



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

January 9, 2012

**Public Access Opinion 12-001
(Request for Review – 2011 PAC 16877)**

FREEDOM OF INFORMATION ACT:
Classification as a "Recurrent Requester"
under Section 2(g) of FOIA

Via Electronic mail and U.S. mail

Ms. Kathy Ford
1004 E. Walnut
Canton, Illinois 61520
Kathy.lindsey2001@yahoo.com

Mr. Tim Orwig
Freedom of Information Officer
Village of Smithfield
P.O. Box 25
Smithfield, Illinois 61477
Cremy22@hotmail.com

Dear Ms. Ford and Mr. Orwig:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2010), as amended by Public Act 97-579, effective August 26, 2011). The central issue presented for review is whether the Village of Smithfield (Village) properly classified Ms. Kathy Ford and her husband, Mr. Vernon Ford, as "recurrent requesters" under sections 2(g) and 3.2 of FOIA (5 ILCS 140/2(g), 3.2 (West 2010), as amended by Public Act 97-579, effective August 26, 2011). For the reasons set forth below, we conclude that the Village has violated FOIA by improperly classifying the requester and her husband as recurrent requesters, and by failing to respond in accordance with the requirements of FOIA.

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BACKGROUND

Facts

On September 14, 2011, Ms. Ford submitted a ten-part FOIA request to the Village seeking copies of minutes, agendas, and other information concerning several different meetings, copies of certain laws and other documents, access to view financial records and checks, and suggestions for more timely acknowledgment of FOIA requests by the Village.¹

The Village responded to Ms. Ford's request on September 21, 2011, in a letter which stated, in its entirety:

You and your husband, Vernon Ford, have been classified as "Recurrent Requesters" under Subsection G, Section 2 of HB1716. Therefore, as stated in Section 3.2 of HB 1716, we will respond to your request within 21 business days of receipt.²

On September 23, 2011, the Public Access Bureau received Ms. Ford's Request for Review challenging the Village's classification of her and her husband as recurrent requesters.³ We forwarded a copy of Ms. Ford's Request for Review to the Village on October 11, 2011, and asked for a detailed explanation of its basis for classifying Ms. Ford as a recurrent requester.⁴ The Village responded to Ms. Ford's FOIA request on October 12, 2011, furnishing her with certain records, and denying other portions of the request because the Village did not have records, or because the request asked a question.⁵

¹Letter from Kathy Ford to Village of Smithfield FOIA Officer (September 14, 2011).

²Letter from Tim Orwig, FOIA Officer, Village of Smithfield, to Kathy Ford (September 21, 2011).

³Letter from Kathy Ford to the Attorney General, State of Illinois (September 23, 2011).

⁴Letter from Matthew C. Rogina, Assistant Attorney General, Public Access Bureau, to Tim Orwig, FOIA Officer, Village of Smithfield (October 11, 2011).

⁵Letter from Tim Orwig, FOIA Officer, Village of Smithfield, to Kathy Ford (October 12, 2011).

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On November 15, 2011, this office extended the time within which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.⁶ On November 16, 2011, the Village responded to our request for an explanation, asserting that Vernon and Kathy Ford had sent numerous FOIA requests over the past year, and enclosing copies of 14 FOIA requests.⁷ As further justification for its position, the Village asserted that: 1) the requests are usually in the same envelope and the responses mailed to the same address; and 2) because Vernon and Kathy Ford had submitted "an excess of Requests for Review" to the Attorney General's Office, mostly sent in by Ms. Ford, Mr. and Ms. Ford should be "classified as a single entity" and should "remain classified as Recurrent Requesters."

We forwarded a copy of the Village's response letter to Ms. Ford on November 28, 2011.⁸ On December 4, 2011, Ms. Ford responded to the Village's answer and asserted that she and her husband should not be bundled as a single entity, nor had she submitted the number of requests statutorily required to be treated as a recurrent requester under section 2(g) of FOIA.⁹ Further, Ms. Ford had obtained copies of all of the FOIA requests that she and her husband had submitted to the Village in order to determine why they were being classified as recurrent requesters, and included those copies with her response.¹⁰ Our review of those requests reveals that Kathy Ford alone sent 10 FOIA requests to the Village between October 12, 2010, and September 14, 2011, including the September 14, 2011, request.¹¹ Kathy and Vernon Ford sent one joint request on January 12, 2011. Vernon Ford alone sent 3 FOIA requests, dated September 8, 2010, October 14, 2010, and August 10, 2011, to the Village.

⁶Letter from Matthew C. Rogina, Assistant Attorney General, to Tim Orwig, FOIA Officer, Village of Smithfield, and Kathy Ford (November 15, 2011).

⁷Letter from Tim Orwig, FOIA Officer, Village of Smithfield, to Matthew C. Rogina, Assistant Attorney General, Public Access Bureau (November 16, 2011).

