



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

**Lisa Madigan**  
ATTORNEY GENERAL

April 1, 2015

*Via electronic mail*

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*Via electronic mail*

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RE: FOIA Request for Review – 2012 PAC 21219

Dear Mr. Allen and Master Sergeant Sutton:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2012), as amended Public Act 98-1129, effective December 3, 2014). For the reasons that follow, the Public Access Bureau concludes that the response by the Illinois State Police (ISP) to Mr. Kirk Allen's July 29, 2012, FOIA request violated the requirements of FOIA.

On that date, Mr. Allen submitted a FOIA request to ISP via e-mail seeking copies of four DVDs and two CDs from closed case files. Specifically, the requested records pertain to two former Edgar County correctional officers who were found guilty of crimes that they committed in connection with their official duties. On August 31, 2012, ISP denied the request pursuant to sections 1, 3(g), and 7(1)(c) of FOIA (5 ILCS 140/1, 3(g), 7(1)(c) (West 2012)). Later that day, the Public Access Bureau received the above-captioned Request for Review contesting the response from ISP. Mr. Allen alleged: (1) the denial was issued after the statutory deadline had elapsed; (2) ISP's claim that the responsive records did not exist at the time of his request is baseless; (3) ISP's claim that it does not possess the equipment to copy

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CDs/DVDs is not a valid basis for denial; (4) ISP did not extend him an opportunity to narrow his request as required by section 3(g) before denying it as unduly burdensome; (5) ISP has not demonstrated that compliance would be cost-prohibitive; (6) the crime victims' identities are already a matter of public record; (7) section 7(1)(c) does not apply because the responsive records bear on the public duties of public employees; (8) graphic testimony has already been disclosed, and; (9) the responsive records cannot all be exempt in their entireties.

On September 17, 2012, the Public Access Bureau forwarded a copy of Mr. Allen's Request for Review to ISP and asked it to: (1) provide this office with unredacted copies of the responsive records for our confidential review; (2) clarify whether it provided Mr. Allen with the opportunity to narrow his request pursuant to section 3(g), and; (3) provide a detailed explanation for the asserted exemptions. **ISP failed to respond.** Accordingly, on February 26, 2013, this office again forwarded a copy of Mr. Allen's Request for Review to ISP and reiterated our questions. On March 5, 2013, this office received ISP's written response **but not the copies of the responsive records that we requested.**

**ISP's response to this office did not assert that it provided Mr. Allen with the opportunity to narrow his request pursuant to section 3(g).** Instead, ISP contended that redacting the interviews would constitute the creation of new records, and asserted that ISP "is not required to create these new and edited copies for Mr. Allen. \* \* \* Again, no public body is required under FOIA to create anything to fulfill a request, and certainly cannot be expected to expend public monies to create new materials."<sup>1</sup> ISP also reiterated that, pursuant to section 7(1)(c), "if making edits and/or redactions of the audio/video were possible, those redactions would not be sufficient to prevent the identity of the crime victims and the graphic descriptions of the acts from being made public."<sup>2</sup> Lastly, ISP claimed that "[p]roviding copies of crime victims' interviews to any member of the public for dissemination as they desire violates [the victims'] statutory rights" under section 4(a)(1) of the Rights of Crime Victims and Witnesses Act (725 ILCS 120/4(a)(1) (West 2012)).

On March 12, 2013, this office received Mr. Allen's reply, contending: (1) "the [withheld] information may be graphic but many of those very details are contained in the written report which has already been provided which also included the name of the victim"; (2) redaction is not considered to entail creation of a new record; (3) the Rights of Crime Victims and Witnesses Act only applies during the criminal justice process, which has been completed in

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<sup>1</sup>Letter from Sergeant Kerry Sutton, Legal Counsel, to Lindsay Lavine, Assistant Public Access Counselor, Office of the Attorney General (March 5, 2013), at 1.

