



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 29, 2013

PUBLIC ACCESS OPINION 13-013
(Request for Review 2013 PAC 24760)

FREEDOM OF INFORMATION ACT:
Duty to Furnish Non-Exempt Records and
to Issue a Written Denial For Any Records
Not Provided

Mr. Joseph Ryan, Reporter
Chicago Tribune
18450 Crossing Drive, Suite A
Tinley Park, Illinois 60487

The Honorable Nancy Clark
City Clerk
City of Harvey
15320 Broadway Avenue
Harvey, Illinois 60426

Dear Mr. Ryan and Ms. Clark:

This is a binding opinion issued by the Attorney General pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2012)). As discussed below, this office concludes that the City of Harvey (City) violated sections 3 and 9(a) of FOIA (5 ILCS 140/3, 9(a) (West 2012)) by failing to furnish all records responsive to Mr. Joseph Ryan's FOIA requests, or alternatively, to issue proper written denials of those requests.

BACKGROUND

On May 13, 2013, Mr. Ryan, on behalf of the *Chicago Tribune*, submitted five separate FOIA requests to the City, each seeking various records related to a now defunct property development project at 17040 South Halsted Street, Harvey, Illinois. Specifically, the five requests sought copies of, among other things: (1) all requests for proposals or other solicitations issued since January 1, 2005, for the development of the indicated property, all

Mr. Joseph Ryan
Ms. Nancy Clark
July 29, 2013
Page 2

submissions in response to the requests for proposals received since January 1, 2005, all development agreements entered into since January 1, 2007, involving the indicated property, power point presentations and other council and staff presentation materials, financial statements/audits/ budgets submitted to the City by the owners/developers of the property since January 1, 2007, copies of insurance policies submitted by the owners/developers to the City since January 1, 2007, any liens placed by the City on the indicated property since January 1, 2007, and other related documentation; (2) records of loans and payments to Sunny Gabhawala and related entities, contracts with and payments to Joseph Letke, Letke & Associates, Public Funding, Business Computing Solutions or related entities; (3) records concerning loan agreements, mortgages, promissory notes executed between the City and the owners/developers of the indicated property, notices of amounts due and owing, outstanding bills, payments and wire transfers to the owners/developers of the indicated property, as well as the City's hotel and motel tax collection records for the most recent four fiscal years; (4) building permit applications, awarded building permits, inspection records, and records of related fines or determinations for the former hotel property; and (5) Resolution 2486, Ordinances 3214A and 3201, bonds issued under the indicated ordinances, guaranty agreements, loan agreements, mortgages, wire transfer records related to the bonds, and other financial records.¹

On May 30, 2013, Mr. Ryan submitted a Request for Review to the Public Access Counselor stating that "only a small fraction of the request had been responded to and there was no negotiation of further time to respond to the remaining, vast majority, of the FOIA requests, nor any communication as to whether the records requested in fact existed or not[.]"² Mr. Ryan stated that he spoke to the City Clerk about his requests on May 30, 2013, and "[i]t was clear from the conversation that no records would be forthcoming and no timetable for complying with the records request was given. Moreover, the clerk expressed problems obtaining the records from other departments[.]"³ The Request for Review alleged that:

[T]he ongoing refusal to provide information on when the FOIA will be responded to or why the records have not been provided --

¹See FOIA request No. 1 submitted by Joseph Ryan, Reporter, *Chicago Tribune*, to Harvey FOIA Officer (May 13, 2013); FOIA request No. 2 submitted by Joseph Ryan, Reporter, *Chicago Tribune*, to Harvey FOIA Officer (May 13, 2013); FOIA request No. 3 submitted by Joseph Ryan, Reporter, *Chicago Tribune*, to Harvey FOIA Officer (May 13, 2013); FOIA request No. 4 submitted by Joseph Ryan, Reporter, *Chicago Tribune*, to Harvey FOIA Officer (May 13, 2013); FOIA request No. 5 submitted by Joseph Ryan, Reporter, *Chicago Tribune*, to Harvey FOIA Officer (May 13, 2013).

