OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
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July 26, 2016

Via electronic mail
Mr. Benjamin L. Schuster
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Via electronic mail
Mr. Kevin Kearney
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RE: FOIA Request for Review – 2015 PAC 39089

Dear Mr. Schuster and Mr. Kearney:

This determination letter is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons that follow, the Public Access Bureau concludes that the response by the Village of Lemont (Village) to Mr. Benjamin Schuster's re-submitted FOIA request did not improperly withhold records pursuant to section 3(g) of FOIA (5 ILCS 140/3(g) (West 2014)). This office further concludes, however, that the Village violated section 8.5(b) of FOIA (5 ILCS 140/8.5(b) (West 2014)) by refusing to provide copies of records that are not reasonably accessible online.

On November 12, 2015, Mr. Steven Elrod, an attorney acting on behalf of the Village of Palos Park (Palos Park), submitted a FOIA request to the Village seeking "all 'documents,'" which he defined for purposes of the request as ten categories of records, concerning fourteen specific properties. On November 19, 2015, the Village provided a link to the Village's website where it said that responsive records could be accessed, but asserted, pursuant to section 3(g) of FOIA, that the remainder of the request was unduly burdensome. The

Village's response offered Mr. Elrod an opportunity to narrow his request to manageable proportions. On November 20, 2015, Mr. Benjamin Schuster, another attorney acting on behalf of the Village of Palos Park, replied that he could not reasonably access the responsive records on the website and re-submitted the FOIA request for those records as required by section 8.5(b) of FOIA. On November 25, 2015, Mr. Jeffrey M. Stein, Village Attorney, responded: (1) Mr. Schuster acknowledged in a telephone conversation that he was able to access all records on the website and, therefore, the Village did not need to do more to make the responsive records on its website accessible even though Mr. Schuster indicated that he was unable to use the website's search function; (2) Mr. Schuster had verbally narrowed part 9 of the request and the Village would provide the responsive records within 5 business days; and (3) four parts of the request, which Mr. Schuster declined to narrow, were denied in their entireties as unduly burdensome. On December 14, 2015, Mr. Schuster submitted this Request for Review alleging: (1) the Village violated section 8.5 of FOIA by refusing to provide copies of records that are not reasonably accessible online; and (2) the remainder of the request is not unduly burdensome because the public interest in disclosure outweighs the Village's burden of compliance and because he offered to grant the Village more time to produce certain records if it would provide others that would establish the relevant timeframes.

This office forwarded a copy of the Request for Review to the Village and requested a written response explaining why compliance with the request would be unduly burdensome. This office also requested that the Village provide a detailed explanation for the Village's assertions that the records on the Village's website are reasonably accessible and that it did not need to take further steps to make them accessible to Mr. Schuster.

In its response dated February 10, 2016, the Village explained that it granted "6 of the 11 requests by directing Palos Park to the Village's online document database. The Village denied the remaining requests pursuant to section 3(g) of FOIA because they sought records relevant to 14 separate issues spanning a 20-year time period."[1] The Village further stated that during a telephone conference with Palos Parks' attorney on November 25, 2015, Mr. Schuster, "admitted that he was able to access the records, but complained the online database was not searchable[,]" and refused to "narrow the remainder of Palos Park's request by date or general time periods[.]"[2]

The Village asserted that its "online database is fully accessible and straightforward to use," and explained how its website is organized:

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[1]Letter from Kevin Kearney, Tressler LLP, to S. Piya Mukherjee, [Assistant Attorney General], Office of the Attorney General (February 10, 2016) at 1.

[2]Letter from Kevin Kearney, Tressler LLP, to S. Piya Mukherjee, [Assistant Attorney General], Office of the Attorney General (February 10, 2016) at 1.

> The website contains two subfolders labeled "Ordinance" and "Resolutions". See http://docs.lemont.il.us/weblink/browse.aspx?dbid=0. The "Ordinances" page contains subfolders for the years 1987 through 2016. Each subfolder contains the relevant ordinances passed that year. Likewise, the "Resolutions" page contains subfolders for the years 1981 through 2016, and each subfolder contains the resolutions passed that year. Both the "Ordinances" and "Resolutions" pages also contain indexes.[3]

The Village further stated that, "The Act does not require the Village to make records searchable; rather, it must ensure they can be reasonably accessed," and that it "has no obligation to do anything further" when its online document database is functional, its search function works, and the website contains indexes for ordinances and resolutions.[4]

