



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

September 20, 2024

PUBLIC ACCESS OPINION 24-011
(Request for Review 2024 PAC 82164)

FREEDOM OF INFORMATION ACT:
Public Body Must Prove How Disclosure of
All Records Withheld Under Section 7(1)(d)(i)
of FOIA Would Interfere With a
Pending Law Enforcement Investigation

Mr. Michael Kielczewski
633 North Parkway
Elk Grove Village, Illinois 60007

Ms. Donna Freidenfelds
Police Records Technician
Elk Grove Village Police Department
901 Wellington Avenue
Elk Grove Village, Illinois 60007

Dear Mr. Kielczewski and Ms. Freidenfelds:

This binding opinion is 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 2023 Supp.)). For the reasons discussed below, this office concludes that the Elk Grove Village Police Department (Police Department) violated the requirements of FOIA by withholding all records responsive to Mr. Michael Kielczewski's FOIA request.

BACKGROUND

On July 6, 2024, Mr. Kielczewski submitted a FOIA request to the Police Department seeking a copy of Case/Incident Report EGP23-026823 and any other records related to that report, excluding body camera footage.¹ On July 12, 2024, the Police Department

¹E-mail from Michael Kielczewski to FOIA@elkgrove.org (July 6, 2024).

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denied Mr. Kielczewski's request² in its entirety pursuant to section 7(1)(d)(i) of FOIA.³ On that same date, Mr. Kielczewski submitted a Request for Review to the Public Access Counselor contesting the denial.⁴ Mr. Kielczewski stated that on December 18, 2023, he "was walking and had taken some video and pictures due to large police activity across the street from a police incident" when he was "identified, detained, searched, disarmed, questioned and released" by the Police Department; he sought the records to better understand the reasons for the Police Department's actions.⁵

On July 29, 2024, the Public Access Bureau sent a copy of the Request for Review to the Police Department. The Public Access Bureau also sent the Police Department a letter asking for an unredacted copy of the requested records for this office's confidential review, together with a detailed explanation of the legal and factual bases for the applicability of the section 7(1)(d)(i) exemption.⁶

On August 1, 2024, the Police Department provided this office with the requested materials.⁷ On August 9, 2024, this office forwarded a copy of the Police Department's written response to Mr. Kielczewski and notified him of his opportunity to reply.⁸ On August 11, 2024, Mr. Kielczewski submitted his reply to the Police Department's response.⁹ In his reply, Mr.

²Letter from Donna Freidenfelds, Police Records Technician, Elk Grove Village Police Department, to [Michael Kielczewski] (July 12, 2024).

³5 ILCS 140/7(1)(d)(i) (West 2023 Supp.), as amended by Public Act 103-605, effective July 1, 2024.

⁴E-mail from Michael Kielczewski to Public Access [Bureau, Office of the Attorney General] (July 12, 2024).

⁵E-mail from Michael Kielczewski to Public Access [Bureau, Office of the Attorney General] (July 12, 2024).

⁶Letter from Christina Lucente-McCullough, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Donna Freidenfelds, Police Records Technician, Elk Grove Village Police Department (July 29, 2024), at 1.

⁷E-mail from Shannon Hernandez, Police Records Assistant, Elk Grove Village Police Dept., to Christina Lucente-McCullough, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (August 1, 2024).

⁸Letter from Christina Lucente-McCullough, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Michael Kielczewski (August 9, 2024).

⁹E-mail from Michael Kielczewski to Christina Lucente-McCullough, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (August 11, 2024).

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Kielczewski maintained that the Police Department improperly "denied even a redacted record or records that would show its justification in stopping me or failure in documenting."¹⁰

On September 6, 2024, this office extended the time within which to issue a binding opinion by 30 business days, to October 23, 2024, pursuant to section 9.5(f) of FOIA.¹¹

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 2022). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2022)) 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." When a record contains information that is exempt from disclosure "but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body **shall** make the remaining information available for inspection and copying." (Emphasis added.) 5 ILCS 140/7(1) (West 2023 Supp.), as amended by Public Act 103-605, effective July 1, 2024.

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

(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[.] (Emphasis added).

"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." *Baudin v. City of Crystal Lake*, 192 Ill. App. 3d 530, 536 (1989). Conclusory statements that the disclosure of records would obstruct a law enforcement proceeding are insufficient to support the assertion

¹⁰E-mail from Michael Kielczewski to Christina Lucente-McCullough, Assistant Attorney General, Public Access Bureau (August 11, 2024).