<sup>2</sup>Letter from Sergeant Kerry Sutton, Legal Counsel, to Lindsay Lavine, Assistant Public Access Counselor, Office of the Attorney General (March 5, 2013), at 2.

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this instance, and; (4) FOIA acknowledges that it requires public bodies to incur costs in order to provide records.<sup>3</sup>

On November 12, 2014, an Assistant Attorney General in the Public Access Bureau notified ISP that this office still required unredacted copies of the responsive records to complete our review of this matter. On November 13, 2014, ISP responded that it would not provide the responsive records for this office's confidential review.

### **DETERMINATION**

All public records in the possession or custody of a public body are "presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2012). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2012).

### **Section 3(g) of FOIA**

Section 3(g) of FOIA provides:

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. Before invoking this exemption, the public body shall extend to the person making the request an opportunity to confer with it in an attempt to reduce the request to manageable proportions. If any body responds to a categorical request by stating that compliance would unduly burden its operation and the conditions described above are met, it shall do so in writing, specifying the reasons why it would be unduly burdensome and the extent to which compliance will so burden the operations of the public body. Such a response shall be treated as a denial of the request for information.

In addition, section 3(d) of FOIA provides:

Each public body shall, promptly, either comply with or deny a request for public records within 5 business days after its

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<sup>3</sup>E-mail from Kirk Allen, Edgar County Watchdogs, to [Lindsay] La[V]ine (March 12, 2013).

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receipt of the request, unless the time for response is properly extended under subsection (e) of this Section. \* \* \* A public body that fails to respond to a request received may not treat the request as unduly burdensome under subsection (g).

Under the plain language of section 3(d), a public body that fails to respond to a FOIA request within 5 business days after its receipt may not treat the request as unduly burdensome. ISP did not respond to Mr. Allen's July 29, 2012, FOIA request until August 31, 2012. Because, ISP failed to respond to Mr. Allen's FOIA request within 5 business days after its receipt, it has waived the opportunity to assert section 3(g) of FOIA.

### **Copying and Redacting the Responsive Records**

ISP's response to Mr. Allen's request contended that redacting the responsive records would necessitate the creation of new records, and that FOIA does not require ISP to create new records:

the Illinois State Police would be required to send the video/audio to a professional communication studio to create such edited copies. Before professional editing work could commence, a transcript would have to be created for all of the video/audio, as transcripts do not currently exist. Once again, the Freedom of Information Act does not require the Illinois State Police to create a record that did not exist at the time of your request.<sup>4</sup>

ISP also asserted that "[a]ny edits to the video/audio would require the work of a professional communications organization and would be cost prohibitive."<sup>5</sup>

Section 1 of FOIA declares that it "is not intended to create an obligation on the part of any public body to maintain or prepare any public record." However, section 1 further provides:

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.

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<sup>4</sup>Letter from Lieutenant Steve Lyddon, FOIA Officer, to Kirk Allen (August 31, 2012).

<sup>5</sup>Letter from Lieutenant Steve Lyddon, FOIA Officer, to Kirk Allen (August 31, 2012).

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Additionally, section 7(1) of FOIA (5 ILCS 140/7(1) (West 2013 Supp.), as amended by Public Act 98-695, effective July 3, 2014) provides: "When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body *may elect to redact* the information that is exempt." (Emphasis added.)

The Illinois Supreme Court "has repeatedly held that statutes should be read as a whole and construed so that no part is rendered meaningless or superfluous." *People v. Lloyd*, 2013 IL 113510, ¶25, 987 N.E.2d 386, 392 (2013).

