

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS**

KOHL HARRINGTON,)	
)	
Plaintiff,)	
)	
v.)	2020CH000170
)	
ILLINOIS DEPARTMENT OF)	
AGRICULTURE,)	
)	
Defendant.)	

COMPLAINT

NOW COMES Plaintiff, KOHL HARRINGTON, by the undersigned attorneys, LOEVY & LOEVY, and brings this suit to overturn Defendant ILLINOIS DEPARTMENT OF AGRICULTURE's willful violation of the Illinois Freedom of Information Act. ILLINOIS DEPARTMENT OF AGRICULTURE failed to comply with HARRINGTON's request for records sufficient to show all feed definitions adopted and published by the Association of American Feed Control Officials ("AAFCO"), which are incorporated in the Illinois Commercial Feed Act of 1961 (505 ILCS 30/10(b)). In violation of the Freedom of Information Act and the basic democratic principle that there should be no secret laws, ILLINOIS DEPARTMENT OF AGRICULTURE contends that materials that are incorporated by reference into laws and regulations can remain secret when the incorporated materials are subject to federal copyright protection. In support of the Complaint, HARRINGTON states as follows:

INTRODUCTION

1. Pursuant to the fundamental philosophy of the American constitutional form of government, 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 consistent with the terms of the Illinois Freedom of Information Act (“FOIA”). 5 ILCS 140/1.

2. Restraints on access to information, to the extent permitted by FOIA, are limited exceptions to the principle that the people of this state have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of the people. 5 ILCS 140/1.

3. Under FOIA Section 1.2, “[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.

PARTIES

4. Plaintiff KOHL HARRINGTON is a documentary filmmaker and is the FOIA requester in this case.

5. Defendant ILLINOIS DEPARTMENT OF AGRICULTURE (“ILDA”) is a public body and located in Sangamon County, IL.

BACKGROUND

6. The Illinois Commercial Feed Act of 1961 (“the Act”) regulates animal feed, including pet food, and gives ILDA the enforcing authority of the Act. 505 ILCS 30/.

7. Pet food manufacturers and companies must comply to the Act in order to sell their products in IL.

8. A huge part of that compliance involves following the feed ingredients and official feed terms.

9. For instance, “chicken meal” is considered a common ingredient in pet foods. The definition of “chicken meal,” official feed term of “chicken meal,” or what is considered acceptable as “chicken meal,” however, are not readily available to the public.

10. There are ingredient definitions created specifically for rendering companies, fuel industries, and human food industries who can divert their waste or surplus into pet food as approved ingredients. One example is wood shavings or peanut hulls can be defined as “powdered cellulose” for animal feed.

11. The public has no way of knowing the specific makeup of a given ingredient without reading the definitions of each ingredient.

12. The Act does not list or define these ingredients. In fact, the Act simply refers to the “official definitions of feed ingredients and official feed terms as adopted and published by the Association of American Feed Control Officials.” 505 ILCS 30/10(b).

13. ILDA does not make this information readily available to the public even though the information is essential to complying with the Act. Instead, they direct the public to purchase the materials from the AAFCO by citing federal copyright protection.

JULY 6, 2020, FOIA REQUEST

14. On July 6, 2020, HARRINGTON submitted a FOIA request (the “Request”) to ILDA for “all records showing all AAFCO feed definitions, including the name of each ingredients and its definition, adopted under 505 ILCS 30/10 (from Ch. 56 1/2, par. 66.10), which specifically states (b) The official definitions of feed ingredients and official feed terms as adopted and published by the Association of American Feed Control Officials and any amendments or supplements thereto are the official definitions of feed ingredients and official feed terms.” Exhibit A at 1.

15. On July 13, 2020, ILDA acknowledged receipt of the Request and sought an extension of five business days. Exhibit A at 1.

16. On July 21, 2020, ILDA denied the Request pursuant to Section 7(1)(a) and Section 106 of the Copyright Act (17 U.S.C. § 106). Exhibit A at 2.

17. ILDA stated, “The AAFCO Official Publication, including the definitions of animal food ingredients, is not itself an Illinois regulation and is subject to copyright protection. This document is available for purchase from AAFCO.” Exhibit A at 2.

18. ILDA further claimed, “Copyright material is protected under Section 106 of the Copyright Act (17 U.S.C § 106) and, therefore cannot be disclosed without authorization. Counsel for AAFCO has informed the Department that it does not authorize disclosure of this information. FOIA cannot be a tool to access material otherwise protected by copyright and is not a proper tool to challenge copyright claims.” Exhibit A at 2.

