



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 21, 2012

PUBLIC ACCESS OPINION 12-015
(Request for Review 2011 PAC 21348)

FREEDOM OF INFORMATION ACT:
Judicial Inquiry Board is Not a "Public
Body" to which FOIA is Applicable

Mr. David Merced, Reg. No. K-84030
Menard Correctional Center
Post Office Box 1000
Menard, Illinois 62259

Ms. Kathy D. Twine
Executive Director & General Counsel
Judicial Inquiry Board, State of Illinois
100 West Randolph Street, Suite 14-500
Chicago, Illinois 60601-3233

Dear Mr. Merced and Ms. Twine:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 120/9.5(f) (West 2011 Supp.)). For the reasons discussed below, we conclude that the Judicial Inquiry Board of the State of Illinois (Board) is not subject to the requirements of FOIA. Therefore, the Board is not required to furnish records in response to a FOIA request.

BACKGROUND

On August 11, 2012, Mr. David Merced submitted a FOIA request to the Board seeking "[d]ocumentation or information stating [the] reason why" a former judge "was removed as a Judge from the Cook County Circuit Court[.]" and the "number and nature of any and all

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complaints against" the judge during his tenure on the bench.¹ (Underscore in original.) On August 20, 2012, Ms. Kathy D. Twine, Executive Director and General Counsel of the Judicial Inquiry Board, responded to Mr. Merced, stating, in pertinent part:

Kindly note that the Board, an independent entity established under the judicial branch of government, is unable to process your request in that the Board is not governed by the [Freedom of Information] Act, which generally applies to legislative and executive bodies of the State (5 ILCS 140/2(a)).²

Alternatively, the Board denied Mr. Merced's request in its entirety under section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) of FOIA (West 2011 Supp.), as amended by Public Acts 97-783, effective July 13, 2012; 97-813, effective July 13, 2012), which exempts "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The Board asserted that the disclosure of the records in question is specifically prohibited by Rule 5(a) of the Board's Rules of Procedures (Judicial Inquiry Board R. 5(a)), adopted pursuant to article VI, section 15(d) of the Illinois Constitution of 1970.

On September 12, 2012, the Public Access Counselor received from Mr. Merced copies of the FOIA request he submitted to the Board, the Board's written response, and unsigned correspondence in which Mr. Merced concedes that copies of the complaints investigated by the Board are exempt from disclosure, but contends that he is entitled to the specific information he requested concerning the complaints.³ On October 16, 2012, Mr. Merced completed a timely submission pursuant to section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2011 Supp.))⁴ by providing the Public Access Counselor with a signed Request for Review.⁵

¹FOIA request submitted by David Merced to Judicial Inquiry Board (August 11, 2012) (Request for Review 2012 PAC 21348).

²Letter from Kathy D. Twine, Executive Director and General Counsel, Judicial Inquiry Board, to David Merced (August 20, 2012).

³Freedom of Information Appeal form from David Merced to Illinois Attorney General (undated).

⁴Section 9.5(a) of FOIA provides that a "person whose request to inspect or copy a public record is denied by a public body, except the General Assembly and committees, commissions, and agencies thereof, may file a request for review with the Public Access Counselor established in the Office of the Attorney General not later than 60 days after the date of the final denial. The request for review must be in writing, signed by the requester, and include (i) a copy of the request for access to records and (ii) any responses from the public body."

⁵Freedom of Information Appeal form from David Merced to Illinois Attorney General (undated).

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On October 24, 2012, the Public Access Bureau forwarded a copy of the Request for Review to the Board for its response.⁶ On November 5, 2012, counsel for the Board reiterated its position that the Board is an "independent entity that is part of the judicial branch of government[]" and is therefore not a public body which is subject to FOIA.⁷

On November 9, 2012, this office properly extended the time to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.

ANALYSIS

Section 3(d) of FOIA (5 ILCS 140/3(d) (West 2010)) provides that "[e]ach *public body* shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request, unless the time for response is properly extended under subsection (e) of this Section." (Emphasis added.) Section 2(a) of FOIA (5 ILCS 140/2(a) (West 2011 Supp.)) defines "public body" to include "*all legislative, executive, administrative, or advisory bodies* of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, [and] any subsidiary bodies of any of the foregoing[.]" (Emphasis added.) Conspicuously absent from this definition is any reference to the judicial branch of State government or its officers or agencies.

The maxim of statutory construction known as *inclusio unius est exclusio alterius* is applicable to the definition of "public body" in section 2(a) of FOIA. Under that principle, where a statute lists the thing or things to which it refers, the inference is that all omissions are exclusions, even in the absence of limiting language. *City of St. Charles v. Illinois Labor Relations Bd.*, 395 Ill. App. 3d 507, 509-10 (2009). In *Copley Press, Inc. v. Administrative Office of Courts*, 271 Ill. App.3d 548 (2nd Dist. 1995), the Appellate Court emphasized the exclusion of the judiciary from the statutory definition of "public body" in holding that components of the judicial branch are not "public bodies" subject to the requirements of FOIA:

Here, [in the definition of "public body" found in section 2(a)], the legislature specifically listed the legislative and executive

⁶Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Kathy D. Twine, Executive Director and General Counsel, Judicial Inquiry Board (October 24, 2012).

