



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 3, 2013

PUBLIC ACCESS OPINION 13-012
(Request for Review 2013 PAC 23857)

FREEDOM OF INFORMATION ACT:
Records in the Possession of the Governing
Body of a Charter School that Pertain to
Public Business Are Public Records

Mr. Dan Mihalopoulos
Staff Reporter
Chicago Sun-Times
350 North Orleans
Chicago, Illinois 60654

Mr. Alfred Quijano
Freedom of Information Officer
UNO Charter School Network
954 West Washington Boulevard, No. 3
Chicago, Illinois 60607-2224

Dear Mr. Mihalopoulos and Mr. Quijano:

This is a binding opinion issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2011 Supp.)). For the reasons discussed below, this office concludes that UNO Charter School Network (UCSN) violated section 3 of FOIA (5 ILCS 140/3 (West 2010)) by failing to provide responsive records in its possession to Mr. Dan Mihalopoulos pursuant to his FOIA request.

BACKGROUND

United Neighborhood Organization (UNO) was organized in 1984 as a "not-for-profit corporation community organization [to be operated] exclusively for social, educational, religious, charitable and scientific purposes to work in the interest of the residents of the

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communities of Chicago which it serves."¹ In 1997, UNO created a subsidiary, UNO Advantage Charter School, Inc., to "obtain a charter for and to operate UNO Advantage Charter School[.]"² In 2009, this subsidiary changed its name to UCSN.³ UNO leases charter schools to UCSN; since 2000 UCSN in turn has engaged UNO to manage charter schools pursuant to a management agreement.⁴ "On average, more than 80 percent of UNO revenues are from UCSN."⁵

On February 15, 2013, Mr. Mihalopoulos, on behalf of the *Chicago Sun-Times*, submitted a FOIA request to UCSN seeking various records concerning the construction of charter schools. Specifically, the request sought: (1) contracts between UCSN and d'Escoto, Inc., including contracts that were paid out of grant moneys disbursed by the State of Illinois Department of Commerce and Economic Opportunity (DCEO); (2) invoices that d'Escoto, Inc., submitted to UCSN seeking payment of State grant money or other public funds; (3) contracts and bid documents related to contracts under which State grant money or other public funds were paid to Reflection Window Co., Inc., Windy City Electric, Aguila Security, or Toltec Plumbing; and (4) the minutes of UCSN Board meetings from January 1, 2009, to the date of the FOIA request.⁶ The same day, Mr. Mihalopoulos submitted a substantially similar FOIA request to UNO.⁷

On March 1, 2013, Mr. Mihalopoulos submitted a Request for Review to the Public Access Counselor alleging, among other things, that UCSN failed to respond to his FOIA

¹Articles of Incorporation under the General Not For Profit Corporation Act, United Neighborhood Organization of Chicago (February 10, 1984).

²Articles of Incorporation under the General Not For Profit Corporation Act, UNO Advantage Charter School, Inc. (October 3, 1997).

³Application to Adopt, Change or Cancel and Assumed Corporate Name under the General Not For Profit Corporation Act, UNO Charter School Network, Inc. (July 15, 2009).

⁴Global Credit Portal, Standard & Poor's, Illinois Finance Authority UNO Charter School Network; Charter Schools 4 (September 13, 2011).

⁵Global Credit Portal, Standard & Poor's, Illinois Finance Authority UNO Charter School Network; Charter Schools 4 (September 13, 2011).

⁶Letter from Dan Mihalopoulos, Staff Reporter, *Chicago Sun-Times*, to Alfred Quijano, Freedom of Information Officer, UNO Charter School Network (February 15, 2013).

⁷Letter from Dan Mihalopoulos, Staff Reporter, *Chicago Sun-Times*, to Alfred Quijano, Freedom of Information Officer, United Neighborhood Organization (February 15, 2013). UNO's response to Mr. Mihalopoulos' FOIA request is the subject of a separate Request for Review. See 2012 PAC 23582. UNO responded by asserting that it is a private not-for-profit corporation and not a "public body" subject to FOIA.