19. HARRINGTON’s original request seeks records sufficient to show “all AAFCO feed definitions, including the name of each ingredients and its definition, adopted under 505 ILCS 30/10.”

20. HARRINGTON is seeking to obtain records that are incorporated in the Illinois Commercial Feed Act of 1961 (505 ILCS 30/10(b)), which is a state statute and a public record.

21. Section 2(c) of FOIA defines public record as “all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.” 5 ILCS 140/2(c).

22. The Illinois Commercial Feed Act of 1961 Section 10 incorporates the definitions of feed ingredients and official terms adopted and published by AAFCO. 505 ILCS 30/10(b).

23. The Illinois Administrative Procedure Act (“IAPA”) states, in relevant part:

(a) An agency may incorporate by reference, in its rules adopted under Section 5-35, rules, regulations, standards, and guidelines of an agency of the United States or a nationally or state recognized organization or association without publishing the incorporated material in full. The reference in the agency rules must fully identify the incorporated matter by publisher address and date in order to specify how a copy of the material may be obtained and must state that the rule, regulation, standard, or guideline does not include any later amendments or editions. ***An agency may incorporate by reference these matters in its rules only if the agency, organization, or association originally issuing the matter makes copies readily available to the public.*** This Section does not apply to any agency internal manual;

...

(c) The agency adopting a rule, regulation, standard, or guideline under this Section shall maintain a copy of the referenced rule, regulation, standard, or guideline in at least one of its principal offices and ***shall make it available to the public upon request for inspection and copying at no more than cost.*** Requests for copies of materials incorporated by reference shall not be deemed Freedom of Information Act requests unless so labeled by the requestor. ***The agency shall designate by rule the agency location at which incorporated materials are maintained and made available to the public for inspection and copying.*** These rules may be adopted under the procedures in Section 5-15. In addition, the agency may include the designation of the agency location of incorporated materials in a rulemaking under Section 5-35, but emergency and preemptory rulemaking procedures may not be used solely for this purpose.

5 ILCS 100/5-75(a) and (c) (emphasis added).

24. Producing copyrighted records pursuant to FOIA and IAPA is considered “fair use” under the federal Copyright Act. 17 U.S.C. § 107.

25. On September 2, 2020, HARRINGTON submitted the request and the denial to the Public Access Counselor (“PAC”) for review. Exhibit B.

26. ILDA does not make the incorporated materials—the definitions of feed ingredients and official terms adopted and published by AAFCO—available “for inspection and copying” to the public.

27. As of the date of this filing, ILDA has not complied with FOIA and has not produced the requested records.

**COUNT I – JULY 6, 2020, FOIA REQUEST,
FAILURE TO PRODUCE RECORDS**

28. The above paragraphs are incorporated by reference.

29. ILLINOIS DEPARTMENT OF AGRICULTURE is a public body under FOIA.

30. The records sought in the FOIA request are non-exempt public records.

31. ILLINOIS DEPARTMENT OF AGRICULTURE violated FOIA by failing to produce all of the requested records.

**COUNT II – JULY 6, 2020, FOIA REQUEST,
FAILURE TO PERFORM AN ADEQUATE SEARCH**

32. The above paragraphs are incorporated by reference.

33. ILLINOIS DEPARTMENT OF AGRICULTURE is a public body under FOIA.

34. ILLINOIS DEPARTMENT OF AGRICULTURE bears the burden of proving beyond material doubt that it performed an adequate search for responsive records.

35. ILLINOIS DEPARTMENT OF AGRICULTURE has failed to come forward with sufficient evidence to carry this burden.

36. ILLINOIS DEPARTMENT OF AGRICULTURE has violated FOIA by failing to adequately search for the responsive records.

**COUNT III – JULY 6, 2020, FOIA REQUEST,
WILLFUL VIOLATION OF FOIA**

37. The above paragraphs are incorporated by reference.

38. ILLINOIS DEPARTMENT OF AGRICULTURE is a public body under FOIA.
39. The records sought in the FOIA request are non-exempt public records.
40. ILLINOIS DEPARTMENT OF AGRICULTURE has willfully and intentionally or otherwise in bad faith violated FOIA.

