

**IN THE CIRCUIT COURT OF THE 22nd JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS**

KIRK ALLEN

PLAINTIFFS,

vs.

ALGONQUIN TOWNSHIP

Defendant.

)
)
)
)
)
)
)
)
)
)

Case No. 19 CH 461

MOTION TO DISMISS PURSUANT TO 735 ILCS 5/2-619

NOW COME, Defendants, ALGONQUIN TOWNSHIP, CHARLES LUTZOW, MELISSA VICTOR, RACHEL LAWRENCE, DAN SHEA and DAVE CHAPMAN (collectively "Defendant") by and through their attorney Matuszewich & Kelly, LLP, and in moving to dismiss Plaintiff's Complaint for Declaratory Judgment and Injunction, pursuant to 735 ILCS 5/2-619 state as follows:

STANDARD OF REVIEW

1. The purpose of a 2-619 motion to dismiss is to summarily dispose of questions of law and easily proved issues of fact. *Torcasso v Standard Outdoor Sales, Inc.*, 157 Ill.2d 484, 486 (1993). Section 2-619 (a)(9) specifically provides that:

(a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

735 ILCS 5/2-619.

2. Further, as above, Section 2-619 allows the defendant to raise any “affirmative matter, which operates to avoid or defeat the Plaintiff’s claim.” *Mogul v. Tucker*, 152 Ill.App.3d 610, 612 (1st Dist. 1987). Affirmative matters within the meaning of section 2-619(a)(9) of the Code encompass matters in the nature of a defense that negates the plaintiff’s cause of action entirely or refutes crucial conclusions of law or conclusions of material fact that are unsupported by the complaint. *O’Hare Truck Services, Inc. v. Illinois State Police*, 284 Ill.App.3d 941, 945-946 (2d Dist. 1996). Further, “A trial court should dismiss a cause of action on the pleadings only if it is clearly apparent that no set of facts can be proven which will entitle a plaintiff to recover.” *Burdinie v. Village of Glendale Heights* 139 Ill.2d 501, 504 (1990).

BACKGROUND

1. Plaintiffs are southern Illinois bloggers, who have created a cottage industry of suing local governments for violation of the Illinois Open Meetings Act and the Illinois Freedom of Information Act. Plaintiffs operates a political scandal sheet, Illinois Leaks, attacking local governments and local government officials. Plaintiffs’ have published articles in their own blog about being “political terrorists”. See attached hereto as **Exhibit A**.

2. Plaintiffs have filed (6) lawsuits against Algonquin Township (Defendant) alleging violation of the Illinois Freedom of Information Act (hereinafter “FOIA”) or the Open Meetings Act (hereinafter “OMA”), specifically: Kirk Allen et al. v. Algonquin Township (18 CH 238) containing 16 counts, Kirk Allen et al. v. Algonquin Township (19 CH 274), Kirk Allen et al. v. Algonquin Township (19 CH 459), Kirk Allen et al. v. Algonquin Township (19 CH 460), Kirk Allen et al. v. Algonquin Township (18 CH 437), Kirk Allen et al. v. Algonquin Township Board (19 CH 484).

3. On February 19, 2019, pursuant to Illinois Freedom of Information Act (FOIA), 5 ILCS 140 et seq., Plaintiff requested (**Exhibit B**):

- a. A copy of all posts made by the Township Clerk to the official Facebook page the Clerk used titled “Karen Lukasik Algonquin Township Clerk” for posts made in 2017.
- b. A copy of all names blocked from the “Karen Lukasik Algonquin Township Clerk” Facebook page.

4. The Township responded by stating that it had ‘no documents responsive to this request’. See **Exhibit C**.

5. Plaintiffs complain that the Defendant denied the request by responding to the FOIA request by on February 27, 2019 advising that that there were “no documents responsive to this request.

