



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 27, 2010

PUBLIC ACCESS OPINION No. 10-002
(Request for Review 2010 PAC 5745)

FREEDOM OF INFORMATION ACT:
No Authority for Public Body to Charge for
Copies for Its Files

Mr. L. Patrick Power
Assistant City Attorney
City of Kankakee
304 South Indiana Avenue
Kankakee, Illinois 60901-3904

Dear Mr. Power:

This binding opinion is issued pursuant to Section 9.5(f) of the Freedom of Information Act (hereinafter FOIA) (5 ILCS 140/9.5(f), added by Public Act Public Act 96-542, effective January 1, 2010).

Findings of Fact

On January 6, 2010, Mr. Terry Taylor submitted 15 separate FOIA requests to the City of Kankakee (City). Each FOIA request sought “[c]opies of certified payroll from May 1, 2008 to April 30, 2009” and “[c]opies of contracts from May 1, 2008 to April 30, 2009” for a specified contractor.¹ On January 8, 2010, Assistant City Attorney L. Patrick Power sent a letter to Mr. Taylor stating that the City would require “an additional five (5) days to respond” to the FOIA Requests.

On January 14, 2010, Mr. Power sent a second letter to Mr. Taylor, stating, in part:

¹ The 15 contractors included Tri-City Construction; Hoerr Construction, Inc.; Sanchez Environmental; Robert F. Smith Construction; Rick Jones Construction; Lead Abatement Associate; John Burns Construction; Gibson Custom Homes, Inc.; Eubanks Sewer Service; Einfeldt Construction, Inc.; Calhoun Construction; Bittman Tree Service; Ace Remodeling; Pat Hatting; and Pommier Construction Co.

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With regard to your request for copies of contracts, as well as statements of non-employee compensation, said copies are ready for you to pickup at the City of Kankakee Administration Building, Adjudication Dept. 2nd Floor.

... Enclosed is an Invoice from the City of Kankakee Community Development Agency for the above referred to copies. *Also enclosed is a second invoice for reproducing copies that need to be retained in the FOIA Department.* Please bring a check with you when you pickup the above referred to copies.² (Emphasis added.)

Pursuant to Section 9.5(a) of FOIA (5 ILCS 140/9.5(a)), on January 28, 2010, Mr. Taylor submitted a Request for Review (RFR) to the Public Access Counselor seeking our review of the City's authority to require a requester to pay for copies of duplicate records to be retained by the City.

On February 9, 2010, we sent a letter to Mr. Taylor and Mr. Power seeking to resolve the matter informally. In the letter, we noted that double charging is not proper for one set of records. Mr. Power responded by letter dated February 11, 2010, and explained the City's approach to this issue:

The Request for Review may indicate that Mr. Taylor was double charged, however, that is not what occurred. As I read 5/ILCS 140/6(a) and (b), the City is entitled to charge for documents 15¢ per page in excess of 50 pages of the copying of all black and white letter or legal size documents. In addition, our FOIA office must maintain a complete copy of all documents forwarded in response to any request. In essence, when a person requests records containing 50 pages, 100 pages must be copies [*sic*] in order for the City to comply.

It's our position that the bill sent to Mr. Taylor was in compliance with the statutes as we have interrupted it [*sic*].

Applicable Statutes

The authority of the Public Access Counselor to issue a binding opinion is set out in Section 9.5 of the Freedom of Information Act. Pursuant to Section 9.5, a person whose request to inspect or copy a public record has been denied by a public body may, not later than 60 days after the

² In its January 14 Letter, the City indicated that it had responsive documents for only nine of Mr. Taylor's FOIA Requests. According to a January 13, 2010, invoice, the City's Community Development Agency charged a total of \$146.55 for 977 pages of documents. The City's Freedom of Information (FOIA) Department's additional invoice reflects a total charge of \$148.05 for duplicate copies.

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date of the final denial, file a written request for review with the Public Access Counselor established in the Office of the Attorney General. If the Public Access Counselor determines that the alleged violation warrants further review, the Attorney General shall examine the issues and the records, shall make findings of fact and conclusions of law, and shall issue to the requester and the public body an opinion in response to the request for review. The opinion shall be binding upon both the requester and the public body, subject to administrative review.