¹¹Letter from Christina Lucente-McCullough, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Michael Kielczewski, Donna Freidenfelds, Police Records Technician, Elk Grove Village Police Department (September 6, 2024).

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of the pending law enforcement proceeding exemption. *Day v. City of Chicago*, 388 Ill. App. 3d 70, 76 (2009) ("Simply saying there is an 'ongoing criminal investigation because the case has not been cleared,' with little additional explanation, is not 'objective indicia' sufficient to show the ongoing investigation exemption applies."); Ill. Att'y Gen. Pub. Acc. Op. No. 24-006, issued April 1, 2024, at 8-9 (explaining that a law enforcement agency must demonstrate with a detailed factual basis, rather than conclusory statements, how disclosure of all information in a police report would interfere with a law enforcement investigation to sustain its burden of proving the report is exempt from disclosure in its entirety pursuant to the section 7(1)(d)(i) exemption). The public body must provide "a detailed justification for the claimed exemption which addresses the specific documents requested and allows for adequate adversarial testing." *Turner v. Joliet Police Department*, 2019 IL App (3d) 170819, ¶ 10.

In its response to this office, the Police Department provided the following reasons for the applicability of section 7(1)(d)(i) to the withheld Case Report EGP23-026823 and a corresponding pedestrian stop card receipt:

1. At this moment, Investigator Miller with the Elk Grove Police Department is working with multiple [agencies] that have had * * * similar incidents occur with an Offender matching the same description, motive, and vehicle.
2. At this moment, an Offender has not been detained or arrested.
3. To release "Incident Report EGP23-026823 [and] any and all records related to this case report" would hinder an ongoing multi-jurisdiction investigation as it would release privy information that has not been divulged to the general public.^[12]

According to the Police Department, Mr. Kielczewski was questioned at the time of the incident because he "was in the vicinity of the occurrence and matched descriptions of the offender[.]"¹³ The Police Department asserted that because it was determined that Mr. Kielczewski "was not involved in the incident nor did he witness the incident[.]" * * * it would be in the best interest for this investigation if the report was not released prior to the investigation being completed."¹⁴

¹²Letter from Shannon Hernandez, Police Records Assistant, Elk Grove Village Police Dept., to Christina Lucente-McCullough, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (August 1, 2024), at [1].

¹³Letter from Shannon Hernandez, Police Records Assistant, Elk Grove Village Police Dept., to Christina Lucente-McCullough, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (August 1, 2024), at [2].

¹⁴Letter from Shannon Hernandez, Police Records Assistant, Elk Grove Village Police Dept., to Christina Lucente-McCullough, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (August 1, 2024), at [2].

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Neither the Police Department's response nor this office's review of the contents of the two records at issue establish by clear and convincing evidence that disclosure of the records would interfere with a pending law enforcement proceeding. The case report indicates that the Police Department administratively closed its investigation into this matter. Although the Police Department asserted that one of its investigators is assisting other law enforcement agencies with similar cases, the Police Department did not explain with any specificity how disclosure of all portions of the two records related to the December 18, 2023, incident would interfere with those joint efforts. Instead, the Police Department referenced an "ongoing multi-jurisdiction investigation" that has not resulted in an arrest, and asserted that the records contain "privy information that has not been divulged to the general public."

The Police Department further stated that there have been other incidents with an offender matching the same description, motive, and vehicle, but the records at issue only describe the suspect's clothing and gender; they do not contain a description of the offender's physical characteristics or a vehicle.¹⁵ To the extent that the report documents a name and the details of a possible motive from which the identity of a possible suspect could be discerned, those limited and segregable portions may be redacted pursuant to the exemption in section 7(1)(c) of FOIA¹⁶ that applies to information that would constitute an unwarranted invasion of personal privacy if disclosed. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 16-009, issued November 7, 2016, at 16 (concluding that the privacy rights of suspects who have been neither arrested nor charged outweigh any legitimate public interest in disclosure of their identities, and thus their identifying information falls within the scope of section 7(1)(c)); *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, 846 F. Supp. 2d 63, 71 (D.D.C. 2012) (the right to privacy is strongest where a subject of an investigation has not been publicly charged). In the absence of facts concerning the status of the ongoing joint investigation and a detailed justification of how disclosure of the contents of the two records would interfere with that investigation, this office concludes that the Police Department has not sustained its burden of demonstrating by clear and convincing evidence that the entire police report and pedestrian stop card receipt are exempt from disclosure under section 7(1)(d)(i) of FOIA.

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:

¹⁵It also is notable that the Police Department provided a description of the suspect's gender and clothing to the news media. Eric DeGrechie, *Armed Robbery Reported At Subway: Elk Grove Village Police*, Patch (December 19, 2023), <https://patch.com/illinois/arlingtonheights/armed-robbery-reported-subway-elk-grove-village-police>.