ARGUMENT

6. The FOIA provides that: “All records in the custody or possession of a public body are presumed to be open to inspection or copying.” 5 ILCS 140/1.2

7. The FOIA requires that public records be subject to Public records are defined:

(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.

5 ILCS 140/2

9. The Plaintiff refers to Karen Lukasik’s Facebook page as her ”Official Facebook Account” and as her “public official Facebook account”. The Clerk did have a Facebook page. **Exhibit E**. This Facebook page was not used by the Clerk to post anything. **Exhibit D**.

10. The Clerk, Karen Lukasik, made no posts to the Facebook page and did not block anyone from making posts on this Facebook page. **Exhibit D.** Further, the Facebook page shows that there were no posts on the page. **Exhibit E.**

11. A public body is only required to provide records which it has in its possession. In this case there are simply no records which can be provided.

12. The Plaintiffs' were advised on February 27, 2019 that there are no public records responsive to their request, **Exhibit C,** however they willfully and maliciously filed this lawsuit.

13. The Township Clerk has stated under oath that the records which the Plaintiffs' seek do not exist, as there were no posts on the Facebook page and no one was blocked for the page. Records which do not exist are not subject to disclosure pursuant to the FOIA. As an affirmative matter defeating this claim there are no records which can be turned over to the plaintiffs.

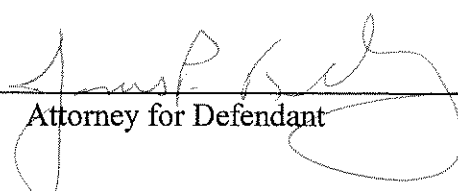
CONCLUSION

The records sought by the Plaintiffs do not exist, and as an affirmative matter the Defendant cannot provide documents which do not exist. The absence of any records to respond to the Plaintiffs' FOIA request is an affirmative matter which defeats the Plaintiffs' claim.

WHEREFORE, the Defendant respectfully requests that this cause be dismissed as a matter of law pursuant to 735 ILCS 5/2-619

Respectfully Submitted:

By:


Attorney for Defendant

James P. Kelly, ARDC #6208284
MATUSZEWICH & KELLY, LLP
101 N. Virginia St., Suite 150
Crystal Lake, Illinois 60014 (815)
459-3120 Telephone
(815) 459-3123 Facsimile
jpkelly@mkm-law.com
litigation@mkm-law.com

Motion to Dismiss
Page 4 of 4

Illinois Leaks

"EDGAR COUNTY WATCHDOGS"

CITY OF CARLINVILLE

Carlinville's Atty Dan Schuering claims Edgar County Watchdogs are Political Terrorists —

BY JMKRAFT ON AUGUST 21, 2018 • (12 COMMENTS)

CARLINVILLE, IL. (*ECWd* (<https://edgarcountywatchdogs.com>)) —

On August 20, 2018, during a Carlinville City Council meeting, their FOIA attorney, Mr. *Dan P. Schuering* (<https://edgarcountywatchdogs.com/wp-content/uploads/2018/08/Schuering-ARDC.jpg>), was discussing Freedom of Information Act requests for public records. To date, several lawsuits have been filed due to Carlinville refusing to provide requested records.

Schuering (<https://www.linkedin.com/in/danschuering/>) stated that the lawsuits were nothing more than the result of "Political Terrorists" -(note: A recent loss on our case number 2017-MR-25 must have gotten under his skin)

We ask "when did suing for records after a city refused to fulfill a FOIA become "political terrorism?"

We are simply demanding compliance with state law.

Regrettably, Attorney Dan Schuering lied to the city council on several points. We will cover his inaccuracies in a future article. Until then, please enjoy this comedy show, and feel free to donate to further the cause of a free press and to the operation of our non-profit governmental accountability organization, the Edgar County Watchdogs:



From: Kirk Allen <Kirk@illinoisleaks.com>
Subject: FOIA request to Algonquin Township
Date: February 19, 2019 at 9:02:56 PM CST
To: "supervisor@algonquintownship.com" <supervisor@algonquintownship.com>, "klukasik@algonquintownship.com" <klukasik@algonquintownship.com>

In accordance with the Freedom of Information Act of Illinois, I am requesting the following public records.