We find that the Request for Review was timely filed and otherwise complies with the requirements of Section 9.5 of FOIA.

With respect to the substantive issue raised by Mr. Taylor's Request For Review, Section 3 of FOIA (5 ILCS 140/3 (West 2008, as amended by Public Act 96-542, effective January 1, 2010), provides:

(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.

* * *

(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. (Emphasis added.)

Section 6 of FOIA (5 ILCS 140/6 (West 2008, as amended by Public Act 96-542, effective January 1, 2010), provides:

(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. * *

*

The City has interpreted FOIA to require that a public body must, in every case, maintain an additional, separate copy of all documents furnished to a requester and may charge the requester a fee for creating this separate copy. Section 3.5 of FOIA (5 ILCS 140/3.5, added by Public Act 96-542, effective January 1, 2010), provides:

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

- (1) note the date the public body receives the written request;
- (2) compute the day on which the period for response will expire and make a notation of that date on the written request;

(3) maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been complied with or denied; and

(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. (Emphasis added.)

This section requires that a Freedom of Information Officer (FOIA Officer) retain “a copy of the response” together with the original request. The term “a copy of the response” clearly includes the written document or documents responding to a FOIA request, which may grant the request, or deny it in whole or in part. Section 3.5 does not expressly require that a FOIA Officer retain an additional, separate copy of the documents furnished pursuant to a request. Rather, as long as the FOIA Officer maintains the specified information and communications, Section 3.5 of FOIA will be satisfied. As a practical matter, the FOIA Officer should be prepared to adequately identify and produce, if requested at a later time, the documents that the public body has furnished.

For example, if a person requested copies of the minutes of all city council meetings for the previous year, the FOIA Officer is not required to keep a duplicate copy of the minutes that were furnished. Instead, it would be sufficient under the Act for the FOIA Officer to note in the response the specific documents that the public body produced and to maintain a copy of that response. If the FOIA Officer keeps a copy of the response sent to the requester and can identify with certainty the records furnished to the requester and locate those records in the files of the public body, Section 3.5 does not also require the public body to retain a duplicate copy of all of the documents furnished to the requester.

We acknowledge that in certain circumstances it will be necessary for a FOIA Officer to retain a copy of a document that has been produced. For instance, where the public body redacts information from a record, retaining a copy of the redacted record would provide the best evidence of what was actually furnished. That does not mean, however, that the public body may shift the cost of preparing the duplicate record to the requester. Section 3(b) of FOIA requires the public body to provide the requester with a copy of any record, and Section 6(b) allows the public body to charge for the cost of reproducing the records. These provisions do not authorize a public body to charge a requester for preparing a duplicate record to maintain in its files.

Section 1 of FOIA (5 ILCS 140/1 (West 2008, as amended by Public Act 96-542, effective January 1, 2010) provides:

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

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the people of this State, and this Act should be construed to this end, 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. The language of Section 3.5, along with language relating to copies and fees in Sections 3 and 6, does not support an interpretation that allows the public body to charge the requester a fee to create a duplicate set of records for the public body to maintain. 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.

Conclusions of Law

The Public Access Counselor finds and concludes that the City of Kankakee has violated Section 6 of the Freedom of Information Act by improperly charging a copying fee to Mr. Terry Taylor for the production of duplicate records for the use of the City. In accordance with this opinion, the City of Kankakee is directed: (1) to immediately provide copies of the records requested by Mr. Taylor, subject only to the payment of the fee properly imposed pursuant to FOIA for a single copy of each record (in excess of 50 pages); or (2) alternatively, if Mr. Taylor has paid the disputed fee, to refund to Mr. Taylor the amount of the copying fees attributable to copies produced for retention by the City. The City of Kankakee should discontinue its practice of charging copying fees to a requester for copies to be retained by the City. Under Section 9.5(f) of FOIA, the City of Kankakee shall either take necessary action immediately to comply with this opinion or shall initiate administrative review under Section 11.5 of FOIA (5 ILCS 140/11.5).

This opinion shall be considered a final decision of an administrative agency, for purposes of administrative review under the Administrative Review Law, 735 ILCS 5/Art. III.

Sincerely,

Lisa Madigan
Attorney General

By: _____
Cara Smith
Public Access Counselor