⁷Letter from Mr. John N. Gallo, Sidley Austin, LLP, to Steve Silverman, Assistant Attorney General, Public Access Bureau (November 5, 2012).

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branches of government without listing the judicial branch. The lack of any reference to the courts or judiciary must be taken as an intent to exclude the judiciary from the disclosure requirements of the Act." *Copley Press, Inc.*, 271 Ill. App. 3d at 553.

Thus, the provisions of FOIA do not apply to the Board if it is an entity within the judicial branch of government.

Article VI, section 15(b), of the Illinois Constitution of 1970 provides that the Board shall be comprised of two judges selected by the Supreme Court and three lawyers and four non-lawyers selected by the Governor. Article VI, section 15(c), of the Illinois Constitution of 1970 vests the Board with the "authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission."⁸ The Board "is an integral part of Illinois' system of judicial discipline." *People ex rel. Illinois Judicial Inquiry Bd. v. Hartel*, 72 Ill. 2d 225, 229 (1978).

In Opinion No. 99-005, issued March 15, 1999, Attorney General Ryan concluded that the Illinois Courts Commission, a body created to hear complaints filed by the Board (*see* Ill. Const. 1970, art. VI, §15(e)), was not subject to either FOIA (5 ILCS 140/1-1 *et seq.* (West 1996)) or the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 1996)), which also defines "public body" to exclude the judiciary.⁹ Citing *Copley Press, Inc.*, the Attorney General stated:

[T]he Illinois Courts Commission is an adjudicatory body of the judicial branch of government. Consequently, based upon the court's reasoning in *Copley Press, Inc. v. Administrative Office of the Courts*, it is my opinion that the Illinois Courts Commission is not subject to the provisions of the Freedom of Information Act. Ill. Att'y Gen. Op. No. 99-005, issued March 5, 1999, at 10.

Attorney General Ryan's conclusion is equally applicable to the Board. As the investigatory arm of the bipartite judicial disciplinary system established under the judicial article of the State Constitution, the Board is a part of the judicial branch of State government.

⁸The "investigative, charging and prosecuting functions are lodged in the Inquiry Board, but the adjudicatory function is separately vested in the Courts Commission." *People ex rel. Judicial Inquiry Bd. v. Courts Commission*, 91 Ill. 2d 130, 135 (1982), quoting 6 Record of Proceedings, Sixth Illinois Constitutional Convention 866-67.

⁹Consistent with FOIA, the definition of a "public body" in section 1.02 of OMA (5 ILCS 120/1.02 (West 2010)) is limited to "legislative, executive, administrative or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing[.]"

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Because the definition of "public body" in section 2(a) of FOIA does not include agencies of the judicial branch, the Board is not subject to the requirements of FOIA. Moreover, to conclude that the Board is an executive or legislative body, and therefore, is subject to FOIA could infringe upon the Illinois Supreme Court's exclusive authority to regulate judicial conduct (*see People ex rel. Harrod v. Illinois Courts Commission*, 69 Ill. 2d 445, 465 (1977)) and violate the principle of separation of powers. *See* Ill. Const. 1970, art. I, §2 ("The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.").

Accordingly, we conclude that the Board is not obligated to comply with Mr. Merced's FOIA request.

FINDINGS AND CONCLUSIONS

1) On August 11, 2012, Mr. David Merced submitted a FOIA request to the Judicial Inquiry Board seeking information concerning complaints against a former circuit court judge.

2) On August 20, 2012, the Board responded, in part, by asserting that it is not a "public body" as defined in FOIA, and thus is not subject to the requirements of that Act.

3) On September 12, 2012, the Public Access Counselor received a copy of the underlying FOIA request, the Board's response, and Mr. Merced's unsigned Request for Review. On October 16, 2012, the Public Access Counselor received Mr. Merced's signed Request for Review. Mr. Merced's Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to the applicability of FOIA to the Board.

4) On October 24, 2012, the Public Access Bureau determined that further inquiry was warranted and issued a letter to the Board requesting that it provide a written explanation for its assertion that the Board is not a "public body" under the definition of that term in section 2(a) of FOIA. On November 9, 2012, the Board responded by reasserting that it is an entity within the judicial branch of State government and, therefore, is not a "public body" as that term is defined in FOIA.

5) Based on the reasoning of *Copley Press, Inc. v. Administrative Office of Courts*, we conclude that because the Board was created under the judicial article of the State Constitution as the investigatory arm of a disciplinary system solely involving State judges, it is an entity of the judicial branch. As an entity of the judicial branch of State government, the provisions of FOIA are not applicable to the Board.

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Therefore, it is the opinion of the Attorney General that because the Board is not subject to the provisions of FOIA, it was not required to comply with Mr. Merced's August 11, 2012, FOIA request. Accordingly, because no violation of FOIA occurred, no remedial action is necessary. Mr. Merced's Request for Review is denied.

This opinion shall be considered a final decision of an administrative agency for the 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 the Judicial Inquiry Board 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