Additionally, the Village characterized the remainder of Mr. Schuster's request as unduly burdensome because locating responsive records would require "a search of voluminous materials for 14 separate issues spanning 20 years."[5] Referencing an affidavit from the Village Administrator detailing the manner in which the Village organizes and stores the records at issue, the Village asserted:

> Complying with the requests, as stated, would require a substantial undertaking. Email correspondence is stored on a server, which would have to be searched using keywords (which were not provided by Palos Park). (Schafer Aff. at ¶ 5). Physical correspondence is organized into folder by date, and stored in the Village's basement storage facility. (Schafer Aff. at ¶ 7). Without a narrowed date range, Village staff would be required to review every correspondence file for records responsive to Palos Park's requests. [Citation.] In addition, case files are also organized by date, and a search of those materials would be conducted the same way. (Schafer Aff. at ¶ 8). There are approximately 160 boxes,

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[3]Letter from Kevin Kearney, Tressler LLP, to S. Piya Mukherjee, [Assistant Attorney General], Office of the Attorney General (February 10, 2016) at 2.

[4]Letter from Kevin Kearney, Tressler LLP, to S. Piya Mukherjee, [Assistant Attorney General], Office of the Attorney General (February 10, 2016) at 2-3.

[5]Letter from Kevin Kearney, Tressler LLP, to S. Piya Mukherjee, [Assistant Attorney General], Office of the Attorney General (February 10, 2016) at 3.

> each containing roughly 20 folders, which would require review. (Schafer Aff. at ¶ 9). Assuming approximately 30 minutes to review one folder, the Village would expend 1600 hours to review all the files relevant to Palos Park's requests. [Citation.] Demanding that the Village undertake a review of this magnitude, without providing a narrowed date range, is a perfect illustration of an unduly burdensome request.[6]

On February 29, 2016, this office received Mr. Schuster's reply. He stated that the Village referred him to its website for responsive ordinances, resolutions, annexation agreements, and annexation petitions related to several annexations by Lemont. Mr. Schuster alleges:

> We have tried dozens of times to make this website work. As demonstrated with the screenshots we included in our Request for Review, Lemont first had not purchased a sufficient number of licenses for us to access the website. When we were eventually able to get onto the website, the search function did not work. * * *
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> * * *
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> Even if Lemont's website works the way Lemont says that it works, the website does not provide reasonable access. Rather, it apparently provides folders that include 35 years' worth of ordinances and resolutions. We do not know when the relevant annexations took place (except for two annexations for which we were able to obtain records independently) so we do not know which folder to start in or how to narrow our request. To locate the responsive ordinances, we would have to open and review nearly every posted ordinance within the 35-year period in the hopes that we stumble upon the relevant ordinances.[7]

Furthermore, Mr. Schuster asserts that the request for correspondence, e-mails, and similar documents is not unduly burdensome, and that his request could be narrowed if the Village provides the ordinances and resolutions responsive to his request. Mr. Schuster asserts that Palos

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[6]Letter from Kevin Kearney, Tressler LLP, to Piya Mukherjee, [Assistant Attorney General], Office of the Attorney General (February 10, 2016) at 3.

[7]Letter from Benjamin L. Schuster, Holland & Knight, to S. Piya Mukherjee, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (February 26, 2016) at 1-2.

Parks is seeking the records because the Village appears to have illegally annexed territory in Palos Park's planning and subdivision jurisdiction, and that the Village "fails to satisfy its burden of demonstrating that the alleged burden in providing the records outweighs the public interest in their disclosure."[8]

DETERMINATION

Section 3(g) of FOIA

Section 3(g) of FOIA provides, in pertinent part:

> Requests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information.

A request for records concerning a specific topic is not unduly burdensome when there is a compelling public interest in disclosure even if compliance with the request would require several weeks of full-time work by employees of the public body. *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 3d 1, 17 (2010). However, a "request that is overly broad and requires the public body to locate, review, redact and arrange for inspection a vast quantity of material that is largely unnecessary to the [requestor's] purpose constitutes an undue burden." *National Ass'n of Criminal Defense Lawyers*, 399 Ill. App. 3d at 17.