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request.⁸ On March 8, 2013, a representative of this office contacted Mr. Stephen F. Welcome, counsel for both UCSN and UNO, regarding the Request for Review. Mr. Welcome advised this office that he had not received a copy of Mr. Mihalopoulos's FOIA request to UCSN. Mr. Welcome agreed to respond to the request, if this office would provide him with a copy of the document. On March 11, 2013, the Public Access Bureau e-mailed a copy of the FOIA request to Mr. Welcome.⁹

On March 19, 2013, Mr. Welcome responded on behalf of UCSN by providing Mr. Mihalopoulos with the requested meeting minutes.¹⁰ In response to the requests for copies of contracts with d'Escoto and invoices from d'Escoto, Mr. Welcome indicated that no responsive documents exist because UCSN is a "separate entity from UNO and has not entered into any contracts with d'Escoto Inc., or the other entities cited in" the FOIA request. In response to the requests for copies of contracts and bid documents involving Reflection Window Co., Inc., Windy City Electric, Aguila Security and Toltec Plumbing, he also asserted that UCSN does not possess or control any other responsive records.¹¹ On March 22, 2013, Mr. Mihalopoulos filed a Request for Review of Mr. Welcome's denial, alleging that "the documents that we are requesting are public records, regardless of whether they are in the possession of UNO or UCSN – both based in the same office and both led by the same CEO[.]"¹² Mr. Mihalopoulos enclosed a September 2011, Standard & Poor's credit rating profile that summarized the relationship between UNO and UCSN, concluding that "[w]e view these closely affiliated organizations as one."¹³

On March 26, 2013, the Public Access Bureau forwarded a copy of the Request for Review to Mr. Welcome and asked him to:

⁸Letter from Dan Mihalopoulos, Staff Reporter, *Chicago Sun-Times*, to Public Access Counselor, Office of the Attorney General (March 1, 2013).

⁹E-mail from Steve Silverman, Assistant Attorney General, to Stephen Welcome (March 11, 2013).

¹⁰The response did not include the minutes from the January 24, 2013, meeting because the minutes had not yet been approved by the board.

¹¹Letter from Stephen F. Welcome, Burke, Burns & Pinelli Ltd., to Dan Mihalopoulos, Staff Reporter, *Chicago Sun-Times* (March 19, 2013).

¹²E-mail from Dan Mihalopoulos, Staff Reporter, *Chicago Sun-Times*, to Public Access Counselor, Illinois Attorney General's Office (March 22, 2013).

¹³Global Credit Portal, Standard & Poor's, Illinois Finance Authority UNO Charter School Network; Charter Schools 4 (September 13, 2011).

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[P]lease describe the relationship between UNO and UCSN, and clarify whether UCSN has contracted or otherwise delegated responsibilities to UNO; if so, please provide copies of the contract(s) or agreement(s). Please explain the extent to which the functions and operations of UNO and UCSN overlap and differ, and the extent to which these entities are managed by the same individuals and operate at the same physical location. * * * In addition, clarify whether UNO and UCSN use the same recordkeeping system, and indicate whether or not each entity's records are accessible to and used by the other entity.¹⁴

In his response, Mr. Welcome stated that UCSN is the governing body of UNO Charter School while "UNO is a private, not-for-profit entity that performs a multitude of various functions, including immigration consulting, community-organizing, the building of charter schools and the provision of various education-related management services. UNO then leases these schools and offers these services to various entities, including UCSN."¹⁵ The response stated that "UNO created UCSN" but the "two organizations have always maintained different identities and missions. * * * Unlike UNO, UCSN has a much narrower purpose, *i.e.*, to operate charter schools."¹⁶ However, UCSN delegated management of UNO charter schools to UNO under a management services agreement:

Among the services UNO provides is the development and planning of school policy, as well as oversight and management of school governance, administration, human resources, facilities management, reporting, budgetary, accounting, marketing, fund-raising, parent relations and legal matters. * * * While these delegations to UNO are broad, encompassing virtually all of the governance of the charter school, the Board of UCSN remains at all times the governing body."¹⁷

¹⁴Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Stephen F. Welcome, Burke, Burns & Pinelli Ltd., (March 26, 2013).

