



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 12, 2013

PUBLIC ACCESS OPINION 13-017
(Request for Review 2013 PAC 25483)

FREEDOM OF INFORMATION ACT:
Duty to Provide "Clear and Convincing"
Evidence to Support Assertion of
Exemptions; Possibility of Obtaining
Public Records through Discovery
Does Not Preclude FOIA Requests

Ms. Maria de los Angeles Diaz
1530 Wesley Avenue
Berwyn, Illinois 60402

Mr. Thomas J. Pavlik
Berwyn City Clerk/FOIA Officer
City of Berwyn
6700 West 28th Street
Berwyn, Illinois 60402-0701

Dear Ms. Diaz and Mr. Pavlik:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2012)). For the reasons discussed below, this office concludes that the City of Berwyn (City) failed to comply with the requirements of FOIA by withholding a copy of a police report requested by Ms. Maria de los Angeles Diaz.



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BACKGROUND

On June 26, 2013, the City received Ms. Diaz's FOIA request seeking a copy of "Police Report # 13-05529."¹ On July 1, 2013, the City sent a form "Notice of Denial" letter noting two reasons for withholding the report in its entirety: (1) "Interference with law enforcement proceedings 5 ILCS 140/7(1)(d)(i)"; and (2) "Deprive a person of a fair trial 5 ILCS 140/7 (1)(d)(iii)[.]"²

Ms. Diaz submitted a Request for Review of the City's denial of her FOIA request and, on August 13, 2013, this office received all documents related to her Request for Review.³ On August 15, 2013, the Public Access Bureau forwarded a copy of the Request for Review to the City and requested "unredacted copies of the withheld records together with a detailed factual and legal basis for the applicability of sections 7(1)(d)(i) and 7(1)(d)(iii) to those records."⁴ On August 27, 2013, this office received from the City unredacted copies of the records in question, as well as a memorandum from the Berwyn Police Department detailing the basis for the denial. The records consist of a 32-page Berwyn Police Department Official Sworn Police Report for Incident 13-05529.

The memorandum submitted in support of the denial notes that section 7(1)(d)(i) of FOIA (5 ILCS 140/ 7(1)(d)(i) (West 2012)) 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:

¹FOIA request submitted by Maria de los Angeles Diaz to Thomas J. Pavlik, City Clerk, City of Berwyn (June 26, 2013).

²Letter from Thomas J. Pavlik, CMC, Freedom of Information Officer, to Maria de los Angeles Diaz (July 1, 2013).

³On July 24, 2013, Ms. Diaz submitted a copy of her FOIA request and a copy of the City's denial of the request to the Public Access Counselor; the Public Access Bureau received these two documents on July 29, 2013. On July 31, 2013, this office informed Ms. Diaz that, in order to file a Request for Review, section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2012)) also required her to submit a written, signed request that the Public Access Counselor review the denial of her FOIA request.³ On August 13, 2013, this office received a written and signed Request for Review from Ms. Diaz. Letter from Maria de los Angeles Diaz to Public Access Counselor (August 7, 2013).

⁴Letter from Rob Olmstead, Assistant Attorney General, Public Access Bureau, to Thomas J. Pavlik, FOIA Officer, City of Berwyn (August 15, 2013).

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(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[.]

The memorandum then states, in relevant part:

Our interpretation of this portion of the statute was based on the fact that the FOIA request [was] received on June 26, 2013 and would interfere with upcoming proceedings that commenced on June 19, 2013. In the past requests such as these were dealt with successfully when the requestor was advised to contact their representing attorney and have them tender a copy of the evidence after it had gone through the discovery portion of the court proceedings. As a law enforcement entity we place a high priority on proactively dealing with situations that affect our community and defer the decision to release information to other official parties associated within the due process of law enforcement proceedings, especially when it is determined from our perspective that a breach of privacy may lead to a safety issue to others in the public or soil the spirit of the legal due process. It is apparent that Ms. [d]e [l]os Angeles [Diaz] is being represented by Consumer Law Group and we would respectfully request that they utilized [sic] the legal mechanisms of discovery and subpoenas to satisfy their request.⁵

The memorandum did not reference section 7(1)(d)(iii) of FOIA (5 ILCS 140/7(1)(d)(iii) (West 2012)), but raised a new issue by requesting that Ms. Diaz use the discovery process rather than FOIA to obtain the records.

