



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

KWAME RAOUL  
ATTORNEY GENERAL

September 3, 2020

*Via electronic mail*  
Ms. Sharon May  
Sharonmay86@yahoo.com

RE: FOIA Request for Review – 2016 PAC 39715

Dear Ms. May:

On January 20, 2016, this office received your Request for Review disputing the Northern Illinois University Foundation's (Foundation) denial of your Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2014)) request, seeking records reflecting any payments made to or on behalf of six individuals or firms from November 1, 2013, to March 31, 2015. In a letter dated February 8, 2016, the Foundation responded to our further inquiry letter, asserting that it is not a public body subject to FOIA.

Recently, this office issued a consolidated determination in which we examined the relationship between the Foundation and Northern Illinois University (University). Ill. Att'y Gen. PAC Req. Rev. Ltrs. 49016 and 49630, issued August 7, 2020. Attached is a copy of the determination, in which this office concluded that the University had contracted with the Foundation to perform governmental functions on its behalf; and as such, non-exempt records in the physical custody of the Foundation relating to those governmental functions are subject to disclosure by the University pursuant to section 7(2) of FOIA (5 ILCS 140/7(2) (West 2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019).<sup>1</sup>

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<sup>1</sup>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.

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In light of that determination, you may wish to submit a FOIA request to the University to obtain the records you were seeking from the Foundation. Accordingly, we are closing this file pursuant to section 9.5(f) of FOIA (5 ILCS 140/9.5(f) (West 2018)), which permits the Attorney General to exercise his discretion to resolve a Request for Review "by a means other than the issuance of a binding opinion."

If you should have any questions, please contact me at (312) 814-4467, [gangelos@atg.state.il.us](mailto:gangelos@atg.state.il.us), or the Chicago address listed below.

Very truly yours,

*Grace Angelos* 

GRACE ANGELOS  
Assistant Attorney General  
Public Access Bureau

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Attachment

cc: *Via electronic mail*  
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STATE OF ILLINOIS

KWAME RAOUL  
ATTORNEY GENERAL

August 7, 2020

*Via electronic mail*  
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dvanbuer@gmail.com

*Via electronic mail*  
Mr. Thomas M. O'Grady  
Assistant General Counsel  
Northern Illinois University  
Altgeld Hall 330  
DeKalb, Illinois 60115-2828  
togradyl@niu.edu

RE: FOIA Request for Review – 2017 PAC 49016 and 49630

Dear Mr. Van Buer and Mr. O'Grady:

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 stated below, the Public Access Bureau concludes that Northern Illinois University (University) improperly denied Mr. Derek Van Buer's July 25, 2017, and September 5, 2017, FOIA requests.

**2017 PAC 49016**

On July 25, 2017, Mr. Van Buer submitted a FOIA request to the University seeking copies of the following:

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

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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.***<sup>(1)</sup> (Emphasis in original).

On August 1, 2017, the University responded, stating that it forwarded the request to the Northern Illinois University Foundation (Foundation), which maintains the requested information. The Foundation subsequently responded that it was not a public body subject to FOIA and, as such, provided no responsive information. Later that same day, Mr. Van Buer submitted this Request for Review contesting the University's response.

On August 11, 2017, the Public Access Bureau sent a copy of the Request for Review to the University and asked it to provide a written explanation of the factual and legal bases for the assertion that the requested information does not constitute "public records" of the University under the definition of that term in section 2(c) of FOIA (5 ILCS 140/2(c) (West 2016)). This office also asked whether the University maintains physical custody of the requested information, and for a description of the relationship between the University and the Foundation and a copy of any contracts or agreements between the University and the Foundation.

On August 22, 2017, the University provided this office with its written answer and copies of its memorandum of understanding with the Foundation dated June 23, 2011. The Public Access Bureau forwarded the University's answer to Mr. Van Buer; he replied on September 11, 2017.

