



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 3, 2013

PUBLIC ACCESS OPINION 13-018
(Request for Review 2013 PAC 25736)

FREEDOM OF INFORMATION ACT:
Public Records in the Possession of a
Contractor Performing a Governmental
Function for a Public Body Are Public
Records of the Public Body; A Public Body
May Not Charge a Requester Fees for the
Contractor to Locate and Retrieve Such Public
Records in a Non-Commercial Request

Mr. Clint Lorton
Midwest Region Foundation for Fair Contracting, Inc.
One North Old State Capitol Plaza, Suite 525
Springfield, Illinois 62701

Ms. Marlene Wilhoit, Clerk
City of Martinsville
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Martinsville, Illinois 62442

Dear Mr. Lorton and Ms. Wilhoit:

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 2012)). For the reasons discussed below, we conclude that the City of Martinsville (City) improperly denied, in part, Mr. Clint Lorton's FOIA request by demanding the payment of unauthorized fees for locating and reviewing responsive records that are in the possession of a contractor who performed a public function for the City.

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BACKGROUND

On August 2, 2013, Mr. Lorton, on behalf of the Midwest Region Foundation for Fair Contracting, Inc., (MRFFC) submitted a FOIA request to the City seeking records concerning a sidewalk/curb improvement project.¹ The request was submitted on a standard FOIA request form used by MRFFC to request records from Illinois public bodies. The form lists twenty categories of records which MRFFC might request from a public body, but in this instance, MRFFC only marked the check boxes of the following twelve types of records to indicate that they were being requested from the City:

5. Copies of the invitation to bid (dated newspaper advertisements);
6. Copies of bid tabulations submitted by all contractors;
7. Copy of the description of funding or funding agreement used to finance the project;

* * *

10. Copy of the signed contract documents including copies of the contractor's Performance Bond and Certificates of Insurance;
11. List of any subcontractors and copies of subcontractor's bonds and proofs of insurance;
12. Copies of certified weekly payroll reports to date;

* * *

15. Copies of any/all daily Engineer work logs;
16. Copies of any/all daily Engineer Records;
17. Copies of any/all correspondence (electronic or otherwise) with the engineering firm or any employee of the firm regarding this project;
18. Copies of any/all correspondence (electronic or otherwise) with any/all contractors or employees of any/all contractors regarding this project;
19. Copies of any/all material suppliers on this project along with material invoices for this project;

¹Letter from Clint Lorton, Field Supervisor, Midwest Region Foundation for Fair Contracting, Inc., to Martinsville FOIA Officer (August 2, 2013).

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20. Copies of any/all change orders issued.^[2]

On August 13, 2013, the City responded by providing Mr. Lorton with records responsive to items 7, 10, 17, and 20 of his request, but further stated:

The City does not have the requested documentation as contained in Nos. 5, 6, 11, 12, 15, 16, 18 and 19. That documentation is in the possession of its engineer [Francis Associates, Consulting Engineers, Land Surveyors]. The engineering firm has estimated that it would cost the City \$1,136.00 for it to obtain the documentation and furnish it. Enclosed is a copy of the statement from the City's engineer.

Upon payment of the enclosed invoice, the City will order its engineer to search for and obtain the requested documentation. If the actual cost is less than the estimated amount, the balance will be refunded to you. If the actual cost is in excess of the estimated amount, the difference will be requested at the time the documentation is delivered to you.^[3]

The invoice assessed a fee of \$960.00 for twelve hours of work by a Project Engineer at \$80.00 per hour and \$176.00 for four hours of work by Office/Clerical staff at \$44.00 per hour.⁴

On August 20, 2013, Mr. Lorton submitted a Request for Review to the Public Access Bureau seeking review of the City's response to his FOIA request.⁵ On August 28, 2013, the Public Access Bureau forwarded a copy of the Request for Review to the City and asked the City to:

clarify whether the City contracts with an engineering firm to perform public work projects on behalf of the City. If so, please

²Letter from Clint Lorton, Field Supervisor, Midwest Region Foundation for Fair Contracting, Inc., to Martinsville FOIA Officer (August 2, 2013).

³Letter from Marlene Wilhoit, FOIA Officer, City of Martinsville, to Clint Lorton, Field Supervisor, Midwest Region Foundation for Fair Contracting, Inc. (August 13, 2013).

⁴Invoice submitted by Francis Associates, Consulting Engineers, Land Surveyors, to City of Martinsville, IL (August 12, 2013).