¹⁶5 ILCS 140/7(1)(c) (West 2023 Supp.), as amended by Public Act 103-605, effective July 1, 2024 (exempting 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.").

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1) On July 6, 2024, Mr. Michael Kielczewski submitted a FOIA request to the Police Department seeking a copy of Case/Incident Report EGP23-026823 and other records related to the case.

2) On July 12, 2024, the Police Department denied Mr. Kielczewski's request in its entirety pursuant to section 7(1)(d)(i) of FOIA.

3) On that same date, Mr. Kielczewski submitted a Request for Review to the Public Access Counselor contesting the Police Department's denial of his request. Mr. Kielczewski's 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 2023 Supp.)).

4) On July 29, 2024, the Public Access Bureau forwarded a copy of the Request for Review to the Police Department along with a letter asking the Police Department for an unredacted copy of the requested records for this office's confidential review, together with a detailed explanation of the legal and factual bases for the applicability of the section 7(1)(d)(i) exemption.

5) On August 1, 2024, the Police Department provided the Public Access Bureau with those materials. The records consisted of a case report and pedestrian stop card receipt.

6) On August 9, 2024, this office forwarded a copy of the Police Department's written response to Mr. Kielczewski and notified him of his opportunity to reply. On August 11, 2024, Mr. Kielczewski replied to the Police Department's response.

7) On September 6, 2024, this office extended the time to issue a binding opinion by 30 business days pursuant to section 9.5 of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

8) Section 7(1)(d)(i) of FOIA exempts from disclosure records in the possession of a law enforcement agency for law enforcement purposes only to the extent that their disclosure would "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[.]"

9) The case report indicates that the Police Department administratively closed its investigation into this matter. Although the Police Department asserted it is participating in an ongoing multi-agency investigation that is looking into other similar incidents, the Police Department's response is devoid of facts to support its claim that disclosure of the two records would obstruct any joint investigation. Because the Police Department has not proven by clear and convincing evidence that disclosure of the records would interfere with a law enforcement proceeding, the Police Department has not sustained its burden of demonstrating that the entire

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police report and pedestrian stop card receipt are exempt from disclosure under section 7(1)(d)(i) of FOIA.

Therefore, it is the opinion of the Attorney General that the Police Department violated the requirements of FOIA by denying in whole Mr. Kielczewski's FOIA request. The Police Department is hereby directed to take immediate and appropriate action to comply with this opinion by providing Mr. Kielczewski with copies of the requested records. In addition to redacting pursuant to section 7(1)(c) information such as a name and details of a possible motive from which the identity of a possible suspect could be discerned, the Police Department may redact pursuant to section 7(1)(b) of FOIA¹⁷ "unique identifiers" that meet the definition of "private information" in section 2(c-5) of FOIA.¹⁸ The Police Department also may redact the names and other personally-identifying information of any witnesses and victims/complainants who provided information to the Police Department during its investigation. If the Police Department does elect to redact any information, it must provide Mr. Kielczewski with a notice of partial denial that meets the requirements of section 9(a) of FOIA (5 ILCS 140/9(a) (West 2022)).

¹⁷Section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2023 Supp.), as amended by Public Act 103-605, effective July 1, 2024) 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."

¹⁸"Private information" is defined 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. 5 ILCS 140/2(c-5) (West 2023 Supp.).

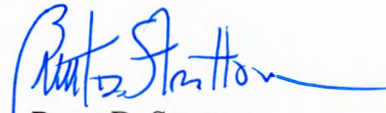
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This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2022). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review with the Circuit Court of Cook County or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Mr. Michael Kielczewski as defendants. *See* 5 ILCS 140/11.5 (West 2022).

Sincerely,

KWAME RAOUL
ATTORNEY GENERAL

By:



Brent D. Stratton
Chief Deputy Attorney General

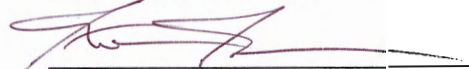
CERTIFICATE OF SERVICE

Steve Silverman, Bureau Chief, Public Access Bureau, hereby certifies that he has served a copy of the foregoing Binding Opinion (Public Access Opinion 24-011) upon:

Mr. Michael Kielczewski
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mkielczewski@comcast.net

Ms. Donna Freidenfelds
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901 Wellington Avenue
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by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Chicago, Illinois on September 20, 2024.



Steve Silverman
Bureau Chief

Steve Silverman
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