#### 2017 PAC 49630

On September 5, 2017, Mr. Van Buer submitted another FOIA request to the University seeking, for the period of July 1, 2017, to August 31, 2017, the same type of report documenting the Foundation's history of payments to vendors which is at issue in 2017 PAC 49016. On September 12, 2017, the University again responded that the Foundation "is the owner of the records you are seeking[ ]" and that the Foundation declined to provide records, asserting that it is "not a public body and not under any obligation to gather the requested

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<sup>1</sup>E-mail from Derek Van Buer to Joan Laurino (July 25, 2017).

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records."<sup>2</sup> In his Request for Review, Mr. Van Buer disputed the University's assertion that it does not maintain the records he requested.

On September 22, 2017, this office sent a copy of the Request for Review to the University and asked it to provide a written response describing its relationship with the Foundation and addressing whether the University contracted the Foundation to perform a governmental function. On October 9, 2017, the University submitted a written response to which Mr. Van Buer replied on October 19, 2017.

### BACKGROUND

According to documentation the Foundation filed with the Office of the Attorney General as a tax-exempt charitable organization, the Foundation's mission is "to secure and manage private support to benefit" the University and to build "financial resources to advance excellence and enhance the University's capacity to transform lives."<sup>3</sup> The documentation indicates that the Foundation's records were maintained in an accounting system shared with the University<sup>4</sup> and that the Foundation's employees were paid by the University, which was then compensated by the Foundation for "a portion of the salaries and services performed by the employees."<sup>5</sup> The documentation further indicated that the Foundation administered for the University gift accounts valued at more than \$3,000,000,<sup>6</sup> and that its endowment funds are intended to support the University's mission to "advance excellence and transform lives."<sup>7</sup>

The University's memorandum of understanding with the Foundation provides that the Foundation will raise, receive, invest and administer funds for the University's benefit.

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<sup>2</sup>E-mail from Joan Laurino, Deputy FOIA Officer, to dvanbuer@gmail.com (September 12, 2017).

<sup>3</sup>Form 990, Return of Organization Exempt from Income Tax, Northern Illinois University Foundation (for the calendar year or tax year beginning July 1, 2013, to June 30, 2014), at 1-2.

<sup>4</sup>Form 990, Return of Organization Exempt from Income Tax, Northern Illinois University Foundation (for the calendar year or tax year beginning July 1, 2013, to June 30, 2014), at 29.

<sup>5</sup>Form 990, Return of Organization Exempt from Income Tax, Northern Illinois University Foundation, Supplemental Information to Form 990 (for the calendar year or tax year beginning July 1, 2013, to June 30, 2014), at 2.

<sup>6</sup>Form 990, Return of Organization Exempt from Income Tax, Northern Illinois University Foundation (for the calendar year or tax year beginning July 1, 2013, to June 30, 2014), at 23.

<sup>7</sup>Form 990, Return of Organization Exempt from Income Tax, Northern Illinois University Foundation (for the calendar year or tax year beginning July 1, 2013, to June 30, 2014), at 24.

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To that end, the agreement provides that "University representatives as reasonably available shall endeavor to cooperate with fundraising initiatives, including major gift solicitation with the Foundation as requested by the Foundation[.]"<sup>8</sup> and that "[t]he University President, Foundation Board of Directors, and the Foundation President and CEO shall work cooperatively to identify, cultivate and solicit prospects for private gifts."<sup>9</sup> The agreement prohibits the University from engaging in "substantial fundraising activities without the consent of the Foundation[.]"<sup>10</sup> The agreement further requires the University to transfer any funds directly received from a donor in the University's name to the Foundation to hold and manage as its fiduciary agent,<sup>11</sup> and provides that the University will pay the Foundation a fee agreed to on an annual basis which does not exceed the costs of its services.<sup>12</sup> Under the agreement, the University provides the Foundation with space for its operations, access to its business services, including accounting, computer and telephone systems, as well as access to the University's human resources services and benefit programs.<sup>13</sup> The Foundation also may request that the University assign its employees to the Foundation to support its fundraising activities.<sup>14</sup> The agreement obligates both parties to "cooperate and provide an environment of open communication so to continue to work together

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<sup>8</sup>Memorandum of Understanding for the purpose of fundraising and development projects and the operation, accounting, and fund investment management of charitable activities, Northern Illinois University – Northern Illinois University Foundation, art. III, §A(2)(c)(i), June 23, 2011.

