

February 1, 2018

RE: FOIA Request for Review – 2018 PAC 51191 (Carlinville)

PAC,

Please consider this my response to Carlinville's January 26, 2018 response to 2018 PAC 51191.

I echo Carlinville's request that one Assistant Attorney General handle all matters involving the City of Carlinville, and their subsidiary bodies, dealing with complaints on FOIA and OMA. It would be much easier to spot patterns of repeated violations. I would also ask that Carlinville define my "affiliates" by name.

In response to Carlinville's letter dated January 30, 2018:

1. **Has the City provided "him with copies of all public records in its possession?"**

The City has not provided me with all records in its possession as that term is defined in the Freedom of Information Act. I think the City has misunderstood the question, which should have asked if the City has provided him with all records defined under Section 2(c), that may "*have been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of*" the City.

Section 2 defines "Public records"

(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 7(2) further defines a public record:

(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.

I suggest, at a minimum, that the City's representative is "*a party with which an agency has contracted to perform a governmental function on behalf of the public body*" since she is allegedly representing the wishes of the Aldermen of the City of Carlinville and its residents. Her contract, was her recommendation by the Mayor, and concurrence by the City Council to be the city's representative.

Unless the City's appointed board member to the alleged water company made decisions without any information in which to base her decisions and used absolutely no records to deliberate or make any decisions in her capacity as the City's representative to the alleged water company, then I believe there are public records that have not been provided.

2. Explain the search:

I noticed the City did not state that any Alderman, in particular the Alderman appointed as the City's representative to the alleged water company, was asked for copies of public records that may "*have been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of*" the Alderman in her deliberations and actions "*on behalf of the City of Carlinville*" while performing her appointed duty as the City's representative to that alleged water company.

What the City stated it did was to "review all records in City files..." – please ask Carlinville to ask the Alderman for public records that may *have been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of* her in her capacity as the designated representative of the City.

3. Does the City possess additional records?

I believe the answer is "YES" especially when applying the definition of "Public records" found in Sections 2 and 7(2) of the FOIA

4. Is the IARWC a party with whom the City has contracted to perform a governmental function?

Please disregard the City's entire responsive argument. They have misinterpreted Article VII, Section 10 of the Illinois Constitution, and have cited caselaw not applicable to this unique situation with the IARWC and any Municipality's authority to participate in the manner in which Carlinville is participating.

- Village of Sherman v. Village of Williamsville dealt with a contract with a "Water Commission" – which is a public body. IARWC claims it is not a public body and therefore cannot possible be part of or enter into "Intergovernmental" agreements
- Mueller v The City of Highland Park dealt with a contract between 2 municipalities and their Constitutional right for intergovernmental agreements. This is not the case with the IARWC
- Baltis v Village of Westchester dealt with agreements and contract between various municipalities. This is not the case with the IARWC
- AG Op 10-003 – again, this does not apply to the IARWC situation
- City of West Frankfort v UAJA Local No 551 – I could not find this case, but doubt it has anything pertaining to what the situation with IARWC

Board of Education v Cahokia District Council No, 58 made it clear, and supports the notion that the participation of Municipalities (or any other public body) such as Carlinville with the formation of IARWC are not as legitimate as they appear to be. Several statutes explain how municipalities may provide, or contract for, a supply of water. Forming their own private water company is never one of those listed legislative authorities for providing water:

This 1982 5th Appellate District case ([here](#)) appears to place limits on Art VII, Sec 10, of the Constitution and defined the term "*prohibited by law*" as found in Sec 10. This Court stated that "*a school board may*

not contract to delegate or surrender a duty conferred upon it by statute or to surrender discretion granted it by statute” and:

*“This long established common law rule has been accepted in the Illinois Constitution of 1970, article 7, section 10(a), which states, “Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance.” (Ill. Const. 1970, art. 7, § 10(a).) As school **districts are given certain express and implied powers** by the School Code of 1961 (Ill. Rev. Stat. 1979, ch. 122 par. 1-1 et seq.), **any attempt to alienate those powers by contracting them away would dilute the effect of the Code and would be “prohibited by law.”**”*

I understand that to mean, in the case of Carlinville (for instance), if the Municipal Code or Intergovernmental Cooperation Act gives a municipality the express and implied powers to provide water to its residents, and describes how to provide for it, it cannot use Art VII, Sec 10, to contract or surrender those powers away to a private nonprofit corporation. Such action would be “prohibited by law” and could not be authorized.

