

IN THE CIRCUIT COURT OF THE 22<sup>nd</sup> JUDICIAL CIRCUIT  
McHENRY COUNTY, ILLINOIS

FILED  
McHenry County, Illinois

MAY 13 2021

KATHERINE M. KILPATRICK  
Clerk of the Circuit Court

KIRK ALLEN,

Plaintiff,

v.

ALGONQUIN TOWNSHIP,

Defendant.

Case No. 19 CH 461

**MEMORANDUM DECISION AND ORDER**

This cause came before the Court on April 28, 2021 for hearing on "Motion to Dismiss Pursuant to 735 ILCS 5/2-619" ("Motion to Dismiss"), filed by Defendant Algonquin Township on October 28, 2020. Plaintiff filed a written response to the Motion to Dismiss on March 17, 2021. Algonquin Township filed a written reply in support of its Motion to Dismiss on April 26, 2021. The Court has read and considered the Motion to Dismiss and the briefs related to same. In addition, the Court has heard and considered oral argument given by counsel for the parties as well as the pleadings, applicable case law and statute(s).

After the April 28, 2021 hearing, the Court took the matter under advisement. This Decision follows.

**BACKGROUND**

On August 1, 2019, Plaintiff filed a Complaint against Algonquin Township alleging violations of the Freedom of Information Act (5 ILCS 140/1 et seq.) ("FOIA") related to a FOIA request submitted February 19, 2019 by Plaintiff to Algonquin Township.

The February 19, 2019 FOIA request sought the following:

- "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."

On February 27, 2019, Algonquin Township provided a written response to the FOIA request, which in relevant part was 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 Lukaski 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."

In his Complaint, Plaintiff contends Algonquin Township's response was not timely and otherwise violated FOIA and seeks injunctive relief and remedies available under FOIA such as attorney fees.

The gist of Algonquin Township's Motion to Dismiss is that its FOIA response was timely and otherwise compliant with FOIA as a matter of law.

## **ANALYSIS**

### **Timeliness of Response**

The February 19, 2019 FOIA request is time stamped 9:02:56 pm. Thus, the earliest it could have been received was at that time.<sup>1</sup>

It is undisputed the FOIA response was submitted on February 27, 2021.

FOIA provides in relevant part, "Each public body shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request,... (5 ILCS 140/3)

Algonquin Township contends that as the FOIA request was received after normal business

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<sup>1</sup> Inexplicably, Plaintiff's counsel refused to concede that, despite the fact that the FOIA request with that time stamp is attached as an exhibit to the Complaint.

hours it was not actually "received" until the next day, February 20. Further, Algonquin Township contends, the running of the five business days does not start until the day after the document is received, meaning February 21. Given those caveats, Algonquin Township's February 27 response was timely, it contends.

Regrettably, neither 5 ILCS 140/3 nor cases interpreting same to the Court's knowledge provide any guidance as to how to calculate the "within 5 business days after its receipt of the request" language.

In support of its contention that the FOIS request was not actually received until February 20, Algonquin Township points to a document entitled "Illinois Freedom of Information Act Frequently Asked Questions By Public Bodies" issued by the Illinois Attorney General which states in relevant part:

"If a FOIA request sent by email appears in the recipient's mailbox during normal working hours, it is received on that day. If it is emailed after business hours including on a weekend or legal holiday, it is 'received' on the following business day."

In regard, to its position that the five (5) business days do not start running until the day after the FOIA request is received, Algonquin Township points to the language in 5 ILCS 140/3 which states "5 business days **after** its receipt of the request" (emphasis added) to suggest an inference that the clock starts running the day after receipt, not the day of receipt. In oral argument Algonquin Township's attorney also referenced the statute on statutes, 5 ILCS 70/1.11, which provides in relevant part:

"The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Saturday or is a holiday as defined or fixed in any statute now or hereafter in force in this State, and then it shall be excluded."

As stated above, to the Court's knowledge, neither 5 ILCS 140/3, nor case law interpreting same, directly address how the "5 business days" are calculated. That said, an attorney general

opinion may be considered persuasive authority in resolving a question of first impression on interpretation of a statute. **Cty. Of Stark v. Cty of Henry**, 296 Ill. App. 3d 393, 394 (3<sup>rd</sup> Dist. 1998). Here, the attorney general's opinion comports with logic and common sense. The email in question here was received by Algonquin Township after 9 pm. It is exceedingly unlikely that anyone would be present at that time to address the email. Thus, it is reasonable to conclude that the email should not be deemed "received" until the next business day when someone would reasonably be expected to be present and in a position to process the email.