⁵E-mail from Clint Lorton to Public Access Bureau (August 20, 2013).

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explain the City's position as to whether records regarding City public works projects in the custody of the engineering firm are subject to disclosure by the City pursuant to section 7(2) of FOIA (5 ILCS 140/7(2) (West 2012)), which provides:

[a] public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act.

Additionally, please explain how the engineering firm maintains the records and the basis for the \$1,136.00 invoice for providing copies of the records. Please identify the specific estimated costs reflected in that invoice, and clarify whether the City is attempting to charge Mr. Lorton for the labor involved in retrieving the records he requested.^[6]

Richard J. Bernardoni submitted a response on behalf of the City, which this office received on September 17, 2013.⁷ The response noted that on August 5, 2013, the City had obtained and furnished to Mr. Lorton the records responsive to items 7, 10, 17, and 20 of his request. The letter further stated that the City later obtained and furnished Mr. Lorton with the payroll reports responsive to item 12 of his request; therefore, only the production of items 5, 6, 11, 15, 16, 18, and 19 remained at issue. The response stated that the City had "obtained an estimate [from its engineer] for the cost to locate and copy" responsive records and had passed that estimate along to Mr. Lorton, but that "Mr. Lorton [had] elected not to pay for the cost of obtaining the documents[.]"⁸

⁶Letter from Josh Jones, Assistant Attorney General, Public Access Bureau, to Marlene Wilhoit, Clerk, City of Martinsville (August 28, 2013).

⁷ Letter from Richard J. Bernardoni, Meehling & Bernardoni, to Josh Jones, Assistant Attorney General, Public Access Bureau (September 12, 2013).

⁸Letter from Richard J. Bernardoni, Meehling & Bernardoni, to Josh Jones, Assistant Attorney General, Public Access Bureau (September 12, 2013).

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Addressing its association with the engineering firm that conducted the sidewalk/curb project, Mr. Bernardoni stated that "Francis Associates[] is a private non-governmental firm that does not fall under the definition of a public body as defined in" FOIA. *See* 5 ILCS 140/2(a) (West 2012). He asserted that the fee provisions of FOIA exclude only the search and personnel costs incurred by public bodies, not by non-governmental entities, noting: "The legislature had no intention for public bodies to be required to pay fees to third parties to reproduce records without being reimbursed."⁹ Accounting for the fee in the invoice provided by the City's engineer, the response simply stated: "[t]he vast majority of the estimate (\$1,136.00) is for labor for locating and assembling the requested documentation."¹⁰ Neither the invoice itself nor the City's response specifically indicates whether any portion of the total estimated cost of \$1,136.00 represents fees charged for copying costs. The response also did not address the applicability of section 7(2) of FOIA.

On September 19, 2013, the Public Access Bureau forwarded a copy of the City's response to Mr. Lorton and notified him of his opportunity to reply under section 9.5(d) of FOIA (5 ILCS 140/9.5(d) (West 2012)).¹¹ On September 24, 2013, Mr. Lorton replied:

It is my expressed opinion that the fees for copying items 11, 15, 16, and 19 are in excess of the amount set by the Attorney General's Office. * * *

The City of Martinsville paid for all the Material, Engineering, and Labor on the project. In my expressed opinion that would make all receipts, invoices, tickets, and engineers logs public body documents. If a Private Company was performing a private project with private monies I can understand that the documents in question would not be covered by FOIA.^{12]}

⁹Letter from Richard J. Bernardoni, Meehling & Bernardoni, to Josh Jones, Assistant Attorney General, Public Access Bureau (September 12, 2013).

¹⁰Letter from Richard J. Bernardoni, Meehling & Bernardoni, to Josh Jones, Assistant Attorney General, Public Access Bureau (September 12, 2013).

¹¹Letter from Josh Jones, Assistant Attorney General, Public Access Bureau, to Mr. Clint Lorton, Midwest Region for Fair Contracting, Inc. (September 19, 2013).

¹²E-mail from Clint Lorton, Field Supervisor, MRFFC, to Mr. Josh Jones, Assistant Attorney General, Public Access Bureau (September 24, 2013).

