



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

September 16, 2020

Via electronic mail

Mr. Frank Rizzo
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Orland Park, Illinois 60462
frank.rizzo1947@protonmail.com

Via electronic mail

Ms. Mallory A. Milluzzi
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RE: FOIA Request for Review – 2020 PAC 63566

Dear Mr. Rizzo and Ms. Milluzzi:

This determination 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, this office concludes that the Village of Orland Park (Village) responded improperly to Mr. Frank Rizzo's June 11, 2020, FOIA request.

On that date, Mr. Rizzo submitted a FOIA request to the Village seeking a list of all persons and/or users who were banned or blocked from the Village's social media accounts, including Twitter and Facebook. On June 16, 2020, the Village responded that it did not possess responsive records. On that same date, Mr. Rizzo replied to the Village that it must possess responsive records because he was currently blocked by the Village on social media. The next day, Mr. Rizzo followed up to the Village with a screenshot showing he was blocked by the Village's official Twitter account and explaining that the Village could access a list of all such persons/users in the Twitter settings. On June 23, 2020, Mr. Rizzo submitted the above-referenced Request for Review alleging that the Village improperly denied his FOIA request; he

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copied the Village's FOIA officer, various Village officials and employees, and the Village's outside counsel, an attorney from Klein, Thorpe, and Jenkins, Ltd. On June 24, 2020, Mr. Rizzo sent an additional e-mail to this office stating:

I sure hope Orland Park preserved the records I requested in my FOIA on June 6th, 2020 because I just noticed that I am no longer blocked on Twitter. The removal of the block right after I file a Request for Review appears to be a deliberate attempt to mislead the Attorney General's office so you can now deny that those records exist, even though they clearly existed at the time of filing the Request for Review, as evidenced by the screenshot showing that I was blocked on Twitter as of yesterday June 23rd, 2020.^[1]

On June 30, 2020, in response to an inquiry from an Assistant Attorney General in the Public Access Bureau about the possibility of mediating this matter, the Village's attorney stated that "the Public Information Communication Manager for the Village of Orland Park has confirmed for me that the Village has no blocked accounts on Twitter so there is nothing to print or provide to the requester."²

On July 2, 2020, this office forwarded a copy of Mr. Rizzo's Request for Review to the Village and asked it to respond to the allegation that it improperly disposed of its social media block lists before responding to the request. This office also requested that the Village provide details of any measures taken to unblock accounts or dispose of the records of its blocked accounts. On July 14, 2020, this office received the Village's response. On July 16, 2020, this office forwarded a copy of the Village's response to Mr. Rizzo. On July 17, 2020, this office received Mr. Rizzo's reply.

DETERMINATION

"All 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); *see also Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2018).

¹E-mail from Frank Rizzo to Public Access [Bureau] [and various other parties] (June 24, 2020).

²E-mail from Dennis G. Walsh to Jane Sternecky (June 30, 2020).

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As an initial matter, Mr. Rizzo's allegation that the Village violated his First Amendment rights by blocking him on social media is not subject to review by this office, because the Public Access Counselor's authority to resolve disputes is limited to alleged violations of FOIA and the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2018)). *See* 15 ILCS 205/7(c)(3) (West 2018). Therefore, this determination is limited to analyzing whether the Village improperly withheld public records responsive to Mr. Rizzo's request.

Public Records

The requirements of FOIA apply to "public records," which are:

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. 5 ILCS 140/2(c) (West 2018).

"In this expansive definition of 'public records,' the legislature recognizes that information or documentation may be stored in myriad media, some physical and some not. Illinois case law has long held that electronic records may be public records subject to FOIA." *Hites v. Waubonsee Community College*, 2016 IL App (2d) 150836, ¶57, 56 N.E.3d 1049, 1061 (1st Dist. 2016). Indeed, FOIA sets forth the General Assembly's intent to broadly encompass records made possible by technological developments that did not exist at the time it was drafted:

The General Assembly further recognizes that technology may advance at a rate that outpaces its ability to address those advances legislatively. To the extent that this Act may not expressly apply to those technological advances, this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made available upon request except when denial of access furthers the public policy underlying a specific exemption. 5 ILCS 140/1 (West 2018).

In its response to this office, the Village argued that any records of accounts it has blocked on social media are not public records for purposes of FOIA, because they are

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"prepared, maintained, possessed, and controlled by Facebook and Twitter,"³ not by the Village itself. The Village contended that while the list of blocked accounts may be viewed by the Village on these platforms, "the Village is not sent a list of names, so it has never 'received' this alleged list."⁴ The Village agreed that it is able to view the lists, but claimed that the lists are "transitory"⁵ in nature and do not become public records until a permanent copy is saved or printed.

