OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 6, 2017

Via electronic mail
Ms. Deborah Lee Wilson
[redacted]

Via electronic mail
Mr. Brian P. Crowley
Franczek Radelet, P.C.
300 South Wacker Drive, Suite 3400
Chicago, Illinois 60606
bpc@franczek.com

RE: FOIA Request for Review – 2017 PAC 43089

Dear Ms. Wilson and Mr. Crowley:

This determination 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 Des Plaines School District No. 62 (District) failed to conduct an adequate search for records and obtain records relating to legal representation from its law firm in response to Ms. Deborah Wilson's June 27, 2016, FOIA request.

On June 2, 2016, Ms. Deborah Wilson first submitted a FOIA request to the District seeking all records mentioning and pertaining to attorney Elaine Siegel and her law firm dated from January 1, 2012, to the date of the request. On June 7, 2016, the District notified Ms. Wilson that the request was unduly burdensome because it would require the review of over 400 e-mails, and offered Ms. Wilson the opportunity to confer in order to reduce the request to manageable proportions. On June 27, 2016, Ms. Wilson modified her request to narrow the time period to August 1, 2014, to the date of the request. On July 5, 2016, the District furnished a responsive record, but also asserted that other records held by its attorneys, Franczek Radelet P.C. (Franczek Radelet), are not subject to disclosure under section 7(2) of FOIA (5 ILCS 140/7(2) (West 2016)). In her Request for Review, Ms. Wilson asserted that the District's

response was incomplete because it did not include any of the over 400 e-mails referenced in the District's prior response on June 7, 2016.[1]

On August 3, 2016, this office sent a copy of the Request for Review to the District and requested that it provide a detailed description of the handling of Ms. Wilson's June 27, 2016, request and the measures taken by the District to search for responsive records, including a description of the specific recordkeeping systems that were searched, the method of that search, and the individuals who were consulted. This office also requested that the District provide the legal and factual bases for asserting that records held by Franczek Radelet are not "public records" subject to disclosure under section 7(2).

On August 11, 2016, the District submitted an answer to this office. This office sent Ms. Wilson a copy of the District's answer on August 16, 2016. Ms. Wilson submitted a written reply on July 22, 2017.

DETERMINATION

Adequacy of Search

FOIA provides that "[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 2016). When presented with a FOIA request, a public body must 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). However, "[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); *see also Workmann v. Illinois State Board of Education*, 229 Ill. App. 3d 459, 463-64 (2nd Dist. 1992) (a public body does not violate FOIA when it does not disclose a record that it no longer possesses). "At all times the burden is on the [public body] to establish the adequacy of its search." *Rugiero v. U.S. Department of Justice*, 257 F.3d 534, 547 (6th Cir. 2001).

In its answer to this office, the District stated that "[t]he individual that oversaw the response to this FOIA request has retired and the School District is unable to confirm with

[1]Ms. Wilson initially submitted a Request for Review contesting the District's assertion that the June 2, 2016, request was unduly burdensome, but in a conversation with a representative of the Public Access Bureau, Ms. Wilson agreed to limit this Request for Review to the District's response to her narrowed request. Therefore, this office does not address the June 2, 2016, request except as background for the subsequent request.

her how she conducted the search for responsive records."[2] The District was unable to further explain the scope of its search. Accordingly, the District has not established that it conducted an adequate search for responsive records in accordance with 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.

Citing a decision by the Appellate Court, First District, the District argues that in order for records to be subject to disclosure under section 7(2), they first must be "public records" as defined by section 2(c) of FOIA (5 ILCS 140/2(c) (West 2016)). *Better Government Ass'n v. Illinois High School Ass'n*, 2016 IL App (1st) 151356, ¶45, 56 N.E.3d 497, 508 (2016) ("the threshold requirement is that the requested documents qualify as a public record."). Specifically, the District contends that the records in question are not "public records" as defined by FOIA[3]:

> The records in question, to the extent they even exist, are not public records. [Citation.] The records in question were not prepared by the School District; they were not used or received by the School District; nor are they in the possession of under the control of the School District. Further, to the extent records exist, they were not prepared for the School District, but were instead

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[2]Letter from Brian P. Crowley, Franczek Radelet P.C., to Neil P. Olson, Assistant Attorney General, Public Access Bureau (August 11, 2016), at 2.

[3]Section 2(c) of FOIA defines "public records" as:

> 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.

> prepared as an ancillary result of Franczek Radelet's representation of the School District. The fact the School District is not in possession of any of these records establishes that the records were not prepared for the School District. The records, to the extent they exist, are internal law firm records prepared by the law firm that happen to pertain to a public matter. They are not records that were prepared for the School District's use or review, nor did the School District send any public records to Franczek Radelet to remove them from the possession of the School District in an attempt to avoid FOIA.[4]

The Appellate Court, Second District, however, has more recently disagreed with the First District's interpretation of section 7(2):

