

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT
EDGAR COUNTY, PARIS, ILLINOIS

JOHN KRAFT,)
)
Plaintiff,)
)
vs.)
)
CLARK-EDGAR RURAL)
WATER DISTRICT (CERWD)) 2012-MR-44
)
and)
)
KEVIN CONOVER, acting in his)
official capacity as FOIA Officer of)
CERWD)
)
Defendants.)

MEMORANDUM OF LAW AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS

Now comes the Clark-Edgar Rural Water District and Kevin Conover, Defendants, by Meehling & Bernardoni, their attorneys, and submit to the court this Memorandum of Law and Authorities in Support of Motion to Dismiss.

I. Background:

In 2008 the water treatment plant of the City of Martinsville, Illinois (Martinsville) flooded. The Clark-Edgar Rural Water District (District) and the City of Marshall, Illinois (Marshall) were the closest water utility suppliers to Martinsville. In co-ordination with each other, both tried to figure out how to supply water to Martinsville (both on a short term and long term basis).

Francis Associates (a private firm that provides engineering services to the District) worked on the problem of providing water to Martinsville for the District. In so doing, it was in contact with Roger Watwood of Marshall.

Francis Associates' invoice to the District for its services referenced an e-mail "to Roger" (no last name noted).

On June 19, 2012 Kirk Allen (Mr. Allen) submitted a Freedom of Information Act (FOIA or the Act) request to the District requesting copies of all invoices received and paid to Francis Associates for the prior 10 years (along with other documents).

On September 17, 2012 Mr. Allen submitted a FOIA request to the District for the following:

1. Copy of Clark-Edgar Advertising Bids published in the Decatur Herald paper in March of 2008
2. Copy of email sent to Roger Eddy on or about 5/8/2008. E-mail was to Roger for the overall Clark-Edgar map and the CERWD paid \$52.50 for the email that according to the invoice from Francis Associates was sent by T. Turner.
3. (Another document not included in the Plaintiff's request.)

In anticipating that the District may not have some of the records, but that Francis Associates may have the records, Mr. Allen in his FOIA request cited section 7(2) of the Act (5 ILCS 140/7(2)).

Work with respect to all three items on the September 17, 2012 request was performed by Francis Associates. All records were those of Francis Associates. The District did not have possession of any of the requested records. Therefore, it had to contact Francis Associates for a response to each of the requested records.

Francis Associates was able to locate the advertising bid (the first item requested).

In looking for the email referenced in the invoice (the second item requested) Francis Associates discovered that there was no email to Roger Eddy on or about May 8, 2008 but there was an email to Roger Watwood on the same date.

Francis Associates invoiced the District for its time to locate the records (photo-copy attached - Exhibit B to Kevin Conover's Supporting Affidavit to Defendants' Motion to Dismiss). That amount (\$76.00) is the amount the District requested from Mr. Allen for the documents. There was no other charge by the District.

The District requested Mr. Allen to pay the \$76.00 before it released the requested information to Mr. Allen. Mr. Allen did not make the payment.

The Plaintiff, John Kraft (Mr. Kraft), a partner of Mr. Allen in the Edgar County Watchdogs, then requested the same information. The District requested reimbursement from Mr. Kraft. The District has not received reimbursement from anyone.

Francis Associates is a private non-governmental firm that does not fall under the definition of a public body as defined in the Act (5 ILCS 140/2(a)) and as such is not subject to the limitations of Section 6(b) and is not subject to the FOIA in general.

II. Statute:

Section 6(b) of the Act (5 ILCS 140/6(b)) provides in part as follows:

“Except when a fee is otherwise fixed by statute, each public body may charge fees reasonably calculated to reimburse its actual cost for reproducing and certifying public records . . .”

and

“ . . . in calculating its actual cost for reproducing records or for the use of the equipment of the public body to reproduce records, a public body shall not include the cost of any search for and review of the records or other personnel cost associated with producing the records . . .”

III. Analysis:

This is a case of first impression. The Defendants were not able to find an Illinois case on point.

In addressing the opening clause of the cited portion of Section 6(b) (except when a fee is otherwise fixed by statute) it should be noted that there is no statute addressing or fixing the fee of a private third party who is responding to a FOIA request to a public body.

Section 6(b) then provides that the public body may charge “its actual costs”. Actual cost is later limited by an exclusion that “a public body should not include the cost of any search for and review of the records or other personnel costs associated with retrieving the records.” In reading this section, it is clear that the legislature is addressing the search and personnel costs of the public body and not the search and personnel costs of a third party searching its own records (a party FOIA does not cover).

Section 6(a) allows the public body to be compensated for the actual cost of purchasing recording medium.

In reading the act as a whole, the legislative intent is that the public body shall be allowed to recoup its costs except for its internal fixed costs (the public body’s personnel costs or reproduction costs - with some exceptions).

If the District was trying to not furnish records to Mr. Allen or Mr. Kraft it could have merely responded that there was no such email (item 2) - which technically is true. It is trying to furnish the records to Mr. Kraft that he wishes to see. It will furnish, upon receipt of the payment to reimburse it for its expense to acquire the records, the Bid Notice and email that was sent on the date mentioned in the item.


In reviewing this matter, it is important to remember that Francis Associates is a private company that is not subject to the provisions of the FOIA. The legislature had no intention for public bodies to be required to pay fees to third parties to reproduce records without being reimbursed. The Act makes no such requirement. If the legislature wished to make such a requirement it would have excluded such costs from the calculation of actual cost (Section 6(b)) just as it excluded the public body's personnel costs.

Mr. Allen should have expected the charge from Francis Associates to the District. He specifically cited section 7(2) of the Act to make sure the District went to Francis Associates to obtain the requested records. Mr. Kraft was aware of this when he made his request.

IV. Summary:

As stated above, it was proper for the District to pass along its actual cost to obtain the documents requested by Mr. Kraft.

CLARK-EDGAR RURAL WATER DISTRICT
and KEVIN CONOVER
By Meehling & Bernardoni

By: 
Its Attorneys

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TO: Clark-Edgar Rural Water District
475 IL Highway 1
Marshall, IL 62441

DATE: September 21, 2012

INVOICE NO:

INVOICE OR STATEMENT FOR SERVICES OR SUPPLIES AS LISTED BELOW

FOIA Request – September 21, 2012

Bob Colvin	0.5	90.00	\$ 45.00
Troy Turner	0.5	62.00	\$ 31.00
		TOTAL	\$ 76.00
		TOTAL AMOUNT DUE	\$ 76.00