OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 10, 2016

**PUBLIC ACCESS OPINION 16-002**
**(Request for Review 2015 PAC 38303)**

FREEDOM OF INFORMATION ACT:
Disclosure of Post-mortem Photographs
to the Executor of the Decedent's Estate

Mr. Larry Young
804 Newton Avenue
Johnston City, Illinois 62951

Master Sergeant Kerry Sutton
Legal Counsel
Illinois State Police
801 South Seventh Street, Suite 1000-S
Springfield, Illinois 62703

Dear Mr. Young and Master Sergeant Sutton:

This is a binding opinion issued by the Attorney General pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons discussed below, this office concludes that the Illinois State Police (ISP) violated FOIA by improperly withholding post-mortem photographs requested by the decedent's father and executor of her estate.

## BACKGROUND

On August 12, 2015, Mr. Larry Young submitted a FOIA request to ISP seeking records pertaining to the death of his daughter, Molly Young. Among other things, the FOIA

request sought "[a]ll crime scene photographs, autopsy photographs, images and trajectory diagram[s]."[1]

On September 30, 2015, ISP responded to Mr. Young's August 12, 2015, FOIA request by providing certain information, but redacted or withheld portions of the responsive records pursuant to sections 7(1)(b)[2] and 7(1)(c) of FOIA (5 ILCS 140/7(1)(b), (1)(c) (West 2014), as amended by Public Act 99-298, effective August 6, 2015).[3] ISP withheld the autopsy photographs and crime scene photographs in their entireties.[4]

On October 26, 2015, Mr. Young submitted a Request for Review to the Public Access Bureau asserting, in part, that "[a]s father and executor of Molly's estate [he is] the only requestor that has the legal right to all the crime scene photos/videos and autopsy photos/videos including the graphic photos."[5] On November 4, 2015, the Public Access Bureau forwarded a copy of the Request for Review to ISP and asked ISP to provide a detailed explanation of its legal and factual bases for withholding those records.[6] ISP did not receive this office's November 4, 2015, correspondence, and a copy of the letter was forwarded to ISP on November 18, 2015.[7] On November 30, 2015, ISP responded and stated, in pertinent part:

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[1]FOIA request from Larry Young to Lieutenant Steve Lyddon, Illinois State Police, Freedom of Information Officer (August 12, 2015). As both Mr. Young and ISP used the term "crime scene" to refer to the scene of Ms. Young's death, this office uses that term in this opinion without implying any conclusion by this office as to the circumstances of Ms. Young's death. The Public Access Counselor's authority to resolve disputes is limited to alleged violations of FOIA and the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2014)). *See* 15 ILCS 205/7(c)(3) (West 2014).

[2]ISP's assertion of section 7(1)(b) applied to redactions in other records provided to Mr. Young that are not at issue in this opinion.

[3]Letter from Aaron Harris, Esq., FOIA Officer, Illinois State Police, to Larry Young (September 30, 2015).

[4]In response to a previous Request for Review, this office had determined that ISP failed to sustain its burden of demonstrating that Mr. Young was not entitled to those records and directed ISP to provide them to him. Ill. Att'y Gen. PAC Req. Rev. Ltr. 28651, issued June 29, 2015. ISP did not comply with that non-binding determination.

[5]Letter from Larry Young to Josh Jones, Public Access Bureau, Office of the Attorney General (October 26, 2015).

[6]Letter from Josh Jones, Supervising Attorney, Public Access Bureau, Office of the Attorney General, to Master Sergeant Kerry Sutton, Legal Counsel, Illinois State Police (November 4, 2015).

[7]E-mail exchange between Josh Jones, Supervising Attorney, Public Access Bureau, Office of the Attorney General, and Master Sergeant Kerry Sutton, Legal Counsel, Illinois State Police (November 18, 2015).

18) * * * Graphic photos of the crime scene and autopsy are exempt per the AG's opinions found in the Law Enforcement FOIA guide provided by the Public Access Counselor's office. Those opinions state:

- Graphic photographs and descriptions of alleged offenses, such as sex crimes, may frequently be withheld under 7(1)(c). *See* 2010 PAC 7791 (Ill. Att'y Gen. PAC Pre-Auth. al7791, issued June 29, 2010, at 2) and 2010 PAC 9091 and 9164 (Ill. Att'y Gen. PAC Pre-Auth. al9091, 9164 issued August 23, 2010, at 2)
    - Graphic photographs of the deceased's body during an autopsy may be withheld under section 7(1)(c). *See* 2010 PAC 8890 and 9217 (Ill. Att'y Gen Pub. Acc. Op. No. 10-003, issued October 22, 2010, at 11).