<sup>9</sup>Memorandum of Understanding for the purpose of fundraising and development projects and the operation, accounting, and fund investment management of charitable activities, Northern Illinois University – Northern Illinois University Foundation, art. III, §A(2)(c)(ii), June 23, 2011.

<sup>10</sup>Memorandum of Understanding for the purpose of fundraising and development projects and the operation, accounting, and fund investment management of charitable activities, Northern Illinois University – Northern Illinois University Foundation, art. III, §A(2)(c), June 23, 2011.

<sup>11</sup>Memorandum of Understanding for the purpose of fundraising and development projects and the operation, accounting, and fund investment management of charitable activities, Northern Illinois University – Northern Illinois University Foundation, art. III, §A(3)(a), June 23, 2011.

<sup>12</sup>Memorandum of Understanding for the purpose of fundraising and development projects and the operation, accounting, and fund investment management of charitable activities, Northern Illinois University – Northern Illinois University Foundation, art. III, §B(1), June 23, 2011.

<sup>13</sup>Memorandum of Understanding for the purpose of fundraising and development projects and the operation, accounting, and fund investment management of charitable activities, Northern Illinois University – Northern Illinois University Foundation, art. IV, §A(1), June 23, 2011.

<sup>14</sup>Memorandum of Understanding for the purpose of fundraising and development projects and the operation, accounting, and fund investment management of charitable activities Northern Illinois University – Northern Illinois University Foundation, art. IV, §B(1), June 23, 2011.

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to enhance the success of the mutual goals of the Foundation and the University."<sup>15</sup>

## DETERMINATION

### Section 7(2) of FOIA

Section 7(2) of FOIA (5 ILCS 140/7(2) (West 2016)) 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.

Under the plain language of this provision, records in the possession of a contractor directly related to a governmental function that the contractor has agreed to perform for the public body are considered to be public records of the public body. As the Illinois Supreme Court explained in *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121124, ¶62, 89 N.E.3d 376, 390 (2017), "section 7(2) ensures that governmental entities must not be permitted to avoid their disclosure obligations by contractually delegating their responsibilities to a private entity." Thus, any records in the physical custody of the Foundation that directly relate to a government function that the Foundation has been contracted to perform for the University are considered the University's records under FOIA.

In *Chicago Tribune v. College of DuPage*, 2017 IL App (2d) 160274, 79 N.E.3d 694 (2017), the Illinois Appellate Court considered whether a foundation conducting fundraising activities for a community college was performing a governmental function for the college for purposes of section 7(2). The court observed that FOIA does not define "governmental function" and rejected as too narrow the plaintiff's argument that the term is limited to conduct mandated or authorized by law for the benefit of the general public: "To accept the Tribune's proposed definition would provide a means by which public bodies could conceal their records by contracting with third parties to perform those tasks that benefit less than the general public, in contravention of the State's public policy favoring disclosure." *College of DuPage*, 2017 IL App (2d) 160274, ¶47, 79 N.E.3d at 707. Instead, the court stated that it was necessary to conduct "a fact-specific inquiry, with an eye toward the particular public body's role and responsibilities and keeping in mind the specific act it has contracted a third party to perform on its behalf." *College*

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<sup>15</sup>Memorandum of Understanding for the purpose of fundraising and development projects and the operation, accounting, and fund investment management of charitable activities Northern Illinois University – Northern Illinois University Foundation, art. V, §A, June 23, 2011.

