



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 13, 2018

Via electronic mail

Mr. Matthew Hopf
Staff Writer

The Herald-Whig

130 South Fifth Street

P.O. Box 909

Quincy, Illinois 62306-0909

mhopf@whig.com

Via electronic mail

Ms. Michele Flaiz

FOIA Officer

City of Quincy

730 Maine Street

Quincy, Illinois 62301

foia@quincyl.gov

RE: FOIA Request for Review – 2018 PAC 53887

Dear Mr. Hopf and Ms. Flaiz:

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 City of Quincy (City) Police Department (Department) improperly withheld use of force reports, with the exception of certain discrete information, in response to Mr. Matthew Hopf's FOIA request.

On June 4, 2018, Mr. Hopf, of *The Herald-Whig*, submitted a FOIA request to the Department seeking copies of "all use of force reports completed by Quincy Police officers in 2017."¹ On June 6, 2018, the Department provided him with a copy of Deputy Chief Doug Vandermaiden's "2017 Annual Review of 'Level of Resistance' Reports"; the Department did not

¹Letter from Matthew T. Hopf, Staff Writer, Quincy Herald-Whig, to Susan Vahlkamp, Quincy Police Department (June 4, 2018).

Mr. Matthew Hopf
Ms. Michele Flaiz
September 13, 2018
Page 2

state that it had withheld any responsive records. On June 12, 2018, Mr. Hopf replied by e-mail, stating "[t]his helps, but it doesn't really give us details about the incidents involved and when they took place. If we could get the actual reports, that would be beneficial."² On June 14, 2018, the Department responded by denying the original request in its entirety pursuant to sections 7(1)(b), 7(1)(c), 7(1)(d)(v), 7(1)(f), 7(1)(s), and 7(1)(v) of FOIA (5 ILCS 140/7(1)(b), (1)(c), (1)(d)(v), (1)(f), (1)(s), (1)(v) (West 2017 Supp.)). On July 5, 2018, this office received Mr. Hopf's Request for Review contesting the Department's denial. Specifically, he argued that the privacy exemptions do not apply because the individuals involved are public employees, and that the section 7(1)(f) exemption does not apply because the records are factual; he acknowledged that private information such as Social Security numbers can be redacted.

On July 12, 2018, this office forwarded a copy of Mr. Hopf's Request for Review to the Department and asked it to provide unredacted copies of the responsive records for our confidential review, together with a detailed explanation of the legal and factual bases for the asserted exemptions.³ On July 24, 2018, this office received those materials from counsel for the Department, who noted that the type of requested record is called a "Levels of Resistance Report" by the Department, but that it would refer to the type of record as a "Use of Force report" for the purposes of its response. The Department maintained that it responded properly to the request. On July 25, 2018, this office forwarded a copy of the Department's response to Mr. Hopf; he did not reply.

DETERMINATION

"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 2016).

Section 7(1)(b) of FOIA

Section 7(1)(b) of FOIA 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." Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2016)) defines "private information" as:

²E-mail from Matt Hopf, Reporter, Herald-Whig, to Susan Vahlkamp (June 12, 2018).

³This office inadvertently did not include section 7(1)(v) of FOIA in its July 12, 2018, letter to the Department. Nevertheless, the Department did provide an analysis of that exemption in its response to this office.

Mr. Matthew Hopf
Ms. Michele Flaiz
September 13, 2018
Page 3

[U]nique 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.

In its response to this office, the Department stated that the use of force reports "contain various private information, not of the police officers, as Mr. Hopf's [letter] cites, but of the subject that is part of each report."⁴ The Department argued that, at a minimum, "any personal identifying information, such as the name, date of birth and other information in the report deemed to be private * * * should be redacted, if production of the reports is ordered."⁵

Conspicuously absent from the above definition of "private information" is any reference to a person's name. Although names are unquestionably "personal information" in the sense that they are specific to particular persons (*see Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 411 (1997)), they are neither confidential nor unique. Instead, names are "basic identification," and as the Supreme Court concluded in *Lieber*, "[w]here the legislature intended to exempt a person's identity from disclosure, it [has done] so explicitly." *Lieber*, 176 Ill. 2d at 412. Therefore, by excluding names from the definition of "private information," the General Assembly clearly did not intend for names to be exempt from disclosure under section 7(1)(b) of FOIA.

