



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

March 6, 2018

Via electronic mail

Mr. Harold Lee Wathan, Jr.
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lee@leewathan.com

Via electronic mail

Ms. Heidi L. Eckert
Jackson Lewis P.C.
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RE: FOIA Request for Review – 2018 PAC 51411

Dear Mr. Wathan and Ms. Eckert:

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 Madison County Sheriff's Office (Sheriff's Office) violated FOIA by denying Mr. Harold Lee Wathan, Jr.'s December 4, 2017, FOIA request.

On that date, Mr. Wathan submitted a FOIA request to the Sheriff's Office seeking video footage of a named person filing for County Board on December 1, 2017. On December 12, 2017, the Sheriff's Office denied the request pursuant to sections 7(1)(c) and 7(1)(e) of FOIA (5 ILCS 140/7(1)(c), (1)(e) (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017). On January 20, 2018, Mr. Wathan submitted the above-captioned Request for Review contesting that denial. He argued that section 7(1)(e) is inapplicable because he is seeking footage from the administration building rather than a prison or jail, and that section 7(1)(c) is inapplicable because: "Providing a video of a person who is holding public office, filing public record papers for election to public

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office, in a public building that she is a board member overseeing, which has cameras in plain sight, would not constitute an unwarranted invasion of personal privacy."¹

On January 29, 2018, this office sent a copy of the Request for Review to the Sheriff's Office and asked it to provide this office with an unredacted copy of the responsive record for this office's confidential review, together with a detailed explanation of the legal and factual bases for the asserted exemptions. On February 21, 2018, this office received those materials, including a complete version of the Sheriff's Office's written response for this office's confidential review and a redacted version for this office to forward to Mr. Wathan.² The Sheriff's Office argued that the footage was also exempt from disclosure under sections 7(1)(d)(i), 7(1)(d)(iii), 7(1)(d)(vii), and 7(1)(v) of FOIA (5 ILCS 140/7(1)(d)(i), (1)(d)(iii), (1)(d)(vii), (1)(v) (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017). On February 26, 2018, Mr. Wathan submitted a reply.

DISCUSSION

Under FOIA, "[a]ll 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). A public body "has the burden of proving by clear and convincing evidence" that information it withholds is exempt from disclosure. 5 ILCS 140/1.2 (West 2016).

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." An "unwarranted invasion of personal privacy" is defined 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." Moreover, "[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."

A public body's assertion that the release of information would constitute an unwarranted invasion of personal privacy is evaluated on a case-by-case basis. *Chicago*

¹Letter from Harold Lee Wathan Jr. to Office of the Illinois Attorney General, Public Access Counselor (January 20, 2018).

²See 5 ILCS 140/9.5(d) (West 2016) ("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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Journeyman Plumbers' Local Union 130 v. Department of Public Health, 327 Ill. App. 3d 192, 196 (1st Dist. 2001). The phrase "clearly unwarranted invasion of personal privacy" evinces a strict standard to claim the exemption, and the burden is on the public body 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). Illinois courts consider the following factors in determining whether disclosure of information would constitute an unwarranted invasion of personal privacy: "(1) the plaintiff's interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information." *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 3d 1, 13 (1st Dist. 2010).

In its non-confidential response to this office, the Sheriff's Office asserted that "[t]he responsive video footage is exempt from production as the footage discloses individuals who were in the Madison County Clerk's Office on the date of the video footage."³ Under the first factor of the four-factor balancing test set out above, the Sheriff's Office argued that Mr. Wathan's interest in the video "is purely personal in nature, and is not aligned with the public's interest in obtaining information contained in the video footage."⁴ The Sheriff's Office explained that Mr. Wathan filed an electoral challenge against the nominating petitions filed by the person at issue in his request, but that the Madison County Electoral Board and Madison County Circuit Judge Dave Dugan both ruled against him. Therefore, the Sheriff's Office argued, "there is no public interest in the disclosure of the video footage as the electoral challenge has been ruled on and, as such, the issue is moot."⁵ In contrast, the Sheriff's Office claimed:

[T]he disclosure of the video would greatly invade the personal privacy of individuals who were present in the Madison County Clerk's Office on the date of the video footage. Business conducted in the County Clerk's Office is highly personal and includes, but is not limited to, citizens paying delinquent tax bills, as well as citizens voting in local and federal elections. Persons displayed in

³Letter from Heidi L. Eckert, Jackson Lewis, to Joshua Jones, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (February 9, 2018), at 2.

