

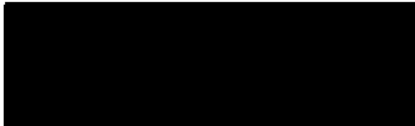


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

February 21, 2020

Via electronic mail
Mr. Aaron Beard



Via electronic mail
The Honorable Chad M. Miller
State's Attorney
Office of the Jasper County State's Attorney
100 West Jourdan
Newton, Illinois 62448
cmiller@jaspercountyil.org

RE: FOIA Request for Review – 2017 PAC 47629

Dear Mr. Beard and Mr. Miller:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2018)).¹

On April 27, 2017, Mr. Aaron Beard submitted a Request for Review to the Public Access Bureau contesting the denial of his April 17, 2017, FOIA request by Jasper County Sheriff's Office (Sheriff's Office). That request sought copies of: (1) Sergeant Brandon Francis's cell phone log for February and March 2017; (2) audio and video recordings for incident number 1-17-000407; and (3) body camera and surveillance footage relating to that incident. The Sheriff's Office denied the request pursuant to section 7(1)(d) of FOIA (5 ILCS 140/7(1)(d) (West 2015 Supp.)), as amended by Public Act 99-642, effective July 28, 2016),

¹In issuing this letter, we recognize that it is coming long after the FOIA dispute took place. Because it raises a legal question that may reoccur, however, this letter is intended to provide guidance to the requester and public body.

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asserting that "[d]isclosure of the requested information would interfere with law enforcement proceedings" and "unavoidably disclose confidential information furnished as part of an active criminal investigation."² This office construed those claims as asserting sections 7(1)(d)(i), 7(1)(d)(iv), and 7(1)(d)(vii) of FOIA (5 ILCS 140/7(1)(d)(i), (1)(d)(iv), (1)(d)(vii) (West 2015 Supp.), as amended by Public Act 99-642, effective July 28, 2016). Mr. Beard contested the denial of his request.

Sections 7(1)(d)(i), 7(1)(d)(iv), and 7(1)(d)(vii) of FOIA exempt 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:

(i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency that is the recipient of the request; [or]

* * *

(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; [or]

* * *

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

Conclusory statements 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). In *Day*, the court explained: "Simply saying there is an 'ongoing criminal investigation because the case has not been cleared,' with little additional explanation, is not 'objective indicia'

²Letter from Chad M. Miller, Jasper County State's Attorney (FOIA Officer), to Aaron [Beard] (February 27, 2017).

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sufficient to show the ongoing investigation exemption applies." *Day*, 388 Ill. App. 3d at 76; *see also* Ill. Att'y Gen. Pub. Acc. Op. No. 17-011, issued August 14, 2017, at 7-8 (public body improperly withheld record under section 7(1)(d)(vii) because it failed to demonstrate that disclosure would interfere with a law enforcement investigation). Rather, a public body must demonstrate *how* disclosure of the records would interfere with or obstruct an investigation. *See Baudin v. City of Crystal Lake*, 192 Ill. App. 3d 530, 536 (2nd Dist. 1989) ("The classification of information as 'law enforcement' or 'investigatory' does not necessarily foreclose access unless it can be shown, in a particular case, that disclosure would interfere with law enforcement and would, therefore, not be in the public interest.").

In its redacted response³ to this office, the Jasper County State's Attorney's Office (State's Attorney's Office), on behalf of the Sheriff's Office, asserted that no audio or video recordings existed for the specified incident number. According to the State's Attorney's Office, the officers do not wear body cameras, and "a great portion of the incident occurred at the Jasper County Annex building, which does not have surveillance cameras."^{4,5} The State's Attorney's Office acknowledged that the Jasper County jail has surveillance cameras, but contended that the incident occurred in an area that was not recorded. With regard to the requested cell phone logs, the State's Attorney's Office contended that release of the logs would unavoidably disclose the identity of the complainant who provided information to the Sheriff's Office regarding the incident at issue. The State's Attorney's Office further argued that the phone logs would reveal "the private cell phone number of Sgt. Brandon Francis (his children and family), Sheriff Rick Britton, and Jasper County State's Attorney Chad M. Miller, as well as other deputies, complainants on cases he was not involved in or other confidential informants on other cases investigated by Sgt. Brandon Francis."⁶ Because the State's Attorney's Office submitted additional information concerning its assertion of the section 7(1)(d) exemptions to the phone logs under a claim of confidentiality, this office is restricted from discussing that information.

