likely to turn up the requested information." *Oglesby v. U.S. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). "[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). In particular, a public body must use search terms that are reasonably calculated to locate all responsive records. *Hall v. C.I.A.*, 668 F. Supp. 2d 172, 183-84 (D.D.C. 2009). Although "[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)), "[a]t all times the burden is on the [public body] to establish the

¹Illinois Department of Public Health, *Fourth Illinois Resident Dies After Vaping Related Lung Injury* (Nov. 14, 2019), <http://www.dph.illinois.gov/news/fourth-illinois-resident-dies-after-vaping-related-lung-injury> (last visited March 2, 2020).

Mr. Jon Styf
Ms. Lisa Reynolds
March 3, 2020
Page 3

adequacy of its search." *Rugiero v. U.S. Department of Justice*, 257 F.3d 534, 547 (6th Cir. 2001).

In its response to this office, the Department asserted that in order for its IT Section to perform a search for responsive e-mails, "requestors are required to be [sic] identify search terms, as well as a time frame for the search."² The Department confirmed that it did not search for responsive e-mails because Mr. Styf only reiterated his request when the Department asked him to specify search terms and a timeframe. As to the Department's Office of Health Protection, the Department stated that it located potentially responsive medical records but provided no information as to how it searched that office or any of its other divisions. Moreover, the Department did not answer this office's question concerning the source materials for the press release. Mr. Styf replied:

In creating its press release on vaping related deaths in the state, the department most certainly had access to relevant data involving those deaths, including documents which state where the deaths occurred.

It is not up to me to locate the date or time frame of which those emails or communications would have been sent, those were clearly accessible to the team that was using public records to create a new public record.^[3]

As to the clarity of Mr. Styf's FOIA request, "[a] request to inspect or copy must reasonably identify a public record and not general data, information, or statistics." *Chicago Tribune Co. v. Department of Financial & Professional Regulation*, 2014 IL App (4th) 130427, ¶33, 8 N.E.3d 11, 19 (2014). 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."). Requests for e-mails about particular matters frequently require public bodies to make judgment calls about the appropriate personnel to consult and queries to run. A requester generally is not required to specify search terms or a timeframe to reasonably describe e-mails concerning a particular subject matter. Rather, the public body is generally obligated to

²Letter from Lisa Reynolds, Acting Freedom of Information Act Officer, Illinois Department of Public Health, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 14, 2020), at 1.

³E-mail from Jon Styf, Editor, Northwest Herald, to Public Access [Bureau] (January 17, 2020).

Mr. Jon Styf
Ms. Lisa Reynolds
March 3, 2020
Page 4

identify the employees whose e-mail accounts are reasonably likely to contain responsive records, and take measures reasonably calculated to locate such records (i.e. devising appropriate search parameters). *See Oglesby*, 920 F.2d at 68.

In this instance, the subject of Mr. Styf's request was specific: a particular press release referencing the recent deaths of four particular individuals. The Department's first press release about a vaping-related death was issued on August 23, 2019; the second was issued October 24, 2019, the third on October 31, 2019, and the fourth on November 14, 2019.⁴ Therefore, the Department had knowledge of the general three-to-four-month timeframe surrounding the deaths. Furthermore, the Department, not Mr. Styf, was in the position to know which of its employees were likely to have sent or received correspondence regarding vaping-related deaths and what keywords any such e-mails were likely to contain. Mr. Styf's choice not to specify search terms or a timeframe did not relieve the Department of its obligation to perform a search that was reasonably calculated to locate responsive e-mails. Additionally, the Department did not set forth information from which this office could conclude that it performed a reasonable search for any other types of responsive records. Although the Department acknowledged that it located certain potentially responsive records, which, this office has verified, are medical records that are expressly exempt from disclosure under section 7(1)(b) of FOIA,⁵ the Department did not explain how it searched the records of its Office of Health Protection. For instance, the Department did not explain which personnel it consulted and why, despite this office's specific request for such information. The Department also gave no indication as to why the Office of Health Protection was its only division that was reasonably likely to maintain responsive records, and provided no information concerning the source materials for the press release. For these reasons, the Public Access Bureau concludes that the Department violated FOIA by failing to conduct a reasonable search for responsive records.

In order to remedy its improper search, this office requests that the Department conduct a new search tailored to the full scope of the request. The Department should then issue a supplemental response to the requester containing copies of the records it locates, subject only to permissible redactions under section 7 of FOIA (5 ILCS 140/7 (West 2018), as amended by Public Act 101-455, effective August 23, 2019). If the Department does not locate any further

⁴Illinois Department of Public Health, <http://www.dph.illinois.gov/search/site/vaping> (last visited March 2, 2020).

⁵Section 7(1)(b) of FOIA exempts from disclosure "[p]rivate information, unless disclosure is required by another provision of this Act, a State or federal law or a court order." Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2018)) defines "private information" as "unique identifiers," including "medical records." The records the Department provided to this office are plainly medical records, as they document a patient's diagnosis and treatment.

Mr. Jon Styf
Ms. Lisa Reynolds
March 3, 2020
Page 5

records responsive to the request, it should provide the requester with a detailed explanation of how it searched.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, please contact me at (312) 814-8413 or jjones@atg.state.il.us.

Very truly yours,

[REDACTED]
JOSHUA M. JONES
Deputy Bureau Chief
Public Access Bureau

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