Additionally, please see United States Supreme court case "National Archives and Records Administration v. Favish et al., 541 US 157 (2004)."[8]

On December 4, 2015, this office forwarded a copy of ISP's response to Mr. Young.[9] On December 14, 2015, Mr. Young replied by citing this office's previous determination, in an earlier Request for Review, that ISP had improperly withheld the crime scene and autopsy photographs from him.[10] By telephone on February 3, 2016, Mr. Young informed the Public Access Bureau that he wished to narrow the scope of this Request for Review to ISP's denial of the crime scene photographs and autopsy photographs.[11]

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[8]Letter from Master Sergeant Kerry Sutton, Legal Counsel, Illinois State Police, to Josh Jones, [Supervising Attorney, Public Access Bureau,] Office of the Attorney General (November 30, 2015), at 2.

[9]Letter from Josh Jones, Supervising Attorney, Public Access Bureau, Office of the Attorney General, to Larry Young (December 4, 2015).

[10]Letter from Larry Young to Josh Jones, Supervising Attorney, Public Access Bureau, Illinois Attorney General's Office (December 14, 2015), at 2. *See* footnote 4 above.

[11]Telephone conversation between Larry Young and Josh Jones, Supervising Attorney, Public Access Bureau, Illinois Attorney General's Office (February 3, 2016). Mr. Young's Request for Review had originally raised questions about records other than the crime scene photographs and autopsy photographs.

On December 28, 2015, this office properly extended the time in which to issue a binding opinion by 30 business days, to February 10, 2016, pursuant to section 9.5(f) of FOIA.[12]

**ANALYSIS**

"It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with [FOIA]." 5 ILCS 140/1 (West 2014). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2014)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." 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 2014).

Section 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. (Emphasis added.)

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 Journeymen Plumbers' Local Union 130, U.A. 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 records to prove that standard has been met. *Schessler v. Department of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994).

Because an individual's personal privacy interest ceases to exist upon death, Ms. Young does not have a privacy interest in the withheld photographs. *See* Ill. Att'y Gen. Pub.

[12]Letter from Josh Jones, Supervising Attorney, Public Access Bureau, Office of the Attorney General, to Larry Young, and Master Sergeant Kerry Sutton, Legal Counsel, Illinois State Police (December 28, 2015).

Acc. Op. No. 12-012, issued August 14, 2012, at 9. The binding opinion ISP cited in its response to this office, however, concluded "that a decedent's surviving family members do possess a separate personal privacy interest in 'their close relative's death-scene images' and similar records." Ill. Att'y Gen. Pub. Acc. Op. No. 10-003, issued October 22, 2010, at 5-6 (citing *National Archives and Records Administration v. Favish*, 541 U.S. 157,170, 124 S. Ct. 1571, 1579 (2004)).

In *National Archives*, the United States Supreme Court analyzed whether the Federal FOIA's personal privacy exemption[13] permitted a public body to withhold from a non-family member the death scene images of President Clinton's deputy counsel, Mr. Vincent Foster, who was officially determined to have committed suicide. Mr. Foster's surviving family members objected to disclosure of the photographs. *National Archives*, 541 U.S. at 160-61, 166 124 S. Ct. at 1574, 1577-78. The Court noted:

> The family does not invoke Exemption 7(C) on behalf of Vincent Foster in its capacity as his next friend for fear that the pictures may reveal private information about Foster to the detriment of his own posthumous reputation or some other interest personal to him. If that were the case, a different set of considerations would control. Foster's relatives instead invoke their own right and interest to personal privacy. They seek to be shielded by the exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased. *National Archives,* 541 U.S. at 166, 124 S. Ct. at 1577.

In light of the applicable precedents, the Court "conclude[d] from Congress' use of the term 'personal privacy' that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions." *National Archives,* 541 U.S. at 167, 124 S. Ct. at 1578. Thus, the Court held "that FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images." *National Archives,* 541 U.S. at 170, 124 S. Ct. at 1579. Because the requester did not demonstrate that the public interest in disclosure of the photographs outweighed the objecting family members' privacy interests, the Court held that providing him with the responsive photographs would constitute an unwarranted invasion of the objecting family members' personal privacy. *National Archives,* 541 U.S. at 174-75, 124 S. Ct. at 1581-82.

