



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 19, 2017

Via electronic mail
Mr. Kirk Allen



Via electronic mail
Ms. Nanette Crippes, Director
Edgar County Emergency Telephone System Board
228 North Central Avenue
Paris, Illinois 61944
911@edgarcountyillinois.com

RE: FOIA Request for Review – 2017 PAC 46454

Dear Mr. Allen and Ms. Crippes:

This determination 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 stated below, the Public Access Bureau concludes that the Edgar County Emergency Telephone System Board (Board) improperly withheld information responsive to Mr. Kirk Allen's September 30, 2016, request.

On February 9, 2017, the Public Access Bureau issued a determination in a prior Request for Review submitted by Mr. Allen (2016 PAC 44873) concluding that the Board had improperly asserted that it did not possess recordings concerning a specific incident which it maintained on a recorder shared with the Edgar County Sheriff's Department; this office "request[ed] that the Board search for and disclose to Mr. Allen copies of any non-exempt responsive records maintained on the shared recorder."¹ In response, on February 14, 2017, the Board sent Mr. Allen a letter denying his request pursuant to section 7(1)(d)(iii) of FOIA (5 ILCS 140/7(1)(d)(iii) (West 2015 Supp.), as amended by Public Act 99-642, effective July 28,

¹Ill. Att'y Gen. PAC Req. Rev. Ltr. 46454, issued February 9, 2017, at 4.

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2016). The Board stated: "All of these records pertain to an ongoing case."² On February 17, 2017, Mr. Allen submitted this Request for Review asking this office to review the Board's assertion of the section 7(1)(d)(iii) exemption.

On February 23, 2017, this office sent a copy of this Request for Review to the Board and asked it to provide this office with copies of the withheld records for our confidential review, as well as a detailed explanation of the factual and legal bases for the applicability of section 7(1)(d)(iii) of FOIA. On February 27, 2017, the Board provided this office with a CD containing audio recordings of the call reporting the incident to the Sheriff's Department and the deputy's radio traffic with dispatch, together with a written response maintaining that those records are exempt from disclosure.³ On March 28, 2017, Mr. Allen submitted a reply, reiterating that the records should be released.

DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2014); *see also Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill. 2d 390, 415 (2006). 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 2014). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois Univ.*, 176 Ill. 2d 401, 408 (1997). Bare conclusions without a detailed rationale do not satisfy a public body's burden of explaining how exemptions are applicable. *See Rockford Police Benevolent and Protective Ass'n v. Morrissey*, 398 Ill. App. 3d 145, 151 (2nd Dist. 2010) (citing *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 464 (2003)).

Section 7(1)(d)(iii) of FOIA

Section 7(1)(d)(iii) of FOIA exempts from disclosure:

(d) Records in the possession of any public body created in the course of administrative enforcement proceedings, and any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would:

²Letter from Nanette Crippes, Edgar County 9-1-1 Director, to Kirk Allen (February 14, 2017).

³The Board submitted two versions of its response: one for forwarding to Mr. Allen and one for this office's confidential review under section 9.5(d) of FOIA (5 ILCS 140/9.5(d) (West 2014) ("The Public Access Counselor shall forward a copy of the answer to the person submitting the request for review, with any alleged confidential information to which the request pertains redacted from the copy.")).

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* * *

(iii) create a substantial likelihood that a person will be deprived of a fair trial or impartial hearing[.]

To demonstrate that records are exempt from disclosure under the corresponding provision of the Federal FOIA (5 U.S.C. §552(b)(7)(B) (2017)), an agency must establish: "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." *Washington Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988).

In its response to this office, the Board asserted that the 9-1-1 call and subsequent dispatch recording are exempt from disclosure because they were created in the course of law enforcement proceedings and because charges were pending against a person involved in the incident at the time of the request and were not expected to be resolved in the near future. The Board further stated that the Sheriff did not want the records released, and that "[r]eleasing information on the case prior to a ruling could create the likelihood that a person will be deprived of a fair trial or an impartial hearing."⁴ Mr. Allen, on the other hand, argues that: (1) information relayed over public airways by dispatchers cannot be withheld; (2) the withheld recordings were not created in the course of administrative enforcement proceedings and thus are not subject to section 7(1)(d)(iii) of FOIA; and (3) the recordings should be released because they pertain to the actions of an Edgar County corrections officer, though the resulting "charges are not related to anything this person did in the performance of their duty as a corrections officer."⁵

This office has confidentially reviewed the 9-1-1 call and dispatch recordings provided by the Board. The 9-1-1 call does include personally-identifying information, such as the name of the caller, the address of the incident, and relationship information; however, the recording does not contain information of a highly emotional or graphic nature. Additionally, the dispatch recording, which presumably could have been heard by members of the public who were listening to the frequency, contains little substantive information.

The Board's assertion of section 7(1)(d)(iii) is largely conclusory. Neither the Board's response to the FOIA request nor its response to this office explained how disclosure of the 9-1-1 call and dispatch records requested by Mr. Allen would create a substantial likelihood that a person would be deprived of a fair trial. Moreover, the records do not appear to contain sensitive information that could potentially taint the objectivity of prospective jurors or have

⁴Letter from Nanette Crippes, Edgar County 9-1-1 Director, to Marie Hollister, Assistant Attorney General, Public Access Bureau (February 27, 2017).

⁵E-mail from Kirk Allen to Public Access (February 17, 2017).

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other adverse consequences on the pending criminal case if disclosed. Because the Board has not set forth facts demonstrating how the disclosure of the withheld records would create a substantial likelihood that a person would be deprived of a fair trial, and because we did not discern such a likelihood from our own review of the records, this office concludes that the Board has not met its burden of demonstrating by clear and convincing evidence that the requested records are exempt from disclosure under section 7(1)(d)(iii) of FOIA.⁶

Although the Board did not raise any other exemptions in its response to Mr. Allen's FOIA request, portions of the records containing the name of the caller and information about the caller's relationship to any other individuals may be properly redacted pursuant to section 7(1)(c) of FOIA⁷ (5 ILCS 140/7(1)(c) (West 2015 Supp.), as amended by Public Act 99-642, effective July 28, 2016). See Ill. Att'y Gen. PAC Req. Rev. Ltr. 40989, issued April 29, 2016, at 2 ("information identifying individuals who provided information to police would constitute an unwarranted invasion of personal privacy."). In addition, a home address and employee identification numbers may be properly redacted under section 7(1)(b) of FOIA⁸ (5 ILCS 140/7(1)(b) (West 2015 Supp.), as amended by Public Act 99-642, effective July 28, 2016).

In accordance with the conclusions expressed in this letter, this office requests that the Board provide Mr. Allen with copies of the requested records, subject only to permissible redactions pursuant to sections 7(1)(b) and 7(1)(c) of FOIA.

⁶This office notes that the employment status of the parties involved in the incident did not factor into this determination, as, regardless, the Board did not set out facts demonstrating that disclosure of the recordings would create a substantial likelihood that a person will be deprived of a fair trial or impartial hearing.

⁷Section 7(1)(c) of FOIA exempts: "Personal 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. "

⁸Section 7(1)(b) exempts from disclosure "private information," which FOIA defines to include a person's "employee identification number[]" and home address." 5 ILCS 140/2(c-5) (West 2015 Supp.)

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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 the Chicago address listed on the first page of this letter. This letter serves to close this matter.

Very truly yours,

A handwritten signature in black ink that reads "Marie Hollister". The signature is written in a cursive, flowing style.

MARIE HOLLISTER
Assistant Attorney General
Public Access Bureau

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