OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 15, 2017

Via electronic mail
Mr. Kirk Allen
P.O. Box 593
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kirk@illinoisleaks.com

Via electronic mail
Mr. Anthony Raffety
FOIA Officer
Illinois Law Enforcement Training and Standards Board
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RE: FOIA Request for Review – 2017 PAC 46154

Dear Mr. Allen and Mr. Raffety:

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 2016)). For the reasons that follow, the Public Access Bureau concludes that the Illinois Law Enforcement Training and Standards Board (Board) improperly denied Mr. Kirk Allen's January 19, 2017, FOIA request.

On that date, Mr. Allen submitted a FOIA request to the Board seeking "[a] copy of the Officer Professional conduct database."[1] On January 26, 2017, the Board denied Mr. Allen's request in its entirety by citing section 6.2 of the Police Training Act (50 ILCS 705/6.2 (West 2016)), which provides that the Board "shall maintain a database readily available to any chief administrative officer, or his or her designee, of a law enforcement agency." The Board's response stated that it had to deny Mr. Allen's request because after reviewing their records it found that he was not a chief administrative officer or designee of a law enforcement agency. That same day, Mr. Allen asked the Board to identify the FOIA exemption that served as the

[1]FOIA request from Kirk Allen to John.Keigher@illinois.gov and Anthony.Raffety@illinois.gov (January 19, 2017).

basis for the denial. On January 27, 2017, the Board asserted that it had denied Mr. Allen's request pursuant to sections 7(1)(a), 7(1)(b), 7(1)(b-5), 7(1)(c), 7(1)(d), 7(1)(d-5), 7(1)(m), and 7(1)(n) of FOIA (5 ILCS 140/7(1)(a), (1)(b), (1)(b-5), (1)(c), (1)(d), (1)(d-5), (1)(m), (1)(n) (West 2016)).

On January 30, 2017, this office received Mr. Allen's Request for Review disputing the denial of his request, which included his arguments against the application of each exemption cited by the Board. On February 8, 2017, this office forwarded a copy of the Request for Review to the Board and asked it to provide a representative sample of the requested records for this office's confidential review, together with a detailed explanation of the legal and factual bases for the asserted exemptions. On February 22, 2017, the Board provided this office with a copy of the "database, as well as copies of five examples of "professional conduct reports" submitted by reporting agencies, copies of two officer statements, and its written response.[2] On March 1, 2017, this office forwarded a copy of the Board's response to Mr. Allen; he did not reply.

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 Department of Public Health*, 218 Ill. 2d 390, 415 (2006). Any public body that denies a record "has the burden of proving by clear and convincing evidence" that the 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 University*, 176 Ill. 2d 401, 407 (1997).

Section 7(1)(a) of FOIA

Section 7(1)(a) of FOIA exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or state law." Under section 7(1)(a), "an exemption restricting the expansive nature of the FOIA's disclosure provisions must be explicitly stated - that is, such a proposed disclosure must be *specifically* prohibited." (Emphasis in original.) *Better Government Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 815-16 (4th Dist. 2008); *but cf. Better Government Ass'n v. Zaruba*, 2014 IL App (2d) 140071, ¶21, 21 N.E.3d 516, 522 (2014) (quoting *Kibort v. Westrom*, 371 Ill. App. 3d 247, 256 (2d Dist. 2007)):

[2]Mr. Kraft's FOIA request sought only a copy of the database itself, not related or underlying records, therefore this office will not address the applicability of the asserted exemptions to the additional records provided to this office by the Board.

> [E]ven if a statute does not specifically provide that records are exempt from disclosure under the FOIA or otherwise contain an explicit prohibition against public disclosure, records are nevertheless exempt "where the plain language contained in a State or federal statute reveals that public access to the records was not intended." [Citation.] On the other hand, section 7(1)(a) does not apply "where a State or federal statute is ambiguous or silent in regard to the disclosure of public records." [Citation.]

The Board cited section 6.2 of the Police Training Act as its basis for withholding the database, and later identified section 7(1)(a) of FOIA, stating that section 6.2 restricted access to the database to a specific class of recipients. Section 6.2(a) of this Act (50 ILCS 705/6.2(a) (West 2016)) provides that "[a]ll law enforcement agencies shall notify the Board of any final determination of willful violation of department or agency policy, official misconduct, or violation of law" when an officer has been dismissed as a result of the violation or resigns while under an investigation for a Class 2 felony or higher. Section 6.2(c) further provides:

> The Board shall maintain a database readily available to any chief administrative officer, or his or her designee, of a law enforcement agency that shall show each reported instance, including the name of the officer, the nature of the violation, reason for the final decision of discharge or dismissal, and any statement provided by the officer.