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This office subsequently obtained a copy of the professional services agreement entered into by the City and Francis Associates relating to the sidewalk/curb improvement project.¹³ Pursuant to the agreement, Francis Associates agreed to provide to the City design engineering services (including the "preparation of plans, specifications, and bidding documents") and construction engineering services (including "construction staking, construction testing services (as required), on-site observation of construction activities, and contract administration as requested by the [City]") related to the sidewalk/curb project in exchange for the payment of specified fees. The agreement expressly provided that "[a]ll documents produced by Francis Associates under this agreement shall become the property of the [City]" and that the agreement would be governed by Illinois law.

On October 18, 2013, this office properly extended the time to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.¹⁴

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 of FOIA (5 ILCS 140/3 (West 2012)) provides, in pertinent part:

(a) Each 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. * * *

(b) Subject to the fee provisions of Section 6 of this Act, each public body shall promptly provide, to any person who submits a request, a copy of any public record required to be disclosed by subsection (a) of this Section and shall certify such copy if so requested.

¹³Agreement between City of Martinsville and Francis Associates, Project No. 4708, dated January 23, 2012, and executed February 8, 2012.

¹⁴Letter from Josh Jones, Assistant Attorney General, Public Access Bureau, to Mr. Clint Lorton, Midwest Region for Fair Contracting, Inc., and Ms. Marlene Wilhoit, Clerk, City of Martinsville (October 18, 2013).

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Public Records

The City asserts that the fee provisions of FOIA prohibit only the assessment of personnel costs incurred by public bodies, not private companies, to locate and reproduce records, and that "Francis Associates is a private company that is not subject to the provisions of the FOIA."¹⁵ However, section 7(2) of FOIA provides:

[a] public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act.

In this instance, the City contracted with Francis Associates to provide design and engineering services for a public sidewalk/curb improvement project. Under section 11-61-2 of the Illinois Municipal Code (65 ILCS 5/11-61-2 (West 2012)), "[t]he corporate authorities of each municipality may vacate, lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds." The design and oversight of the sidewalk/curb improvement project was clearly a "governmental function" of the City. Accordingly, pursuant to section 7(2) of FOIA, records in the possession of Francis Associates that directly relate to the project are public records of the City subject to the provisions of FOIA, despite the fact that the firm, and not the City, has physical custody of the records. Moreover, the contract itself expressly provides that "[a]ll documents produced by Francis Associates under this agreement shall become property of the [City]."¹⁶

Authority to Charge Fees

The City's authority to charge fees for the production of public records is limited by section 6(b) of FOIA (5 ILCS 140/6(b) (West 2012)), which provides:

Except when a fee is otherwise fixed by statute, *each public body may charge fees reasonably calculated to reimburse its actual cost for reproducing and certifying public records and*

¹⁵Letter from Richard J. Bernardoni, Meehling & Bernardoni to Mr. Josh Jones, Assistant Attorney General, Public Access Bureau (September 12, 2013).

¹⁶Agreement between City of Martinsville and Francis Associates, Project No. 4708, dated January 23, 2012, and executed February 8, 2012.

for the use, by any person, of the equipment of the public body to copy records. 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. If a public body provides copies in color or in a size other than letter or legal, the public body may not charge more than its actual cost for reproducing the records. ***In calculating its actual cost for reproducing records or for the use of the equipment of the public body to reproduce records, 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. Such fees shall be imposed according to a standard scale of fees, established and made public by the body imposing them. The cost for certifying a record shall not exceed \$1. (Emphasis added.)

Section 6(a) of FOIA (5 ILCS 140/6(a) (West 2012)) also addresses the assessment of fees and provides, in pertinent part:

A public body may not charge the requester for 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.)

Thus, under the plain language of sections 6(a) and 6(b), a public body may not charge a non-commercial requester for the costs of searching for public records, for reviewing public records, or for any other personnel expenses associated with reproducing public records. The imposition of a fee that is not consistent with subsections (6)(a) and 6(b) of FOIA constitutes a denial of the request. 5 ILCS 140/6(d) (West 2012).

The City argues that section 6(b) provides that a public body may charge the "actual costs" of a search by someone other than the public body itself. Section 6(b) permits a public body to "charge fees reasonably calculated to reimburse its ***actual cost*** for reproducing and certifying public records," but provides that the fees assessed by the public body "shall not exceed" 15 cents per page for black and white copies, nor "more than its actual cost" for color or abnormally-sized copies. Taken in context with section 6(a), it is clear that the use of the term "actual cost" is intended to allow a public body to recoup expenses it incurs in copying and/or

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certifying public records, but not to permit a public body to charge a non-commercial requester for search, review, or other personnel costs.