Likewise, it is reasonable to conclude that the "5 business days" countdown commences the day after receipt of the FOIA request. First, 5 ILCS 140/3 states "5 business days **after** its receipt of the request" (emphasis added), implying the passage of some amount of time before the clock starts ticking on the response time rather than it beginning immediately. More significantly, it is clear that the language of 5 ILCS 140/3 falls within the umbrella of the statute on statutes, 5 ILCS 70/1.11. One, 5 ILCS 140/3 is clearly a statute. Two, 5 ILCS 140/3 clearly provides a "time within which any act provided by law is to be done".

For the above stated reasons, the Court finds that Algonquin Township's response to Plaintiff's FOIA request was provided within five (5) business days after its receipt. However, the Court must still address Algonquin Township's contention that the substance of that response complied with FOIA as a matter of law.

#### **Substance of FOIA Request**

Algonquin Township has taken the position that its response of "The Township has no records which are responsive to your request" establishes as a matter of law that its response complies with FOIA and thus Plaintiff's Complaint should be dismissed.

If the above quote constituted the entirety of Algonquin Township's response, that

contention might have merit. However, immediately after the above quoted language, Algonquin Township added the following language: "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 Algonquin Township." That additional language is problematic for numerous reasons.

Here, Plaintiff specifically and only requested posts from the Facebook page entitled "Karen Lukasik for Algonquin Township Clerk". Plaintiff never requested posts from a Facebook page entitled "Karen Lukasik for Algonquin Township Clerk". Thus, there would be no reason for Algonquin Township to respond to a request that was not made. It is possible the drafter of the FOIA response (Algonquin Township's counsel, James Kelly), was simply attempting to address a potential future request. In such case, that additional language would be superfluous but harmless. Conversely, it is also possible the statement "Karen Lukasik for Algonquin Township" was a scrivener's error for an intended "Karen Lukasik Algonquin Township". In that instance, that additional language would render the response at least arguably violative of FOIA.

As set forth in **Better Gov't Ass'n v. City of Chi. Office of Mayor**, 2020 IL App (1<sup>st</sup>) 190038 a governmental body cannot take the position that social media sites such as Facebook pages in the name of individual employees/agents are personal property and the governmental body need not conduct any search of same for public records subject to FOIA.

Yet, here, if indeed the language "Karen Lukasik for Algonquin Township Clerk" was meant to read "Karen Lukasik Algonquin Township Clerk", the language of that sentence suggests Algonquin Township has taken the position that it need not and in fact did not conduct a search of that Facebook page, thus negating the statement in the sentence before, "The Township has no records which are responsive to your request." **Better Gov't Ass'n** makes it clear that the burden is on the public body in such instances to establish it conducted a reasonably diligent search of a

private account to find public records. That burden has not been met here; at least at this stage.

Algonquin Township points to the two affidavits of the Township Clerk, Karen Lukasik, in support of its contention that any ambiguities created by the FOIA response language are cleared up by the affidavits of Ms. Lukasik. The Court is not convinced.

First, the two affidavits contradict each other in substantive part. Ms. Lukasik's first affidavit states "The Karen Lukasik Algonquin Township Clerk' Facebook page was not an official Facebook page of the Township Clerk." The amended affidavit states "The Facebook page referred to and known as the 'Karen Lukasik Algonquin Township Clerk' is and was at all times it has existed, the 'official' Facebook page of the Township Clerk." That contradiction alone makes it difficult for the Court to accept Algonquin Township's premise that there are no genuine issues of fact.

The more significant defect in Ms. Lukasik's affidavits is that neither affidavit provides any information as to the scope or nature of the search conducted. Rather, both affidavits simply state in conclusory fashion that there have been no such posts. That is insufficient pursuant to **Better Gov't Ass'n, ¶ 1**.

It may be that there are indeed no documents in the possession of Algonquin Township responsive to Plaintiff's FOIA request. However, that has not yet been established to the Court's satisfaction. Thus, the Motion to Dismiss should be denied.

### **ORDER**

#### **IT IS HEREBY ORDERED:**

The Motion to Dismiss filed by Defendant Algonquin Township is denied.

Entered: \_\_\_\_\_

*Kevin G. Costello*

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KEVIN G. COSTELLO  
JUDGE