



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 14, 2017

Via electronic mail

Mr. Cal Skinner

McHenry County Blog

[REDACTED]
calskinner2@gmail.com

Via electronic mail

Mr. Scott Hartman

Deputy County Administrator, McHenry County

200 North Seminary Avenue

Woodstock, Illinois 60098

SEHartman@co.mchenry.il.us

RE: FOIA Request for Review – 2017 PAC 46249

Dear Mr. Skinner and Mr. Hartman:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons that follow, the Public Access Bureau concludes that the County of McHenry (County) improperly designated Mr. Cal Skinner as a recurrent requester.

On January 18, 2017, Mr. Skinner submitted a FOIA request to the County seeking electronic communications exchanged between Jack Franks and Oliver Serafini during the January 17, 2017, County Board meeting. On January 20, 2017, the County responded by notifying Mr. Skinner that it was designating him as a "recurrent requester" as that term is defined in section 2(g) of FOIA (5 ILCS 140/2(g) (West 2015 Supp.)). In this Request for Review, Mr. Skinner contended that he operates a website, the McHenry County Blog, and is a member of the "news media" excepted from the "recurrent requester" designation.

On February 7, 2017, this office sent a copy of the Request for Review to the County and requested that it provide a detailed explanation of the legal and factual bases for

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designating Mr. Skinner as a "recurrent requester." This office also requested that the County address Mr. Skinner's assertion that he should be considered "news media" for the purposes of FOIA, as defined by section 2(f) of FOIA (5 ILCS 140/2(f) (West 2015 Supp.)).

On March 1, 2017, the County submitted a written response, and discussed three prior non-binding determinations from this office on the issue of the definition of "news media" under FOIA. On March 2, 2017, this office forwarded a copy of the County's response to Mr. Skinner. On March 27, 2017, Mr. Skinner submitted a written reply together with his affidavit relating to the history and operations of the McHenry County Blog.

DETERMINATION

Section 2(g) of FOIA defines a "recurrent requester" as:

a person that, in the 12 months immediately preceding the request, has submitted to the same public body (i) a minimum of 50 requests for records, (ii) a minimum of 15 requests for records within a 30-day period, or (iii) a minimum of 7 requests for records within a 7-day period. *For purposes of this definition, requests made by news media and non-profit, scientific, or academic organizations shall not be considered in calculating the number of requests made in the time periods in this definition* when the principal purpose of the requests is (i) to access and disseminate information concerning news and current or passing events, (ii) for articles of opinion or features of interest to the public, or (iii) for the purpose of academic, scientific, or public research or education. (Emphasis added.)

As highlighted above, the definition of "recurrent requester" excludes requests from members of the "news media" who make requests for certain purposes. Section 2(f) of FOIA defines "news media," in relevant part, as a "newspaper or other periodical issued at regular intervals whether in print or electronic format, a news service whether in print or electronic format[.]"

In the absence of Illinois Appellate Court precedents on how to interpret the term "news media," this office has found persuasive guidance in cases from other jurisdictions interpreting similar statutory definitions. Those cases generally hold that "an individual or entity that self-publishes information on the Internet generally must demonstrate some adherence to recognized journalistic standards such as editorial oversight or the creation of original content similar to that of traditional media" in order to be considered "news media." Ill. Att'y Gen. PAC

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Req. Rev. Ltr. 44649, issued December 2, 2016, at 5. That authority and prior determinations by this office do not exclude the possibility that a blog or website would constitute "news media" if it bears enough resemblance to traditional media sources. Indeed, as noted above, the statutory definition of "news media" in FOIA includes the "electronic format" of newspapers or periodicals issued at regular intervals, or the "electronic format" of a news service.

In its response to this office, the County argues:

McHenry County has no evidence that Mr. Skinner * * * adheres to recognized journalistic standards. While the posts may include the personal commentary or editorial of the blog's publisher, this opinion-based content is not analogous to the reporting with editorial oversight and fact checking that hallmark traditional news sources. Therefore, Mr. Skinner's website does not resemble a "newspaper," "periodical," or "news service" in an electronic form and does not fall within the plain definition of "news media" in section 2(f) of FOIA.^[1]

According to Mr. Skinner's affidavit, the McHenry County Blog was established in 2005, and since that time, approximately 30,000 news stories have been published on the website, and have generated more than 78,000 reader comments.² Mr. Skinner asserted that for the period beginning February 2, 2017, and ending March 21, 2017, the McHenry County Blog attracted 50,027 visitors, 31,858 unique visitors, and 271,435 page views.³ Mr. Skinner described the content on the McHenry County Blog as follows:

The stories published by the McHenry County blog include in-depth reports, investigations, and commentary on (i) county, township, municipal, school, and park district governance, their elected members, budgets, tax levies and extensions, and employment hiring and termination decisions; (ii) reports, exposes, and analysis of county, state, and federal elections, candidates for elective office, the candidate's position on the issues, and election results; (iii) analysis of legal cases filed in the United [States] District Courts and the 22nd Judicial Circuit McHenry County

¹Letter from Scott Hartman, McHenry County, Deputy County Administrator and FOIA Officer, to Neil Olson, Deputy Public Access Counselor, Illinois Attorney General's Office (March 1, 2017), at 2.