Although names as well as dates of birth are not within the scope of section 7(1)(b), as they are not "unique identifiers," the Department may properly redact information that meets the plain language of the definition of "private information" in FOIA. Based on this office's confidential review of the use of force reports, the primary information that meets this definition is home addresses and signatures.

⁴Letter from David. G. Penn, Schmiedeskamp, Robertson, Neu & Mitchell, LLP, to Marie Hollister, Assistant Attorney General, Public Access Bureau (July 24, 2018), at 3.

⁵Letter from David. G. Penn, Schmiedeskamp, Robertson, Neu & Mitchell, LLP, to Marie Hollister, Assistant Attorney General, Public Access Bureau (July 24, 2018), at 3-4.

Mr. Matthew Hopf
Ms. Michele Flaiz
September 13, 2018
Page 4

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." Section 7(1)(c) defines "unwarranted invasion of personal privacy" as:

[T]he 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.

A public body's assertion that the release of information would constitute a clearly unwarranted invasion of personal privacy is evaluated on a case-by-case basis. *Chicago Journeymen 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 response to this office, the Department argued:

[T]here is specificity and detail about the nature of the use of force that could be an unwarranted invasion of privacy of the subject of the report. Given that these Use of Force reports are strictly internal, are not used in the criminal investigation or prosecution, or, in any way, shared with third parties, there is no compelling or legitimate reason to violate the privacy of the subjects in these reports.^[6]

⁶Letter from David. G. Penn, Schmiedeskamp, Robertson, Neu & Mitchell, LLP, to Marie Hollister, Assistant Attorney General, Public Access Bureau (July 24, 2018), at 3.

Mr. Matthew Hopf
Ms. Michele Flaiz
September 13, 2018
Page 5

Thus, the Department claimed that "the balance weighs in favor of not producing the underlying Use of Force reports, where the summary of reports has already been produced."⁷

Under the first and second factors of the balancing test, Mr. Hopf's interest in disclosure as a reporter is aligned with the strong public interest in information regarding the manner in which law enforcement officials perform their public duties, particularly with respect to the use of force. *See, for example, Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997) (ordering disclosure of documents pertaining to allegations of police torture in part because "[p]erformance of public duties and investigations of their performance is a matter of great public importance.").

Regarding the third factor, the degree of invasion of personal privacy, some of the use of force reports contain certain highly personal information that would constitute a clearly unwarranted invasion of the subjects' personal privacy if their identifying information were to be disclosed. Further, information identifying a suspect or subject of a use of force report who was not arrested or charged is highly personal. *Citizens for Responsibility and Ethics in Washington v. United States Dep't of Justice*, 846 F. Supp. 2d 63, 71 (D.D.C. 2012) (quoting *American Civil Liberties Union v. United States Dep't of Justice*, 655 F.3d 1, 7 (D.C. Cir. 2011)) (the right to privacy "is strongest where the individuals in question 'have been investigated but never publicly charged.'"⁸ However, redaction of the names of the subjects (other than the arrestees),⁹ and any other discrete identifying details, would significantly diminish the degree of invasion of personal privacy that would result from disclosure.

Finally, there do not appear to be any other means of obtaining the requested use of force reports short of a lawsuit. Although the Department argued that the summary of the reports disclosed to Mr. Hopf serves the purpose of providing insight into the Department's use of force, the summary does not provide the same detailed information as the reports themselves.

⁷Letter from David. G. Penn, Schmiedeskamp, Robertson, Neu & Mitchell, LLP, to Marie Hollister, Assistant Attorney General, Public Access Bureau (July 24, 2018), at 3.

⁸*See also* Ill. Att'y Gen. Pub. Acc. Op. No. 16-009, issued November 7, 2016, at 16 (disclosure of information identifying suspect of a crime who had not been arrested or charged would constitute an unwarranted invasion of personal privacy).

⁹The Attorney General has issued a binding opinion concluding that "arrestees are considered 'essentially public personages' with a 'limited' and 'qualified' right to privacy, 'and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest' that are subject to disclosure." Ill. Att'y Gen. Pub. Acc. Op. No. 12-006, issued March 16, 2012, at 7 (citing *Tennessean Newspaper, Inc. v. Levi*, 403 F. Supp. 1318, 1321 (D.C. Tenn. 1975)).

