



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 14, 2017

Via electronic mail

Mr. Edward Franckowiak
edward.franckowiak@gmail.com

Via electronic mail

Mr. Tony Davis
Records Manager
Naperville Police Department
1350 Aurora Avenue
Naperville, Illinois 60540
davist@naperville.il.us

RE: FOIA Request for Review – 2017 PAC 47673

Dear Mr. Franckowiak and Mr. Davis:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2016)): For the reasons stated below, the Public Access Bureau concludes that the Naperville Police Department (Department) improperly withheld records responsive to Mr. Edward Franckowiak's March 14, 2017, FOIA request in their entirety, instead of providing redacted copies of records.

On that date, Mr. Franckowiak submitted a FOIA request to the Department seeking recordings of calls reporting the shooting on January 27, 2017, at Scullen Middle School and radio traffic of cars that were involved on the day of the incident. On March 17, 2017, the Department denied the request in its entirety, stating that it could "not release any information while a case is under investigation."¹ On April 30, 2017, Mr. Franckowiak submitted this Request for Review contesting the Department's denial.

On May 3, 2017, the Public Access Bureau sent a copy of the Request for Review to the Department stating that this office construed the Department's denial as a denial pursuant

¹E-mail from Cali Reavy, Naperville Police Records, Naperville Police Department, to Edward Franckowiak (March 17, 2017).

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to section 7(1)(d)(vii) of FOIA (5 ILCS 140/7(1)(d)(vii) (West 2016)). This office requested that the Department provide copies of the withheld records for our confidential review, together with a detailed explanation of the factual and legal bases for its assertion of section 7(1)(d)(vii) of FOIA. On May 12, 2017, the Department submitted a written response. A portion of the Department's written response was submitted confidentially pursuant to section 9.5(d) of FOIA (5 ILCS 140/9.5(d) (West 2016)), which prohibits this office from disclosing that information in this determination. The non-confidential portions of the Department's response asserted that the recordings were also exempt pursuant to sections 7(1)(b) and 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)(b), (1)(d)(iv) (West 2016)). The Department also furnished this office with a redacted copy of the requested recordings. On May 12, 2017, this office sent Mr. Franckowiak a copy of the Department's non-confidential response; he did not reply. On June 7, 2017, an Assistant Attorney General in the Public Access Bureau contacted the Department and requested that it provide this office with unredacted copies of the recordings for our confidential review. On June 23, 2017, this office received unredacted copies of the recordings from the Department.

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 2016); *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 2016). 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, Unit No. 6 v. Morrissey, et al.*, 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)(b) of FOIA

The Department cited section 7(1)(b) of FOIA, which exempts from disclosure "[p]rivate information, unless disclosure is required by another provision of this Act, a State or federal law or a court order," as the exemption applicable to certain portions of the withheld recordings. Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2016)) defines "private information" as:

unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone

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numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.

The Public Access Bureau has listened to the unredacted audio recordings, which reveal a driver's license number, personal telephone numbers, home addresses, and personal license plates. The plain language of section 7(1)(b) exempts driver's license numbers and personal telephone numbers. Further, in this case, the home addresses and license plate numbers on the recordings are identified in connection with specific individuals' residences and vehicles and therefore are attributable to those individuals. Accordingly, this office concludes that the Department did not improperly withhold the driver's license number, personal telephone numbers, home addresses, and personal license plates from the recordings pursuant to section 7(1)(b) of FOIA.

Sections 7(1)(d)(iv) and 7(1)(d)(vii) of FOIA

Section 7(1)(d)(vii) 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:

* * *

(iv) unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies; except that the identities of witnesses to traffic accidents, traffic accident reports, and rescue reports shall be provided by agencies of local government, except when disclosure would interfere with an active criminal investigation conducted by the agency that is the recipient of the request;

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(vii) obstruct an ongoing criminal investigation by the agency that is the recipient of the request.