¹⁵Letter from Stephen F. Welcome, Burke, Burns & Pinelli Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 3 (April 11, 2013).

¹⁶Letter from Stephen F. Welcome, Burke, Burns & Pinelli Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 3 (April 11, 2013).

¹⁷Letter from Stephen F. Welcome, Burke, Burns & Pinelli, Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 4 (April 11, 2013).

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The response further stated that the boards of UNO and UCSN currently "share the same members * * *, but those boards meet separately and maintain separate agendas and minutes."¹⁸ Further, UNO's chief executive officer also served as President of UCSN.¹⁹ The response also stated that "some functions of UCSN operate at the same physical location as UNO[.]"²⁰ A copy of the management services agreement lists both entities' address as 954 West Washington Boulevard, Chicago, Illinois 60607.²¹ Finally, the response stated that "UNO and UCSN use the same record-keeping system and have access to each other's records."²²

Turning to the records that are the subject of the FOIA request, Mr. Welcome asserted that the only responsive records in the possession of either UNO or UCSN are the contracts between UNO and d'Escoto, Inc., which are only in the possession of UNO.²³ The response added that neither UCSN nor UNO possesses contracts and bid documents concerning Reflection Window Co., Inc., Windy City Electric, Aguila Security, or Toltec Plumbing because those companies did not contract directly with UNO. Instead, those entities subcontracted with a vendor that UNO hired to provide design and construction services; d'Escoto, Inc., served as UNO's representative in dealing with the vendor.²⁴

¹⁸Letter from Stephen F. Welcome, Burke, Burns & Pinelli, Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 4 (April 11, 2013).

¹⁹Letter from Stephen F. Welcome, Burke, Burns & Pinelli, Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 5 (April 11, 2013).

²⁰Letter from Stephen F. Welcome, Burke, Burns & Pinelli, Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 5 (April 11, 2013). UCSN's website lists its business address as 954 West Washington Boulevard, Chicago, Illinois. 60607, available at http://echalk.unocharterschools.org/site_res_view_folder.aspx?id=7076b581-b270-422f-8a90-3eb6136fbf09, last visited June 7, 2013. UNO's website lists its business address as 954 West Washington Boulevard, #3, Chicago, Illinois 60607, available at, <http://www.uno-online.org>, last visited June 7, 2013.

²¹Contract for the purpose of a Management Services Agreement, United Neighborhood Organization - UNO Charter School Network, § 5.06 (November 3, 2010).

²²Letter from Stephen F. Welcome, Burke, Burns & Pinelli, Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 6 (April 11, 2013).

²³Letter from Stephen F. Welcome, Burke, Burns & Pinelli Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 2 (April 11, 2013).

²⁴Letter from Stephen F. Welcome, Burke, Burns & Pinelli Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 2 (April 11, 2013).

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This office forwarded a copy of UCSN's response to Mr. Mihalopoulos.²⁵ He replied on April 17, 2013, contending that "UCSN technically may be the governing body of what is commonly referred to as UNO's network of charter schools, but UNO effectively governs the charter schools, performing UCSN's operations in toto."²⁶ Mr. Mihalopoulos also disputed Mr. Welcome's assertion that neither UCSN nor UNO possessed responsive records concerning companies other than d'Escoto, Inc., and provided this office with an appendix to a letter from the chief executive officer of UNO to DCEO which appeared to reference responsive records.