1. A copy of all posts made by the Township Clerk to the official Facebook page she used titled "Karen Lukasik Algonquin Township Clerk" I am seeking posts made in 2017.
2. A copy of all names blocked from the "Karen Lukasik Algonquin Township Clerk" Facebook page.

I qualify as both media and non-profit under the definitions in Section 2 (c-10) ("Commercial purpose"), Section 2 (f) ("News media"), Section 2 (g) ("Recurrent requester"), and Section 2 (h) ("Voluminous request") of the Freedom of Information Act, for the purposes of being exempt to the provisions of Section 3.1 (Requests for commercial purposes), Section 3.2 (Recurrent requesters), Section 3.6 (Voluminous requests), and Section 6 (Authority to charge fees).

I request expedited processing on the basis of an urgency to inform the citizens and taxpayers of Illinois about their government's activities. If any element of this request is denied in whole or in part, I ask that you justify all withholdings individually by reference to specific exemptions of the Act. Please provide all responsive information to me electronically.

I request a rolling production of records, such that the public body furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the below address. If you have any questions please do not hesitate to contact me. Rolling production is not to be perceived as an agreement to extend the timeframe for compliance under FOIA.

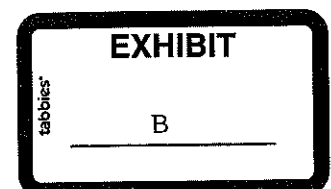
If you are not the FOIA officer responsible for any part of this request you are required by law to forward it to the appropriate FOIA officer.

The purpose of the request is to access and disseminate information regarding the legal rights of the general public and is not for the principal purpose of personal or commercial benefit.

As outlined in FOIA, documents shall be furnished without charge or at a reduced charge, as determined by the public body, if the person requesting the documents states the specific purpose for the request and indicates that a waiver or reduction of the fee is in the public interest. Waiver or reduction of the fee is in the public interest if the principal purpose of the request is to access and disseminate information regarding the health, safety and welfare or the legal rights of the general public and is not for the principal purpose of personal or commercial benefit.

I am requesting the records be provided in electronic format if that is the method in which they are stored. If they are in paper form and the copier can convert them to electronic format I would appreciate receiving them electronically.

Thanks,
Kirk Allen
P.O. Box 593
Kansas, IL 61933



LAW OFFICES OF
MATUSZEWICH & KELLY, LLP

101 N. Virginia St., Suite 150
Crystal Lake, Illinois 60014
(815) 459-3120 Telephone
(815) 459-3123 Facsimile

February 27, 2019

VIA E-MAIL at kirk@illinoisleaks.com

Mr. Kirk Allen
PO Box 593
Kansas, IL 61933

Re: FOIA Request, Dated Tuesday, February 19, 2019 9:02 PM

Dear Mr. Allen:

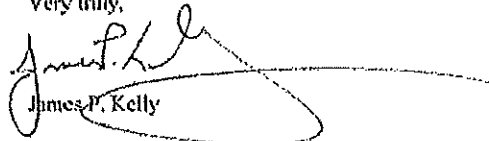
Thank you for writing to Algonquin Township with your request for information pursuant to the Illinois Freedom of Information Act, 5 ILCS 140/1, et seq. On February 19, 2019 (after close of business), you requested:

1. A copy of all posts made by the Township Clerk to the official Facebook page she used titled "Karen Lukasik Algonquin Township Clerk". I am seeking posts made in 2017.
2. A copy of all names blocked from the "Karen Lukasik Algonquin Township Clerk" Facebook page.