On August 27, 2013, this office forwarded a copy of the City's response to Ms. Diaz.⁶ She did not reply. On September 27, 2013, the Public Access Counselor extended the

⁵Memorandum from Berwyn Police Department to Assistant Attorney General Rob Olmstead (August 23, 2013).

⁶Letter from Rob Olmstead, Assistant Attorney General, Public Access Bureau, to Maria de los Angeles Diaz (August 27, 2013).

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time to issue a binding opinion by 30 business days, to November 12, 2013.⁷

ANALYSIS

"All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2012). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2012)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act." Although section 7 of FOIA (5 ILCS 140/7 (West 2012)) outlines several exemptions to disclosure, those exemptions are to be read narrowly. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

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

The City asserts that the records requested by Ms. Diaz are exempt because their disclosure would interfere with pending or reasonably contemplated law enforcement proceedings. The plain language of section 7(1)(d)(i), however, provides that this exemption applies only to an agency that is conducting such proceedings. *See* Public Act 97-542, effective January 1, 2010, (which amended 5 ILCS 140/7(1)(c)(i) (West 2008), by adding the phrase "that is the recipient of the request" and renumbering it to section 7(1)(d)(i)). The information provided to this office does not indicate that either the City or the Berwyn Police Department is conducting or contemplating any law enforcement proceedings with respect to the subject of the police reports. The City's response references "upcoming proceedings that commenced on June 19, 2013,"⁸ without additional information. Although this office concludes that the City has not properly asserted this exemption, we will nonetheless examine whether this exemption applies to the requested police records.

In *Day v. City of Chicago*, 388 Ill. App. 3d 70 (1st Dist. 2009), the City of Chicago denied a request for a police report by a convicted felon under a similar exemption in a

⁷Letter from Rob Olmstead, Assistant Attorney General, Public Access Bureau, to Maria De Los Angeles Diaz and Thomas J. Pavlik, Berwyn City Clerk/FOIA Officer (September 27, 2013).

⁸Memorandum from Berwyn Police Department to Assistant Attorney General Rob Olmstead (August 23, 2013).

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prior version of FOIA.⁹ The City also denied the report because disclosure would "obstruct an ongoing criminal investigation." *Day*, 388 Ill. App. 3d at 74, *citing* 5 ILCS 140/7(1)(c)(viii) (West 2006). Affiants for the City of Chicago in *Day* affirmed that they:

[d]etermined from reviewing the files * * * that the investigation is still ongoing, [that] there is still an ongoing criminal investigation because the case has not been cleared, [and that] release of information could 'very well interfere with the criminal investigation, which is ongoing. Suspects in this crime could become aware of the status of the investigation, the degree of knowledge that police have as to their involvement, and the type of evidence that exists which could incriminate them.' *Day*, 388 Ill. App. 3d at 75-76.

The Illinois Appellate Court concluded the affidavits were "entirely conclusory and inadequate to sustain the City's burden to show the requested documents * * * were exempt because disclosure would 'obstruct an ongoing criminal investigation.'" *Day*, 388 Ill. App. 3d at 75. The court also held that "[i]t is impossible to tell from the affidavits whether the investigation into aspects of the crime 'other than Mr. Day's arrest and conviction' is actually 'pending,' as required by section 7(1)(c)(i)." *Day*, 388 Ill. App. 3d at 76.

The City likewise has not asserted facts to support its argument that law enforcement proceedings are pending or contemplated and that the release of the police report will interfere with those proceedings. As previously noted, the City did not identify any investigation or specific proceedings or describe how release of the records would interfere with any proceedings. The City asserts that it has "determined from our perspective that a breach of privacy may lead to a safety issue."¹⁰ That assertion, however, is conclusory and not supported by facts. The City has not detailed how it concluded that a safety issue exists or whose safety

⁹The wording of section 7(1)(c)(i) of FOIA (5 ILCS 140/7(1)(c)(i) (West 2006)) was nearly identical to the current 7(1)(d)(i) exemption providing that:

[r]ecords compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public body, 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.

¹⁰Memorandum from Berwyn Police Department to Assistant Attorney General Rob Olmstead (August 23, 2013).