⁸Letter from Matthew C. Rogina, Assistant Attorney General, Public Access Bureau to Kathy Ford and Tim Orwig (November 28, 2011).

⁹Letter from Kathy Ford to Matthew Rogina, Assistant Attorney General, Public Access Bureau (December 4, 2011).

¹⁰We note that the 14 FOIA requests that Ms. Ford sent us are identical to those that the Village had furnished to us. Thus, the parties do not dispute who sent each request or the dates on which the requests were submitted.

¹¹The dates of Ms. Ford's FOIA requests are October 12, 2010; November 10, 2010; January 20, 2011; February 9, 2011; February 23, 2011; July 7, 2011; July 13, 2011; August 10, 2011; August 10, 2011; and September 14, 2011.

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Relevant Provisions of FOIA

The amendments to FOIA contained in Public Act 97-579 adding the "recurrent requester" provisions became effective on August 26, 2011. 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." The statute also specifically defines a "request" as "a written document (or oral request, of the public body chooses to honor oral requests) that is submitted to a public body via personal delivery, mail, telefax, electronic mail, or other means available to the public body and that identifies the particular public records the requester seeks and provides that "[o]ne request may identify multiple records to be inspected or copied." 5 ILCS 140/2(g) (West 2010), as amended by Public Act 97-579, effective August 26, 2011.

Section 3.2 of FOIA sets out the procedures that a public body must follow if it intends to treat an individual as a recurrent requester. First, a public body must, within five days after receiving a FOIA request, notify the requester:

(i) that the public body is treating the request as a request under subsection (g) of Section 2, (ii) of the reasons why the public body is treating the request as a request under subsection (g) of Section 2, and (iii) that the public body will send an initial response within 21 business days after receipt in accordance with subsection (a) of this Section. The public body shall also notify the requester of the proposed responses that can be asserted pursuant to subsection (a) of this Section. 5 ILCS 140/3.2(b) (West 2010), as amended by Public Act 97-579, effective August 26, 2011.

Second, the public body must respond to the requester within 21 business days after receipt of the request as follows:

[T]he response shall (i) provide to the requester an estimate of the time required by the public body to provide the records requested and an estimate of the fees to be charged, which the public body may require the person to pay in full before copying the requested documents, (ii) deny the request pursuant to one or more of the exemptions set out in this Act, (iii) notify the requester that the request is unduly burdensome and extend an opportunity to the

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requester to attempt to reduce the request to manageable proportions, or (iv) provide the records requested. 5 ILCS 140/3.2(a) (West 2010), as amended by Public Act 97-579, effective August 26, 2011.

Section 3.2(c) (5 ILCS 140/3.2(c) (West 2010), as amended by Public Act 97-579, effective August 26, 2011) requires that unless a public record is exempt from disclosure, a public body shall comply with a request within a reasonable period considering the size and complexity of the request.

Thus, in order to lawfully classify a person as a recurrent requester under FOIA a public body must:

- (1) Properly calculate the number of FOIA requests made to determine whether any of the three categories identified in section 2(g) is applicable;
- (2) If the number of requests during the requisite time period meets or exceeds the statutory threshold, notify the person within 5 days of the request that he or she is being treated as a recurrent requester. Notification must include the public body's reasons for treating the requester as a recurrent requester, a statement that the public body will provide an initial response within 21 days of receipt of the request, and an explanation of the different responses that may be asserted; and
- (3) Send an initial response within 21 days either: 1) advising the requester when the public body expects to respond and the estimated fees; 2) denying the request; 3) advising the requester that the request is unduly burdensome; or 4) providing the requested records.

ANALYSIS

Issues

This request for review raises three issues: 1) whether the Village can count FOIA requests by Vernon Ford in calculating Ms. Ford's total number of FOIA requests for purposes of section 2(g); 2) whether the number of requests Ms. Ford has submitted qualifies her as a "recurrent requester," as defined in FOIA; and 3) whether the Village followed the requirements of FOIA when it notified Ms. Ford that she and her husband were being treated as recurrent requesters?

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Requests Submitted by Requester's Husband

In applying the recurrent requester guidelines, the Village included three FOIA requests submitted by Mr. Ford and one joint request by Mr. and Ms. Ford when calculating Ms. Ford's total number of FOIA requests. Although we agree that the joint request may be included, the requests by Mr. Ford cannot be counted. The Village reasoned that requests from each individual came in one envelope and its responses were sent to the same address. The Village also asserted that the Fords had submitted "excessive" Requests for Review to the Public Access Counselor and most were sent by Ms. Ford. These facts, assuming they are accurate, are not sufficient to conclude that the requests are attributable to one person.