In his reply, Mr. Rizzo argued that the Village controlled records responsive to his request because it controls its own social media accounts, which it uses to conduct public business. Mr. Rizzo noted that the Village's new social media policy provides that the Village's social media accounts are Village property and that content "must be able to be stored and retrieved in accordance with the FOIA."⁶

This office has reviewed the instructions for viewing blocked accounts from both Facebook and Twitter. Facebook's instructions provide that in order to view accounts that the user has blocked, the account owner can click on Settings, then Blocking.⁷ Twitter's instructions outline a similar process: the account owner navigates to Settings and Privacy, then to Privacy and Safety, then to Blocked Accounts.⁸

The Public Access Bureau disagrees with the Village's arguments that the records of blocked accounts are prepared, used, maintained, possessed, and controlled only by these social media sites and not by the Village, and that a record of blocked accounts is not created by the Village but solely by Twitter and/or Facebook. The Village's argument ignores the fact that the Village, as owner of the accounts, chooses which accounts to block on Facebook and Twitter

³Letter from Mallory A. Milluzzi, Assistant Village Attorney, to Jane Sternecky, Assistant Attorney General, Public Access Bureau (July 14, 2020).

⁴Letter from Mallory A. Milluzzi, Assistant Village Attorney, to Jane Sternecky, Assistant Attorney General, Public Access Bureau (July 14, 2020).

⁵Letter from Mallory A. Milluzzi, Assistant Village Attorney, to Jane Sternecky, Assistant Attorney General, Public Access Bureau (July 14, 2020).

⁶E-mail from Frank Rizzo to Jane Sternecky, Assistant Attorney General, Public Access Bureau (July 17, 2020).

⁷Facebook, *How do I see a list of people I've blocked on Facebook?*, <https://www.facebook.com/help/471563593459787>.

⁸Twitter, *How to manage your block list*, <https://help.twitter.com/en/using-twitter/advanced-twitter-block-options>.

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thus creating the lists of accounts that are blocked on each site by the act of blocking them. Therefore, the lists of its blocked accounts on Facebook and Twitter are under the control of the Village. Additionally, the Village plainly conducts public business via its official social media accounts. A review of the Village's Facebook and Twitter accounts shows that the Village uses the sites to share a variety of information about Village business, including information regarding Village Board meetings. Although the Village claims that the lists are "explicitly not"⁹ public records because they are transitory in nature, no provision of FOIA excludes records that may be transitory from its scope, nor did the Village provide any authority to support this assertion. Therefore, this office has determined that the Facebook and Twitter block lists are public records for the purposes of FOIA.

Creation of New Records

While a public body is not required to generate new records in response to a FOIA request (*Kenyon v. Garrels*, 184 Ill. App. 3d 28, 32 (4th Dist. 1989)), exporting existing information used to conduct public business into a new format does not constitute creation of a new record. Ill. Att'y Gen. Pub. Acc. Op. No. 12-014, issued December 11, 2012, at 7 (noting that "both Illinois and federal courts have rejected claims that a public body creates a new record when it compiles information in its possession in a new format to make the information available for inspection and copying.").

In its response to this office, the Village further argued that it was not obligated to comply with Mr. Rizzo's request because FOIA does not require a public body to create a record that it does not already possess. The Village argued that *Chicago Tribune Co. v. Department of Financial and Professional Regulation*, 2014 IL App (4th) 130427, 8 N.E.3d 11 (2014) is analogous because the court determined that a public body was not required to answer a "general inquiry question" regarding the number of initial claims received for a set of physicians. The Village stated that because it does not "maintain" a list of the users it blocks on social media, it is similarly not obligated to "create" this list in order to respond to Mr. Rizzo's FOIA request.¹⁰

The Village also cited *Hites v. Waubensee Community College*, 2016 IL App (2d) 150836, 56 N.E.3d 1049 (2016), in which the court stated:

⁹Letter from Mallory A. Milluzzi, Assistant Village Attorney, to Jane Sternecky, Assistant Attorney General, Public Access Bureau (July 14, 2020).

¹⁰Letter from Mallory A. Milluzzi, Assistant Village Attorney, to Jane Sternecky, Assistant Attorney General, Public Access Bureau (July 14, 2020).

