



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

May 26, 2023

PUBLIC ACCESS OPINION 23-008
(Request for Review 2023 PAC 76033)

FREEDOM OF INFORMATION ACT:
Improper Treatment of FOIA Request as
Request for Commercial Purpose and
Improper Assessment of Fee

Mr. Ihab Mikati
Environmental Justice Attorney
Natural Resources Defense Council, Inc.
Environment, Equity & Justice Center
20 North Wacker Drive, Suite 1600
Chicago, Illinois 60606

Mr. Alex Starnes
Assistant State's Attorney
St. Clair County State's Attorney's Office
10 Public Square
Belleville, Illinois 62220

Dear Mr. Mikati and Mr. Starnes:

This binding opinion is 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 2020)). For the reasons discussed below, this office concludes that St. Clair County (County) violated FOIA by improperly treating a FOIA request submitted by the Natural Resources Defense Council, Inc., (Council) as a commercial request.

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BACKGROUND

On February 15, 2023, Mr. Ihab Mikati, on behalf of the Council, submitted a FOIA request to the County seeking records regarding flood-related home buyout programs.¹ Mr. Mikati requested a fee waiver pursuant to section 6(c) of FOIA (5 ILCS 140/6(c) (West 2020)). In support of the fee waiver request, he stated that the purpose of the FOIA request was in the public interest, that the request was not for personal or commercial benefit, and that the Council is a non-profit organization.² More specifically, Mr. Mikati stated that "[t]his request is being made by [the Council's] Environment, Equity & Justice Center in order to procure information that will assist vulnerable communities in decision-making concerning their participation in the FHM [Flood Hazard Mitigation] program and analogous programs."³ On February 22, 2023, the County informed Mr. Mikati that the responsive records consist of approximately 650 pages of e-mails and applications subject to redaction.⁴ The County estimated \$90 in copying fees at a rate of 15 cents per page after the first 50 pages, and \$130 for reviewing the records at a rate of \$10 per hour, for a total fee of \$220.⁵ On that same date, Mr. Mikati asked the County to clarify whether it had determined that his request was ineligible for a fee waiver and reiterated that the request was in the public interest.⁶ On March 6, 2023, Mr. Mikati informed the County that he would pay the \$220 fee **"under protest in order to avoid any further delay."**⁷ (Emphasis in original.)

¹Letter from Ihab Mikati, Environmental Justice Attorney, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center to Benjamin Henning, St. Clair County FOIA Officer, and Bryan Whitaker, St. Clair County Emergency Management Agency (February 15, 2023), at 1-3.

²Letter from Ihab Mikati, Environmental Justice Attorney, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center to Benjamin Henning, St. Clair County FOIA Officer (February 15, 2023), at 3-4.

³Letter from Ihab Mikati, Environmental Justice Attorney, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center to Benjamin Henning, St. Clair County FOIA Officer (February 15, 2023), at 3.

⁴E-mail from Alex Starnes, Assistant States Attorney, St. Clair State's Attorney's Office to Meleah Geertsma, [Director, Environmental Justice Policy, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center] (February 22, 2023).

⁵E-mail from Alex Starnes, Assistant States Attorney, St. Clair State's Attorney's Office to Meleah Geertsma, [Director, Environmental Justice Policy, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center] (February 22, 2023).

⁶E-mail from Ihab Mikati, Esq., Environmental Justice Attorney, Natural Resources Defense Council, Environment, Equity & Justice Center to [Alex] Starnes (February 22, 2023).

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On March 28, 2023, Mr. Mikati submitted a Request for Review to the Public Access Counselor stating that on March 13, 2023, he received a voicemail from an Assistant State's Attorney which indicated that more than 3,000 pages of responsive records had been printed and that the estimated fee was \$1,000—\$400 for copies at a rate of 15 cents per page and \$600 for 60 hours of reviewing the records at a rate of \$10 per hour.⁸ On March 15, 2023, Mr. Mikati responded to the Assistant State's Attorney via e-mail by declining to pay the fee and requesting an opportunity to discuss the matter.⁹ Mr. Mikati stated that he did not receive a reply.¹⁰ Among other things, his Request for Review asserted that the FOIA request does not have a commercial purpose and that the County's "fees include hundreds of dollars for search and review costs which are authorized only for commercial purpose requests."¹¹

On April 3, 2023, the Public Access Bureau sent a copy of the Request for Review to the County along with a letter asking it to provide a written response (1) specifying the amount of the fee assessed to Mr. Mikati; (2) explaining the County's legal and factual bases for assessing that fee, and (3) clarifying the extent to which any records responsive to Mr. Mikati's request are maintained in electronic format.¹² On April 6, 2023, the County provided a response to the Public Access Bureau.¹³ On April 7, 2023, this office forwarded a copy of the

⁷E-mail from Ihab Mikati, Environmental Justice Attorney, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center to [Alex] Starnes, [St. Clair County FOIA Officer] (March 6, 2023).

