



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

August 10, 2017

Via electronic mail

Via electronic mail

Mr. Martin M. Beltz
FOIA Officer
Perry County Government
#1 Public Square
Pinckneyville, Illinois 62274
perrycountyfoia@gmail.com

RE: FOIA Request for Review – 2017 PAC 47187

Dear [REDACTED] and Mr. Beltz:

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 stated below, the Public Access Bureau concludes that the response by the Sheriff's Office (Sheriff's Office) to [REDACTED] March 6, 2017, FOIA request did not violate FOIA.

On that date, [REDACTED] submitted a six-part FOIA request to the Sheriff's Office seeking various records regarding a former deputy, including: (1) any complaints made against the deputy alleging inappropriate communications with any minor(s); (2) records showing any specific dialogue exchanged between the deputy and any minor(s); (3) documents regarding the Sheriff's Office's investigation of any such complaints; (4) the complete work schedule for the deputy for a specific timeframe; (5) records pertaining to the deputy being assigned to the position of the school resource officer along with documents regarding suspensions, reassignments, and resignation of the deputy, and (6) a request for the following:

[A]ll electronic communications, including cellphone text messages from both department-issued and personal cellphones of

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[named deputy], email messages from both department issued and personal email accounts of [named deputy], Facebook messages from both department issued and personal Facebook accounts * * * of [named deputy], sent and received by [named deputy] during all times he was on duty as the Perry County Resource Officer.^[1]

On March 13, 2017, the Sheriff's Office responded by providing [redacted] with some responsive records.² Regarding part six of the request, the Sheriff's Office provided documents from the department-issued cell phone and pages from the Sheriff's Office's School Resource Facebook page. However, the Sheriff's Office indicated any records from the deputy's personal accounts did not meet the definition of public records under FOIA because the Sheriff's Office never possessed or controlled such records. On March 31, 2017, [redacted] filed this Request for Review alleging that the Sheriff's Office failed to produce all records responsive to his request.

On April 6, 2017, this office forwarded a copy of the Request for Review to the Sheriff's Office and asked it to respond to [redacted] allegation that its response to the request was incomplete. In addition, this office requested that the Sheriff's Office provide a detailed description of the measures taken by the Sheriff's Office to search for records responsive to each part of [redacted] request, including the specific recordkeeping systems that were searched, the method of the search, and the individuals who were consulted. Also, this office asked the Sheriff's Office to provide the factual and legal bases for the Sheriff's Office's assertion that any responsive records from the deputy's personal accounts did not meet the definition of a public record under FOIA.

On April 24, 2017, this office received the Sheriff's Office's response in which the Sheriff's Office maintained that it had provided [redacted] with all the responsive records in its possession. However, the Sheriff's Office response also indicated that after receiving the Request for Review from this office, it sent a letter to the former-deputy on April 24, 2017, requesting that he inform the Sheriff's Office if he possessed any records responsive to [redacted] request, and if so, to provide copies of the records to the Sheriff's Office by May 5, 2017. On April 25, 2017, this office forwarded the Sheriff's Office's response to [redacted]; he replied

¹Letter from [redacted] to Steve Bareis, Perry County Sheriff, Perry County Sheriff's Office (March 6, 2017).

²Certain portions of the provided responsive records were redacted pursuant to sections 7(1)(a), 7(1)(b), and 7(1)(c) of FOIA (5 ILCS 140/7(1)(a), (1)(b), (1)(c) (West 2016)). [redacted] Request for Review, however, does not dispute the redactions to the records provided to him. Therefore, the scope of this review is limited to whether the measures performed by the Sheriff's Office appear to be reasonably calculated to locate all records responsive to [redacted] request.

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on May 1, 2017. On July 27, 2017, an Assistant Attorney General in the Public Access Bureau confirmed with the Sheriff's Office, by e-mail, that the former-deputy did not respond to its April 24, 2017, letter.

DETERMINATION

The requirements of FOIA apply to "public records," which is defined as:

[A]ll 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.)
5 ILCS 140/2(c) (West 2016)

When presented with a FOIA request, a public body is required to conduct a "reasonable search tailored to the nature of a 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). Neither the destruction of responsive records nor speculation that additional records may exist "undermines the reasonableness of the agency's search[.]" *Moore v. F.B.I.*, 366 Fed. Appx. 659, 661 (7th Cir. 2010); see *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982) ("A requester is entitled only to records that an agency has in fact chosen to create and retain."); *Miller v. United States Dep't of State*, 779 F.2d 1378, 1385 (8th Cir. 1985) ("The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it.").

The Attorney General has issued a binding opinion which determined that electronic messages pertaining to the transaction of public business that are stored on personal accounts are "public records" as defined by section 2(c) of FOIA. Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, issued August 9, 2016, at 10. The binding opinion explained that while FOIA does not specifically prescribe how a public body should search for responsive e-mails maintained on private accounts, depending on the circumstances, a public body may satisfy the requirement to conduct a reasonable search by directing the applicable employee to turn over any responsive e-mails. See Ill. Att'y Gen. Pub. Acc. Op. No. 16-006 at 10-11.

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The Sheriff's Office's response to this office explained that it searched the former deputy's work phone and work e-mail account, and provided all responsive records in its physical possession to [REDACTED]. Additionally, with respect to any responsive records that may be stored on the former-deputy's personal accounts, the Sheriff's Office has demonstrated that it asked the former-employee to conduct a search and turn over any responsive records, but has not received a response.

In his Request for Review, [REDACTED] asserts that the Sheriff's Office should be required to provide any records from the deputy's personal accounts even if it must obtain the records from a communications provider. This office, however, has previously determined that a public body is not required to use a subpoena process to obtain records from a communications provider in order to respond to a FOIA request for text messages. *See Ill. Att'y Gen. PAC Req. Rev. Ltr. 29327*, issued March 27, 2015, at 2-3 ("There is no indication that the General Assembly intended to require a public body to generate a lawsuit and issue or obtain a subpoena in order to gain control over records that it does not maintain in the ordinary course of business in order to respond to a FOIA request.").

In this instance, other than by filing a lawsuit or obtaining a subpoena seeking to compel the former-deputy to search his personal e-mail, phone, and Facebook accounts and turn over any records responsive to [REDACTED] request, the Sheriff's Office does not appear to have any way to require the former-deputy to cooperate because he is no longer an employee of the Sheriff's Office. Because the available information indicates that the Sheriff's Office disclosed all responsive records in its physical possession or custody, and because it contacted the former-deputy and asked him to search his personal accounts, this office is unable to conclude that the Sheriff's Office violated the requirements of FOIA by failing to conduct an adequate search.

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, you may contact me by mail at the Chicago address listed on the first page of this letter, by phone at (312) 550-4480, or by e-mail at sbarnaby@atg.state.il.us. This letter serves to close this file.

Very truly yours,

[REDACTED]
SHANNON BARNABY
Assistant Attorney General
Public Access Bureau

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