The Board's response indicates that the database created pursuant to this provision "consists of a spreadsheet containing the names of individuals who have been reported by their former agencies, the name of such agency, the date the report was received, the nature of the offense, a column indicating whether or not the individual was dismissed or resigned and a final column indic[a]ting if the report is open or closed."[3]

In his Request for Review, Mr. Allen noted that section 6.2 of the Police Training Act "contains no language that restricts" access to the database, stating: "Had the legislature wanted that data base to be exempt from FOIA they would have stated that these records are not subject to FOIA or are protected from public review."[4] The Board, however, asserts that the database is designed to assist law enforcement administrators and that its dissemination is limited to that purpose:

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[4]Letter from Kirk Allen to [the Public Access Bureau] (undated), at 1.

> The mandate does not require the Board to make this available to the general public – rather, the Board must make this available to chief administrative officers of a law enforcement agency. This position is supported by the legislative transcript in which both the House and Senate sponsors indicate that the database is "for law enforcement" to "protect police departments" and to give the highest ranking official "the ability [to] seek and look at the employee's history." With this, it becomes clear that the ability to review the names and information in this database was intended for the highest-ranking law enforcement personnel only, not the public.[5]

This office has reviewed the legislative transcripts highlighted by the Board. According to the Senate sponsor of the bill that added section 6.2 to the Police Training Act, the database was intended to allow "law enforcement to identify and keep track of officers dismissed for misconduct or those who resign while under the investigation[,]"[6] and thus to "protect[ ] police departments from being on the hook from * * * hiring * * * a bad cop."[7] Such comments do not evince a clear intent by the General Assembly to specifically prohibit disclosure of the database under FOIA.

Although the plain language of section 6.2(c) of the Police Training Act requires that the database be made "readily available" to chief administrative officers of law enforcement agencies or their designees, it does not provide that the database should be made available *only* to those individuals. Section 6.2 contains no language restricting access to the database. If the General Assembly had intended to specifically prohibit disclosure of the database, it would have done so expressly. Moreover, the Board's argument above does not account for the fact that the

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[5]Letter from Anthony Raffety, FOIA Officer, Illinois Law Enforcement Training and Standards Board, to [Teresa] Lim, Assistant Attorney General (February 21, 2017), at 2.

[6]Remarks of Sen. Raoul, May 30, 2015, Senate Debate on Senate Bill No. 1304, at 92.

[7]Remarks of Sen. Raoul, May 30, 2015, Senate Debate on Senate Bill No. 1304, at 116.

database is a "public record" as defined in FOIA,[8] and therefore it is "presumed to be open to inspection or copying." (5 ILCS 140/1.2 (West 2016)). Accordingly, this office concludes that the Board has not demonstrated by clear and convincing evidence that the database is exempt from disclosure under section 7(1)(a) of FOIA.[9]

Section 7(1)(b) of FOIA

Section 7(1)(b) of FOIA 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." 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 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.

In its response to this office, the Board stated that information that would uniquely identify individuals is exempt from disclosure under section 7(1)(b). However, this office's review of the database revealed that it does not contain any information that meets the definition of "private information" set out above. To the extent that the Board's response is intended to assert that names are exempt from disclosure under section 7(1)(b), names are unquestionably "personal information" in the sense that they are specific to particular persons (*see Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 411 (1997)), but

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[8]Section 2(c) of FOIA (5 ILCS 140/2(c) (West 2016)) provides:

> Public records" means 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.

[9]The Board also argued that the information in the database is exempt from disclosure under section 7(1)(a) pursuant to "the general principles of defamation." Letter from Anthony Raffety, FOIA Officer, Illinois Law Enforcement Training and Standards Board, to [Teresa] Lim, Assistant Attorney General (February 21, 2017), at 2-3. However, the Board cited no corresponding provision of law or rule or regulation implementing such a law, as required to demonstrate the records are exempt from disclosure pursuant to section 7(1)(a).

they are neither confidential nor unique. To the contrary, names are "basic identification," and as the Supreme Court concluded in *Lieber*, "[w]here the legislature intended to exempt a person's identity from disclosure, it [has done] so explicitly." *Lieber*, 176 Ill. 2d at 412. Therefore, by excluding names from the definition of "private information," the General Assembly clearly did not intend for names to be exempt from disclosure under section 7(1)(b) of FOIA. Accordingly, the Board failed to sustain its burden of demonstrating that names or any other information in the database is exempt from disclosure under section 7(1)(b).