⁸Letter from Ihab Mikati, Environmental Justice Attorney, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center to Leah Bartelt, Public Access Counselor, Office of the Attorney General (March 28, 2023), at 4.

⁹E-mail from Ihab Mikati, Esq., Environmental Justice Attorney, Natural Resources Defense Council, Environment, Equity & Justice Center, to [Alex] Starnes (March 15, 2023).

¹⁰Letter from Ihab Mikati, Environmental Justice Attorney, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center to Leah Bartelt, Public Access Counselor, Office of the Attorney General (March 28, 2023), at 4.

¹¹Letter from Ihab Mikati, Environmental Justice Attorney, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center to Leah Bartelt, Public Access Counselor, Office of the Attorney General (March 28, 2023), at 2.

¹²Letter from Benjamin J. Silver, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Alex Starnes, Assistant State's Attorney, St. Clair County State's Attorney's Office (April 3, 2023), at 1.

¹³Letter from Alex Starnes, Assistant State's Attorney/FOIA Officer, St. Clair County State's Attorney's Office, to Benjamin J. Silver, [Assistant Attorney General], Public Access Counselor, Office of the Attorney General, and Ihab Mikati Esquire, Natural Resource Defense Council, Inc., Environment, Equity & Justice Center (April 6, 2023).

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County's response to Mr. Mikati and notified him of his opportunity to reply.¹⁴ On April 12, 2023, Mr. Mikati submitted a reply.¹⁵

ANALYSIS

The County's response to this office¹⁶ stated that it assessed Mr. Mikati fees of \$400 pursuant to section 6(b) of FOIA¹⁷ and \$600 pursuant to section 6(f) of FOIA.¹⁸ Section 6(b) of FOIA provides, in pertinent part:

No fees shall be charged for the first 50 pages of black and white, letter or legal sized copies requested by a requester. The fee for black and white, letter or legal sized copies shall not exceed 15 cents per page. * * * **a public body shall not include the costs of any search for and review of the records or other personnel costs associated with reproducing the records, except for commercial requests as provided in subsection (f) of this Section.** " (Emphasis added.)

Section 6(f) of FOIA authorizes a public body to charge a requester with a commercial purpose "up to \$10 for each hour spent by personnel in searching for and retrieving a requested record or examining the record for necessary redactions. No fees shall be charged for the first 8 hours spent by personnel in searching for or retrieving a requested record." Based on its plain language, however, this provision applies "only to commercial requests." 5 ILCS 140/6(f) (West 2020).

¹⁴Letter from Benjamin J. Silver, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Ihab Mikati, Environmental Justice Attorney, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center (April 7, 2023).

¹⁵Letter from Ihab Mikati, Environmental Justice Attorney, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center, to Benjamin J. Silver, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (April 12, 2023).

¹⁶Letter from Alex Starnes, Assistant State's Attorney/FOIA Officer, St. Clair County State's Attorney's Office, to Benjamin J. Silver, [Assistant Attorney General], Public Access Counselor, Office of the Attorney General, and Ihab Mikati Esquire, Natural Resource Defense Council, Inc., Environment, Equity & Justice Center (April 6, 2023), at 1.

¹⁷5 ILCS 140/6(b) (West 2020).

¹⁸5 ILCS 140/6(f) (West 2020).

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Because the County cited section 6(f) of FOIA as its basis for charging Mr. Mikati \$600 to review responsive records, it is apparent that the County treated his request as a request with a commercial purpose. Section 9.5(b) of FOIA provides that "[a] person whose request to inspect or copy a public record was treated by the public body as a request for a commercial purpose under Section 3.1 of this Act may file a request for review with the Public Access Counselor for the limited purpose of reviewing whether the public body properly determined that the request was made for a commercial purpose."

