



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

January 30, 2018

Via electronic mail

Mr. John Kraft

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

Paris, Illinois 61944

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

RE: FOIA Request for Review – 2018 PAC 51191

Dear Mr. Kraft:

The Public Access Bureau has received the enclosed response to your Request for Review from the Attorney for the City of Carlinville (City). Additional confidential documents provided to the Public Access Counselor have been withheld.

You may, but are not required to, reply in writing to the public body's response. If you choose to reply, you must submit your reply to this office within 7 working days of your receipt of this letter. 5 ILCS 140/9.5(d) (West 2016). Please send a copy of your reply to the City as well.

If you have any questions, please contact me at (217) 782-9054.

Very truly yours,

MATTHEW HARTMAN
Assistant Attorney General
Public Access Bureau

Enclosure

cc: Mr. Dan O'Brien
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124 East Side Square
PO Box 671
Carlinville, Illinois 62626

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January 26, 2018

Mr. Matt Hartman
Assistant Attorney General
Public Access Bureau
Office of the Attorney General
500 S. Second St.
Springfield, IL 62706

Re: OMA Request for Review - 2018 PAC 51069

Dear Mr. Hartman,

This letter is written in response to your letter dated January 17, 2018 and our telephone conversation on January 24th. I am copying Ms. Hollister because she is responsible for Mr. Kraft's request for review 2018 PAC 51191 dated January 2018. I respectfully request that one Assistant Attorney General handle all matters involving Mr. Kraft and his affiliates with the City of Carlinville. Please note that I have attached and incorporate by reference the response sent to you by Attorney Foreman of the Illinois Alluvial Regional Water Company.

In response to your questions:

1. **Has the City provided "him with copies of all public records in its possession?"** The City provided Mr. Kraft with copies of all public records in its possession.
2. **"(E)xplain the search that was performed to locate records responsive to Mr. Kraft's request."** The City Clerk reviewed all records in City files, all departments including the aldermen and alderwomen and mayor that may have records responsive to his request. The Clerk had the Chief of Police whose duties include providing "IT" services to the City, review all files or emails in the City database for records requested by Mr. Kraft. Records were searched by hand and by electronic means.
3. **Does the City "possess additional records responsive to Mr. Kraft's request?"** No.

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FOIA/OMA

4. Is the "IARWC a party with whom the City has contracted to perform a governmental function on behalf of the City?" No. The City of Carlinville has the legal authority to become a member of IARWC. "Article VII, section 10 of the Illinois Constitution has conferred broad power on municipalities regarding intergovernmental agreements. It provides: Units of local government***may contract or otherwise associate among themselves***to obtain or shares services and to exercise, combine or transfer any power or function in any manner not prohibited by law or by ordinance. Under paragraph (c) of section 10, the State is directed to encourage intergovernmental cooperation." *Village of Sherman v. Village of Williamsville*, 435 N.E.2d 548, 106 Ill.App.3d 174, 61 Ill.Dec. 851, 551 (4th Dist.1982). "Municipal corporations have broad power to contract among themselves," and are "specifically authorized to contract for a water supply (Ill.Rev.Stat. 1985, ch. 24, par. 11-124-1 and establish all necessary rules and regulations concerning the use and supply of water (Ill. Rev. Stat.1985, ch. 24, par.11-125-3)" *Mueller v. The City of Highland Park*,519 N.E. 2d 712, 715,166 Ill.App.3rd 114, 116 Ill.Dec. 6744 (2nd Dist. 1988). It is a "well established principle that a municipal corporation owning and operating a water system and selling water to individuals, although engaged in public service does so in its business or proprietary capacity, not in any governmental capacity, and no distinction is to be drawn between such business whether engaged in by a municipality or by a private corporation." *Baltis v. Westchester*, 121 N.E. 2d 495, 500, 3 Ill.2d 388 (Ill. Sup. Ct. 1954). The use and supply of water is proprietary in nature. It is not a government function such as the provision of "municipal law enforcement power" that "are governmental rather than proprietary in nature." 2010 *Op. Atty. Gen. No. 10-003*, citing 1982 *Op. Ill. Att'y Gen. No. 82-32*. "A municipal corporation selling water for private consumption does so in its proprietary rather than governmental capacity. No distinction is to be drawn between such business of selling when indulged in by a municipality and when engaged in by a private corporation." *City of West Frankfort v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local No. 551*, 262 N.E.2d 649, 651, 53 Ill. App.2d 207 (5th Dist. 1964).

