



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

August 30, 2017

Via electronic mail
Mr. Derek Van Buer
230 Thornbrook Road
DeKalb, Illinois 60115
dvanbuer@gmail.com

RE: FOIA Request for Review – 2017 PAC 49016

Dear Mr. Van Buer:

The Public Access Bureau has received the enclosed response to your Request for Review from the Northern Illinois University (University). Additional confidential documents provided to the Public Access Counselor have been withheld.

You may, but are not required to, reply in writing to the public body's response. If you choose to reply, you must submit your reply to this office within 7 working days of your receipt of this letter. 5 ILCS 140/9.5(d) (West 2016). Please send a copy of your reply to the University as well.

If you have questions about this matter, please contact me at (217) 785-7438.

Very truly yours,

Christopher R Boggs

CHRISTOPHER R. BOGGS
Assistant Attorney General
Public Access Bureau

Enclosure

cc: *Via electronic mail*
Mr. Tom O'Grady
Assistant General Counsel
Northern Illinois University
DeKalb, Illinois 60115
togrady1@niu.edu



NORTHERN ILLINOIS UNIVERSITY

Office of General Counsel

August 22, 2017

Mr. Christopher R. Boggs
Assistant Attorney General
Public Access Bureau
Office of the Illinois Attorney General
500 South Second Street
Springfield, IL 62706

Re: FOIA Request for Review – 2017 PAC 49016

Dear Assistant Attorney General Boggs:

Northern Illinois University (NIU or University) is in receipt of your letter regarding the above-referenced matter. Your office has requested a detailed explanation of the factual and legal bases for the assertion that the records requested are not “public records” of the University under the definition of that term in section 2(c) of FOIA (5 ILCS 140/2(c) (West 2015 Supp.)). You have also asked for (1) Clarification whether the University maintains physical custody of the records; (2) A description of the relationship between the University and the Foundation; (3) A copy of contracts or agreements between the University and the Foundation. Lastly, you have requested that if the University does not maintain physical custody of the records to please provide a representative sample for this office’s confidential review.

On July 25, 2017, Mr. Derek Van Buer specifically requested:

“Payment History by Vendor Name Report that is part of the PeopleSoft Financials modules. If you don’t have this report, then a report with similar information. The period is March 1, 2017, to June 30 2017. The business unit I want for the report is NIU Foundation (not NIU). If possible, please remove the bank name field, the back account number field, and vendor id field, as these are the only fields that may be redacted. Please provide me this information in Microsoft Excel like FOIA Response 5718. Please add voucher amount, voucher id, and invoice number as additional fields because multiple vouchers are processed as one check. These fields were added for FOIA 5746.”

On July 25, 2017, Ms. Joan Laurino the Deputy FOIA Officer sent the NIU Foundation (“Foundation”) an email with Mr. Van Buer’s request. **On August 1, 2017 the Foundation who is the owner of the record**

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responded that they are a 501(c)(3) entity and therefore not a public body and are not under an obligation to gather the requested records. On August 1, 2017, the FOIA office informed Mr. Van Buer of the response from the Foundation and informed him that any further questions he has on the requested records should be addressed with the Foundation.

From Mr. Van Buer's request and this Request for Review, it is clear that Mr. Van Buer is challenging the assertion that the records requested are not "public records" under FOIA. I will address this specific argument and provide the legal and factual justification for the assertion that these are not "public records". I will also clarify whether the University maintains these records and describe the relationship between the University and the Foundation.

Attached, please find the Memorandum of Understanding dated June 23, 2011 between NIU and the Foundation as well as an Agreement dated June 30, 1983. Since the University does not maintain, physical custody of the records we are unable to provide a representative sample for confidential review by your office.

The Relationship between NIU and The NIU Foundation:

The NIU Foundation is an independent corporation, incorporated under the General Not-for-Profit Corporation Act of the State of Illinois. It is governed by a Board of Directors, who select their own successors. They are not appointed by Northern Illinois University or any other branch of State government.

The President of Northern Illinois University is included on the Foundation's Board of Directors **without voting rights**. According to Section 4.02 of the Foundation's Bylaws, a copy of which is attached, the President of Northern Illinois University "shall not be entitled to vote on any matter, and shall not be counted for purposes of determining whether a quorum is present". The voting directors of the Foundation are not employees or Trustees of Northern Illinois University.

Northern Illinois University pays the Foundation to provide fundraising and similar services.

Public Records Under the Definition of that term in Section 2(c):

Section 2(c) defines a public records as (c) "all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information 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.** (emphasis added)

First, the plain language of section 2(c) requires that the record itself pertain to the transaction of public business, having been or being used by, **received by, in the possession of or under the control** of any public

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body.” As was explained to Mr. Van Buer the records do not pertain to the business of NIU or the State of Illinois. They are the records created by, belonging to and under the control the Foundation and pertain to the business of the Foundation. The Foundation is not a public body as defined under FOIA. Additionally, the “Travel Expense Log” requested by Mr. Van Buer is not prepared by or for the University. The University is not in possession of those records. Mr. Van Buer erroneously relies on the definition of a “business unit” in PeopleSoft as follows:

An identification code the represents a high-level organization of business information. You “**can**” use a business unit to define regional or departmental units within a larger organization. (emphasis added)

The operative term in the definition Mr. Van Buer provided is **can**. The definition of can is 1. To be able to do something <you can lift 500 pounds>. 2. To have permission (as often interpreted by courts); may <no appeal can be filed until the filing fee is paid> Black's Law Dictionary (10th ed. 2014).

Consistent with the Memorandum of Understanding between the University and the Foundation stating that the Foundation’s “records are its own property and that the Foundation has the authority to keep all of its own records and data confidential consistent with the law... Upon reasonable advance notice the Foundation shall provide the University access to the Foundation’s books and records with respect to the funds the Foundation holds as an agent... provided however the University agrees to take appropriate steps to protect the confidentiality of the Foundation’s books and records.” (Memorandum of Understanding 2B(3)), **the business unit “NIU Foundation” in PeopleSoft is delineated as its own separate entity. The records although housed on NIU servers, are under the control and possession of the Foundation not NIU.** The records belong to the Foundation and they have control over how those records are accessed and used.

The Court in Hites v. Wabonsee Community College held that in order for data in a database to be designated as public records under FOIA the data must pertain “to the transaction of public business and be 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.” Hites v. Wabonsee Cmty. Coll., 2016 IL App (2d) 150836, ¶ 67, 56 N.E.3d 1049, 1063, as modified on denial of reh'g (July 13, 2016), appeal denied sub nom. Hites v. Wabonsee Cmty. Coll., 65 N.E.3d 840 (Ill. 2016). In the instant case the records requested by Mr. Van Buer do not pertain to the transaction of Public Business but pertain to the business of the Foundation a 501(c)(3) entity. As such the Foundation has not statutory obligation to fulfill Mr. Van Buer’s FOIA request. In addition, the records in question were not be prepared by or for or having been or being used by, received by, in the possession of, or under the control of the University. As the University has tried to explain to Mr. Van Buer on several occasions these records are the records of the Foundation and not NIU.

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Conclusion

The University believes that the information contained within this written explanation, supports the University's assertion that the documents requested are not "public records". As such, Northern Illinois University requests that you find that the University appropriately applied applicable exemptions under the law to the records at issue and close this Request for Review. If you have any comments or questions, please do not hesitate to contact me at 815-753-5454 or togrady1@niu.edu. Thank you.

Sincerely,

NORTHERN ILLINOIS UNIVERSITY

/s/Thomas M. O'Grady

Thomas M. O'Grady
Assistant General Counsel

Page 4 of 4

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