



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 26, 2018

PUBLIC ACCESS OPINION 18-007
(Request for Review 2018 PAC 52206)

FREEDOM OF INFORMATION ACT:
Public Body's Burden when Denying
a Request as an Unduly Burdensome
Repeated Request

Ms. Duaa Eldeib
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Mr. Joel M. Diers
Legal Services
Illinois Department of Corrections
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Dear Ms. Eldeib and Mr. Diers:

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 2016)). For the reasons discussed below, this office concludes that the Illinois Department of Corrections (IDOC) improperly denied Ms. Duaa Eldeib's March 6, 2018, FOIA request as an unduly burdensome repeated request.

BACKGROUND

On November 7, 2017, Ms. Eldeib, on behalf of *ProPublica Illinois*, submitted a FOIA request to IDOC seeking various records concerning the Illinois Impact Incarceration

Ms. Duaa Eldeib
Mr. Joel M. Diers
June 26, 2018
Page 2

Program.¹ On November 27, 2017, IDOC provided Ms. Eldeib with copies of certain responsive records but, pursuant to section 8.5(a) of FOIA (5 ILCS 140/8.5(a) (West 2016)),² denied access to an administrative rule on the basis that it was posted on the Illinois General Assembly's website and provided a link to the relevant portion of the Illinois Administrative Code. IDOC also stated that it did "not maintain or possess additional records responsive to" Ms. Eldeib's request.³ Over the course of the next few weeks, Ms. Eldeib corresponded with IDOC concerning its response to her request,⁴ and on December 22, 2017, IDOC again responded that it did not maintain or possess additional responsive records.⁵

On February 2, 2018, Ms. Eldeib submitted a Request for Review to the Public Access Bureau (file No. 2018 PAC 51547) alleging that IDOC's response to her request was incomplete.⁶ On February 15, 2018, the Public Access Bureau sent Ms. Eldeib a letter stating: "Because you did not submit your Request for Review until more than 60 days after IDOC allegedly denied your FOIA request by failing to provide additional responsive records, section 9.5(a) precludes this office from reviewing IDOC's response, and this file has been closed."⁷ The letter, however, also stated:

¹FOIA request from Duaa Eldeib, Reporter, *ProPublica Illinois*, to Lindsey Hess, Public Information Officer, Illinois Department of Corrections (November 7, 2017).

²Section 8.5(a) of FOIA provides:

Notwithstanding any provision of this Act to the contrary, a public body is not required to copy a public record that is published on the public body's website. The public body shall notify the requester that the public record is available online and direct the requester to the website where the record can be reasonably accessed.

³Letter from Lisa Weitekamp, Freedom of Information Officer, The Illinois Department of Corrections, to Duaa Eldeib (November 27, 2017).

⁴E-mails between Duaa Eldeib and Lindsey Hess (November 28, 2017, through December 22, 2017).

⁵E-mail from Lindsey Hess to Duaa Eldeib (December 22, 2017).

⁶E-mail from Duaa Eldeib, Reporter, *ProPublica Illinois*, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (February 2, 2018).

⁷Ill. Att'y Gen. PAC Req. Rev. Ltr. 51547, issued February 15, 2018, at 1.

Ms. Duaa Eldeib
Mr. Joel M. Diers
June 26, 2018
Page 3

You may wish to submit a new FOIA request to IDOC asking for the additional information that you are seeking about the impact incarceration program. As stated above, if your request is denied you may file a Request for Review with the Public Access Counselor not later than 60 days after the date of that denial.^{18]}

On March 6, 2018, Ms. Eldeib submitted a new FOIA request to IDOC seeking copies of the same records concerning the Illinois Impact Incarceration Program.⁹ On March 12, 2018, IDOC denied the request pursuant to section 3(g) of FOIA (5 ILCS 140/3(g) (West 2016)), which permits a public body to deny repeated requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied. Specifically, IDOC asserted: "You previously requested these records, and a response was sent to you on November 17, 2017, pursuant to FOIA Request #171108074. Therefore, that record is denied pursuant to Section 3(g) of the Freedom of Information Act."¹⁰ On March 15, 2018, Ms. Eldeib submitted a Request for Review contesting IDOC's assertion that her request was an unduly burdensome repeated request.¹¹ She alleged that IDOC's response was incomplete because it did not include records such as certain annual reports and "the Impact Incarceration Program Orientation Manual, Impact Incarceration Program Consent to Participate (DOC 0455), Impact Incarceration Program Participant Release (DOC 0458), Mental Health Screening (DOC 0457) and Medical Screening (0456) forms."¹²