Conclusory statements asserting that the disclosure of requested records would obstruct a law enforcement proceeding are insufficient to demonstrate that law enforcement records are exempt from disclosure under FOIA. *See Day v. City of Chicago*, 388 Ill. App. 3d 70, 74-77 (1st Dist. 2009).

The records at issue concern a January 27, 2017, homicide of a man in a vehicle in the parking lot of Scullen Middle School.² In its response to this office, the Department stated that it withheld the responsive records pursuant to section 7(1)(d)(vii) because, at the time of Mr. Franckowiak's request, it "was in the process of interviewing approximately one-hundred witnesses. Some of those witnesses have yet to be interviewed. Public dissemination of *any* materials pursuant to Mr. Fran[c]kowiak's request would have obstructed and possibly tainted the accounts of the witnesses who remained to be interviewed."³ (Emphasis in original.)

The generalized assertion that disclosure of any information responsive to the request would have interfered with witness interviews is largely conclusory. Although this office recognizes that the disclosure of certain sensitive details could hamper the Department's ability to assess the credibility of witnesses and otherwise interfere with its investigation, this office has not received any information as to *how* disclosure of the full recordings or any particular information in the recordings requested by Mr. Franckowiak would have obstructed an ongoing criminal investigation at the time of his request. Accordingly, this office concludes that the Department has not sustained its burden of showing by clear and convincing evidence that the records are exempt from disclosure in their entirety under section 7(1)(d)(vii) of FOIA. The Department may, however, redact the description of the physical condition of the decedent's vehicle contained in the 9-1-1 recording pursuant to section 7(1)(d)(vii), because the disclosure of such sensitive information that has not previously been disseminated to the public could obstruct the Department's investigation. Because disclosure of the name and contact information of the caller would unavoidably disclose the identity of the person who called 9-1-1 to report the incident to law enforcement, the Department may properly redact that information pursuant to section 7(1)(d)(iv) of FOIA.

²Karen Sorensen, *Lewis University professor found shot to death in Naperville*, NAPERVILLE SUN (January 30, 2017, 8:09 AM), <http://www.chicagotribune.com/suburbs/naperville-sun/ct-nvs-naperville-homicide-shooting-st-0129-20170128-story.html>

³Letter from Tony Davis, Records Manager, Naperville Police Department, to Matt Hartman, Assistant Attorney General, Public Access Bureau (May 12, 2017).

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The confidential portion of the Department's response to the Public Access Bureau contained an assertion that the recordings were also exempt from disclosure under an exemption that was not cited in its response to the requester. Because the Department provided that portion of its response to this office confidentially, section 9.5(d) of FOIA precludes this office from further identifying the exception or the revealing the Department's explanation for the exception. However, this office has reviewed the requested recordings in light of the Department's additional claimed exemption and concludes that the Department has not sustained its burden of demonstrating that any portions of the recordings are exempt from disclosure under that exemption.

Because the Department did not demonstrate by clear and convincing evidence that the recordings it withheld are exempt from disclosure in their entirety, this office concludes that the Department improperly denied those records. Therefore, this office requests that the Department provide Mr. Franckowiak with copies of those records, subject to the redaction of "private information" under section 7(1)(b), the identity of individual who called 9-1-1 under section 7(1)(d)(iv) of FOIA, and the description of the physical condition of the decedent's vehicle under section 7(1)(d)(vii) of FOIA. The Department may also redact, pursuant to section 7(1)(c) of FOIA⁴ (5 ILCS 140/7(1)(c) (West 2016)), the names, dates of birth, and other "personal information" identifying students, parents or guardians, and other individuals who were present at the scene but not involved in the incident.


⁴Section 7(1)(c) of FOIA exempts from disclosure:

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. "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.

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The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this file. If you have any questions, please contact me at (217) 782-9054.

Very truly yours,


MATT HARTMAN
Assistant Attorney General
Public Access Bureau

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