5. What services does the IARWC perform or plan on performing for the City?

It is my understanding that the IARWC intends to contract with various entities to supply water to them.

6. What is the reason for the IARWC’s December 28, 2017 request for payment?

Agree, and additionally state that this is but one instance where she had to have used records that may *“have been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of”* her in her capacity as the designated representative of the City, in order to make a decision, *“on behalf of the city council,”* that whatever legal and incidental fees for the water concept which were incurred, generating the request for payment from IARWC to Carlinville.

7. Is IARWC a subsidiary body of the City?

I believe it is. It was allegedly formed under the perceived granting of those powers under Article VIII, Section 10 of the Constitution, which is clearly and unmistakably the provision concerning “Intergovernmental” Agreements – even though the City has bastardized its true meaning.

IARWC has conducted its meetings in public and has made minutes of meetings or other documents available to the public – contrary to Carlinville’s claim.

8. How was the IARWC founded?

The City of Carlinville **filed a false grant application** with the USDA to obtain funds for this “project” and received the grant under false pretense.

Under item number 11 Descriptive Title Of Applicant’s Project, of the grant application (attached), it clearly states *“Central Illinois regional Water Supply – See attached project description”* – However, in the attached project description, it clearly explains the description is to evaluate options to develop a viable water supply, treatment and transmission system to serve a **Regional Water Commission** . . . The City of Carlinville is the lead entity until a **water commission** can be formed. (emphasis mine)

It is clear the City applied for, and told the USDA that the grant was to be use for a “WATER COMMISSION” – which is a public body. Instead, they have or are using this federal grant funding to support and form what they call a private nonprofit water company. The City has every statutory right to participating in forming a “Water Commission” – the same cannot be said for the City participating and forming a private water company.

9. How is IARWC funded?

Agree that it is funded with Federal Grants, and by the City of Carlinville.

10. What is the relationship between the City and the IARWC?

No comment

11. How is IARWC controlled?

No comment other than Carlinville appointed one of its Aldermen to represent Carlinville and to act on behalf of Carlinville

12. Question on exercising day-to-day control

No comment

Finally, the City claims they are “committed to open government” which is about as far from actual truth as one could get.

Examples:

Carlinville repeatedly refused to respond to the PAC for information related to violations of the FOIA. The AG asked several times for their response. None was provided.

There is currently one active Request for Review that I filed with the AG’s Pac against Carlinville for their failure to provide public records.

There are currently four active FOIA lawsuits in Macoupin Circuit Court naming Carlinville as defendant for their alleged failure to provide public records. Carlinville didn’t even bother to respond to most of those:

- 2017 MR 25 – Kraft v Carlinville
- 2017 MR 82 – Kraft v Carlinville
- 2017 MR 101 – Bogue v Carlinville
- 2017 MR 126 – Thomas v Carlinville

The City’s electoral board attorney even stated during a public meeting, and on camera, that the City wanted to litigate the FOIA request so that during depositions, the City could find out who asked Kraft to ask for specific public records. If that is not outright willful and intentional violations of the FOIA, I don’t know what would be.

Even after the City Council voted in an Open Meeting to direct their attorney to provide the requested records, none were ever provided.

Such is the history of Carlinville's "commitment to open government" - Carlinville has a very recent and very real problem complying with requirements of Open Meetings and Open Records.

Thanks,

John Kraft

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