



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 21, 2018

Ms. Mary Polich
Gabriel Environmental Services
1421 North Elston Avenue
Chicago, Illinois 60642

Ms. Helen Shields-Wright
Head Assistant Attorney/FOIA Officer
Metropolitan Water Reclamation District of Greater Chicago
100 East Erie Street
Chicago, Illinois 60611-3154

RE: FOIA Request for Review - 2011 PAC 17798

Dear Ms. Polich and Ms. Shields-Wright:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2016). For the reasons explained below, the Public Access Bureau concludes that the Metropolitan Water Reclamation District of Greater Chicago (District) improperly treated Ms. Mary Polich's FOIA request as being from a recurrent requester because it applied the recurrent requester provisions of FOIA retroactively.

On December 8, 2011, the District received a FOIA request under the name "Mary Polich" from the business e-mail account of her husband, Mr. John Polich. Mr. Polich is an employee of Gabriel Environmental Services (GES). On December 14, 2011, the District responded by notifying Mr. Polich that the District had designated him as a "recurrent requester" pursuant to section 2(g) of FOIA (5 ILCS 140/2(g) (West 2011 Supp.)). The notification letter advised Mr. Polich that he met the requirements for a recurrent requester because "[i]n the year preceding the request date * * * we have received 96 requests from you."¹ The letter further indicated that the District would provide an initial response within 21 business days and "comply with the request within a reasonable period considering the size and complexity of the request, in

¹Letter from Helen Shields-Wright, Head Assistant Attorney, Metropolitan Water Reclamation District of Greater Chicago, to John Polich, Gabriel Environmental Services (December 14, 2011).

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accordance with section 3.2(c)² of FOIA² (5 ILCS 140/3.2(c) (West 2011 Supp.)). The District did not directly issue a response to Ms. Polich at that time.

The Public Access Bureau forwarded a copy of the Request for Review to the District and requested additional information concerning its receipt and handling of the FOIA request, including a clarification as to why the District sent the notification letter to Mr. Polich rather than Ms. Polich. The District responded, in pertinent part, that it construed GES as the requester and issued a response to Mr. Polich because the request was sent from his business e-mail account:

The [District] has received 96 requests from GES within the past year and, as such, GES falls under the recurrent requester category as defined in section 3.2 of the Act.

* * *

As you can see from the correspondence from employees at GES, the named person seeking information and the email addressee is not always consistent. While a copy of an email FOIA request was sent to you purportedly from Mary Polich and the actual appeal to you was "signed" by Mary Polich, it originated from a "jpolich" per the email address.^[3]

In her reply to the District's response to the allegations in the Request for Review, Ms. Polich stated that she works for GES and shares her husband's business e-mail account. She further stated, in pertinent part:

Many corporations are much larger than Gabriel, and could consistently need, for business purposes, to have individuals on their staffs cumulatively send more than 96 FOIAs in a year to a specific agency. Gabriel alone has 5-6 individuals who regularly FOIA IEPA for information, due to the nature of what each person does here.^[4]

²Letter from Helen Shields-Wright, Head Assistant Attorney, Metropolitan Water Reclamation District of Greater Chicago, to John Polich, Gabriel Environmental Services (December 14, 2011).

³Letter from Ms. Helen Shields-Wright, Head Assistant Attorney, Metropolitan Water Reclamation District of Greater Chicago, to Steve Silverman, Assistant Attorney General, Public Access Bureau (January 5, 2012).

⁴E-mail from Mary Polich, Gabriel Environmental Services, to Steve Silverman, Assistant Attorney General, Public Access Bureau (January 13, 2012).

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The Public Access Bureau subsequently received confirmation that the District disclosed records responsive to GES on January 10, 2012; no copying fees were assessed.

DETERMINATION

Definition of Recurrent Requester

Section 2(b) of FOIA (5 ILCS 140/2(b) (West 2011 Supp.)) defines a "person" as "any individual, corporation, partnership, firm, organization or association, acting individually or as a group." Section 2(g) of FOIA defines a "recurrent requester" as a "person" who, "in the 12 months immediately preceding the request, has submitted to the same public body (i) a minimum of 50 requests for records, (ii) a minimum of 15 requests for records within a 30-day period, or (iii) a minimum of 7 requests for records within a 7-day period." A public body's time to respond to a request by a recurrent requester is extended to 21 business days after receipt of the request. 5 ILCS 140/3.2(a) (West 2016)).⁵

Comments during the Senate floor debate by one of the co-sponsors for House Bill 1716, which as Public Act 97-579 added the recurrent requester provision in section 2(g) to FOIA, indicate that the legislation was intended to ease the strain on public bodies that had been heavily burdened by large numbers of FOIA requests, particularly from businesses:

The sweeping FOIA law that was put into place was outstanding in principle, outstanding conceptually, but, frankly, the pendulum had swung too far and became very impractical for many municipalities and local units of government to maintain. And, in fact, many local units of government were overwhelmed by commercial FOIA that got in the way of legitimate citizen inquiries, and indeed it overwhelmed the system and taxed the taxpayers because they were -- under a timeline that was entirely unreasonable. Remarks of Sen. Sandack, May 30, 2011, Senate Debate on House Bill 1716, at 75.