Section 2(g) of FOIA defines a recurrent requester as a "person." "Person" is defined, for purposes of FOIA, as "any individual, corporation, partnership, firm, organization or association, acting individually or as a group." 5 ILCS 140/2(b) (West 2010), as amended by Public Act 97-579, effective August 26, 2011. Ms. Ford asserts that her requests and that of her husband are separate, unless they submit the request jointly. Nothing in the statute permits the Village to aggregate the separate requests of two individuals for purposes of section 2(g) simply because the individuals are married or live at the same address. The Village did not act in accordance with the requirements of FOIA when it considered requests made by Mr. Ford in determining whether Ms. Ford was a recurrent requester. Even if Ms. Ford had submitted the number of requests required to be considered a recurrent requester, the Village would still have acted improperly by labeling Mr. Ford as a recurrent requester based on his wife's requests. Additionally, although the Village notes that Ms. Ford has submitted Requests for Review to the Public Access Counselor, nothing in the statute allows the Village to consider Requests for Review filed with the Public Access Counselor when calculating the number of FOIA requests under section 2(g).

Number of FOIA Requests Submitted and Requirements of Section 2(g)

With respect to the number of FOIA requests actually submitted by Ms. Ford and whether those fit into any of the categories in section 2(g), the parties agree on the dates of the requests, and the first request submitted by Ms. Ford after the recurrent requester amendment became effective was September 14, 2011. Ms. Ford's 11 requests in the year prior to her September 14, 2011, request does not even approach section 2(g)'s minimum requirement of 50 FOIA requests in one year to be treated as a recurrent requester. Even erroneously aggregating all requests from the Fords that the Village had received within one year, 14 requests clearly does not equal the statutory thresholds of 50 requests within a year, 15 requests in 30 days, or 7

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requests in 7 days. The Village had no legitimate basis on which to declare Ms. Ford, Mr. Ford, or Ms. and Mr. Ford jointly as recurrent requesters.

Public Body's Response

We also note that, in addition to improperly determining that Ms. Ford and Mr. Ford were recurrent requesters, the Village failed to follow the statutory procedure for notifying Ms. Ford of its determination. Although the Village did advise Ms. Ford within 5 days that she was being treated as a recurrent requester, that letter did not explain why she was being treated as such, nor did the Village explain the possible responses that it would provide within 21 days. The statute requires a public body to include in the notification the reasons why it is treating the request as recurrent under subsection 2(g), as well as to explain the potential responses it may provide. The Village did respond to Ms. Ford's FOIA request within 21 business days. However, because Ms. Ford was improperly treated as a recurrent requester, the Village should have responded within 5 days.

FINDINGS AND CONCLUSIONS

After full review and giving due consideration to the arguments of the parties, the Public Access Counselor's findings, and the applicable law, the Attorney General finds that:

- 1) On September 14, 2011, Ms. Kathy Ford submitted a FOIA request to the Village requesting, among other things, records relating to Village meetings and financial records.
- 2) On September 21, 2011, the Village notified Ms. Ford that it was treating her as a recurrent requester, and advised that they would respond to her FOIA request within 21 business days.
- 3) On September 23, 2011, Ms. Ford submitted to the Public Access Counselor a Request for Review of the Village's September 21, 2011, determination that she was a recurrent requester. Ms. Ford's Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2010), as amended by Public Act 97-579, effective August 26, 2011). Therefore, the Attorney General may issue a binding opinion with respect to the Village's decision to treat Ms. Ford as a recurrent requester.

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4) The Attorney General properly extended the time to issue a binding opinion by 30 business days, pursuant to section 9.5(f) (5 ILCS 140/9.5(f) (West 2010), as amended by Public Act 97-579, effective August 26, 2011), until January 9, 2012.

5) The Village, as a matter of law, violated FOIA by treating Ms. Ford and her husband as one person for purposes of section 2(g).

6) The Village, as a matter of law, violated FOIA because the 11 FOIA requests that Ms. Ford made in the year prior to her September 14, 2011, request do not meet the statutory thresholds of 50 requests within a year, 15 requests within 30 days, or 7 requests within 7 days.

7) The Village, as a matter of law, violated section 3.2(b) of FOIA by failing to notify Ms. Ford of the reasons why she was being treated as a recurrent requester.

For the reasons addressed above, it is the opinion of the Attorney General that the Village has, in violation of the requirements of the Freedom of Information Act, improperly classified Ms. Ford and Mr. Ford as recurrent requesters. Although the Village has responded to the FOIA request underlying this review, we direct the Village to refrain from treating further FOIA requests from Ms. Ford and Mr. Ford as requests under section 2(g) unless and until any request properly qualifies as a request from a recurrent requester under FOIA.

This opinion shall be considered a final decision of an administrative agency for purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2010). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Ms. Kathy Ford as defendants. *See* 5 ILCS 140/11.5 (West 2010).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:


Michael J. Luke
Counsel to the Attorney General