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[13]5 U.S.C. § 552(b)(7)(C) (2002). The exemption allowed federal government agencies to withhold "records or information compiled for law enforcement purposes[ ]" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]"

Similarly, in Ill. Att'y Gen. Pub. Acc. Op. No. 10-003, at 1-2, the requesters who sought autopsy and other post-mortem images were not related to the decedents. Further, the surviving family members in the matters addressed by the binding opinion also strongly objected to disclosure of the post-mortem photographs of the decedents.[14] Based on those objections, the Attorney General concluded that the public body "sustained its burden of demonstrating that the release of the post-mortem photographs of the bodies of [the decedents] would constitute a clearly unwarranted invasion of the surviving family members' personal privacy." Ill. Att'y Gen Pub. Acc. Op. No. 10-003, issued October 22, 2010, at 11.[15]

In contrast, Mr. Young has expressly requested copies of the photographs of his daughter. Ms. Young was not married, and Mr. Young has been appointed as the executor of her estate.[16] The circumstances here are therefore distinctly different from those addressed in *National Archives* and Ill. Att'y Gen. Pub. Acc. Op. No. 10-003, both of which concerned requests by non-family members. Clearly, an individual may consent to the disclosure of information in which he or she has a personal privacy interest. ISP has not articulated a legal rationale that justifies withholding personal information concerning Ms. Young from her father, including her death-scene and autopsy photographs. Accordingly, this office concludes that ISP has not sustained its burden of demonstrating by clear and convincing evidence that the responsive photographs are exempt from disclosure to Mr. Young.[17]

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[14]E-mail from Richard Velázquez, Special Counsel to the President, Office of the President, Cook County Board of Commissioners, to Matthew C. Rogina, [Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (September 15, 2010).

[15]None of the Public Access Counselor's pre-authorization letters that ISP cited in its response to this office involved a FOIA request seeking information concerning one of the requester's own family members. Instead, all of the requests were submitted by third parties who did not assert that they had the consent of the surviving family members to obtain personal information concerning the decedents.

[16]On February 28, 2015, Mr. Young provided this office with a document filed with the Circuit Court of the First Judicial Circuit on October 25, 2012, which states that he had been appointed Independent Administrator of his daughter's estate. Letters of Office – Decedent's Estate, In the Matter of the Estate of Molly Marie Young, Deceased, No. 12-P-88 (Circuit Court, Jackson County ). Under the law, "[t]he executor or the administrator with the will annexed shall administer all the testate and intestate estate of the decedent." 755 ILCS 5/6-15 (West 2014).

[17]This office notes that providing personal information concerning Ms. Young to the requester does not mean that ISP must provide the same information to other requesters who are unrelated to Ms. Young. Mr. Young has consented to the disclosure of personal information concerning his daughter to him, not to others. Mr. Young has requested that ISP not release further personal information concerning Ms. Young to the general public.

## FINDINGS AND CONCLUSIONS

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

1) On August 12, 2015, Mr. Larry Young submitted a FOIA request to the Illinois State Police seeking records relating to the death of his daughter, Molly Young. Among other things, the request sought "[a]ll crime scene photographs, [and] autopsy photographs" relating to Ms. Young's death.

2) On September 30, 2015, ISP denied the request for those photographs, citing section 7(1)(c) of FOIA, which exempts from disclosure "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Section 7(1)(c) defines "unwarranted invasion of personal privacy" 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."

3) On October 29, 2015, the Public Access Bureau received Mr. Young's October 26, 2015, Request for Review letter in which he disputed the denial of his request for those photographs. The Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2014)).

4) On November 4, 2015, and November 18, 2015, the Public Access Bureau sent a copy of Mr. Young's Request for Review to ISP and asked it to provide a detailed explanation of the legal and factual bases for withholding those photographs. On November 30, 2015, the ISP responded to this office.

5) This office forwarded a copy of ISP's response to Mr. Young on December 4, 2015. On December 18, 2015, by a letter dated December 14, 2015, this office received Mr. Young's reply to ISP's response.

6) On December 28, 2015, this office properly extended the time in which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) ISP has failed to demonstrate by clear and convincing evidence that the photographs in question are exempt from disclosure to Mr. Young pursuant to section 7(1)(c) of FOIA. In these circumstances, Mr. Young, as the father of the decedent and the executor of her estate, has consented through his FOIA request to the disclosure to him of personal information

concerning his daughter. He has therefore waived his personal privacy interest in withholding the photographs from dissemination to him. ISP has not articulated a legal rationale that would justify withholding personal information concerning Molly Young from her father, including her death-scene and autopsy photographs.

Therefore, it is the opinion of the Attorney General that ISP improperly denied Mr. Young's Freedom of Information Act request for crime scene photographs and autopsy photographs in violation of the requirements of the Act. Accordingly, ISP is directed to take immediate and appropriate action to comply with this opinion by providing Mr. Young with copies of those photographs.

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 2014). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review with the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Mr. Larry Young as defendants. *See* 5 ILCS 140/11.5 (West 2014).

Sincerely,

LISA MADIGAN
ATTORNEY GENERAL

By: 

Michael J. Luke
Counsel to the Attorney General