Reading FOIA as a whole, it is clear that the General Assembly recognized that compliance with FOIA would entail costs to public bodies; nonetheless, compliance was deemed to be of such fundamental importance that no provision was made for excusing compliance due to the costs thereof. Further, the General Assembly provided separate provisions regarding the creation of records and the redaction of existing records. Redacting information from a record does not constitute the creation of a new record within the meaning of section 1. *See Bowie v. Evanston Community Consol. School Dist. No. 65*, 128 Ill. 2d 373, 382-83 (1989). Moreover, the phrase "may elect" in section 7(1) signifies that FOIA is permissive, not mandatory; if a public body wishes to withhold responsive information, it may redact only the information that it can clearly and convincingly demonstrate to be exempt from disclosure, and it must disclose the remainder. *See Roehrborn v. Lambert*, 277 Ill. App. 3d 181, 186 (1st Dist. 1995) ("The purpose of the Act is to ensure disclosure of information, not to protect information from disclosure. \* \* \* The exemptions cannot be read to prohibit dissemination of such information, but rather are simply cases where disclosure is not required").

In this instance, ISP refused to provide the responsive records for this office's confidential review. As a result, we are unable to confirm whether the responsive records do contain exempt information and, if they do, how the records might appropriately be redacted to protect confidentiality. Because of ISP's refusal to cooperate with our review, we can only conclude that ISP failed to sustain its burden of demonstrating by clear and convincing evidence that the responsive records are exempt from disclosure in whole or in part.

#### Section 7(1)(c) of FOIA

Section 7(1)(c) of FOIA exempts from disclosure:

[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information.

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'Unwarranted invasion of personal privacy' means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. *The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.* (Emphasis added.)

A public body's contention that the release of information would constitute an unwarranted invasion of personal privacy is evaluated on a case-by-case basis. *Chicago Journeymen Plumbers' Local Union 130, U.A. v. Dep't of Pub. Health*, 327 Ill. App. 3d 192, 196 (2001). The phrase "clearly unwarranted invasion of personal privacy" evinces a strict standard to claim the exemption, and the burden is on the government agency having charge of the record to prove that standard has been met. *Schessler v. Dep't of Conservation*, 256 Ill. App. 3d 198, 202 (1994).

ISP asserted that the responsive records cannot be redacted in a manner sufficient to protect the identities of crime victims and graphic descriptions of criminal acts. However, without reviewing the responsive records, this office is unable to verify that assertion. **Moreover, because the responsive records relate to a closed criminal matter in which public employees were convicted of crimes committed in connection with their official duties, there is reason to believe that the responsive records contain information that is expressly not exempt from disclosure pursuant to section 7(1)(c). Therefore, ISP has failed to sustain its burden of demonstrating that the responsive records are exempt from disclosure in their entireties pursuant to section 7(1)(c) of FOIA.**

### **Rights of Crime Victims and Witnesses Act**

Lastly, ISP cited section 4(a)(1) of the Rights of Crime Victims and Witnesses Act, which provides that crime victims have "[t]he right to be treated with fairness and respect for their **dignity** and privacy throughout the criminal justice process." Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2012)), however, provides that "[e]ach 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." The only provision of section 7 that could arguably exempt information under the Rights of Crime Victims and Witnesses Act is section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2012)), but **only if the Rights of Crime Victims and Witnesses Act specifically prohibits the disclosure of that information.** The Rights of Crime Victims and Witnesses Act, however, does not specifically prohibit the disclosure of any information. It merely states a general principle that the privacy rights of victims and witnesses should be respected. It does not suggest that those undefined privacy rights outweigh the specific disclosure requirements of FOIA.

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Therefore, ISP has failed to sustain its burden of demonstrating that the responsive records are exempt from disclosure pursuant to section 7(1)(a) of FOIA.

### CONCLUSION

For the reasons set forth above, we conclude that ISP violated FOIA by failing to sustain its burden of demonstrating by clear and convincing evidence that the responsive records are exempt from disclosure in their entirety. We direct ISP to provide Mr. Allen with copies of all responsive records, subject only to the redaction of private information as defined in FOIA, and information, if any, concerning the victims or witnesses the disclosure of which would constitute a clearly unwarranted invasion of privacy pursuant to section 7(1)(c).

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have questions, you may contact me at the Chicago address on the first page of this letter. This letter serves to close this matter.

Very truly yours,



JOSH JONES  
Assistant Attorney General  
Public Access Bureau

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