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of *DuPage*, 2017 IL App (2d) 160274, ¶48, 79 N.E.3d at 708. In concluding that the college's foundation was "plainly performing a government function on behalf of the college[,] the court noted that the college had delegated its fundraising responsibilities to the foundation and routed private donations through the Foundation, and that "[t]he Foundation's strategic private-fundraising efforts are coordinated and integrated with the College's goals and objectives." *College of DuPage*, 2017 IL App (2d) 160274, ¶50, 79 N.E.3d at 708. The court added that "[i]f the Foundation did not undertake these responsibilities, the College would necessarily do so itself[.]" *College of DuPage*, 2017 IL App (2d) 160274, ¶50, 79 N.E.3d at 708.

The University's memorandum of understanding with the Foundation reflects that the parties are involved in a similar collaborative arrangement. The Foundation is far from an independent third party. Although the University has delegated the official responsibility for raising, receiving, and administering private funds to the Foundation, the University actively supports those efforts by providing resources and assistance. The University's response to this office tried to distinguish the foundation in *College of DuPage* from its Foundation by arguing that the University does not have statutory authority comparable to section 3-39.1 of the Community College Act (110 ILCS 805/3-39.1 (West 2016)), which authorizes community colleges "[t]o accept gifts, grants or legacies from any source when made for community college purposes." Yet the University's Board of Trustees is authorized "[t]o succeed to and to administer all trusts, trust property, and gifts now or hereafter belonging or pertaining to Northern Illinois University." 110 ILCS 685/30-45(6) (West 2016). The first page of the University's memorandum of understanding with the Foundation cites a University regulation that alludes to this statutory provision and authorizes the University to contract with educational not-for-profit organizations to further the University's educational objectives.<sup>16</sup> It is readily apparent from the memorandum of understanding that the University has contracted the Foundation to perform functions, including those authorized by statute, to support its educational mission. It also is readily apparent that, as with the college in *College of DuPage*, the University would undertake those functions itself if it did not contract the Foundation to perform them. Indeed, the memorandum of understanding not only delegates fundraising and financial responsibilities to the Foundation, it prohibits the University from engaging in substantial fundraising activities without the Foundation's consent and requires the University to transfer any donations it directly receives to the Foundation. Accordingly, this office concludes that the University has contracted the Foundation to perform governmental functions on its behalf.

Alternatively, the University acknowledged that "[w]hile the Foundation may be engaged in an activity that could be construed as a governmental function, they are also engaged

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<sup>16</sup>Memorandum of Understanding for the purpose of fundraising and development projects and the operation, accounting, and fund investment management of charitable activities, Northern Illinois University – Northern Illinois University Foundation, Recitals, §A, June 23, 2011.



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in activities that may not be construed as a government function."<sup>17</sup> The University did not identify any activities in which the Foundation engages that may not be governmental functions, but asserted that it "fulfilled its obligation by following the [*College of DuPage*] Court[']s directive and forwarding" Mr. Van Buer's FOIA request "to the Foundation to determine whether any of the records that Van Buer requested fell under the governmental function of administering 'all ... gifts now or hereafter belonging or pertaining to Northern Illinois University[ ]' under section 30-45(6) of the Northern Illinois University Law."<sup>18</sup>

*College of DuPage* does not stand for the proposition that "governmental function" for purposes of section 7(2) of FOIA is limited to activities that a public body is authorized by statute to perform. The court expressly stated that such a narrow definition would enable public bodies to conceal records in contravention of the intent of FOIA. *College of DuPage*, 2017 IL App (2d) 160274, ¶47, 79 N.E.3d at 707. Still, not all records in the possession of a third party contracted to perform a governmental function are subject to disclosure. The direct relation requirement in section 7(2) "helps to ensure that parties are only able to access records of private contractors that are truly related to its exercise of a governmental function and not those records that are only incidentally or tangentially related to the contract with the government." *Rushton v. Dep't of Corrections*, 2019 IL 124552, ¶29, \_\_\_ N.E.3d at \_\_\_ (2019).