On March 19, 2018, the Public Access Bureau sent a copy of the Request for Review to IDOC, together with a letter asking it to "please provide this office with a detailed explanation for the assertion that IDOC previously properly responded to the same request. In your response, please provide a detailed description of how IDOC searched for responsive

⁸Ill. Att'y Gen. PAC Req. Rev. Ltr. 51547, issued February 15, 2018; at 2.

⁹FOIA request from Duaa Eldeib, Reporter, *ProPublica Illinois*, to Lisa Weitekamp, FOIA officer, Illinois Department of Corrections (March 6, 2018).

¹⁰Letter from Lisa Weitekamp, Freedom of Information Officer, Illinois Department of Corrections, to Duaa Eldeib (March 12, 2018).

¹¹E-mail from Duaa Eldeib, Reporter, *ProPublica Illinois*, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (March 15, 2018).

¹²E-mail from Duaa Eldeib, Reporter, *ProPublica Illinois*, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (March 15, 2018).

Ms. Duaa Eldeib
Mr. Joel M. Diers
June 26, 2018
Page 4

records, addressing with specificity the records that Ms. Eldeib alleges to be missing."¹³ In a letter dated March 26, 2018, and e-mailed to this office on March 27, 2018, IDOC provided a written response asserting that it "responded to the same request previously" and "[f]or this reason" denied Ms. Eldeib's March 6, 2018, request pursuant to section 3(g) of FOIA.¹⁴ IDOC also stated:

By her own admission Ms. Eldeib did not seek a request for review on the November 27, 2017 response until February 2, 2018. Mr. [sic] Eldeib's failure to request a review in IDOC file number 171108074 within the 60 days required by law (5 ILCS 140/9.5(a)) effectively confirms IDOC's original response as proper. Therefore IDOC believes the basis for the original denials are no longer at issue in this matter. Rather, the sole question should be rather [sic] Ms. Eldeib has requested the same records previously and received a response from IDOC.¹⁵

IDOC did not explain how it searched for responsive records as this office requested. On March 27, 2018, this office forwarded a copy of IDOC's response to Ms. Eldeib.¹⁶ She did not submit a reply.

Pursuant to section 9.5(f) of FOIA, on May 11, 2018, the Public Access Bureau properly extended the time within which to issue a binding opinion by 30 business days, to June 26, 2018.¹⁷

¹³Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Lisa Weitekamp, Freedom of Information Officer, Illinois Department of Corrections (March 19, 2018), at 1.

¹⁴Letter from Joel M. Diers, Freedom of Information Office, Illinois Department of Corrections, to Josh Jones, Assistant [Attorney General], Office of the Illinois Attorney General (March 26, 2018).

¹⁵Letter from Joel M. Diers, Freedom of Information Office, Illinois Department of Corrections, to Josh Jones, Assistant [Attorney General], Office of the Illinois Attorney General (March 26, 2018).

¹⁶Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Duaa Eldeib, Reporter, *ProPublica Illinois* (March 27, 2018).

¹⁷Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Duaa Eldeib, Reporter, *ProPublica Illinois*, and Joel M. Diers, Freedom of Information Office, Illinois Department of Corrections (May 11, 2018).

Ms. Duaa Eldeib
Mr. Joel M. Diers
June 26, 2018
Page 5

ANALYSIS

"[I]t is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government." 5 ILCS 140/1 (West 2016). Accordingly, "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2016).

Section 3(g) of FOIA provides that "[r]epeated requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied under this Act shall be deemed unduly burdensome under this provision."