²E-mail from Joseph Ryan, *Chicago Tribune*, to Illinois AG PAC, Office of the Attorney General (May 30, 2013).

³E-mail from Joseph Ryan, *Chicago Tribune*, to Illinois AG PAC, Office of the Attorney General (May 30, 2013).

Mr. Joseph Ryan
Ms. Nancy Clark
July 29, 2013
Page 3

or whether the records even will be provided at some point – constitu[tes] at the very least a blatant denial of responsibility under the FOIA law, if not an all out effort at cloaking the public records from public view.⁴

On June 6, 2013, the Public Access Bureau forwarded a copy of the Request for Review to the City and requested a "written explanation of its receipt and handling of the five FOIA requests submitted by Mr. Ryan on May 13, 2013[.]" together with copies of any written responses to Mr. Ryan.⁵ In an effort to resolve this matter, a representative of this office telephoned the City Clerk on June 13, 2013, and stated that, as discussed below, FOIA requires a public body to issue a written denial to the requester if it does not provide all records responsive to a request. On June 14, 2013, the City Clerk issued a written response to this office stating, in relevant part:

[W]e do apologize for the delay in answering Mr. Ryan. We did inform him verbally, but not in writing of the delay of certain items he requested and that we forwarded this information to the proper departments. We do know that these are clearly public record[s] and by that there is a time frame. The City Clerk's office is complying and not trying to hold records back or deny answering Mr. Ryan's FOIA requests.⁶

The City Clerk further explained that certain records had been furnished to Mr. Ryan while other records or information had been requested from the City's Building and Planning Department, the Comptroller, and the City Attorney. The City Clerk stated that responses from those offices were pending.⁷

⁴E-mail from Joseph Ryan, Reporter, *Chicago Tribune*, to Public Access Counselor, Office of the Attorney General (May 30, 2013).

⁵Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, to Nancy Clark, City Clerk, City of Harvey (June 6, 2013).

⁶Letter from Nancy L. Clark, City Clerk, City of Harvey, to Steve Silverman, Office of the Attorney General, State of Illinois (June 14, 2013).

⁷Letter from Nancy L. Clark, City Clerk, City of Harvey, to Steve Silverman, Office of the Attorney General, State of Illinois (June 14, 2013).

Mr. Joseph Ryan
Ms. Nancy Clark
July 29, 2013
Page 4

On June 21, 2013, this office forwarded a copy of the City's response to Mr. Ryan.⁸ On July 3, 2013, Mr. Ryan submitted a reply stating that the City had furnished "some additional documents, but all of the critical ones (payment records, contracts, records submitted by the developer) are still outstanding."⁹ Mr. Ryan provided this office with updates on July 12, 2013,¹⁰ and July 16, 2013,¹¹ in which he stated that the City still had not provided most of the records he requested.

ANALYSIS

"It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act." 5 ILCS 140/1 (West 2012). Under section 1.2 of FOIA (5 ILCS 140/1.2 (West 2012)), "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2012)) provides that "[e]ach 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."

Section 3(d) of FOIA (5 ILCS 140/3(d) (West 2012)) provides:

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, unless the time for response is properly extended under subsection (e) of this Section.¹² ***Denial shall be in writing as provided in Section 9 of this Act.*** Failure to comply with a written request, extend the time for response, or deny a request within 5 business days after its receipt shall be considered a denial of the request [unless the requester and the public body agree in writing to extend the time for compliance for a period to be determined by the parties¹³]. (Emphasis added.)

⁸Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Joseph Ryan, *Chicago Tribune* (June 21, 2013).

⁹E-mail from Joseph Ryan, *Chicago Tribune*, to Steve Silverman (July 3, 2013).

¹⁰E-mail from Joseph Ryan, *Chicago Tribune*, to Steve Silverman (July 12, 2013).

¹¹E-mail from Joseph Ryan, *Chicago Tribune*, to Steve Silverman (July 16, 2013).

¹²Section 3(e) of FOIA (5 ILCS 140/3(e) (West 2012)) enumerates seven reasons for which a public body may extend the time for responding to a FOIA request by 5 business days.