Notwithstanding the plain language of section 6, however, the City contends that "[t]he legislature had no intention for public bodies to be required to pay fees to third parties to reproduce records without being reimbursed."¹⁷ In section 1 of FOIA (5 ILCS 140/1 (West 2012)), however, the General Assembly acknowledges that the Act may create expenses for public bodies, but found that the expenses of compliance are justified by the importance of providing public access to the records of government:

The General Assembly recognizes that this Act imposes fiscal obligations on public bodies to provide adequate staff and equipment to comply with its requirements. The General Assembly declares that providing records in compliance with the requirements of this Act is a primary duty of public bodies to the people of this State, and this Act should be construed to this end, fiscal obligations notwithstanding.

The records requested by Mr. Lorton are public records of the City, and it is the obligation of the City to produce those records pursuant to a FOIA request. Although the records are currently in the possession of a third party with which the City contracted to perform certain services, FOIA does not permit the City to charge Mr. Lorton for any labor costs incurred by the City in obtaining copies of those records from the contractor. By conditioning the production of the requested records upon his payment of such costs, the City improperly denied Mr. Lorton's August 2, 2013, FOIA request and violated section 6 of FOIA.

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 August 2, 2013, Mr. Clint Lorton, on behalf of the Midwest Region Foundation for Fair Contracting, Inc., submitted a FOIA request to the City of Martinsville seeking records concerning a sidewalk/curb improvement project within the City.
- 2) On August 13, 2013, the City provided Mr. Lorton with records responsive to items 7, 10, 17, and 20 of his request, but stated that it did not possess records responsive to

¹⁷Letter from Richard J. Bernardoni, Meehling & Bernardoni to Mr. Josh Jones, Assistant Attorney General, Public Access Bureau (September 12, 2013).

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items 5, 6, 11, 12, 15, 16, 18, and 19 because those records were in the possession of the City's engineering firm. The City produced an invoice from the engineering firm estimating that it would charge the City \$1,136.00 to locate and furnish the requested records. The City notified Mr. Lorton that it would obtain and furnish the records upon Mr. Lorton's payment of the estimated costs.

3) On August 20, 2013, Mr. Lorton submitted a Request for Review of the City's denial of his FOIA request. Mr. Lorton'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)).

4) On August 28, 2013, this office forwarded a copy of Mr. Lorton's Request for Review to the City and asked it to provide information regarding whether it had contracted with an engineering firm to perform the sidewalk/curb project for the City, whether records in the possession of the engineering firm would be considered records of the City and subject to disclosure, how the engineering firm maintained the records in question, and the basis for the fees set out in the invoice, including whether the City and the engineering firm were seeking to charge for the labor involved in retrieving the records.

5) On September 12, 2013, an attorney for the City responded that the City had provided Mr. Lorton with the records responsive to part 12 of his FOIA request. The City stated that it had obtained an estimate of the cost for its engineer to locate and copy the remaining items and had passed that estimate along to Mr. Lorton. The City asserted that the vast majority of the \$1,136.00 estimate was for labor for locating and assembling the requested documents. The City further asserted that under section 6(b) of FOIA, a public body may charge a requester the "actual costs" of a search for records conducted by someone other than the public body itself.

6) On October 18, 2013, the Public Access Counselor extended the time to issue a binding opinion by 30 business days to December 3, 2013. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) Records in the possession of the engineering firm hired by the City to plan and oversee the sidewalk/curb improvement project relate directly to the performance of a governmental function by the contractor, and are therefore public records of the City under section 7(2) of FOIA. The City is obligated to produce the records to Mr. Lorton. Section 6 of FOIA does not permit the City to require a non-commercial requester such as Mr. Lorton to pay the costs of any search for or review of records, or other personnel costs required to produce the public records pursuant to his request.


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Therefore, it is the opinion of the Attorney General that the City improperly denied Mr. Lorton's FOIA request by requiring payment of a government contractor's estimated costs for locating public records and reproducing the City's records as a condition of obtaining copies thereof. The City is hereby directed to take immediate and appropriate action to comply with this opinion by providing Mr. Lorton with copies of the records responsive to items 5, 6, 11, 15, 16, 18, and 19 of his FOIA request.

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 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. Clint Lorton as defendants. *See* 5 ILCS 140/11.5 (West 2012).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
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