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may be at issue. Accordingly, the City has not sustained its burden of showing by clear and convincing evidence that section 7(1)(d)(i) of FOIA prohibits the disclosure of the police report in this instance.

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

Section 7(1)(d)(iii) of FOIA exempts from disclosure records that would "create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing[.]" In its August 23, 2013, reply to this office, the City did not mention this exemption. As a result, it is possible that the City is no longer relying on this exemption. In any event, however, the City's response to this office did not provide details to support this exemption, stating only that it "determined from our perspective that a breach of privacy may * * * soil the spirit of legal due process."¹¹ As noted above, such a conclusory statement cannot sustain the burden of providing clear and convincing evidence that section 7(1)(d)(iii) of FOIA is applicable to this request.

Availability of Records through the Discovery Process

The City's response also asserts that Ms. Diaz should obtain the requested records through a subpoena or the discovery process rather than through a FOIA request. The City did not cite a provision of FOIA that exempts from disclosure records that potentially could be obtained through discovery or identify another federal or state law, rule, or regulation that permits withholding records on these grounds.

In *Hoover v. U.S. Dep't of the Interior*, 611 F.2d 1132, 1137 (5th Cir. 1980), a federal appeals court reversed the district court's decision to dismiss a lawsuit challenging the denial of a request under FOIA for a property appraisal report. Because the report related to a pending condemnation lawsuit, the district court "held that the request for the report should be considered in that action through normal discovery procedures." *Hoover*, 611 F. 2d at 1136. The appeals court disagreed, emphasizing that the issue of whether the public has a right to access records under FOIA is distinct from whether a litigant may obtain records through discovery:

The question of discoverability presented in the condemnation action is not related to the rights of general public access under the FOIA to agency documents. * * * The appellant landowner's right under the FOIA, where he is in effect asserting the rights of the public to obtain such appraisals, is inherently

¹¹Memorandum from Berwyn Police Department to Assistant Attorney General Rob Olmstead, (August 23, 2013).

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different than his particularized status as the landowner in the condemnation proceeding. He is entitled to vindicate his public rights in the instant FOIA suit in accordance with the requirements of the FOIA. *Hoover*, 611 F. 2d at 1136.

Indeed, the fact that a record may not be subject to discovery in a court proceeding does not mean that the same record cannot be obtained through FOIA. In *Playboy Enterprises Inc. v. U.S. Dep't of Justice*, 677 F.2d 931 (D.C. Cir. 1982), the court considered whether previous discovery rulings that a report was privileged in "non-FOIA civil actions" rendered the report exempt from disclosure under FOIA. *Playboy Enterprises Inc.*, 677 F.2d at 935. The court held that the discovery rulings were not dispositive because different standards govern the right to access records under FOIA:

We reject the argument that because the government's claim of privilege with respect to the Rowe Report had been sustained in discovery proceedings in other cases the District Court ought to have given "controlling weight" to those determinations. The short answer to the Department's contention is that the issues in discovery proceedings and the issues in the context of a FOIA action are quite different. That for one reason or another a document may be exempt from discovery does not mean that it will be exempt from a demand under FOIA. *Playboy Enterprises Inc.*, 677 F.2d at 936.

Likewise, Illinois Supreme Court rules governing discovery do not restrict parties to litigation from accessing records through FOIA. Supreme Court Rule 201(a) (Ill. S. Ct. R. 201(a) (effective July 1, 2002)) does provide that "[d]uplication of discovery methods to obtain the same information should be avoided." The committee comments to the rule (Ill. S. Ct. R. 201(a), Committee Comments (revised June 1, 1995)) indicate that it was intended to prevent the use of redundant and unnecessary discovery methods:

The committee considered and discarded a provision requiring leave of court before a party could request by one discovery method information already obtained through another. The committee concluded that there are circumstances in which it is justifiable to require answers to the same or related questions by different types of discovery procedures but felt strongly that the rules should discourage time-wasting repetition; hence the provision that duplication should be avoided.

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Obtaining public documents pursuant to FOIA is not among the specific "discovery methods" set out in Supreme Court Rule 201(a).