⁴Letter from Heidi L. Eckert, Jackson Lewis, to Joshua Jones, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (February 9, 2018), at 2.

⁵Letter from Heidi L. Eckert, Jackson Lewis, to Joshua Jones, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (February 9, 2018), at 2.

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the video footage were conducting this type of personal business and have an expectation of privacy.⁶

Lastly, the Sheriff's Office stated that Mr. Wathan "asserted to having knowledge of the content of the video" before the Madison County Electoral Board and Madison County Circuit Judge Dugan and thus must have "other means of obtaining the information which he believes is depicted in the video footage."⁷

Mr. Wathan replied, in pertinent part, that "[v]ideo of individuals who were in the Madison County Clerk's office on the date that was requested were in a public space within the County Administrative building where there is no expectation of privacy[.]"⁸ He stated that there is public interest in disclosure of the video footage because "the objection hearing and judicial review by Judge Dave Dugan were covered by the local press, the release of the video will most certainly be covered by it and I intend to use it as the basis for my appeal since it was not allowed in the hearing or judicial review."⁹ He also argued that the business conducted at the Clerk's Office is public and that he has no alternative means of obtaining a visual record of the petition filing.

This office's review of the responsive video footage revealed that it shows members of the public approaching the counter and interacting with the staff of the Clerk's Office. While the faces of the members of the public are identifiable, the papers carried by some of the members of the public cannot be read because of the distance of the camera and somewhat grainy nature of the footage. The footage also lacks sound. This office finds that any invasion of personal privacy would be minimal under these circumstances. The members of the public were in a public building and the Sheriff's Office did not demonstrate that anything highly personal about their activities is depicted in the footage. Conversely, the public interest in disclosure of the footage is at least moderate, as the media has reported on Mr. Wathan's petition challenge¹⁰

⁶Letter from Heidi L. Eckert, Jackson Lewis, to Joshua Jones, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (February 9, 2018), at 2.

⁷Letter from Heidi L. Eckert, Jackson Lewis, to Joshua Jones, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (February 9, 2018), at 2.

⁸Letter from Harold Lee Wathan Jr. to Office of the Illinois Attorney General, Public Access Counselor (February 26, 2018), at 4.

⁹Letter from Harold Lee Wathan Jr. to Office of the Illinois Attorney General, Public Access Counselor (February 26, 2018), at 5.

¹⁰Scott Cousins, *Challenges to county election petitions set for Friday morning*, The Telegraph (Dec. 13, 2017, 7:02 p.m.), <https://www.thetelegraph.com/news/article/Challenges-to-county-election-petitions-set-for-12581914.php>.

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and he is seeking to verify whether petitions were filed in accordance with the law. Further, there appear to be no alternative means for Mr. Wathan to obtain the footage he requested. On balance, because the footage does not depict highly personal conduct, this office has determined that the Sheriff's Office improperly denied Mr. Wathan's request under section 7(1)(c).

Sections 7(1)(d)(i), 7(1)(d)(iii), and 7(1)(d)(vii) of FOIA

Sections 7(1)(d)(i), 7(1)(d)(iii), 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;

* * *

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

* * *

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

Bare assertions without a detailed rationale do not satisfy a public body's burden of explaining how exemptions are applicable. *See Rockford Police Benevolent & Protective Ass'n v. Morrissey*, 398 Ill. App. 3d 145, 151 (2d Dist. 2010) (citing *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 464 (2003)). Rather, "[t]o meet its burden * * *, the public body must provide a detailed justification for its claim of exemption, addressing the requested records specifically and in a manner allowing for adequate adversarial testing." *Rockford Police Benevolent & Protective Ass'n v. Morrissey*, 398 Ill. App. 3d 145, 150 (2nd Dist. 2010).

In its non-confidential response, the Sheriff's Office merely quoted the language of these exemptions. In its confidential response, the Sheriff's Office provided two additional sentences. This office is not at liberty to discuss the contents of those sentences other than to

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note that the Sheriff's Office did not demonstrate that the footage is part of a pending or actually and reasonably contemplated law enforcement proceeding that it is conducting or an ongoing criminal investigation that it is conducting. The Sheriff's Office also did not provide facts supporting the assertion that disclosure of the footage would create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing. Therefore, the Sheriff's Office improperly withheld the footage under these three section 7(1)(d) exemptions.