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A listing of search results is analogous to a tally of the number of complaints in *Chicago Tribune*. Both are information about or derived from public records. Neither existed prior to a FOIA request. Both require the public body to answer the requester's general inquiry as opposed to disclosing public records. *Hites*, 2016 IL App (2d) 150836, ¶77, 56 N.E.3d at 1066.

Further, the most analogous case, according to the Village, is *Nat'l Sec. Counselors v. C.I.A.*, 898 F. Supp. 2d 233, 271 (D.D.C. 2012), in which a Federal court determined that "a FOIA request for a listing or index of a database's contents that does not seek the contents of the database, but instead essentially seeks information about those contents, is a request that requires the creation of a new record, insofar as the agency has not previously created and retained such a listing or index." The Village argued that this matter is analogous because the "particular listing or index of users did not exist prior to [Mr. Rizzo's] FOIA request, neither the Village nor employees keep or create a list of blocked users; it is merely a transient artifact of the use of Facebook or Twitter."¹¹ The Village further stated that it does not "store, maintain, track, or compile users blocked by the Village, and a list, a printout, or a screenshot of users blocked by the Village is not something that the Village has chosen to create or maintain."¹²

In his reply, Mr. Rizzo stated that in order to retrieve a list of blocked accounts from the Village's Twitter page, the Village would need only need to click on a link. Mr. Rizzo stated that, in contrast to the records requested in *Chicago Tribune*, the data does not need to be searched or combed through, nor does it need to be reviewed or tallied, in order to generate a list of blocked social media users.

The decisions in *Chicago Tribune*, *Hites*, and *Nat'l Sec. Counselors* are inapposite. As discussed above, the lists of blocked accounts were under the Village's control and used by the Village to conduct public business at the time of the request. In *Chicago Tribune*, the requester asked the public body to compile statistics from data, therefore calling for the creation a record the public body had not chosen to maintain. In *Hites*, the requester likewise sought totals that the public body did not possess in its databases. In *Nat'l Sec. Counselors*, the court concluded that a public body was not required to produce a listing of database search results, but that the public body would be obligated to disclose the non-exempt underlying data.

¹¹Letter from Mallory A. Milluzzi, Assistant Village Attorney, to Jane Sternecky, Assistant Attorney General, Public Access Bureau (July 14, 2020).

¹²Letter from Mallory A. Milluzzi, Assistant Village Attorney, to Jane Sternecky, Assistant Attorney General, Public Access Bureau (July 14, 2020).

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Mr. Rizzo's request did not ask the Village to compile or tally any information, nor did he seek information about the block lists as opposed to the block lists themselves.

Neither of the processes available from Facebook or Twitter for viewing a list of blocked accounts describes the creation of a new record; rather, the account owner is merely accessing existing information within their account. This information was not incidentally created by Facebook or Twitter—it is generated as a result of the Village taking action to block users. In order to provide Mr. Rizzo with the requested records, the Village simply needed to copy the pages from Facebook and Twitter that show the blocked accounts. Therefore, the Public Access Bureau concludes that disclosing the block lists would not require the creation of a new record, and therefore they are subject to disclosure pursuant to FOIA.

Duty to Preserve Records

A public body that receives a FOIA request has a duty to preserve the public records that were requested. *See, i.e., Walloon Lake Water System, Inc. v. Melrose Twp.*, 163 Mich. App. 726, 732, 415 N.W.2d 292, 295 (1987) ("[T]he duty to provide access to records properly requested under the [Michigan] FOIA inherently includes the duty to preserve and maintain such records until access has been provided or a court executes an order finding the record to be exempt from disclosure."). A public body violates FOIA by disposing of records that are the subject of a pending request and then responding to the requester that it possesses no responsive records.

The Village stated that it did not dispose of any public records, because the list of blocked accounts on its social media accounts are not public records. As stated above, this office concludes that the requested lists are public records. The Village did not claim that it had no accounts on its block lists at the time of Mr. Rizzo's request. The receipt of Mr. Rizzo's FOIA request imposed a duty upon the Village to preserve the lists of any accounts it had blocked. The Village has not stated whether it preserved a list of the accounts that were blocked on Facebook and Twitter at the time of Mr. Rizzo's FOIA request. Therefore, to the extent that the Village possesses these records, the Public Access Bureau requests that it provide copies of them to Mr. Rizzo.

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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) 814-4461, or by e-mail at jsternecky@atg.state.il.us. This letter serves to close this file.

Very truly yours,



JANE STERNECKY
Assistant Attorney General
Public Access Bureau

63566 f pub rec 3d response incomplete mun

cc: *Via electronic mail*
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