Section 2(c-10) of FOIA (5 ILCS 140/2(c-10) (West 2020)) defines "commercial purpose" as:

the use of any part of a public record or records, or information derived from public records, in any form for sale, resale, or solicitation or advertisement for sales or services. For purposes of this definition, requests made by news media and non-profit, scientific, or academic organizations shall not be considered to be made for a "commercial purpose" when the principal purpose of the request is (i) to access and disseminate information concerning news and current or passing events, (ii) for articles of opinion or features of interest to the public, or (iii) for the purpose of academic, scientific, or public research or education.

In its response to the Public Access Bureau, the County asserted that "the documents must be reviewed by our office for all appropriate redactions[]" and that section 6(f) of FOIA "states that a public body may charge for labor costs for commercial requests of up to \$10 per hour (after the first 8 hours)[.]"¹⁹ Despite this office's request for a detailed explanation of the factual and legal bases for its fee, the County did not explain why it believes Mr. Mikati's request has a commercial purpose or otherwise address how fees for commercial requests set

¹⁹Letter from Alex Starnes, Assistant State's Attorney/FOIA Officer, St. Clair County State's Attorney's Office, to Benjamin J. Silver, [Assistant Attorney General], Public Access Counselor, Office of the Attorney General, and Ihab Mikati Esquire, Natural Resource Defense Council, Inc., Environment, Equity & Justice Center (April 6, 2023), at 1.

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forth in section 6(f) of FOIA are applicable to Mr. Mikati's request.²⁰ In his reply, Mr. Mikati denied that the Council is seeking the records for sale, re-sale, or solicitation or advertisement for sales or services.²¹ He emphasized that the Council is "a nonprofit organization[]" and that his FOIA request "(1) stated the specific purpose of the request ('to procure information that will assist vulnerable communities in decision-making' regarding a program designed to relocate them from their homes), and (2) indicated how 'a fee waiver would be in the public interest because furnishing the requested documents primarily benefits the general public.'"²² The reply also provided an internet link to a Council report on flood-related home buyout programs which recommends changes in the current system and advocates new approaches.²³

The materials provided to this office provide no support for the County's determination that Mr. Makati submitted a request for a commercial purpose that is subject to the fee provisions of section 6(f) of FOIA. The Council is registered as a not-for-profit corporation with the Office of the Illinois Secretary of State.²⁴ Mr. Mikati's description of the expected use of the records appears to indicate that they are being sought "for the purpose of academic, scientific, or public research or education." 5 ILCS 140/2(c-10)(iii) (West 2020). The plain language of section 2(c-10) provides that a request with such a "principal purpose" made by a non-profit organization "shall not be considered to be made for a 'commercial purpose[.]'" Even if the exclusion in section 2(c-10)(iii) did not apply to the Council's request, there is no indication that the Council intends to use the records "for sale, resale, or solicitation or

²⁰Instead, the County asserted to this office that the FOIA request does not qualify for a fee waiver and that the County "is under no statutory duty to waive fees based upon the Requestor's objection to said fee." Letter from Alex Starnes, Assistant State's Attorney/FOIA Officer, St. Clair County State's Attorney's Office, to Benjamin J. Silver, [Assistant Attorney General], Public Access Counselor, Office of the Attorney General, and Ihab Mikati Esquire, Natural Resource Defense Council, Inc., Environment, Equity & Justice Center (April 6, 2023), at 2. However, the issue presented is not whether the County has an obligation to grant a request for a fee waiver, but whether the County properly treated the request as having a commercial purpose and imposing a fee applicable only to such requests.

²¹Letter from Ihab Mikati, Environmental Justice Attorney, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center to Benjamin J. Silver, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (April 12, 2023), at 1.

²²Letter from Ihab Mikati, Environmental Justice Attorney, Natural Resources Defense Council, Inc., Environment, Equity & Justice Center to Benjamin J. Silver, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (April 12, 2023), at 1-2.

²³Anna Weber and Rob Moore, *Going Under: Long Wait Times for Post-Flood Buyouts Leave Homeowners Underwater*, NATIONAL RESOURCES DEFENSE COUNCIL (September 2019), <https://www.nrdc.org/sites/default/files/going-under-post-flood-buyouts-report.pdf>

²⁴Office of the Illinois Secretary of State, Corporation File Detail Report, Natural Resources Defense Council, Inc. (on file with author).

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advertisement for sales or services." Therefore, this office concludes that the County improperly treated Mr. Mikati's February 15, 2023, as a request made for a commercial purpose.

FINDINGS AND CONCLUSIONS

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

1) On February 15, 2023, Mr. Ihab Mikati, on behalf of the Natural Resources Defense Council, Inc. (Council), submitted a FOIA request to the County seeking records regarding flood-related home buyout programs. The Council is registered as a non-profit corporation with the Office of the Illinois Secretary of State.