The FOIA officer for this response is the Algonquin Township Supervisor, Charles Lutzow, who states as follows:

The Township has no records which are responsive to your request. Karen Lukasik is not a public body and her personal Facebook "Karen Lukasik for Algonquin Township Clerk" account was not prepared for, used by, received by, possessed by or controlled by a public body, in this case Algonquin Township.

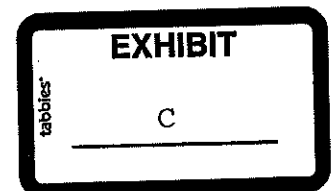
Very truly,


James P. Kelly

cc: Supervisor
Clerk

CRYSTAL LAKE, IL

CRYSTAL LAKE, IL



Email or Phone

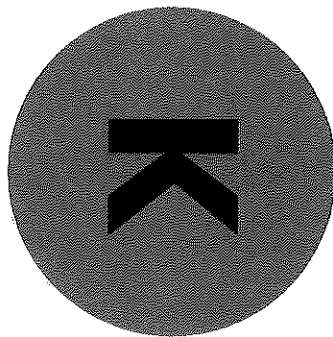
Password

Login

Forgot account?

Like Share Suggest Edits

Send Message



Karen Lukasik
Algonquin Township Clerk

- Home
- Reviews
- Photos
- About
- Community

Create a Page

No Rating Yet

Community

See All

1 person likes this

1 person follows this

About

See All

Contact Karen Lukasik Algonquin Township Clerk on Messenger

Personal Blog

Page Transparency

See More

Facebook is showing information to help you better understand the purpose of a Page. See actions taken by the people who manage and post content.

Page created - January 18, 2018

See more of Karen Lukasik Algonquin Township Clerk on Facebook

Login

or

Create New Account

EXHIBIT

E



Curso de Costura y Moda
Personal Blog



kami
Library



Institut des Technologies de Ba...
Education



Creaciones itzel
Footwear Store

[See More](#)

[Pages](#) [Other](#) [Brand](#) [Website](#) [Personal](#)
[Blog](#) [Karen Lukasik Algonquin Township Clerk](#)

[English \(US\)](#) · [Español](#) · [Português \(Brasil\)](#) · [Français \(France\)](#) · [Deutsch](#)

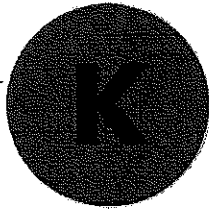
[Privacy](#) · [Terms](#) · [Advertising](#) · [Ad Choices](#)

See more of Karen Lukasik Algonquin Township Clerk on Facebook

[Login](#)

OR

[Create New Account](#)



Karen Lukasik
Algonquin Township
Clerk

- [Home](#)
- [Reviews](#)
- [Photos](#)
- [About](#)
- [Community](#)
- [Create a Page](#)

Like	Share	Suggest Edits
------	-------	---------------

[Send Message](#)

[Forgot account?](#)

No Rating Yet

Community See All

1 person likes this

1 person follows this

About See All

Contact Karen Lukasik Algonquin Township Clerk on Messenger

Personal Blog

Page Transparency See More

Facebook is showing information to help you better understand the purpose of a Page. See actions taken by the people who manage and post content.

Page created - January 18, 2018

People

1 like

- Related Pages**
- Hilola**
Personal Blog
 - Curso de Costura y Moda**
Personal Blog
 - kami**
Library
 - institut des Technologies de Ba...**
Education
 - Creaciones itzel**
Footwear Store
- [See More](#)

Pages Other Brand Website Personal
 Blog Karen Lukasik Algonquin Township Clerk

English (US) · Español · Português (Brasil) · Français (France) · Deutsch

[Privacy](#) · [Terms](#) · [Advertising](#) · [Ad Choices](#) · [Cookies](#) · [More](#)
 Facebook © 2020

See more of Karen Lukasik Algonquin Township Clerk on Facebook

[Log In](#)

or

[Create New Account](#)