Additionally, Mr. Mihalopoulos argued that records in the possession of companies that have contracted with a vendor hired by UNO to provide construction and design services are subject to disclosure by UCSN under section 7(2) of FOIA (5 ILCS 140/7(2) (West 2011 Supp.) , as amended by Public Acts 97-783, effective July 13, 2012; 97-813, effective July 13, 2012; 97-847, effective September 22, 2012; 97-1065, effective August 24, 2012; and 97-1129, effective August 28, 2012).²⁷ Section 7(2) of FOIA provides that 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." On April 26, 2013, Mr. Welcome responded to this argument by asserting that records concerning subcontractors hired by UNO's vendor for the design and construction of charter schools do not relate to UCSN's management services agreement with UNO and, therefore, fall outside the scope of section 7(2) of FOIA.²⁸

On April 29, 2013, this office asked Mr. Welcome to clarify whether UCSN or UNO possesses any other responsive records and to explain why any such records that those entities provided to DCEO are no longer in their possession.²⁹ On May 16, 2013, Mr. Welcome responded by stating that he located copies of the letter and documents that UNO submitted to

²⁵Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Dan Mihalopoulos, Staff Reporter, *Chicago Sun-Times* (April 12, 2013).

²⁶Letter from Dan Mihalopoulos, Staff Reporter, *Chicago Sun-Times*, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau (April 17, 2013).

²⁷Letter from Dan Mihalopoulos, Staff Reporter, *Chicago Sun-Times*, to Steve Silverman, Assistant Attorney General, Public Access Bureau (April 17, 2013).

²⁸Letter from Stephen F. Welcome, Burke, Burns & Pinelli Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 2 (April 26, 2013).

²⁹Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Stephen F. Welcome, Burke, Burns & Pinelli Ltd., (April 29, 2013).

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DCEO, including records responsive to the FOIA request which UNO obtained from its vendor and other entities.³⁰ He provided this office with a copy of UNO's complete response to DCEO, but reiterated that UNO and UCSN do not possess any other requested records concerning companies subcontracted by UNO's vendor because UNO has not obtained those documents from its vendor or the other entities.³¹

On April 26, 2013, this office properly extended the time to issue a binding opinion in this matter to June 12, 2013, pursuant to section 9.5(f) of FOIA.³² On June 12, 2013, this office properly extended the time period to issue a binding opinion in this matter to July 3, 2013.³³

ANALYSIS

"It is a fundamental obligation of government to operate openly and provide public records as expeditiously and efficiently as possible in compliance with this Act." 5 ILCS 140/1 (West 2010). All public records in the possession or custody of a public body are presumed to be open to inspection and copying. 5 ILCS 140/1.2 (West 2010). Section 3 of FOIA provides, in pertinent part:

(a) Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act. * * *

(b) Subject to the fee provisions of Section 6 of this Act, each public body shall promptly provide, to any person who submits a request, a copy of any public record required to be disclosed by subsection (a) of this Section and shall certify such copy if so requested. 5 ILCS 140/3(a), (b) (West 2010).

³⁰Letter from Stephen F. Welcome, Burke, Burns & Pinelli Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau (May 13, 2013).

³¹Letter from Stephen F. Welcome, Burke, Burns & Pinelli Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau (May 13, 2013).

³²Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, to Dan Mihalopoulos, Staff Reporter, *Chicago Sun-Times*, Stephen F. Welcome, Burke, Burns & Pinelli Ltd., and Alfred Quijano, Freedom of Information Officer, UNO Charter School Network (April 26, 2013).

³³Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, to Dan Mihalopoulos, Staff Reporter, *Chicago Sun-Times*, Stephen F. Welcome, Burke, Burns & Pinelli Ltd., and Alfred Quijano, Freedom of Information Officer, UNO Charter School Network (June 12, 2013).

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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 2010).

