

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

FILED

DEC 10 2012

JOHN KRAFT

Plaintiff

vs.

CLARK-EDGAR RURAL
WATER DISTRICT (CERWD)

and

KEVIN CONOVER, acting in his
Official capacity as FOIA Officer of
CEWRD

Defendants.

Karen B. Halloran
Circuit Clerk, 5th Judicial Circuit Edgar County

2012-MR-44

MEMORANDUM OF LAW AND AUTHORITIES
IN SUPPORT OF PLAINTIFF RESPONSE TO
DEFENDANT MOTION TO DISMISS

Now comes Plaintiff, Mr. John Kraft, *pro se*, and admit to the court this Memorandum of Law and Authority in Support of Plaintiff Response to Defendant Motion to Dismiss.

I. Background.

The background information concerning what Mr. Allen did, or did not, request is not applicable.

The CERWD's assertion that Mr. Allen and Mr. Kraft are "partners" has no merit. We have no business ties. Mr. Kraft owns and operates a website; Mr. Allen provides contributing content without any compensation. No contractual or verbal agreements exist of any kind.

Mr. Kraft did request a copy of Mr. Allen's FOIA request, and it is public record according to [5 ILCS 140/3.5(4)] the Illinois Freedom Of Information Act, which states in part that when a public body receives a request, the public body shall:

"...create a file for the retention of the original request, a copy of the response, a record of written communications with the requestor, and a copy of other communications..."

This file created is a public record, subject to the FOIA. The invoice from Francis Associates to the CERWD was incurred by the CERWD to fulfill Mr. Allen's FOIA request. The fact that Mr. Allen did not pay the invoice is not applicable to Mr. Kraft's FOIA request, as he requested a public record that the CERWD was, and still is, in possession of.

Whether Francis Associates is or is not subject to FOIA in general, is moot. Mr. Kraft did not request any documents from Francis Associates; he only requested the public documents created by a FOIA request in the possession of the CERWD.

II. Statute:

Section 1 of the Act (5 ILCS 140/1) provides in part as follows (emphasis mine):

"...It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act..."

and

"The General Assembly recognizes that this Act imposes fiscal obligations on public bodies to provide adequate staff and equipment to comply with its requirements. The General Assembly declares that providing records in compliance with the requirements of this Act is a primary duty of public bodies to the people of this State, and this Act should be construed to this end, fiscal obligations notwithstanding."

Section 2 of the Act (5 ILCS 140/2) provides in part as follows (emphasis mine):

"Sec. 2. Definitions. As used in this Act:

(c) "Public records" means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information 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."

Section 3 of the Act (5 ILCS 140/3) provides (emphasis mine) as follows:

"(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. Notwithstanding any other law, a public body may not grant to any person or entity, whether by contract, license, or otherwise, the exclusive right to access and disseminate any public record as defined in 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."

Section 3.5 of the Act (5 ILCS 140/3.5) provides in part (emphasis mine) as follows:

"Sec. 3.5. Freedom of Information officers.

(a)...Upon receiving a request for a public record, the Freedom of Information officer shall:

(4) create a file for the retention of the original request, a copy of the response, a record of written communications with the requester, and a copy of other communications."

Section 6 of the Act (5 ILCS 140/6) provides (emphasis mine) as follows:

"Sec. 6. Authority to charge fees.

(a) When a person requests a copy of a record maintained in an electronic format, the public body shall furnish it in the electronic format specified by the requester, if feasible. If it is not feasible to furnish the public records in the specified electronic format, then the public body shall furnish it in the format in which it is maintained by the public body, or in paper format at the option of the requester. A public body may charge the requester for the actual cost of purchasing the recording medium, whether disc, diskette, tape, or other medium. A public body may not charge the requester for the costs of any search for and review of the records or other personnel costs associated with reproducing the records, except for commercial requests

as provided in subsection (f) of this Section. Except to the extent that the General Assembly expressly provides, statutory fees applicable to copies of public records when furnished in a paper format shall not be applicable to those records when furnished in an electronic format."

"(b) 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 for the use, by any person, of the equipment of the public body to copy records. No fees shall be charged for the first 50 pages of black and white, letter or legal sized copies requested by a requester. The fee for black and white, letter or legal sized copies shall not exceed 15 cents per page. If a public body provides copies in color or in a size other than letter or legal, the public body may not charge more than its actual cost for reproducing the records. 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 costs of any search for and review of the records or other personnel costs associated with reproducing the records, except for commercial requests as provided in subsection (f) of this Section. Such fees shall be imposed according to a standard scale of fees, established and made public by the body imposing them. The cost for certifying a record shall not exceed \$1."

"(d) The imposition of a fee not consistent with subsections (6) (a) and (b) of this Act constitutes a denial of access to public records for the purposes of judicial review."