The records Mr. Van Buer requested reflect the Foundation's payments to vendors. Given that the information submitted to this office establishes that the Foundation's sole purpose is to support the University's educational mission, primarily by raising, receiving, and administering private funds with the University's cooperation and resources, it is unclear how any of the Foundation's payments to vendors could be unrelated to a governmental function. Further, the Foundation apparently made no effort to determine whether the requested records relate to a governmental function and the University apparently made no effort to contest the Foundation's flawed reason for refusing to do so. The University's response to this office stated that the University e-mailed the Foundation and asked it to "provide any records that would be considered a business record of the University[.]" and "the Foundation replied in an email that \* \* \* they are a 501(c)(3) entity and therefore not a public body and not under any obligation to

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<sup>17</sup>Letter from Thomas M. O'Grady, Assistant General Counsel, Northern Illinois University, Office of the General Counsel, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (October 9, 2017), at 5.

<sup>18</sup>Letter from Thomas M. O'Grady, Assistant General Counsel, Northern Illinois University, Office of the General Counsel, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (October 9, 2017), at 5.

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gather the requested records."<sup>19</sup> The Foundation's assertion that it is a private entity is irrelevant to whether its records relate to a governmental function and are subject to disclosure by the University pursuant to section 7(2) of FOIA.

Although the *College of DuPage* court recognized "that a public body may face difficulty in obtaining records from a third-party contractor that performs a government function on its behalf[,]," it declined to address that circumstance because the college "took no effort to obtain the requested record from the Foundation." *College of DuPage*, 2017 IL App (2d) 160274, ¶57, 79 N.E.3d at 710. The court also rejected the college's "contention that it is powerless to obtain the subpoena, as doing so would have required minimal effort due to the extreme degree to which the College is entwined with the Foundation[.] \* \* \* We note that this is not a circumstance where the requested record does not exist or was lost or destroyed." *College of DuPage*, 2017 IL App (2d) 160274, ¶57, 79 N.E.3d at 710.

Likewise, the operations of the University and the Foundation in this matter are closely connected, and the records at issue reside on a computer system shared by the University and the Foundation. The University's response to this office conceded that the records are housed on its servers but maintained that they are solely controlled by the Foundation pursuant to the memorandum of understanding. Regardless, the location of the records is not in question and there is no indication that the University has made reasonable efforts to obtain them in order to comply with its obligations under FOIA. This office requests that it do so.<sup>20</sup>

#### **Memorandum of Understanding Does Not Supersede the Disclosure Requirements of FOIA**

Lastly, the University's memorandum of understanding with the Foundation contains certain confidentiality provisions. In particular, the memorandum of understanding states that "[t]he University recognizes 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."<sup>21</sup>

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<sup>19</sup>Letter from Thomas M. O'Grady, Assistant General Counsel, Northern Illinois University, Office of the General Counsel, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (October 9, 2017), at 1.

<sup>20</sup>Mr. Van Buer disputes the University's contention that it does not directly possess or control the records at issue. Because this office has determined that the records constitute the University's records under section 7(2) of FOIA, we need not address whether the University has physical custody of the records.

<sup>21</sup>Memorandum of Understanding for the purpose of, fundraising and development projects and the operation, accounting, and fund investment management of charitable activities Northern Illinois University – Northern Illinois University Foundation, art. IV, §B(1), June 23, 2011.

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The Attorney General has previously concluded that an agreement that restricts a public body from fulfilling its statutory obligation to provide public records 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 disclosure under FOIA is unenforceable); *see also State ex. rel. Findlay 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 June 23, 2011, memorandum of understanding between the University and the Foundation does not supersede the requirements of FOIA and does not provide a valid basis for failing to provide records subject to disclosure under section 7(2) of FOIA.

In accordance with the conclusions in this letter, the Public Access Bureau requests that the University provide Mr. Van Buer with the information he requested. This office has determined that resolution of these matters does not require the issuance of a binding opinion. If you have any questions, please contact me at (312) 814-6756 or [ssilverman@atg.state.il.us](mailto:ssilverman@atg.state.il.us). These files are closed.

Very truly yours,



STEVE SILVERMAN  
Bureau Chief  
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