Section 27A-5(c) of the Charter Schools Law (105 ILCS 5/27A-5(c) (West 2011 Supp.), as amended by Public Act 97-813, effective July 13, 2012) provides that the "governing body of a charter school shall be subject to the Freedom of Information Act and the Open Meetings Act." See *Jordan v. Northern Kane Educational Corp.*, 2009 WL 509744, 3 (N.D. Ill. 2009) ("the governing body of a charter school is subject to the same disclosure requirements applicable to other government entities in Illinois. [Citation.] It therefore appears that the Illinois legislature when enacting the Illinois Charter School Act intended that the governing body of a charter school function as a public, governmental entity").

Under the Charter Schools Law, a charter school proposal "shall be submitted to the State Board and the local school board in the form of a proposed contract entered into between the local school board and the governing body of a proposed charter school." 105 ILCS 5/27A-7(a) (West 2010). The "certified charter shall constitute a binding contract and agreement between the charter school and a local school board under the terms of which the local school board authorizes the **governing body** of the charter school to operate the charter school on the terms specified in the contract." (Emphasis added.) 105 ILCS 5/27A-6(a) (West 2010). Notably, section 27A-5(h) of the Charter Schools Law (105 ILCS 5/27A-5(h) (West 2011 Supp.), as amended by Public Act 97-813, effective July 13, 2012) provides that a charter school may contract with a "for-profit or nonprofit private entity for: * * * the provision of any service, activity, or undertaking that the charter school is required to perform in order to carry out the terms of its charter."

The charter governing UCSN charter schools is a contract between UCSN and the City of Chicago Board of Education.³⁴ Under the plain language of section 27A-6(a) of the Charter Schools Law, the party authorized to operate a charter school by a local school board pursuant to such an agreement is the governing body of a charter school. In accordance with section 27A-5(h) of the Charter Schools Law, UCSN, as the governing body of the charter schools, has delegated management of its charter schools to its parent company, UNO. The Charter Schools Law does not provide that an entity loses its status as the governing body of a charter school by contracting with another entity to perform management functions. Accordingly, UCSN is subject to FOIA under section 27A-5(c) of the Charter Schools Law. Because UCSN contends that only UNO possesses records responsive to Mr. Mihalopoulos'

³⁴Renewal of Charter and Charter School Agreement (UNO Charter School), Board of Education of the City of Chicago – UNO Charter School Network, July 1, 2008.

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FOIA request, however, this office must determine whether records in UNO's possession should be considered public records of UCSN for purposes of FOIA.

First, based on the facts described above, UNO and UCSN operate as the same entity for purposes of serving as the governing body of the charter schools. Both entities have the same business address, share the same record-keeping system and each have access to the other's records. At the time of the February 15, 2013, FOIA request, the same individuals served on the UNO and UCSN Boards, and the CEO of UNO was the president of UCSN.³⁵ UNO develops the charter schools for the purpose of leasing them to UCSN which UNO created to manage the schools. UCSN then delegates that management role to UNO pursuant to a management services agreement. Among other things, this agreement authorizes UNO to oversee and manage "maintenance of all facilities[.]"³⁶ "all third party contracts for facility improvement and maintenance" and "all third party contracts with vendors necessary for the operations of the schools[.]"³⁷ The independent auditors' report included in UCSN's 2010 annual report described the agreement as including "development and opening of new school campuses."³⁸ UCSN acknowledges that "these delegations to UNO are broad, encompassing virtually all of the governance of the charter school[.]"³⁹

Nonetheless, UCSN asserts that "UNO simply leases buildings to UCSN for purposes of operating charter schools. UCSN independently operates these schools as it sees fit."⁴⁰ But, in fact, UNO operates the charter schools under the management services agreement. UCSN also has financed the renovation of UNO's buildings for charter schools. In 2008, UNO and UCSN "jointly obtained a loan with a bank in the amount of \$65,000,000 recorded on

³⁵The UNO and UCSN boards recently diversified their membership. Mr. Rangel resigned from the boards, but remains CEO of UNO. Linda Lutton, *Embattled UNO charter school leader steps aside, stops short of resigning*, May 28, 2013, available at <http://www.wbez.org/news/embattled-uno-charter-school-leader-steps-aside-stops-short-resigning-107403>.