"(f) A public body may charge up to \$10 for each hour spent by personnel in searching for and retrieving a requested record. No fees shall be charged for the first 8 hours spent by personnel in searching for or retrieving a requested record. A public body may charge the actual cost of retrieving and transporting public records from an off-site storage facility when the public records are maintained by a third-party storage company under contract with the public body. If a public body imposes a fee pursuant to this subsection (f), it must provide the requester with an accounting of all fees, costs, and personnel hours in connection with the request for public records. The provisions of this subsection (f) apply only to commercial requests."

Section 7 of the Act (5 ILCS 140/7) provides (emphasis mine) as follows:

"Sec. 7. Exemptions.

(2) 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."

III. Analysis:

In reading the Act as a whole, the legislative intent is that the public body bears the costs of complying with the Act by specifically addressing the issue when it stated that it recognized the Act imposed fiscal obligations on the public body to provide adequate staff and equipment to

comply with this Act. The General Assembly further stated that compliance is a primary duty of the public body, fiscal obligations notwithstanding.

“The General Assembly clearly recognized in Section 1 that there are costs associated with the duties imposed by FOIA, and that those costs would rest primarily on public bodies. One of the obligations of a public body under Section 3.5 of FOIA is to keep necessary records of the body's compliance with its requirements***As with other records required by law to be maintained by public bodies, the cost of creating and maintaining those records is borne by the public body. Had the General Assembly intended for a public body to be able to shift the costs of its recordkeeping to the requester, it could have expressly done so. It did not.” (Source: Lisa Madigan, Attorney General Binding Opinion 10-002, for Request for Review 2010 PAC 5745)

Mr. Kraft's request is defined in Section 2 (c), as a public record created by and in the possession of a public body.

Section 3 (a) states a public body may not grant to any person or entity, whether by contract, license, or otherwise, the exclusive right to access and disseminate any public record as defined in this Act. This statement, coupled with Section 6(d) – imposing a fee not consistent with this Act, is in fact giving Francis Associates exclusive rights, by contract, to the records. It is the duty of the public body to maintain accurate public records. CERWD chose to keep the records with Francis Associates and should expect an invoice when retrieving said records.

Section 3 (b) directs us to look at Section 6 to determine if a public body can charge a fee for the requested documents.

The public records Mr. Kraft requested were prepared by and in the possession of the CERWD. The requested records are separate and distinct from the request by Mr. Allen, in so much as the General Assembly specifically directed Freedom of Information Act Officers of public bodies, in Section 3.5 of the Act, to 'create a file' when a request is received***. This created file is a new public record and subject to FOIA.

Section 6 (a), when talking about records in electronic format, specifically prohibits a public body from charging the requester for the costs of any search for and review of the records or other personnel costs associated with reproducing the records, except for commercial requests. The denied FOIA request was for records that were stored in electronic format, requesting they be delivered in an electronic format, and was not a commercial request.

When section 6 (b) states: "*Except when a fee is otherwise fixed by statute****". The Act, a statute, fixes fees in the very same paragraph (and others) by stating ****No fees will be charged for the first 50 pages**** and later in that paragraph by fixing fees in the sentence: ****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 costs of any search for and review of the records or other personnel costs associated with reproducing the records, except for commercial requests****. This explicitly prohibits fees for any search and review unless the request is a commercial request. The denied FOIA request is not a commercial request.

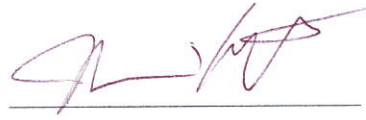
Section 7, paragraph (2) verifies that public records in the possession of Francis Associates, a contractor for the CERWD, are considered public records of the CERWD for the purposes of this act. This is a clear intent by the legislature to put the cost of recordkeeping on the public body, not the individual FOIA requester.

In review of this matter, it is important to remember that Mr. Kraft requested a copy of a previous FOIA request, a public record. CERWD was required by the Act to create the record. The cost incurred by CERWD for the public record from a previous requestor is moot, paid for or not. Public records in the possession of private contractors are public records of the public body. As a public record of the public body, costs for search and review shall not be invoiced to the requester, unless the request was for a commercial purpose. If the request was for a commercial purpose, which neither requests were, the public body could only charge up to \$10 per hour after the first 8 hours spent searching or retrieving (5 ILCS 140/6(f)). The \$76 invoice was for two people, 30 minutes each – this would still be a prohibited charge to a commercial request.

IV. Summary:

As stated above, the request for public records was denied by the imposition of a fee not consistent with subsections 6 (a) and (b) of the Illinois Freedom Of Information Act.

JOHN KRAFT
pro se

A handwritten signature in dark ink, appearing to be 'John Kraft', written over a horizontal line.

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