Section 7(1)(e) of FOIA

Section 7(1)(e) of FOIA exempts from disclosure "[r]ecords that relate to or affect the security of correctional institutions and detention facilities." Because any record pertaining to a prison or jail could be deemed to "relate to" security in the broadest sense of that term, the Public Access Bureau has consistently determined that section 7(1)(e) applies only when a public body demonstrates that disclosure of a requested record would pose a potential security risk to a correctional or detention facility. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 32159, issued April 17, 2015.

In support of the applicability of section 7(1)(e), the Sheriff's Office asserted:

Here, it is clear that release of the video footage jeopardizes the security of all Madison County buildings and operations, including the Madison County Jail. All Madison County buildings utilize the same video surveillance system; hence, if the requested video footage is produced, an individual would be able to scrutinize and determine the specific areas of County building being videoed and plan an attack on areas not being monitored. This not only exposes the County buildings to irreparable damage, but also places Madison County employees, as well as citizens, in serious danger. The video surveillance system is utilized as a safety measure, and disclosing the video footage would impact safety as the cameras' location and viewing/videoing range would be disclosed.^[11]

¹¹ Letter from Heidi L. Eckert, Jackson Lewis, to Joshua Jones, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (February 9, 2018), at 3.

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Mr. Wathan replied: "Clearly this exemption does not apply to video footage of a candidate filing for county board at the County Clerk's office in the county administration building."¹²

The Sheriff's Office did not explain how disclosing video footage of the counter in the public area of the Clerk's Office would somehow jeopardize the security of the Madison County Jail. The notion that the same video surveillance system is used at the Jail does not prove that video footage that only shows the public counter in the Clerk's Office could be used to plan an attack on or in the Jail. Because section 7(1)(e) is limited to records that would pose a security risk to correctional and detention facilities if disclosed, the Sheriff's Office improperly denied Mr. Wathan's request under section 7(1)(e).

Section 7(1)(v) of FOIA

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

Vulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public. Information exempt under this item may include such things as details pertaining to the mobilization or deployment of personnel or equipment, to the operation of communication systems or protocols, or to tactical operations.

The Sheriff's Office provided the same explanation for the applicability of section 7(1)(v) as section 7(1)(e). Mr. Wathan replied, in pertinent part, that "[t]he claim that release of the requested footage 'exposes the County buildings to irreparable damage, but also places Madison County employees, as well as citizens, in serious danger' has not been supported by any factual basis as required by law to support exemption under section 7(1)(v)."¹³

¹²Letter from Harold Lee Wathan Jr. to Office of the Illinois Attorney General, Public Access Counselor (February 26, 2018), at 8.

¹³Letter from Harold Lee Wathan Jr. to Office of the Illinois Attorney General, Public Access Counselor (February 26, 2018), at 9.

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Even if the video footage could be considered a "security measure" that is within the scope of section 7(1)(v), the Sheriff's Office did not demonstrate that its disclosure would be expected to jeopardize the effectiveness of the surveillance camera as a security measure or the safety of the personnel who implement it or the public. The Sheriff's Office's argument is conclusory and speculative. While the Public Access Bureau has previously determined that security camera footage from inside prisons and jails was exempt from disclosure in light of the unique security concerns in those environments,¹⁴ the same safety concerns do not apply to the video footage at issue here. Therefore, the Sheriff's Office improperly denied the request under section 7(1)(v).

In accordance with the conclusions expressed in this letter, this office requests that the Sheriff's Office provide Mr. Wathan with a copy of the responsive video footage.

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. Should you have questions, please contact me at (312) 814-8413 or jjones@atg.state.il.us.

Very truly yours,



JOSHUA M. JONES
Deputy Bureau Chief
Public Access Bureau

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¹⁴See, e.g., Ill. Att'y Gen. PAC Req. Rev. Ltr. 23336, issued April 21, 2014, at 2 (concluding that disclosure of security camera footage from inside correctional institution to correctional officer depicting an incident in which the correctional officer was injured would jeopardize prison security because it "would reveal blind spots that inmates could exploit to evade detection of actions that could endanger other inmates and/or staff members.").