Section 7(1)(b-5) of FOIA

Section 7(1)(b-5) of FOIA exempts from disclosure "[f]iles, documents, and other data or databases maintained by one or more law enforcement agencies and *specifically designed to provide information* to one or more law enforcement agencies *regarding the physical or mental status of one or more individual subjects*." (Emphasis added.) The Board argues that this provision applies to the database because the Board is a law enforcement agency. However, by its plain language, section 7(1)(b-5) only applies to information specifically intended to inform law enforcement agencies about the physical or mental status of subjects. The legislative history behind section 7(1)(b-5) confirms that it pertains to "requirement data for law enforcement regarding mental and physical disabilities that is maintained for the safety of responding officers and the individuals and the public."[10] The database Mr. Allen requested was not designed to inform law enforcement about such disabilities, and this office's review of the database showed that it does not contain data or other information regarding the physical or mental status of any of the reported officers. Accordingly, this office concludes that the Board has not demonstrated by clear and convincing evidence that the database is exempt from disclosure under section 7(1)(b-5) of FOIA.

Section 7(1)(c) of FOIA

Section 7(1)(c) permits a public body to withhold "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." An "unwarranted invasion of personal privacy" is defined by section 7(1)(c) as 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." Further, under section 7(1)(c), "[t]he disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy."

[10]Remarks of Sen. Millner, May 15, 2009, Senate Debate on House Bill No. 47 (which as Public Act 99-558, effective January 1, 2010, enacted section7(1)(b-5) of FOIA), at 59.

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. Department of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994).

The Board's response acknowledges that the "public should be advised of officers who have been decertified and can no longer serve in law enforcement positions[,]"[11] but asserts that the public's interest in learning which officers have been reported to the database is not comparable. While the decertification of an officer is prompted by a felony conviction, the Board asserts that the reports reflected in the database involve allegations of misconduct that have not been vetted through the formal decertification process. Consequently, "the public's interest in learning of the improper activity of law enforcement officers does not [rise] to the level already available through decertification. Since these allegations do not meet this threshold, the resulting harm to the individual's reputation warrants an exemption from disclosure."[12]

Although the types of misconduct reported to the database may not rise to a level meriting decertification, a law enforcement agency's decision to terminate an officer's employment or investigate an officer for actions that would constitute at least a Class 2 felony signifies that the conduct at issue bears on the officer's ability to perform the public duties of law enforcement. Under the plain language of section 7(1)(c), the disclosure of information that bears on an officer's public duties cannot constitute an unwarranted invasion of personal privacy. Moreover, the substantial public interest in the disclosure of information concerning alleged officer misconduct outweighs any privacy interests in the database, which does not reveal highly personal or objectionable details about the misconduct allegedly committed. *See Gekas v. Williamson*, 393 Ill. App. 3d 573, 586 (2009) (analyzing whether records related to citizen complaints against police officer were exempt from disclosure under a prior version of section 7(1)(c) (5 ILCS 140/7(1)(b) (West 2006)) and concluding: "Insomuch as these materials, true or false, founded or unfounded, bear on his duties as a police officer, the disclosure of these materials would not invade his personal privacy, and, thus, we do not reach the question of whether their disclosure would be a 'clearly unwarranted invasion of [his] personal privacy'"). Accordingly, the Board has not sustained its burden of demonstrating that the database is exempt from disclosure under section 7(1)(c).

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[11]Letter from Anthony Raffety, FOIA Officer, Illinois Law Enforcement Training and Standards Board, to [Teresa] Lim, Assistant Attorney General (February 21, 2017), at 3.

[12]Letter from Anthony Raffety, FOIA Officer, Illinois Law Enforcement Training and Standards Board, to [Teresa] Lim, Assistant Attorney General (February 21, 2017), at 4.

Section 7(1)(d) of FOIA

Section 7(1)(d) of FOIA exempts from disclosure certain "[r]ecords 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" cause one or more of seven enumerated consequences, such as "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 law enforcement agencies (5 ILCS 140/7(1)(d)(iv) (West 2016)) or "disclose unique or specialized investigative techniques" in a manner that would harm the public body (5 ILCS 140/7(1)(d)(v) (West 2016)).

The Board asserts that sections 7(1)(d)(iv) and 7(1)(d)(v) are applicable because "[s]ome of the records contained within the misconduct database contain information * * * that would disclose the identity of confidential sources and expose specialized investigative techniques[.]"[13] Yet, as noted above, the Board's database does not contain such records; it is merely a spreadsheet that sets out general information about each report. Because the database does not contain the identities of any witnesses or depict any investigative techniques, this office concludes that the Board has not demonstrated by clear and convincing evidence that the database is exempt from disclosure pursuant to section 7(1)(d).