WHEREFORE, HARRINGTON asks that the Court:

- i. declare that ILLINOIS DEPARTMENT OF AGRICULTURE has violated FOIA;
- ii. order ILLINOIS DEPARTMENT OF AGRICULTURE to conduct an adequate search for the requested records;
- iii. order ILLINOIS DEPARTMENT OF AGRICULTURE to produce the requested records;
- iv. enjoin ILLINOIS DEPARTMENT OF AGRICULTURE from withholding non-exempt public records under FOIA;
- v. order ILLINOIS DEPARTMENT OF AGRICULTURE to pay civil penalties;
- vi. award HARRINGTON reasonable attorneys' fees and costs; and
- vii. award such other relief the Court considers appropriate.

Dated: October 21, 2020

RESPECTFULLY SUBMITTED,

/s/ Merrick J. Wayne

Attorneys for Plaintiff
KOHL HARRINGTON

Matthew Topic, ARDC # 6290922
Joshua Burday, ARDC # 6320376
Merrick Wayne, ARDC #6330610
LOEVY & LOEVY
311 North Aberdeen, 3rd Floor
Chicago, IL 60607

312-243-5900
foia@loevy.com

Records Request, AAFCO feed definitions

4 messages

Kohl Harrington <kohl@harringtonfilms.com>
To: "AGR.FOIA" <AGR.FOIA@illinois.gov>
Bcc: Kohl Harrington <kohl@harringtonfilms.com>

Mon, Jul 6, 2020 at 10:03 AM

I am requesting all records showing all AAFCO feed definitions, including the name of each ingredient and its definition, adopted under (505 ILCS 30/10) (from Ch. 56 1/2, par. 66.10), which specifically states, (b) The official definitions of feed ingredients and official feed terms as adopted and published by the Association of American Feed Control Officials and any amendments or supplements thereto are the official definitions of feed ingredients and official feed terms.

AGR.FOIA <AGR.FOIA@illinois.gov>
To: Kohl Harrington <kohl@harringtonfilms.com>

Mon, Jul 13, 2020 at 8:42 AM

Mr. Harrington,

Regarding your FOIA request received on July 6, 2020, please be advised the Department is extending for five additional working days the time limit for responding to your request. Section 140/3(e)(vi) of the Illinois Freedom of Information Act [5 ILCS 140] states:

"(e) The time for response under this Section may be extended by the public body for not more than 5 business days from the original due date for any of the following reasons: ... (vi) the request for records cannot be complied with by the public body within the time limits prescribed by paragraph (c) of this Section without unduly burdening or interfering with the operations of the public body"

The extension due date for your request will be July 20, 2020.

Thank you

Pam Harmon

FOIA Officer

Illinois Department of Agriculture

[Quoted text hidden]

State of Illinois - CONFIDENTIALITY NOTICE: The information contained in this communication is confidential, may be attorney-client privileged or attorney work product, may constitute inside information or internal deliberative staff communication, and is intended only for the use of the addressee. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. If you have received this communication in error, please notify the sender immediately by return e-mail and destroy this communication and all copies thereof, including all attachments. Receipt by an unintended recipient does not waive attorney-client privilege, attorney work product privilege, or any other exemption from disclosure.

1 of 3

Kohl Harrington <kohl@harringtonfilms.com>
To: "AGR.FOIA" <AGR.FOIA@illinois.gov>

Tue, Jul 21, 2020 at 10:06 AM

Exhibit A

Hello,

I did not receive the records for my request on the extension due date, July 20, 2020.

-Kohl Harrington
Harrington Films
323-237-9958
[Quoted text hidden]

Teefey, John <John.Teefey@illinois.gov>
To: "kohl@harringtonfilms.com" <kohl@harringtonfilms.com>
Cc: "AGR.FOIA" <AGR.FOIA@illinois.gov>

Tue, Jul 21, 2020 at 12:44 PM

Thank you for writing to the Illinois Department of Agriculture with your request for information pursuant to the Illinois Freedom of Information Act, 5 ILCS 140/1 et seq.

In your letter, you requested the following records:

“all records showing all AAFCO feed definitions, including the name of each ingredient and its definition, adopted under (505 ILCS 30/10) (from Ch. 56 1/2, par. 66.10), which specifically states, (b) The official definitions of feed ingredients and official feed terms as adopted and published by the Association of American Feed Control Officials and any amendments or supplements thereto are the official definitions of feed ingredients and official feed terms.”

The AAFCO Official Publication, including the definitions of animal food ingredients, is not itself an Illinois regulation and is subject to copyright protection. This document is available for purchase from AAFCO. Therefore, the requested information cannot be disclosed pursuant to Section 7(1)(a) of the Freedom of Information Act which provides that the following “shall be exempt from inspection and copying”:

(a) Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.