The portions of the request that the Village denied as unduly burdensome sought copies of all "documents" concerning specific properties identified by address and permanent index number. The request defined "documents" as including all petitions to annex, annexation agreements, ordinances, public notices and "***[a]ll correspondence and other public records, including, without limitation***, all letters, e-mails and memoranda, related to the annexation or potential annexation of the Properties by the Village of Lemont."[9] (Emphasis added.) The request further sought all "ordinances, resolutions, or other enactments approved by the Village of Lemont approving any (i) zoning, special use, variation, or similar land use approval, (ii) plat of subdivision, or (iii) public incentive for any of the properties; " all "documents discussing,

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[8]Letter from Benjamin L. Schuster, Holland & Knight, to S. Piya Mukherjee, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (February 26, 2016) at 3.

[9]Letter from Steven M. Elrod, Holland & Knight, LLP, to Mr. George J. Schaefer, Village Administrator/FOIA Officer, Village of Lemont (November 12, 2015), at 2-3.

addressing or showing the contiguity of the Properties to other properties located within the boundaries of the Village of Lemont;" all "agreements related to any of the Properties entered into by the Village of Lemont[;]" all "correspondence regarding the annexation or development of the Properties;" and all "correspondence or agreements with ComEd or any of its subsidiaries related to the properties[.]"[10]

It is clear that compliance with Mr. Schuster's request would impose a significant burden on the Village's operations. The available information indicates that compliance with the request, which covers an indefinite time period, would require the Village to search for paper records contained within 160 boxes and to expend a significant amount of time and effort trying to locate responsive e-mails and attachments. Given the broad definition of "documents" in the request, the Village would be justified in conducting a thorough review of the records to identify portions that may be exempt from disclosure under FOIA.

With respect to the public interest in disclosure of all responsive records, Mr. Schuster states that "it appears Lemont has engaged in a series of illegal annexations of territory within Palos Park's planning and subdivision jurisdiction."[11] There is a compelling public interest in disclosure of records that could demonstrate the illegal annexation of property. However, the disputed portions of the broad, categorical request appear to encompass virtually all or almost all records related to the annexation of the properties in question. The scope of these requests is not limited to records that could potentially shed light on whether the properties were illegally annexed. Under these circumstances, the public interest in disclosure of all the records at issue does not outweigh the heavy burden of compliance with the request. Accordingly, this office concludes that the Village did not improperly deny portions of Mr. Elrod's November 12, 2015, FOIA request as unduly burdensome under section 3(g) of FOIA. This office notes, however, that Mr. Schuster offered to narrow the request after obtaining records from the website that he was unable to access; we encourage the parties to continue working together to ease the burden on the public body yet provide access to these records which are clearly of interest to the public.

Section 8.5(a) and 8.5(b) of FOIA

Section 8.5(a) of FOIA (5 ILCS 140/8.5(a) (West 2014)) provides that "a public

[10]Letter from Steven M. Elrod, Holland & Knight, LLP, to Mr. George J. Schaefer, Village Administrator/FOIA Officer, Village of Lemont (November 12, 2015), at 2-3.

[11]Letter from Benjamin L. Schuster, Holland & Knight, to S. Piya Mukherjee, Assistant Attorney General, Office of the Attorney General (February 26, 2016) at 3.

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.*** (Emphasis added.) Section 8.5(b) of FOIA further provides, in pertinent part:

> ***If the person requesting the public record is unable to reasonably access the records online*** after being directed to the website pursuant to subsection (a) of this Section, the requester may re-submit his or her request for the record stating his or her inability to reasonably access the record online, and the ***public body shall make the requested record available for inspection or copying as provided in Section 3 of this Act.*** (Emphasis added.)

In construing a statute such as FOIA, the primary goal is to ascertain and effectuate the intent of the General Assembly. *See Southern Illinoisan v. Illinois Dep't of Public Health*, 218 Ill. 2d 390 (2006). The best indicator of legislative intent is the language of the statute, which must be given its plain and ordinary meaning. *See, e.g., Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 2012 IL 111286, ¶23, 962 N.E.2d 956, 964 (2012). However, "where the language used leaves uncertainty as to how it should be interpreted in a particular context, the court can consider the purpose behind the law and the evils the law was designed to remedy." *Phoenix Bond & Indemnity Co. v. Pappas*, 194 Ill. 2d 99, 106 (2000). "A fundamental principle of statutory construction is to view all provisions of a statutory enactment as a whole. Accordingly, words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute." *Southern Illinoisan*, 218 Ill. 2d at 415. A statute should not be construed in a way that would defeat its purpose "or yield an absurd or unjust result." *Phoenix Bond & Indemnity Co.*, 194 Ill. 2d at 107.