> Respectfully, we believe that the First District misconstrued the statute when it stated that the requested records must independently satisfy the definition of "public records" under section 2(c) in order to trigger section 7(2). Simply put, such a reading of section 7(2) would contravene the basic rules of statutory interpretation and render section 7(2) superfluous.
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> If accepted, the First District's interpretation would also lead to absurd results in many instances. Under its reasoning, records that are in the possession of an entity that has contracted with a public body to perform a governmental function, and that directly relate to that governmental function, will not be subject to FOIA unless they were first "prepared by," prepared for," "used by," "received by," "possessed by," or "controlled by" the public body. By virtue of having entered into a contract delegating the performance of a governmental function to a third party, however, the public body rarely will have actually prepared, used, received, possessed those records that "directly relate" to the governmental function. To impose those additional requirements, as the First District suggests, would have the unintended effect of shielding third-party records from disclosure in precisely those instances

[4]Letter from Brian P. Crowley, Franczek Radelet P.C., to Neil P. Olson, Assistant Attorney General, Public Access Bureau (August 11, 2016), at 2.

where section 7(2) was plainly meant to apply. *Chicago Tribune v. College of DuPage*, 2017 IL App (2d) 160274, ¶¶37, 41, ___ N.E.3d ___ (2017).

In addition, while it recently affirmed the First District's decision on the ground that the Illinois High School Association was not performing a "governmental function" for the defendant school district, the Illinois Supreme Court did not adopt the First District's analysis but instead articulated the 7(2) standard more consistently with the Second District's analysis – without the threshold "public record" requirement: "If a public body contracts with a party to perform a governmental function on behalf of the public body, ***records that are in that party's possession*** that directly relate to that governmental function and are not otherwise exempt are public records of the public body. * * * [S]ection 7(2) ensures that governmental entities must not be permitted to avoid their disclosure obligations by contractually delegating their responsibility to a private entity." (Emphasis added.) *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121124, ¶¶61-62, ___ N.E.3d ___ (2017).

Accordingly, this office concludes that the requested records in this matter need not stand on their own as public records as defined by section 2(c) of FOIA in order for section 7(2) to apply. Rather, under section 7(2), the requested records in the possession of Franczek Radelet would be considered to be the District's records if they directly relate to a governmental function that Franczek Radelet has contracted to perform for the District. *See Illinois High School Ass'n*, 2017 IL 121124, ¶61, ___ N.E.3d at ___.

A "'governmental function' is defined as '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.'" *Illinois High School Ass'n*, 2017 IL 121124, ¶63, ___ N.E.3d at ___ (quoting Black's Law Dictionary 812 (10th ed. 2014)). The District argues that Franczek Radelet is not performing a governmental function on its behalf: "Franczek Radelet is a private law firm that solely provides legal services to its clients. It does not perform the governmental functions of a school district, such as providing education services, transportation services, or food services."[5] In her reply to the District's answer, Ms. Wilson contends that under section 10-2 of the Illinois School Code (105 ILCS 5/10-2 (West 2016)), each public school district may sue and be sued, and that Franczek Radelet was representing the

[5]Letter from Brian P. Crowley, Franczek Radelet P.C., to Neil P. Olson, Assistant Attorney General, Public Access Bureau (August 11, 2016), at 2-3.

District in an employment lawsuit she filed against it in which she was represented by Ms. Siegel.[6]

The District construes the scope of its governmental functions too narrowly to exclude litigation records relating to its governmental functions, such as education services. The law firm's litigation services, such as representing the District Board in litigation in employment matters involving present or former teachers, support the education services of the District. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 37730, issued November 10, 2016, at 3 (determining litigation records in possession of attorney relating to statutory authority of pension fund subject to disclosure under section 7(2)). Moreover, if the District Board did not contract with a private law firm to defend it in litigation, it undoubtedly would represent itself in litigation. *See College of DuPage*, 2017 IL App (2d) 160274, at ¶50, ___ N.E.3d at ___. Accordingly, any records directly relating to the defense of the District Board in the possession of Franczek Radelet are public records of the District under section 7(2) of FOIA.

In accordance with the conclusions of this letter, this office requests that the District perform a supplemental search for responsive records and disclose any additional records located to Ms. Wilson. This office also requests that the District obtain any responsive records in the possession of Franczek Radelet and disclose them to Ms. Wilson in accordance with section 7(2) of FOIA.

[6]Section 10-2 of the School Code provides that "[t]he directors of each district shall be a body politic and corporate, by the name of 'school directors of district No. ....., county of ..... and State of Illinois,' and by that name may sue and be sued in all courts and places where judicial proceedings are had." Therefore, it is the Board of Education for the District (Board) that is the proper party to any litigation under section 10-2. The records furnished by Ms. Wilson to this office reflect that the District Board was the named defendant in her lawsuit. Neither party distinguishes between the District and its Board, and this office also concludes that the distinction is not material for the purposes of this determination. *See Board of Educ. of Bremen High School Dist. No. 228 v. Mitchell*, 387 Ill. App. 3d 117, 122, 124-26 (1st Dist. 2008) (noting lack of precision in naming school districts and boards of education as party defendants, and reversing dismissal for failure to name board of education as defendant as a "hypertechnical discrepancy.")

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this file. Please contact me at nolson@atg.state.il.us or (217) 782-9078 if you have questions.

Very truly yours,

NEIL P. OLSON
Deputy Public Access Counselor
Assistant Attorney General
Public Access Bureau

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