³⁶Contract for the purpose of a Management Services Agreement, United Neighborhood Organization - UNO Charter School Network, § 1.01.04 (November 3, 2010).

³⁷Contract for the purpose of a Management Services Agreement, United Neighborhood Organization - UNO Charter School Network, § 1.01.07 (November 3, 2010).

³⁸United Charter School Network, Inc., 2010 Illinois Charitable Organization Annual Report, Independent Auditors' Report, Notes to Financial Statement 16 (2011).

³⁹Letter from Stephen F. Welcome, Burke, Burns & Pinelli, Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 4 (April 11, 2013).

⁴⁰Letter from Stephen F. Welcome, Burke, Burns & Pinelli, Ltd., to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 7 (April 11, 2013).

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[UCSN's] books and guaranteed by UNO."⁴¹ Proceeds from the loan were used to renovate two buildings: "All construction costs were paid by UCSN * * * However, the buildings are owned by UNO."⁴² In 2011, UNO and UCSN, "as co-borrowers, refinanced its existing debt of \$61,733,986 recorded on [UCSN] and \$939,103 recorded on UNO. The existing loans were repaid in a three tranche transaction which closed simultaneously."⁴³ This annual report further indicates that UCSN's "TOP MANAGEMENT OFFICIALS AND KEY EMPLOYEES ARE PAID VIA THE UNITED NEIGHBORHOOD ORGANIZATION (A RELATED ORGANIZATION)[;]" UNO paid UCSN's president, vice-president, and director of operations "FOR THEIR RESPONSIBILITIES IN MANAGING BOTH UCSN AND UNO."⁴⁴ Thus, UCSN has funded renovations to buildings it leases from UNO through a loan guaranteed by UNO, and UNO pays the salaries of UCSN's top officials and employees for their roles in managing both entities.

Based on all of these facts, it is clear that at the time of the FOIA request, UNO and UCSN were controlled by the same individuals and UCSN contracted with UNO to perform the role that UNO created UCSN to perform – operating the charter schools. Under all of these circumstances, there is no substantive distinction between UNO and UCSN with respect to developing and operating charter schools. For purposes of governing the charter schools, UNO and UCSN are inextricably intertwined and act as the same entity.

The requirements of FOIA expressly apply to "all records * * * 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 2011 Supp.). Section 2.5 of FOIA (5 ILCS 140/2.5 (West 2010)) further provides that "[a]ll records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public." Records concerning the "affairs of government, the acts of public officials and the expenditure of public funds are public records which are to be made available to any person who

⁴¹United Neighborhood Organization, 2010 Illinois Charitable Organization Annual Report, Independent Auditors' Report, Consolidated Notes to Financial Statement 16 (2011).

⁴²United Neighborhood Organization, 2010 Illinois Charitable Organization Annual Report, Independent Auditors' Report, Notes to Consolidated Financial Statements 15 (2012).

⁴³United Charter School Network, Inc., 2010 Illinois Charitable Organization Annual Report, Independent Auditors' Report, Notes to Financial Statement 13 (2011).

⁴⁴United Charter School Network, Inc., 2010 Illinois Charitable Organization Annual Report, 35 (2011).

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submits a request to inspect them[.]” *Hamer v. Lentz*, 171 Ill. App. 3d 888, 898 (1st Dist. 1988), *rev'd on other grounds*.

Because UNO and UCSN act as the same entity for the purpose of serving as the governing body of charter schools, records responsive to Mr. Mihalopoulos's request which are in the possession of or under the control of UNO must also be considered to be in the possession and under the control of UCSN. Even assuming, as UCSN argues, that the construction of charter schools is not within the scope of the two entities' management services agreement, the records requested document the use of public funds to build charter schools, which are "public" schools that UCSN and UNO manage. *Northern Kane Educational Corp.*, 2009 WL 509744, 2; *see also Board of Educ. of Rich Tp. High School Dist. No. 227 v. Illinois State Bd. of Educ.*, 2011 IL App (1st) 110182 ¶36, 965 N.E.2d 13, 35 (1st Dist. 2011) ("The Charter Schools Law is meant to provide a means to improve educational opportunities for **public** school students."). (Emphasis added.) Because these records relate to the use of public funds for public schools and are in the possession of the governing body of a charter school, this office concludes that those records are subject to disclosure by UCSN under FOIA.