Mr. Matthew Hopf
Ms. Michele Flaiz
September 13, 2018
Page 6

Accordingly, this office concludes that the public interest weighs in favor of disclosure of the reports, subject to the redaction of the names of the members of the public who were not arrested and other discrete details that would identify them, together with dates of birth.¹⁰

Section 7(1)(f) of FOIA

Section 7(1)(f) of FOIA exempts from inspection and copying "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body."

The section 7(1)(f) exemption applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). It is "intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." *Harwood*, 344 Ill. App. 3d at 248; see also *Kalven v City of Chicago*, 2014 IL App (1st) 121846, ¶24, 7 N.E.3d 741, 748 (2014) ("Only those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." (quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010))). The Illinois Appellate Court also has stated that "'purely factual material'" is not exempt from disclosure under section 7(1)(f) unless it is "'inextricably intertwined'" with predecisional discussions. *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶36, 980 N.E.2d 733, 743 (2012) (quoting *Enviro Tech International, Inc. v. United States Environmental Protection Agency*, 371 F.3d 370, 374-75 (7th Cir. 2004)).

In its response to this office, the Department contended that the section 7(1)(f) exemption applies because the withheld use of force reports "are simply documentation, which include opinions on the results of the use of force utilized in a given situation, that is used by the police department to analyze the trends in the use of force, any training and equipment needs, and if any techniques and/or policy revisions are necessary."¹¹ The Department also stated that

¹⁰See Ill. Att'y Gen. Pub. Acc. Op. No 16-009, issued November 7, 2016, at 12 ("An individual's birth date is highly personal by its very nature and the subject's right to privacy outweighs any legitimate public interest in disclosing this information.").

¹¹Letter from David. G. Penn, Schmiedeskamp, Robertson, Neu & Mitchell, LLP, to Marie Hollister, Assistant Attorney General, Public Access Bureau (July 24, 2018), at 5.

Mr. Matthew Hopf
Ms. Michele Flaiz
September 13, 2018
Page 7

the reports "are not formal policy, but, are utilized in the predecisional consideration that leads to final policy[.]"¹²

Based on this office's confidential review, the use of reports consist almost exclusively of factual information rather than opinions, with the discrete exception of notations as to whether the use of force was effective or not. Although the use of force reports are written by police officers and reflect their impressions of what transpired in these incidents, they are akin to police incident reports that recite what happened in a matter-of-fact manner. Such fact-based accounts do not reveal the give-and-take of any Department deliberations or policymaking. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 38173, issued February 13, 2018 (use of force report not exempt under section 7(1)(f) because it "neither provide[d] opinions on the narratives and other information presented in the report, nor insight into how the police department formulated any action."). Because disclosure of the use of force reports would not reveal any predecisional deliberative material, with the exception of notations as to whether the use of force was effective or not, the Department improperly withheld the use of force reports pursuant to section 7(1)(f) of FOIA.

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

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

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:

* * *

(v) disclose unique or specialized investigative techniques other than those generally used and known or disclose internal documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct, and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request[.]

¹²Letter from David. G. Penn, Schmiedeskamp, Robertson, Neu & Mitchell, LLP, to Marie Hollister, Assistant Attorney General, Public Access Bureau (July 24, 2018), at 5.

Mr. Matthew Hopf
Ms. Michele Flaiz
September 13, 2018
Page 8

In support of its assertion of section 7(1)(d)(v), the Department argued that "based on both the department policy and procedure, these forms are created for law enforcement purposes only involving unique or specialized investigation and techniques[.]" and that disclosure of the records "could compromise the ability of the police department to properly conduct its job."¹³

Neither the Department's response to Mr. Hopf's request nor the Department's response to this office demonstrated that the responsive records depict any "unique or specialized investigative techniques other than those generally used and known" as required under the plain language of section 7(1)(d)(v). The responsive records describe the use of force to subdue a subject rather than investigative techniques. Therefore, this office has determined that the Department improperly withheld the use of force reports under section 7(1)(d)(v) of FOIA.