The primary objective when construing the meaning of a statute is to ascertain and give effect to the intent of the General Assembly. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). "The most reliable indicator of legislative intent is the statutory language, given its plain and ordinary meaning." *Gaffney v. Board of Trustees of Orland Fire Protection District*, 2012 IL 110012, ¶56, 969 N.E.2d 359, 372 (2012). Where the language of a statute is clear and unambiguous, a reviewing body "may not depart from the plain language by reading into the statute exceptions, limitations, or conditions that the legislature did not express." *Hayashi v. Illinois Department of Financial and Professional Regulation*, 2014 IL 116023, ¶16, 25 N.E.3d 570, 576 (2013). Further, statutes must be construed "as a whole, so that no part is rendered meaningless or superfluous." *People v. Jones*, 223 Ill. 2d 569, 581 (2006).

Under the plain language of section 3(g) of FOIA, a public body may deny a FOIA request as an unduly burdensome repeated request only if it has previously provided the requester with all of the nonexempt responsive records or properly denied the same FOIA request by the same requester in accordance with FOIA. Thus, when a requester contests the denial of a request as an unduly burdensome repeated request, it is necessary to look back to the original request and response to determine whether the public body previously provided the requester with *all* of the nonexempt responsive records pursuant to FOIA or *properly denied* a prior request from the same requester for the same records pursuant to FOIA. See Ill. Att'y Gen. Pub. Acc. Op. No. 11-003, issued April 1, 2011, at 6 (concluding that a public body could not treat a FOIA request as an unduly burdensome repeated request because it did not establish that it had properly denied the requester's previous FOIA requests for the same records).

IDOC argues that this office lacks "jurisdiction" to review the denial of a request as an unduly burdensome repeated request where the requester did not submit a Request for Review challenging the public body's original denial. Section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2016)), however, contains no such limitation. That section provides: "A person whose

Ms. Duaa Eldeib
Mr. Joel M. Diers
June 26, 2018
Page 6

request to inspect or copy a public record is denied by a public body * * * 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." No language in FOIA states that a person whose FOIA request was denied as an unduly burdensome repeated request may not submit a Request for Review to the Public Access Counselor unless he or she submitted a Request for Review of the denial of the previous request, nor does FOIA state that this office may not review whether such a denial was proper.

Further, where the General Assembly has intended to restrict this office's authority to review a type of denial, it has done so expressly. *See* 5 ILCS 140/9.5(b) (West 2016) (providing that a person whose FOIA request was made for a commercial purpose may not file a Request for Review with the Public Access Counselor except to dispute the public body's determination that the request was made for a commercial purpose). IDOC provided no support for the assertion that a requester's failure to file a Request for Review of the denial of the original request within the 60-day time period provided in section 9.5(a) of FOIA "effectively confirms [the public body's] original response as proper."¹⁸ If a public body withholds records without a valid basis pursuant to FOIA, the public body's response is improper regardless of whether it is contested in a subsequent proceeding.¹⁹ Moreover, IDOC's construction of section 9.5(a) of FOIA would render the term "properly" in section 3(g) superfluous. Plainly, the General Assembly's inclusion of the term "properly" establishes that a public body may not rely on an improper response to one request to deny a subsequent request for the same records.

In responding to this Request for Review, IDOC did not provide information showing that it had either given Ms. Eldeib copies of all of the records responsive to her November 7, 2017, request or properly denied any of the responsive records or information in the records. Accordingly, this office concludes that IDOC has not sustained its burden of demonstrating that it properly denied Ms. Eldeib's March 6, 2018, request as an unduly burdensome repeated request.

FINDINGS AND CONCLUSIONS

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

¹⁸Letter from Joel M. Diers, Freedom of Information Office, Illinois Department of Corrections, to Josh Jones, Assistant [Attorney General], Office of the Illinois Attorney General (March 26, 2018).

¹⁹Any person whose FOIA request was denied may also file suit for injunctive or declaratory relief in the appropriate circuit court pursuant to section 11 of FOIA (5 ILCS 140/11 (West 2016)).

Ms. Duaa Eldeib
Mr. Joel M. Diers
June 26, 2018
Page 7

1) On November 7, 2017, Ms. Duaa Eldeib, on behalf of *ProPublica Illinois*, submitted a FOIA request to the Illinois Department of Corrections seeking copies of various records concerning the Illinois Impact Incarceration Program.