Second, even assuming, *arguendo*, that UNO and UCSN are separate entities and that UCSN is the sole governing body of a charter school for purposes of section 27A-5(c) of the Charter Schools Law, the records in question are nonetheless subject to disclosure by UCSN under section 7(2) of FOIA. These records concern schools that are built by UNO for the purpose of leasing them to UCSN, and which UNO then operates pursuant to a management services agreement with UCSN. As discussed above, section 7(2) of FOIA provides that 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* shall be considered a public record of the public body, for purposes of this Act." (Emphasis added.) Education is "a vitally important governmental function." *Puffer-Hefly School Dist. No. 69 v. Du Page Regional Bd. of School Trustees of Du Page*, 339 Ill. App. 3d 194, 202 (2nd Dist. 2003). The operation of charter schools is authorized by the Charter Schools Law which, as noted above, "is meant to provide a means to improve educational opportunities for public school students." *Board of Educ. of Rich Tp. High School Dist. No. 227*, 2011 IL App (1st) 110182 at ¶102, 965 N.E.2d at 35. Further, UNO has received State grants to build charter schools.⁴⁵ Funding for those grants was

⁴⁵United Neighborhood Organization, 2010 Illinois Charitable Organization Annual Report, Independent Auditors' Report, Notes to Consolidated Financial Statements 20 (2012).

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authorized by Public Act 96-0039, effective July 13, 2009, to "alleviate school overcrowding."⁴⁶

Thus, the records in question pertain to the use of public funds by UNO to build public schools, which it leased to UCSN, a subsidiary which UNO created to operate the schools. UCSN, in turn, contracted with UNO to oversee and manage the schools. Thus, even if UCSN does not physically possess the records in question, under section 7(2) it is obligated to obtain them from UNO, because the records directly relate to a governmental function delegated to UNO by UCSN. Likewise, any responsive records that are not physically in the possession of UCSN or UNO but which are in the possession of vendors that UNO hired with public funds to perform design or construction services are subject to disclosure under section 7(2). A vendor which contracted with UNO to build charter schools funded by State grants is engaged in performing a governmental function on behalf of the governing body of the charter schools. Consequently, subcontracts and other records related to that public function are considered public records of UCSN under section 7(2) of FOIA and section 27A-5(c) of the Charter Schools Law, even if the records are not in the possession of UCSN or UNO, and those records must be produced.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the arguments of the parties, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On February 15, 2013, Mr. Dan Mihalopoulos sent separate FOIA requests to UCSN and UNO seeking meeting minutes and various records concerning the use of public funds to build charter schools.

2) On March 1, 2013, Mr. Mihalopoulos submitted a Request for Review to the Public Access Counselor alleging that UCSN failed to respond to his FOIA request.

⁴⁶Article 7, section 100 of Public Act 96-0039 provides that \$98,000,000, or so much thereof as may be necessary, is appropriated from the Build Illinois Bond Fund to the Department of Commerce and Economic Opportunity for a grant to the "United Neighborhood Organization for the acquisition, construction, rehabilitation, renovation and equipping facilities, to a silver certification from the United States Green Building Council's Leadership in Energy and Environmental Design Green Building Rating System, to assist in alleviating school overcrowding in the state."

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3) On March 8, 2013, the Public Access Bureau contacted Stephen F. Welcome, counsel for both UCSN and UNO, regarding UCSN's failure to reply to Mr. Mihalopoulos's February 15, 2013, FOIA request. Mr. Welcome stated that he had not received the request from UCSN.