2) On February 22, 2023, the County informed the Council that there were approximately 650 pages of responsive records. The County estimated that the fee for those records would be \$220, consisting of \$90 in copying fees at a rate of 15 cents per page and \$130 for reviewing the records at a rate of \$10 per hour.

3) On March 13, 2023, the County provided an updated estimate of more than 3,000 pages of responsive records and a fee consisting of (1) \$400 for copies at a rate of 15 cents per page and (2) \$600 for 60 hours of reviewing the records at a rate of \$10 per hour.

4) On March 28, 2023, Mr. Mikati submitted a Request for Review asserting that the County improperly assessed fees that only are applicable to commercial requests; he denied that his request had a commercial purpose. The 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 2020)). Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

5) On April 3, 2023, the Public Access Bureau sent a copy of the Request for Review to the County and requested a detailed explanation of the County's legal and factual bases for the fee it assessed to Mr. Mikati.

6) On April 6, 2023, this office received the County's written response. The response indicated that the County assessed a copying fee of 15 cents per page pursuant to section 6(b) of FOIA, and additional fees for reviewing records pursuant to section 6(f) of FOIA. The County's response stated that "the documents must be reviewed by our office for all appropriate redactions[]" and that section 6(f) of FOIA provides "a public body may charge for labor costs for commercial requests of up to \$10 per hour (after the first 8 hours)[.]"

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7) On April 7, 2023, the Public Access Bureau forwarded the County's response to Mr. Mikati and notified him of his opportunity to reply. On April 12, 2023, Mr. Mikati replied.

8) Section 9.5(b) of FOIA authorizes the Public Access Counselor to review a public body's determination that a FOIA request was made for a commercial purpose.

9) Section 6(b) of FOIA provides "a public body shall not include the costs of any search for and review of the records or other personnel costs associated with reproducing the records, except for commercial requests as provided in subsection (f) of this Section." Section 6(f) of FOIA provides a public body may charge a requester with a commercial purpose "up to \$10 for each hour spent by personnel in searching for and retrieving a requested record or examining the record for necessary redactions. No fees shall be charged for the first 8 hours spent by personnel in searching for or retrieving a requested record." That provision expressly applies "only to commercial requests." 5 ILCS 140/6(f) (West 2020).

10) Section 2(c-10) of FOIA defines "commercial purpose" as "the use of any part of a public record or records, or information derived from public records, in any form for sale, resale, or solicitation or advertisement for sales or services." Section 2(c-10) also provides that "requests made by news media and non-profit, scientific, or academic organizations shall not be considered to be made for a "commercial purpose" when the principal purpose of the request is * * * (iii) for the purpose of academic, scientific, or public research or education."

11) The information provided to this office is devoid of any facts indicating that Mr. Mikati would use any part of the records responsive to his FOIA request "for sale, resale, or solicitation or advertisement for sales or services." Instead, the available information indicates that the Council, a non-profit organization, sought the records for the purpose of public research and education.

Therefore, it is the opinion of the Attorney General that the County improperly treated Mr. Mikati's February 15, 2023, FOIA request as a request made for a commercial purpose and assessed Mr. Mikati an improper fee for responsive records. Accordingly, the County is hereby directed to take immediate and appropriate action to comply with this opinion by providing Mr. Mikati with copies of the responsive records, subject only to permissible fees for copying under section 6(a) (5 ILCS 140/6(a) (West 2020)) or 6(b) of FOIA.²⁵

²⁵Pursuant to section 6(a) of FOIA, "[w]hen a person requests a copy of a record maintained in an electronic format, the public body shall furnish it in the electronic format specified by the requester, if feasible. * * * [S]tatutory fees applicable to copies of public records when furnished in a paper format shall not be applicable to those records when furnished in an electronic format."

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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 2020). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review with 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. Ihab Mikati of the Natural Resources Defense Council, Inc., as defendants. *See* 5 ILCS 140/11.5 (West 2020).

Very truly yours,

KWAME RAOUL
ATTORNEY GENERAL

By:

A handwritten signature in black ink, appearing to read "Brent D. Stratton", written over a horizontal line.

Brent D. Stratton
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

Steve Silverman, Bureau Chief, Public Access Bureau, hereby certifies that he has served a copy of the foregoing Binding Opinion (Public Access Opinion 23-008) 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 Chicago, Illinois on May 26, 2023.



Steve Silverman
Bureau Chief

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