2) On November 27, 2017, IDOC provided Ms. Eldeib with copies of certain responsive records and referred her to the Illinois General Assembly's website for an additional record. IDOC asserted that it did not possess additional records responsive to other aspects of Ms. Eldeib's request. Ms. Eldeib filed a Request for Review of this response on February 2, 2018, alleging that IDOC's response was incomplete. The Public Access Bureau declined to review Ms. Eldeib's Request for Review because it was filed more than 60 days after IDOC's denial of her FOIA request.

3) On March 6, 2018, Ms. Eldeib submitted a FOIA request to IDOC seeking copies of the same records that she had sought in an earlier FOIA request that she submitted to IDOC on November 7, 2017.

4) On March 12, 2018, IDOC denied the request as an unduly burdensome repeated request pursuant to section 3(g) of FOIA.

5) On March 15, 2018, Ms. Eldeib submitted a Request for Review contesting IDOC's March 12, 2018, denial. The Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA.

6) On March 19, 2018, the Public Access Bureau sent a copy of the Request for Review to IDOC and asked it to provide this office with a detailed explanation of its assertion that it properly responded to Ms. Eldeib's previous request for the same records. This office also asked IDOC to provide a detailed description of how it searched for responsive records, addressing with specificity the records that Ms. Eldeib alleged to be missing from its response.

7) In a letter dated March 26, 2018, and submitted to this office on March 27, 2018, IDOC responded that its November 27, 2017, response was no longer at issue, asserting that Ms. Eldeib's failure to file a Request for Review within the statutory time limits confirmed that the response was proper.

8) On March 27, 2018, the Public Access Bureau forwarded a copy of IDOC's written answer to Ms. Eldeib. She did not submit a reply.

9) On May 11, 2018, this office extended the time within which to issue a binding opinion by 30 business days, to June 26, 2018, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

Ms. Duaa Eldeib
Mr. Joel M. Diers
June 26, 2018
Page 8

10) Section 3(g) of FOIA provides, in pertinent part: "Repeated requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied under this Act shall be deemed unduly burdensome under this provision."

11) Under the plain language of section 3(g), when a requester contests the denial of a request as an unduly burdensome repeated request, it is necessary to determine whether the public body previously provided the requester with all of the nonexempt responsive records pursuant to FOIA or properly denied a prior request from the same requester for the same records pursuant to FOIA.

12) The plain language of FOIA does not restrict the Public Access Counselor's authority to review a public body's denial of a FOIA request as an unduly burdensome repeated request where the requester did not submit a Request for Review of the denial of his or her previous request for the same records.

13) IDOC did not provide support for its assertion that a requester's failure to file a Request for Review within the 60-day time period provided in section 9.5(a) of FOIA "effectively confirms [the public body's] original response as proper." On the contrary, a response is proper only if it complies with the requirements of FOIA.

14) IDOC did not demonstrate that it either provided Ms. Eldeib with all of the nonexempt records responsive to her November 7, 2017, FOIA request, or properly denied any of the responsive records.

Therefore, it is the opinion of the Attorney General that IDOC failed to demonstrate that it properly denied Ms. Duaa Eldeib's March 6, 2018, Freedom of Information Act request as an unduly burdensome repeated request. Accordingly, IDOC is directed to take immediate and appropriate action to comply with this opinion by performing a thorough search for the records Ms. Eldeib alleges to be missing from its response and issuing a supplemental response to Ms. Eldeib. If IDOC locates additional responsive records, it shall provide copies to Ms. Eldeib, subject only to permissible redactions under section 7 of FOIA (5 ILCS 140/7 (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017). IDOC shall also issue a notice of partial denial in accordance with section 9 of FOIA (5 ILCS 140/9 (West 2016)) if it redacts or withholds any responsive records. If IDOC maintains that it does not possess additional records responsive to portions of the request, IDOC shall provide Ms. Eldeib with a detailed written explanation of how it searched for those requested records.

Ms. Duaa Eldeib
Mr. Joel M. Diers
June 26, 2018
Page 9

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 2016). 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 Duaa Eldeib as defendants. *See* 5 ILCS 140/11.5 (West 2016).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:



Michael J. Luke
Counsel to the Attorney General

CERTIFICATE OF SERVICE

Sarah L. Pratt, Public Access Counselor, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 18-007) upon:

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by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Springfield, Illinois on June 26, 2018.


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