FOIA does not define the meaning of "reasonably access" in section 8.5(b). Undefined terms should be construed in the broader context of the statute as a whole to effectuate the purposes behind the law. *See Niven v. Siqueira*, 109 Ill. 2d 357, 366 (1985) ("When the terms of a statute are not specifically defined, the words must be given their ordinary and popularly understood meanings [citation], but the words must also be construed with reference to the purposes and objectives of the statute").

Section 1 of FOIA (5 ILCS 140/1 (West 2014)) declares that it is "the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees[.]" The Illinois Supreme Court has found the "purpose of the FOIA is to open governmental records to the light of public scrutiny[,]" and that the Act

should be liberally construed to achieve the General Assembly's intent of providing "the public with easy access to government information[.]" *Southern Illinoisan*, 218 Ill. 2d at 415-16, citing *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 378 (1989). In analyzing whether records are responsive to a request, FOIA should not be interpreted "in a way that would promote a practice of *over*-production, ***whereby requesting parties would be buried with voluminous materials of little or no relevance***." (Emphasis added.) *Electronic Frontier Foundation v. Dep't of Justice*, No. C 10-4892 RS, 2012 WL 5372103, at *2 (N.D. Cal. 2012).

As discussed above, Mr. Schuster re-submitted the FOIA request for the records that the Village asserted were available on its website, stating that he could not reasonably access those records. In his Request for Review, Mr. Schuster asserted that those records are not reasonably accessible because repeated attempts to access the website did not generate records responsive to his request, and that on numerous occasions, attempts to search resulted in error messages. The Village's response to this office stated that its staff and attorneys were able to conduct searches on the website, and that a search of the word "annex" yielded 199 results, with links to the relevant ordinances and resolutions.[12] On July 21, 2016, an Assistant Attorney General (AAG) in the Public Access Bureau conducted the same search and received 200 results, each of which contained links to resolutions, ordinances and other records related to annexations; some of these records include voluminous exhibits. The AAG was unable to discern from the headings of the results whether they were responsive to Mr. Schuster's resubmitted request. A search of a sample of the specific properties by their addresses and index numbers yielded mixed results. Some addresses returned records that appeared to be responsive while no results were returned for other addresses. Searches of index numbers returned hundreds of results, many of which appeared to concern records that were not responsive to the request.

Interpreting section 8.5(b) as authorizing a public body to simply direct a requester to a website where he or she would bear the burden of reviewing a vast quantity of non-responsive records in an attempt to locate the discrete information that was sought would contravene the General Assembly's intent to promote easy access to full and complete information concerning public business. Other than by reviewing voluminous materials that are likely to be irrelevant to his request, there does not appear to be a way for Mr. Schuster to conduct a search of the records of the 200 annexations maintained on the Village's website and to identify those that concern the specific properties for which he is seeking information. At a minimum, "reasonably access[]" would appear to include the ability to accurately identify narrow categories of records by a specific subject matter, which was not the case here. The plain language of the provision does not permit a public body to refuse to provide copies of records

[12]Letter from Kevin Kearney, Tressler LLP, to S. Piya Mukherjee, [Assistant Attorney General], Office of the Attorney General (February 10, 2016) at 2.

when a requester who was unable to reasonably access the records on the public body's website re-submits his or her request stating an inability to do so, as Mr. Schuster did on behalf of Palos Park. Accordingly, this office concludes that the Village violated section 8.5(b) of FOIA by failing to provide copies of pertinent records after Mr. Schuster re-submitted the request and stated that he was unable to reasonably access the records on the Village's website.

In accordance with the conclusions expressed in this determination, this office requests that the Village provide Mr. Schuster with copies of the responsive records that the Village asserted could be reasonably accessed on its website. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (312) 814-5206. This correspondence shall serve to close this matter.

Very truly yours,

[redacted]

S. PIYA MUKHERJEE
Assistant Attorney General
Public Access Bureau

39089 f 3g und burd proper 8.5(b) improper mun

Access, Public

From: Access, Public
Sent: Monday, August 08, 2016 4:05 PM
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Cc: 'kkearney@tresslerllp.com'
Subject: PAC 39089
Attachments: 39089 f 3g und burd proper 8.5(b) improper mun.pdf

Good Afternoon,

Attached, is a letter from AAG Mukherjee.

Thanks,

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