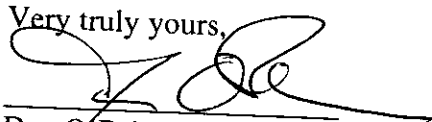
5. **“(W)hat services (does) the IARWC performs or intends to perform for the City?”** The IARWC is intended to provide a reliable source of potable water to the City of Carlinville.
6. **What is “the reason for the IARWC’s December 28, 2017 request for payment?”**
“Alderwoman Campbell asked for 3,000 of the 30,000 allocated to be released from the city to cover legal and incidental fees for the water concept.” (Minutes of the Carlinville City Council December 4, 2017) (attached)
7. **“(Is) the IARWC a subsidiary body of the City?”** No. The IARWC is not a subsidiary body of the City. In order to determine whether an entity is a “subsidiary body” of municipal corporation subject to the Open Meetings Act and Freedom of Information Act, the court considers whether an entity has legal existence independent of government resolution, the nature of functions performed by entity, and the degree of government control exerted over the entity, *Hopf v Top Corp, Inc.*, 628 N.E. 2d 311, 314, 256 Ill. App. 3d 887, (1st Dist. 1993). The IARWC has a legal existence independent of the City. IARWC was incorporated as private not-for-profit corporation on December 5, 2017 (Corporation File Detail Report attached). Since incorporation it has conducted its “board meetings and business negotiations in a private manner and has not made minutes of meetings or other documents available to the public.” *Hopf v Top Corp, Inc.*, 628 N.E. 2d 311, 314, 256 Ill. App. 3d 887, (1st Dist. 1993). The mission of the IARWC is to “utilize a local aquifer, known as “Alluvial Aquifer”, to provide a reliable source of potable water to its members located within a four county service area consisting of Macoupin, Greene, Jersey, and Madison Counties.” As noted above, the provision of water has long been held to be proprietary in nature. The degree of government control over the entity by the City of Carlinville is the vote of one board member.
8. **How was “the IARWC founded?”** The City of Carlinville owns Carlinville Lake I and Lake II. These lakes are the current source of potable water to Carlinville and rural water customers in the area. These lakes have many challenges, including siltation, aging infrastructure, increasing maintenance costs and other issues identified by engineers and the IEPA. The lakes and current infrastructure are unable to meet the future water needs of the City of Carlinville. As part of its efforts over many years (e.g. many public hearings,

identification of funding sources, investigating alternative sources, alternative remedies, etc.) to find a solution, the City hired engineers and applied for a rural development grant through the USDA. Entities with similar water concerns came together to form the IARWC.

9. **How is "the IARWC funded?"** The IARWC is funded by its members. The City of Carlinville applied for and received a USDA Grant for \$30,000.00 with the City's contribution an additional \$10,000.00 (\$40,000.00 total). The City has been invoiced and approved an initial payment of \$3,000.00 to the IARWC from this grant. (see attached USDA correspondence referencing said grant).
10. **What is the "relationship between the City and the IARWC?"** The IARWC is a not-for-profit corporation. It is mutual company owned and operated by its members. The City is one of three current members. (See attached Corporation Detail Report). The City of Carlinville is a municipal corporation. It has a proprietary relationship with IARWC.
11. **How "the IARWC is controlled?"** The IARWC is controlled by an independent board of directors and officers. The directors and officers do not have to be an employee of, member of the boards or city council of the members. There are no employees at this time.
12. **Does the "City Council or its appointed representatives exercise day-to-day control over the operations of the IARWC?"** No.

Please contact me if I can provide any further information and clarification. The City of Carlinville, Mayor Demuzio, aldermen and alderwomen are committed to open government and will continue to comply with requests from your office. They also understand the need to reply to the repeated requests on this and other matters by Mr. Kraft and his supporters, no matter how costly and time consuming it may be to the City of Carlinville taxpayers or harmful it may be to achieving a reliable cost-effective long term water source for the City, its families and the employees of its large private water users.

Very truly yours,



Dan O'Brien
Attorney for the City of Carlinville

enclosures:

cc: Assistant Attorney General Marie Hollister
Alderman Bilbruck
Alderwoman Brockmeier
Alderwoman Campbell
Alderman Direso
Alderman Downey
Alderwoman Heigert
Alderwoman Oswald
Alderwoman Toon
Mayor Demuzio