Even assuming that Ms. Diaz was a party to a civil proceeding, the availability of records through discovery does not affect a person's right to access records under FOIA. To the contrary, section 1 of the Act states that "it is the public policy of the State of Illinois that access *by all persons* to public records promotes * * * transparency and accountability[.] * * * It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act." (Emphasis added). 5 ILCS 140/1 (West 2012). Accordingly, the City's argument that discovery may be available to Ms. Diaz (which has not been shown by clear and convincing evidence) does not preclude her from seeking records under FOIA or provide a basis for the City to withhold records pursuant to section 7 of FOIA.

By withholding the records requested by Ms. Diaz, the City has violated section 3(a) of FOIA. The City is obligated to provide Ms. Diaz with copies of the records, subject only to appropriate redactions for "private information" under section 7(1)(b) (5 ILCS 140/7(1)(b) (West 2012)) and information that would "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" police under section 7(1)(d)(iv) of FOIA (5 ILCS 140/7 7(1)(d)(iv) (West 2012)).

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the arguments submitted, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On June 26, 2013, the City of Berwyn received a FOIA request from Ms. Maria de los Angeles Diaz seeking a copy of Police Report 13-05529.

2) On July 1, 2013, the City denied the request citing sections 7(1)(d)(i) and 7(1)(d)(iii) of FOIA. Section 7(1)(d)(i) exempts from disclosure records which, if disclosed, would interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by the law enforcement agency that is the recipient of the request. Section 7(1)(d)(iii) exempts records the disclosure of which would create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing.

3) On August 13, 2013, Ms. Diaz submitted to the Public Access Counselor all documents required for a Request for Review. The Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2012)).

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4) On August 15, 2013, the Public Access Bureau forwarded a copy of the Request for Review to the City, requested unredacted copies of the withheld records, and asked the City to provide an explanation of the legal and factual basis for its assertion of sections 7(1)(d)(i) and 7(1)(d)(iii) of FOIA.

5) On August 23, 2013, the City provided the Public Access Bureau with unredacted copies of the records in question together with a memorandum explaining its conclusion that the records were exempt under FOIA. In addition to its original claims of exemption under sections 7(1)(d)(i) and 7(1)(d)(iii) of FOIA, the City asserted the records were exempt because they were otherwise available through the judicial discovery process.

6) On September 27, 2013, the Public Access Counselor extended the time to issue a binding opinion by 30 business days, to November 12, 2013. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) The City has not alleged or demonstrated that it is or will be conducting any law enforcement proceeding pertaining to the subject of the police report. Section 7(1)(d)(i) of FOIA is applicable to records only when the recipient of a FOIA request conducts such proceedings. Moreover, the City's assertions that the release of the requested records would interfere with a law enforcement proceeding are conclusory and not sufficient to sustain its burden of showing by clear and convincing evidence that the release of such records would, in fact, do so. Consequently, the City's denial of Ms. Diaz's request pursuant to section 7(1)(d)(i) was improper.

8) The City's argument that the release of the requested records would deprive a criminal defendant of a fair trial or "soil the spirit of legal due process,"¹² without additional facts, is conclusory and not sufficient to sustain its burden of showing by clear and convincing evidence that the release of such records would, in fact, do so. Consequently, the City's denial of Ms. Diaz's request pursuant to section 7(1)(d)(iii) was improper.

9) Further, the City's argument that Ms. Diaz should obtain the requested records through criminal or civil discovery procedures does not assert a valid exemption under FOIA. The availability of records through the judicial discovery process does not impact a person's separate and distinct right to access public records under FOIA. Consequently, to the extent, if any, that this post-denial assertion may be cognizable, the City improperly denied Ms. Diaz's request on this basis.

¹²Memorandum from Berwyn Police Department to Rob Olmstead, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (August 23, 2013).

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Therefore, it is the opinion of the Attorney General that the City of Berwyn has violated the requirements of the Freedom of Information Act by denying Ms. Maria de los Angeles Diaz's FOIA request seeking a copy of Police Report 13-05529. Accordingly, the City is directed to take immediate and appropriate action to comply with this opinion by providing the requested records, subject only to permissible redactions under sections 7(1)(b) and 7(1)(d)(iv) of FOIA.

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2012). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Ms. Maria de los Angeles Diaz as defendants. *See* 5 ILCS 140/11.5 (West 2012).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:



Michael J. Luke
Counsel to the Attorney General