4) On March 11, 2013, the Public Access Bureau forwarded a copy of the UCSN FOIA request to Mr. Welcome.

5) On March 19, 2013, UCSN responded to the FOIA request by providing copies of requested meeting minutes, but asserted that it did not possess any other responsive records.

6) On March 22, 2013, Mr. Mihalopoulos filed a Request for Review of UCSN's response. Mr. Mihalopoulos' Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2011 Supp.)). The Public Access Counselor extended the time to issue a binding opinion to July 3, 2013. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) On March 26, 2013, the Public Access Bureau determined that further action was warranted and sent a letter to UCSN requesting a detailed explanation of the relationship between UNO and UCSN and seeking clarification as to whether those two entities operate at the same physical location, and whether both entities use the same record-keeping system and have access to each other's records.

8) On April 11, 2013, UCSN responded that UNO created UCSN, which is the governing body of UNO charter schools. UNO builds and leases charter schools to UCSN. UCSN then delegates management of the UNO charter schools to UNO pursuant to a management services agreement. In addition, UCSN stated that UNO and UCSN use the same record-keeping system and have access to each other's records. UCSN stated that UNO possesses records concerning d'Escoto, Inc., but does not possess records concerning the other entities referenced in the FOIA request. UCSN asserted that it does not possess responsive records.

9) On May 13, 2013, UCSN acknowledged that additional responsive records had been located, which UNO had provided to DCEO in response to that agency's request for information. However, UCSN maintained that neither UNO nor UCSN possessed any other records concerning subcontractors that were hired by a vendor that UNO contracted to design and build charter schools.

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10) UCSN is the "governing body" of UNO charter schools and, therefore, is subject to FOIA pursuant to section 27A-5(c) of the Charter Schools Law.

11) At the time of the FOIA request, the Board of UNO and UCSN consisted of the same Board members and UCSN's president was the CEO of UNO. UNO and UCSN maintain the same business address, use the same recordkeeping system and have access to each other's records. UNO pays UCSN's key employees and top management officials, and UCSN contracted with UNO to operate the charter schools. Based on all of the circumstances, UNO and UCSN are substantively indistinguishable and constitute the same entity for the purpose of charter school operations, including serving as the governing body of the charter schools. Therefore, records concerning the charter schools in the possession of UNO are public records in the possession of UCSN.

12) Records concerning the use of public funds to design and build charter schools are public records subject to inspection and copying under section 2.5 of FOIA.

13) Even assuming that UCSN is the sole governing body of the charter schools and that only records of UCSN are subject to FOIA, responsive records in the possession of UNO are subject to disclosure under section 7(2) of FOIA because the records directly relate to agreements under which UNO performs governmental functions for UCSN. Specifically, UNO builds the schools for the purpose of leasing them to UCSN; UCSN leases public schools from UNO and contracts with UNO to manage those schools.

14) Records in the possession of vendors that UNO hired to design and build charter schools are considered records of UNO and UCSN under section 7(2) of FOIA because UNO contracted the vendors to perform a governmental function.

In accordance with these findings of facts and conclusions of law, UCSN is directed to provide Mr. Mihalopoulos with all records responsive to his request in the possession of UCSN, UNO, and their vendors. Under section 9.5(f) of FOIA, UCSN must either immediately comply with this binding opinion or initiate administrative review under section 11.5 of FOIA (5 ILCS 140/11.5 (West 2010)).


This opinion shall be considered a final decision of an administrative agency for the purpose of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2010). An aggrieved party may obtain judicial review of the decision by filing a

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complaint for administrative review in the Circuit Court of Cook County or Sangamon County within 35 days of the date of this decision, naming the Attorney General of Illinois and Mr. Dan Mihalopoulos as defendants. *See* 5 ILCS 120/7.5 (West 2010).

Very truly yours,

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23857 rfr 3d response sd

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