Section 7(1)(s) of FOIA

Section 7(1)(s) of FOIA exempts from inspection and copying:

Any and all proprietary information and records related to the operation of an intergovernmental risk management association or self-insurance pool or jointly self-administered health and accident cooperative or pool. Insurance or self insurance (including any intergovernmental risk management association or self insurance pool) claims, loss or risk **management** information, records, data, advice or communications. (Emphasis added.)

The Department's response to this office contended that the records are exempt from disclosure under section 7(1)(s) because they "are used to assess, develop and modify use of force techniques, formulate policy and procedures, and develop training for police officers in the use of force as part of risk management."¹⁴ Further, the Department argued that "[w]ithout the data and opinions contained in the Use of Force reports, the City's ability to manage and assess risk is compromised."¹⁵

¹³Letter from David. G. Penn, Schmiedeskamp, Robertson, Neu & Mitchell, LLP, to Marie Hollister, Assistant Attorney General, Public Access Bureau (July 24, 2018), at 4.

¹⁴ Letter from David. G. Penn, Schmiedeskamp, Robertson, Neu & Mitchell, LLP, to Marie Hollister, Assistant Attorney General, Public Access Bureau (July 24, 2018), at 5.

¹⁵Letter from David. G. Penn, Schmiedeskamp, Robertson, Neu & Mitchell, LLP, to Marie Hollister, Assistant Attorney General, Public Access Bureau (July 24, 2018), at 5.

Mr. Matthew Hopf
Ms. Michele Flaiz
September 13, 2018
Page 9

The Attorney General has issued a binding opinion which concluded that "management" is the operative word in section 7(1)(s), and that the exemption is limited to "information regarding the policies, procedures, and practices that an intergovernmental risk management association or self-insurance pool adopts to manage its claims, loss, and risk exposure." Ill. Att'y Gen. Pub. Acc. Op. No. 11-004, issued April 15, 2011, at 5-6. Although the Department's response to this office states that it uses the use of force reports to formulate risk management policies and procedures, the reports themselves do not reveal any policies, procedures, or practices that the Department has adopted to manage claims, loss, and risk exposure. Accordingly, the Department did not sustain its burden of demonstrating that the records are exempt from disclosure pursuant to section 7(1)(s) of FOIA.

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. (Emphasis added.)

In its response to this office, the Department argued that the reports "include information relating to response policies or plans" that "could impact the safety of police officers and other bystanders. The concern is that this information could be disseminated, and people would understand how the police respond and essentially react against that."¹⁶

By its plain language, the section 7(1)(v) exemption applies to "[v]ulnerability assessments, security measures, and response policies or plans" themselves. In contrast, the Department argued that the use of force reports are exempt because they *relate* to response policies or plans. The exemption concerns homeland security and emergency preparations rather

¹⁶Letter from David. G. Penn, Schmiedeskamp, Robertson, Neu & Mitchell, LLP, to Marie Hollister, Assistant Attorney General, Public Access Bureau (July 24, 2018), at 6.

Mr. Matthew Hopf
Ms. Michele Flaiz
September 13, 2018
Page 10

than routine duties carried out by a police department. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 48212, issued November 2, 2017, at 7. This office's review of the withheld reports determined that they are not vulnerability assessments, security measures, or response policies or plans within the scope of section 7(1)(v); they recount circumstances that have already transpired which are unrelated to homeland security or emergency preparations. Accordingly, this office concludes that the Department improperly denied the use of force reports pursuant to section 7(1)(v).

Because the Department did not sustain its burden of demonstrating by clear and convincing evidence that the use of force reports are exempt from disclosure in their entirety, this office asks that the Department provide Mr. Hopf with copies of the use of force reports, subject only to the redaction of the discrete information identified above as exempt from disclosure under sections 7(1)(b), 7(1)(c), and 7(1)(f) of FOIA.

The Public Access Bureau has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have any questions, please contact me at the Chicago address on the first page of this letter.

Very truly yours,



MARIE HOLLISTER
Assistant Attorney General
Public Access Bureau

53887 f 71b proper improper 71c proper improper 71dv improper 71f proper improper 71s
improper 71v improper pd

cc: *Via electronic mail*
Mr. David G. Penn
Schmiedeskamp, Robertson, Neu & Mitchell, LLP
525 Jersey Street
Quincy, Illinois 62301
dpenn@srm.com