Ms. Polich has acknowledged that she submitted her FOIA request in her capacity as an employee of GES. It also is undisputed that Mr. Polich had submitted 96 FOIA requests to the District in his capacity as an employee of GES in the 12-month period preceding the FOIA request that Ms. Polich submitted to the District. Therefore, this office must initially determine whether a public body may properly attribute FOIA requests submitted by individual employees

⁵In contrast, a public body must respond to most other types of requests within 5 business days after receipt of the request unless it extends the time to respond by an additional five business days. 5 ILCS 140/3(d) (West 2010).

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in their employment capacity to their business employer, and classify the business employer as a recurrent requester under section 2(g) based on the cumulative number of FOIA requests.

Because Mr. Polich and Ms. Polich were acting as employees of GES rather than acting individually, this office concludes that all their FOIA requests are attributable to GES for the purposes of section 2(g) of FOIA. We note that classifying each individual employee who submits a FOIA request in their employment capacity as a separate "person" under section 2(g) would enable any business with a sufficiently large number of employees to overwhelm a public body with FOIA requests. For example, a business with 500 employees could submit 3,000 FOIA requests to a public body in the names of individual employees in a 7-day period without any of the individual employees or the business meeting the definition of a "recurrent requester" pursuant to section 2(g). Construing section 2(g) in such a manner would undermine the legislative intent of Public Act 97-579, and possibly yield absurd results.

Application of Public Act 97-579

Next, we must determine whether FOIA requests submitted on behalf of GES by Mr. Polich before August 26, 2011, the effective date of the "recurrent requester" FOIA amendment, may be used to classify GES as a recurrent requester. The District has advised this office that Mr. Polich has submitted only nine FOIA requests since August 26, 2011. Therefore, GES only may be properly classified as a recurrent requester based on Mr. Polich's 96 FOIA requests to the District in the year preceding Ms. Polich's FOIA request if section 2(g) applies retroactively.

In *Commonwealth Edison Company v. Will County Collector*, 196 Ill. 2d 27 (2001) the Illinois Supreme Court considered the issue of whether statutory amendments that affect tax rates should be given retroactive application. In doing so, the court adopted the retroactivity analysis used by the United States Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, (1994). Under the *Landgraf* analysis, a court looks first to whether the legislature has expressly prescribed the temporal reach of a statute (whether it is clearly intended to be retroactive or to be prospective only), and, if so, gives effect to the legislative intent, absent a constitutional prohibition. If the legislature has not indicated the reach of a statute or amendment, "then the court must determine whether applying the statute would have a retroactive impact, *i.e.*, 'whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'". *Commonwealth Edison*, 196 Ill 2d at 38, quoting *Landgraf*, 511 U.S. at 280, 114 S. Ct. at 1505.

More recently, the Illinois Supreme Court in *Caveney v. Bower*, 207 Ill. 2d 82 (2003), stated that through section 4 of the Statute on Statutes (5 ILCS 70/4) (West 2002)), the General Assembly has indicated the "temporal reach of *every* amended statute." (Emphasis in original.) *Caveney*, 207 Ill. 2d at 92. The court stated that "[s]ection 4 represents a clear

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legislative directive as to * * * statutory amendments and repeals: those that are procedural in nature may be applied retroactively, while those that are substantive may not." *Caveney*, 207 Ill. 2d at 92.

A review of the language of Public Act 97-579 confirms that the General Assembly did not specifically indicate the temporal reach of the "recurrent requester" provisions in the amendment. Therefore, the question is whether the "recurrent requester" amendment is procedural or substantive in nature. A procedural change in the law generally prescribes a method of enforcing rights or involves pleadings, evidence and practice. *Ores v. Kennedy*, 218 Ill. App. 3d 866 (1991). A substantive change in law establishes, creates or defines rights. *Schwieckert v. AG Services of America, Inc.*, 355 Ill. App. 3d 439, 443 (2005), quoting *Ogdon v. Gianakos*, 415 Ill. 591, 595 (1953); see also *Perry v. Dep't of Financial and Professional Regulation*, 2018 IL 122349, ¶71, ___ N.3d ___ (2018) (amendments that "alter the scope of information that is accessible[]" under FOIA are substantive changes).

FOIA guarantees Illinois citizens the right to full and complete information regarding the affairs of government. Section 1 of FOIA (5 ILCS 140/1) (West 2010)) provides, in pertinent part:

Restraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people. The provisions of this Act shall be construed in accordance with this principle. This Act shall be construed to require disclosure of requested information as expeditiously and efficiently as possible and adherence to the deadlines established in this Act."

In this situation, the District's consideration of FOIA requests submitted prior to August 26, 2011, in determining whether GES was a "recurrent requester" imposed an adverse consequence on GES for its otherwise lawful conduct. The District's consideration of the FOIA requests, therefore, has a substantive effect. Moreover, even if the recurrent requester amendment could be construed as purely procedural, courts have concluded that an amendment cannot be applied retroactively if the amended statute has a retroactive impact by attaching "new legal consequences to events completed before the statute was changed." *Schwieckert*, 355 Ill. App. 3d at 444. Here, if applied retroactively, the recurrent requester provision would impose restrictions on the availability of information to a requester based on past lawful conduct, the FOIA requests made prior to August 26, 2011, when the number or frequency of requests made by a requester was immaterial. Accordingly, this office concludes that the District improperly

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treated Ms. Polich's December 8, 2011, as a request by a recurrent requester. Because the District subsequently responded to the FOIA request at issue, no further action is necessary.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, you may contact me at (312) 814-6756.

Very truly yours,

STEVE SILVERMAN
Bureau Chief
Public Access Bureau

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