²Affidavit of Cal Skinner, ¶ 5.

³Affidavit of Cal Skinner, ¶ 6.

including reports on the parties involved, issues presented, and case outcomes; and (iv) general articles on the state of health of local McHenry County businesses, churches, schools, social issues, individual citizens, obituaries, and book reviews.^[4]

Mr. Skinner further described the methods of compiling information for posts on the McHenry County Blog:

The articles written are based on information gathered and obtained through confidential sources, interviews of interested parties, editorial decision-making, reviewing original source material, such as county and local government records, budgets, tax levies and extensions, political mailings, press releases, attending county and local government public meetings, posing questions to government officials and members of the public in attendance at the meetings, utilizing Freedom of Information Act (FOIA) requests, examining legal files located in the McHenry County Circuit Clerk's office and with the Clerk of the United States District Courts, and posting original photographs taken at public meetings, the attendees, speakers, elected officials, candidates for office, political rallies, and other newsworthy local events to better educate the public on matters of public interest.^[5]

Mr. Skinner detailed particular articles as illustrative of the types of coverage provided on the McHenry County Blog.⁶ He also stated that the McHenry County Blog and its reporting had been cited in several other outlets in both the traditional and non-traditional media.⁷ Lastly, Mr. Skinner cited his journalistic experience outside the McHenry County Blog working on a college newspaper, an on-line Illinois publication, and his father's local newspaper in McHenry County.⁸

This office has also independently reviewed the McHenry County Blog website during the pendency of this Request for Review. The McHenry County Blog is regularly

⁴Affidavit of Cal Skinner, ¶ 7.

⁵Affidavit of Cal Skinner, ¶ 8.

⁶Affidavit of Cal Skinner, ¶ 9.

⁷Affidavit of Cal Skinner, ¶ 12.

⁸Affidavit of Cal Skinner, ¶¶ 13-16.

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updated with posts on governmental issues in McHenry County and elsewhere. The site often includes original content consisting of Mr. Skinner's opinion and commentary on these issues.

The County focuses on specific factors such as editorial oversight or fact checking to conclude that the McHenry County Blog is not news media. However, such a focus is overly narrow. Courts reviewing similar issues, as well as this office, have not identified any single factor as exclusive or dispositive:

No one fact is dispositive; rather, the inquiry should focus on the **totality of the circumstances**. For example, traditional media outlets publish commentary and editorials, some of which are not objective or neutral in their viewpoints, but they are nevertheless members of the media. Another example: a small-town newspaper that no longer prints a newspaper but elects to disseminate the news online is a member of the media. But a person who prints and distributes one million copies of a flyer may not be a member of the media despite his or her breadth of readership. *Services Employees Int'l Union Local 5 v. Professional Janitorial Serv. of Houston, Inc.*, 415 S.W.3d 387, 399 (Tex. App. 2013).

Cf. Ill. Att'y Gen. PAC Req. Rev. Ltr. 44649, at 5 (to constitute news media, blogger must demonstrate "some adherence to recognized journalistic standards *such as* editorial oversight *or* the creation of original content similar to that of traditional media"). (Emphasis added.)

Therefore, while the editorial process is one factor to be considered, it cannot be considered in isolation. In *Service Employees Int'l Union Local 5*, the Texas Court of Appeals considered whether a labor union that operated websites is a member of the "electronic media" for purposes of interlocutory appeal jurisdiction. In order to determine whether the interlocutory appeal statute applied, the court looked to whether the entity's primary business was reporting the news, and considered the following factors: "the goods and services offered by the Internet author and the sources of the Internet author's revenue"; "the Internet author's journalistic background, experience, and independence"; "the extent to which the Internet author has an established presence or reputation in traditional media"; "the character and content of the Internet author's communications and range of reporting"; "the editorial process"; and "the size, nature, and diversity of the readership and whether the readership relies on the author to obtain news." *Service Employees Int'l Union Local 5*, 415 S.W.3d at 399.


Mr. Skinner has furnished evidence that the McHenry County Blog functions much like a member of the traditional news media in terms of its production of original content,

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its range of reporting on issues of public interest, its established presence on its own and in the traditional media, and the size and diversity of its readership. Judging from the totality of the circumstances, this office concludes that the McHenry County Blog is a newspaper or periodical issued at regular intervals in "electronic format" and, therefore, a member of the "news media" as defined by section 2(f) of FOIA. Accordingly, based on the available evidence, the County violated FOIA by improperly designating Mr. Skinner as a "recurrent requester" under section 2(g) of FOIA.

In accordance with the conclusions of this letter, this office requests that the County treat Mr. Skinner's FOIA request as being from "news media." The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at (217) 782-9078 or nolson@atg.state.il.us.

Very truly yours,


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

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