Mr. Joseph Ryan
Ms. Nancy Clark
July 29, 2013
Page 5

Section 9(a) of FOIA (5 ILCS 140/9(a) (West 2012)) further provides:

Each public body denying a request for public records shall *notify the requester in writing of the decision to deny the request*, the reasons for the denial, including a detailed factual basis for the application of any exemption claimed, and the names and titles or positions of each person responsible for the denial. Each notice of denial by a public body shall also inform such person of the right to review by the Public Access Counselor and provide the address and phone number for the Public Access Counselor. Each notice of denial shall inform such person of his right to judicial review under Section 11 of this Act. (Emphasis added.)

In this instance, the facts are undisputed that the City provided only a portion of the records requested in Mr. Ryan's FOIA requests. In response to this office, the City acknowledged that it possesses additional records that are subject to disclosure, but stated that additional time was needed to locate those records. However, the City and Mr. Ryan did not agree in writing, or even informally, to extend the period for compliance pursuant to section 3(e) of FOIA.

Under the law, the City was required, within 5 business days after receiving Mr. Ryan's requests, to furnish all responsive records in its possession, to extend the period for compliance by 5 additional business days, to negotiate a longer extension with Mr. Ryan, if necessary, or to deny the requests in writing.

The City's failure to provide all responsive records within the requisite time period constituted a denial of Mr. Ryan's FOIA requests. The City, however, did not issue a written denial that identified the reasons for denying the requests as required by section 9(a) of FOIA. Accordingly, the City violated both section 3(d) and section 9(a) of FOIA.

¹³See 5 ILCS 140/3(e) (West 2012).

Mr. Joseph Ryan
Ms. Nancy Clark
July 29, 2013
Page 6

FINDINGS AND CONCLUSIONS

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

1) On May 13, 2013, Mr. Joseph Ryan submitted five FOIA requests to the City of Harvey seeking records related to a now defunct property development project at 17040 South Halsted Street, Harvey, Illinois.

2) On May 30, 2013, Mr. Ryan submitted a Request for Review to the Public Access Counselor alleging that the City had failed to provide most of the records he requested, to negotiate an extension for providing the records, or to deny the requests in writing.

3) The City's failure to provide all responsive records, extend the period for responding, or deny Mr. Ryan's requests in writing within 5 business days after receipt of the requests constitutes a denial of the requests.

4) Mr. Ryan's Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2012)). Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

5) On June 6, 2013, the Public Access Bureau determined that further action was warranted and sent a letter to the City requesting an explanation of its response to the FOIA requests together with copies of any written responses that had been issued to Mr. Ryan.

6) On June 14, 2013, the City responded to the Public Access Bureau by acknowledging that additional responsive records in its possession were subject to disclosure, but had not been located and provided to Mr. Ryan. The City's response also acknowledged that it had not issued written denials of Mr. Ryan's FOIA requests.

7) The City's failure to comply with or properly deny Mr. Ryan's FOIA requests within the requisite time period violated section 3(d) of FOIA. Further, to the extent that responsive records do exist, the City's failure to provide those requested records constituted denials of the FOIA requests. The denials did not comply with the specific requirements of section 9(a) of FOIA.

Therefore, it is the opinion of the Attorney General that the City violated FOIA by improperly denying the five FOIA requests submitted by Mr. Ryan on May 13, 2013. Accordingly, the City is directed to take immediate and appropriate action to comply with this opinion by providing Mr. Ryan with copies of all non-exempt records responsive to his request.

Mr. Joseph Ryan
Ms. Nancy Clark
July 29, 2013
Page 7

If the City withholds or redacts any record, it is directed to provide a written explanation of the reasons therefor, including a detailed factual basis for any exemption that it may assert. Pursuant to section 9.5(f) of FOIA, the City must either immediately comply with this binding opinion or initiate administrative review under section 11.5 of FOIA (5 ILCS 140/11.5 (West 2012)).

This opinion shall be considered a final decision of an administrative agency for the purpose of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2012). 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 Mr. Joseph Ryan as defendants. See 5 ILCS 140/11.5 (West 2012).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
Counsel to the Attorney General