³The State's Attorney's Office submitted both a complete version of its written response to the matter for this office's confidential review and a redacted version for this office to forward to Mr. Beard. *See* 5 ILCS 140/9.5(d) (West 2018) ("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.").

⁴Letter from Chad M. Miller, Jasper County State's Attorney (FOIA Officer), to S. Piya Mukherjee, Assistant Attorney General (April 19, 2017 [*sic*]).

⁵Although the letter from State's Attorney Chad M. Miller to S. Piya Mukherjee is dated April 19, 2017, this date is clearly erroneous because this Request for Review was filed on April 27, 2019, and the letter was transmitted to this office by e-mail on May 16, 2019.

⁶Letter from Chad M. Miller, Jasper County State's Attorney (FOIA Officer), to S. Piya Mukherjee, Assistant Attorney General (April 19, 2017 [*sic*]).

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In reply to that answer, Mr. Beard questioned the lack of audio or video recordings of the incident, asserting that he had observed several cameras in the courthouse and State's Attorney's Office. He also maintained that the Sheriff's Office improperly denied his request for the phone logs of Sgt. Francis.

Upon review of the State's Attorney's Office's complete response, together with the responsive phone logs, this office concludes that the State's Attorney's Office has not provided facts sufficient to demonstrate that the records are exempt from disclosure in their entirety under the asserted 7(1)(d) exemptions. As discussed above, Illinois courts have made it clear that the mere existence of an active criminal investigation is an inadequate basis for denying a request. Here, the Sheriff's Office has not illustrated how disclosure of the phone logs, which simply list the phone numbers, times, and dates of each call and minimal other information, would interfere with any pending law enforcement proceeding or ongoing criminal investigation. The phone logs do not reveal the substance of any cell phone conversations. Similarly, the State's Attorney's Office did not demonstrate that the phone logs must be withheld entirely to avoid disclosing the identities of complainants who provided information to the Sheriff's Office. The State's Attorney's Office indicated that the phone logs documented phone calls between Sgt. Francis, Sheriff Rick Britton, and other public employees. Communications between officers or between members of two public bodies pertaining to the transaction of public business are public records, including portions of phone bills that document the occurrence of such communications. *See, for example*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 35580, issued May 12, 2016 (phone log not exempt from disclosure in its entirety where certain listed cell phone numbers corresponded to devices assigned to school district employees for use in their public duties and were paid for by public funds). "Construing section 7(1)(d)(iv) to apply to individuals who provide information for a law enforcement investigation pursuant to their duties as public servants would yield [an] absurd result, and statutes should be construed to avoid absurdity." Ill. Att'y Gen. PAC Req. Rev. Ltr. 26558, issued January 7, 2014, at 3. In this matter, the State's Attorney's Office did not establish that all of the documented phone calls involved personal communications rather than communications pertaining to the transaction of public business. Accordingly, this office concludes that the State's Attorney's Office has not demonstrated by clear and convincing evidence that the phone logs are exempt from disclosure in their entirety pursuant to section 7(1)(d)(i), 7(1)(d)(iv), and 7(1)(d)(vii) of FOIA.

With regard to the remaining items of the request, the State's Attorney's Office's explanation of its handling of Mr. Beard's request indicates that the Sheriff's Office does not maintain responsive audio or video recordings. FOIA requires a public body to conduct a "reasonable search tailored to the nature of [each] particular request." *Campbell v. U.S. Department of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). However, "[a] requester is entitled only to records that an agency has in fact chosen to create and retain." *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982); *see also* *Kenyon v. Garrels*, 184 Ill.

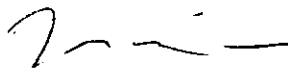
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App. 3d 28, 32 (4th Dist. 1989) (public body not required to answer questions or create records in response to a FOIA request). In this matter, the State's Attorney's Office explained that officers do not wear body cameras and that surveillance cameras did not capture the areas where the incident occurred. This office has not received sufficient evidence to dispute those claims. Accordingly, this office is unable to conclude that the State's Attorney's Office's response to the remaining items violated FOIA.

This office requests that the Sheriff's Office provide Mr. Beard with a copy of the phone logs that discloses any business phone numbers,⁷ including phone numbers for cell phones that are paid for by a public body. The Sheriff's Office may redact the personal telephone numbers of family, friends, or complainants pursuant to section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019).

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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⁷See Ill. Att'y Gen. PAC Req. Rev. Ltr. 22902, issued June 27, 2016, at 3 (business telephone numbers not exempt under section 7(1)(b) of FOIA).