



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

February 9, 2017

Via electronic mail

Mr. Kirk Allen
P.O. Box 593
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kirk@illinoisleaks.com

Via electronic mail

Ms. Nanette Crippes, Director
Edgar County Emergency Telephone System Board
228 North Central Avenue
Paris, Illinois 61944
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RE: FOIA Request for Review – 2016 PAC 44873

Dear Mr. Allen and Ms. Crippes:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons stated below, the Public Access Bureau concludes that the response by the Edgar County Emergency Telephone System Board (Board) to Mr. Kirk Allen's September 30, 2016, request violated the requirements of FOIA.

On that date, Mr. Allen submitted a four-part FOIA request to the Board seeking copies of various records pertaining to a September 5, 2016, incident. On October 11, 2016, the Board responded that it did not possess responsive records because there was no 9-1-1 call about the incident. On October 14, 2016, the Board's FOIA officer sent Mr. Allen a letter stating that she was out of the office from September 30, 2016, until her return on October 11, 2016, and that any non-9-1-1 dispatch records about the incident would be under the control of the Edgar County Sheriff's Department (Sheriff's Department). On November 3, 2016, Mr. Allen submitted this Request for Review alleging that the Board's response was not timely and that the Board has access to the requested information because the equipment involved in dispatch is paid for and controlled by the Board.

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On November 18, 2016, this office sent a copy of this Request for Review to the Board and asked it to provide a written explanation of its search for responsive records, including the manner in which the types of records requested would regularly be maintained. This office also asked the Board to address the timeliness of its response and whether it has a back-up FOIA officer. On November 21, 2016, the Board provided, in pertinent part, the following response:

[The Board does] not possess any records in regards to this incident. There was an incident on this date, but there was no 9-1-1 call, time sheet, or radio traffic over our 9-1-1 channel in regards to this incident. I listened to recordings of all 9-1-1 calls from that date and looked through all my dispatch forms from that date, no 9-1-1 records exist. This was [a Sheriff's Department] matter, not a 9-1-1 matter. As Kirk Allen stated, we are separate public bodies. He will need to direct his request for any records of this incident to the [Sheriff's Department]. There is an Eventide recorder at the Sheriff Department which records all phone lines and radio channels. 9-1-1 is housed in the [Sheriff's Department]. 9-1-1 owns and maintains the recorder; however both the [Sheriff's Department] and 9-1-1 have their own phone lines and radio channels that are recorded on this one recorder. [The Board has] an agreement/policy as to who has the authority to release recordings on the recorder based on what lines or channels those recordings are on. I have included a copy of that agreement. I, as 9-1-1 Director, have no authority over the Sheriff's phone lines or his radio channel nor does he over [the Board's].

As far as the timeliness of [the Board's] initial response, the 5 day time frame was not ignored as [Mr. Allen] suggested, but it is a fact that I was out of the office on vacation. I am the only employee of the [Board]. The Board does not have a back-up FOIA officer.^[1]

On December 12, 2016, Mr. Allen submitted a reply, asserting that the FOIA officer's vacation has no bearing on the Board's obligation to respond to FOIA requests in a timely manner.

¹Letter from Nanette Crippes, Edgar County 9-1-1 Director, to Christopher R. Boggs, Assistant Attorney General, Public Access Bureau (November 21, 2016).

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DETERMINATION

Completeness of the Board's Response

Section 1.2 of FOIA (5 ILCS 140/1.2 (West 2014)) provides that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." Section 2(c) of FOIA (5 ILCS 140/2(c) (West 2015 Supp.)) defines "public records" as "all records[] * * * 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." FOIA generally requires a public body to conduct a "reasonable search tailored to the nature of [each] particular request." *Campbell v. U.S. Department of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). Further, "[a] requester is entitled only to records that an agency has in fact chosen to create and retain."

The Board verified for this office that it conducted a search of its 9-1-1 recordings and dispatch records but asserted that it did not locate any responsive records because the incident in question involved only the Sheriff's Department, which is a separate public body. However, in a previous Request for Review of the Board's denial of a recording of radio traffic on the Sheriff's Department's frequency (2013 PAC 18624), the Board confirmed for this office that it is "the administrator of [the Eventide recorder] and can produce copies of recordings," but asserted that it has "no authority over [the Sheriff's Department's] phone lines or radio frequencies." The Public Access Bureau rejected the Board's assertion that only the Sheriff's Department had authority to furnish the recording and determined that the Board must disclose public records in its possession, absent the assertion of a valid exemption, even if those records document the performance of a separate public body. Ill. Att'y Gen. PAC Req. Rev. Ltr. 18624, issued October 23, 2013, at 2.