Section 7(1)(d-5) of FOIA

Section 7(1)(d-5) of FOIA exempts from disclosure "[a] law enforcement record created for law enforcement purposes and contained in a shared electronic record management system if the law enforcement agency that is the recipient of the request did not create the record, did not participate in or have a role in any of the events which are the subject of the record, and only has access to the record through the shared electronic record management system." (Emphasis added.) Under the plain language of section 7(1)(d-5), a law enforcement agency may withhold a law enforcement record if it had no involvement in the creation of the record and has access to the record only through a shared electronic system. In this case, the Board created the database and does not have access to the information listed therein only through a shared electronic system, but rather through reports it receives directly from law enforcement agencies. *See* 50 ILCS 705/6.2(a), (c) (West 2016). Further, Remarks by the Senate sponsor of House Bill 4596, which added section 7(1)(d-5) of FOIA as part of Public Act 97-1065, effective August 24, 2012, confirm that the section 7(1)(d-5) exemption was intended to be limited in scope and

[13]Letter from Anthony Raffety, FOIA Officer, Illinois Law Enforcement Training and Standards Board, to [Teresa] Lim, Assistant Attorney General (February 21, 2017), at 5.

aimed specifically at facilitating participation in the Illinois Citizen and Law Enforcement Analysis and Reporting System (ICLEAR):

> [T]his is a -- an amendment to the Freedom of Information Act. It's a very narrow loophole they're closing. It allows law enforcement records, contained and [sic] shared electronic management systems, to be shared for law enforcement purposes. It allows local agencies to -- to become part of the ICLEAR sharing project. Remarks of Sen. Haine, May 15, 2012, Senate Debate on House Bill No. 4596 (which as Public Act 97-1065, effective August 24, 2012, enacted section 7(1)(d-5) of FOIA), at 80.

Here, the Board's involvement with the database is different from that of local law enforcement agencies participating in ICLEAR. Rather than accessing records through a shared electronic management system, the Board is responsible for maintaining the database and making it readily available to chief administrative officers of law enforcement agencies or their designees. Accordingly, the Board has not demonstrated by clear and convincing evidence that the database is exempt from disclosure under section 7(1)(d-5).

Section 7(1)(m) of FOIA

Section 7(1)(m) exempts from disclosure "[c]ommunications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body[.]" Communications protected by the attorney-client privilege are within the scope of section 7(1)(m). *See People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 201 (1st Dist. 1997). This office has reviewed the information in the database and determined that it does not contain any attorney-client communications. Likewise, the database does not contain materials compiled in anticipation of a criminal, civil, or administrative proceeding upon the request of an attorney advising the public body. Accordingly, this office concludes that the Board has not demonstrated by clear and convincing evidence that the database is exempt from disclosure under section 7(1)(m).

Section 7(1)(n) of FOIA

Section 7(1)(n) exempts from disclosure "[r]ecords relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed." The Attorney General has issued a binding opinion distinguishing an "adjudication" from an informal disciplinary

proceeding. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 13-011, issued June 11, 2013. In this opinion, the Attorney General examined whether records pertaining to a police chief's suspension of an employee were properly withheld under section 7(1)(n). The Attorney General concluded that the police chief's interviews with witnesses, their fact-based observations, and additional evidence supporting the decision to suspend the employee were not exempt from disclosure pursuant to section 7(1)(n) because the informal disciplinary process did not culminate in an "adjudicatory procedure or 'agency proceeding' where witnesses were called and the identified employee had a right to call [witnesses] and make arguments." Ill. Att'y Gen. Pub. Acc. Op. No. 13-011, at 8. The Public Access Bureau has also consistently determined that records generated independent of an adjudication falls outside the scope of section 7(1)(n) of FOIA. Ill. Att'y. Gen. PAC Req. Rev. Ltr. 11212, issued May 26, 2011.

In its response to this office, the Board's asserted:

> The Board acknowledges that the "final outcome" of disciplinary measures is not exempt from disclosure; however, the fact that these "outcomes" are specifically referenced, indicates that the salacious, personal, and private details of such disciplinary measures must otherwise be protected.
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> Furthermore, in addition to those who underwent a formal disciplinary procedure, the database also includes individuals who resign in the course of an investigation. In these instances, no final outcome of the charges or claims is reported. Therefore, the requester's position that all decisions are final is clearly inapplicable.[14]

This office's review of the database showed that while it discloses whether an officer was terminated or resigned and the general nature of the violation, it does not reveal the details of a related adjudication, if any, such as any witnesses called or arguments made. Absent information generated as part of an adjudication, section 7(1)(n) does not apply. Because the database does not contain or reveal records pertaining to a public body's adjudication of an employee disciplinary case, this office concludes that the Board has not demonstrated by clear and convincing evidence that the database is exempt from disclosure under section 7(1)(n) of FOIA.

[14]Letter from Anthony Raffety, FOIA Officer, Illinois Law Enforcement Training and Standards Board, to [Teresa] Lim, Assistant Attorney General (February 21, 2017), at 6.

In accordance with the conclusions expressed in this determination, this office requests that the Board promptly disclose a copy of the database to Mr. Allen. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at the Chicago address listed on the first page of this letter.

Very truly yours,

TERESA LIM
Assistant Attorney General
Public Access Bureau

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