Under FOIA, information that is protected from disclosure by state or federal law cannot be disclosed. Copyright material is protected under Section 106 of the Copyright Act (17 U.S.C. § 106) and, therefore, cannot be disclosed without authorization. Counsel for AAFCO has informed the Department that it does not authorize disclosure of this information. FOIA cannot be a tool to access material otherwise protected by copyright and is not a proper tool to challenge copyright claims.

You have a right to have the denial of your request reviewed by the Public Access Counselor (PAC) at the Office of the Illinois Attorney General. 5 ILCS 140/9.5(a). You can file your Request for Review with the PAC by writing to:

Public Access Counselor

Office of the Attorney General

[500 South 2nd Street](#)

[Springfield, Illinois 62706](#)

Fax: 217-782-1396

E-mail: publicaccess@atg.state.il.us

You also have the right to seek judicial review of your denial by filing a lawsuit in the State circuit court. 5 ILCS 140/11.

If you choose to file a Request for Review with the PAC, you must do so within 60 calendar days of the date of this denial. 5 ILCS 140/9.5(a). Please note that you must include a copy of your original FOIA request and this denial letter when filing a Request for Review with the PAC.

John Teefey

General Counsel

Illinois Department of Agriculture

Appeal/Request for Review- Record Request Illinois Department of Agriculture

Kohl Harrington <kohl@harringtonfilms.com>

To: publicaccess@atg.state.il.us

Bcc: eun@loevy.com

Wed, Sep 2, 2020 at 9:30 AM

Hello,

I am appealing the decision provided to me by the Illinois Department of Agriculture, and requesting review with your PAC office, concerning my FOIA request submitted on July 6, 2020.

Original request "I am requesting all records showing all AAFCO feed definitions, including the name of each ingredient and its definition, adopted under (505 ILCS 30/10) (from Ch. 56 1/2, par. 66.10), which specifically states, (b) The official definitions of feed ingredients and official feed terms as adopted and published by the Association of American Feed Control Officials and any amendments or supplements thereto are the official definitions of feed ingredients and official feed terms."

On July 21, 2020, John Teefey of Illinois Department Of Agriculture denied my request, stating "Under FOIA, information that is protected from disclosure by state or federal law cannot be disclosed. Copyright material is protected under Section 106 of the Copyright Act (17 U.S.C. § 106) and, therefore, cannot be disclosed without authorization. Counsel for AAFCO has informed the Department that it does not authorize disclosure of this information. FOIA cannot be a tool to access material otherwise protected by copyright and is not a proper tool to challenge copyright claims."

I have attached copies of this communication for your convenience.

Please note, I am not trying to use FOIA to "access material otherwise protected by copyright", as the denial alleged. **I am trying to access feed definitions and feed ingredients that are adopted into law.**

The records I am requesting pertain to ingredient definitions, adopted into law under (505 ILCS 30/10) (from Ch. 56 1/2, par. 66.10). Since these ingredient definitions are adopted into actual law under (505 ILCS 30/10) (from Ch. 56 1/2, par. 66.10), these ingredient definitions are subject to FOIA. Even though the Illinois Department of Agriculture has adopted these ingredients into law, these ingredients are not posted publicly for all citizens to see, even though they're considered law.

The Illinois Department of Agriculture maintains active membership with AAFCO, where the Illinois Department of Agriculture joins federal agencies such as the FDA, and other state regulatory agencies, and participates actively in the proposal, review, and definition aspects of feed ingredients and ingredients that are approved for use in pet foods. Illinois Department of Agriculture then takes this work, allows public employee work to be copywritten by a "private non profit organization", and then it appears the department proceeds to adopt this copy written work into actual Illinois law under (505 ILCS 30/10) (from Ch. 56 1/2, par. 66.10). Please note that as an active member of AAFCO, the Illinois Department of Agriculture is a part of asking citizens to pay \$550 to attend these meetings, where regulatory work for the state is being conducted. Also, the Illinois Department of Agriculture has been asking citizens and referring citizens to go to the AAFCO website where they can purchase the ingredient definitions that are adopted into law under (505 ILCS 30/10) (from Ch. 56 1/2, par. 66.10).

Please confirm receipt of my complaint, and please provide me with a tracking number for my complaint.

-Kohl Harrington
Harrington Films
323-237-9958



Kohl Harrington Mail - Records Request, AAFCO feed definitions.pdf

88K

Exhibit B