In this matter, the Board contends that it is unable to provide responsive records because on December 1, 2014, the Board and the Sheriff's Department formalized an agreement that allows each public body to maintain separate phone lines and radio channels on the shared recorder; the agreement further provides that neither public body has the authority to disclose the other party's records. The Attorney General has previously concluded that an agreement that restricts a public body from fulfilling its statutory obligation to provide public records in its possession or custody is not a valid basis for denying a FOIA request. Ill. Att'y Gen. Pub. Acc. Op. No. 14-005, issued June 30, 2014, at 9 (concluding that a confidentiality agreement that requires a public body to withhold records subject to the requirements of FOIA is unenforceable); *see also* Ill. Att'y Gen. Pub. Acc. Op. No. 15-002, issued January 23, 2015, at 10 (a public body cannot create laws to avoid disclosing public records to the public or otherwise absolve their obligation to comply with the requirements of FOIA); *State ex. rel. Findlay*

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Publishing Company v. Hancock County Board of Commissioners, 80 Ohio St. 3d 134, 137, 684 N.E. 2d 1222, 1225 (Ohio 1997) ("A public entity cannot enter into enforceable promises of confidentiality regarding public records"); *Tribune-Review Publishing Company v. Westmoreland County Housing Authority*, 574 Pa. 661, 675, 833 A. 2d 120 (Pa. 2003) ("the confidentiality clause contained in this agreement is void as against public policy to the extent that it conflicts with the text and purpose of the [Open Records] Act. A public entity may not enter into enforceable promises of confidentiality regarding public records").

Thus, the December 1, 2014, agreement between the Board and the Sheriff's Department does not supersede the disclosure requirements of FOIA. Because the Board's efforts to locate records did not include searching for recordings in its possession of the Sheriff's Department's phone lines and radio channel, this office concludes that the Board violated FOIA by failing to conduct an adequate search for the records Mr. Allen requested.

In accordance with the conclusion expressed above, this office requests that the Board search for and disclose to Mr. Allen copies of any non-exempt responsive records maintained on the shared recorder. If the Board asserts that records are exempt from disclosure, it should provide a notice of denial to Mr. Allen that includes a detailed factual basis for the applicability of the relevant exemption and that otherwise complies with the requirements of section 9 of FOIA (5 ILCS 140/9 (West 2014)).

Timeliness of the Board's Response

"It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act." 5 ILCS 140/1 (West 2014). The procedures for responding to a FOIA request are clear. Section 3(d) of FOIA (5 ILCS 140/3(d) (West 2014)) provides:

Each public body shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request, unless the time for response is properly extended under subsection (e) of this Section. Denial shall be in writing as provided in Section 9 of this Act. Failure to comply with a written request, extend the time for response, or deny a request within 5 business days after its receipt shall be considered a denial of the request. A public body that fails to respond to a request within the requisite periods in this Section but thereafter provides the requester with copies of the requested public records may not impose a fee for such copies. A public body that fails to respond to

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a request received may not treat the request as unduly burdensome under subsection (g). (Emphasis added.)

Furthermore, section 3.5(a) of FOIA (5 ILCS 140/3.5(a) (West 2014)) requires public bodies to "designate one or more officials or employees to act as its [FOIA] officer or officers. Except in instances when records are furnished immediately, [FOIA] officers, or their designees, shall receive requests submitted to the public body under [FOIA], *ensure that the public body responds to requests in a timely fashion*, and issue responses under [FOIA]." (Emphasis added.)

It is undisputed that the Board failed to provide a timely response to Mr. Allen's request. Accordingly, the Board violated section 3(d) of FOIA. Although FOIA requires only that the Board designate at least one official or employee to act as its FOIA officer, this office encourages the Board to designate a second FOIA officer to prevent similar untimely responses in the future.

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 the Springfield address listed on the first page of this letter. This letter serves to close this matter.

Very truly yours,



CHRISTOPHER R. BOGGS
Assistant Attorney General
Public Access Bureau

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