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STATE OF ILLINOIS

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March 1, 2024

Via electronic mail

Ms. Meredith Newman
mnewman@bettergov.org

Via electronic mail

Ms. Chrissie Kapustka
Deputy Corporation Counsel
City of Peoria
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RE: FOIA Request for Review – 2024 PAC 79596

Dear Ms. Newman and Ms. Kapustka:

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 2022), as amended by Public Act 103-069, effective January 1, 2024.). For the reasons stated below, the Public Access Counselor concludes that the City of Peoria (City) improperly withheld records responsive to Ms. Meredith Newman's December 18, 2023, FOIA request.

On that date, Ms. Newman submitted a FOIA request to the City seeking "[a]ll records and reports of the phone interview Officer Jonathan Irving, of Peoria Police Department (Police Department), had with Kathy Harvey on 2/24/22."¹ On January 3, 2024, the City denied Ms. Newman's FOIA request in its entirety under sections 7(1)(d)(i) and 7(1)(d)(iii) of FOIA.² On January 3, 2024, Ms. Newman submitted the above-referenced Request for Review contesting the denial of her request. In her Request for Review, Ms. Newman argued that the

¹FOIA portal message from Meredith Newman to City of Peoria (December 18, 2023).

²5 ILCS 140/7(1)(d)(i), (1)(d)(iii) (West 2022), as amended by Public Acts 103-154, effective June 30, 2023; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023.

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section 7(1)(d)(i) and 7(1)(d)(iii) exemptions would not apply in these circumstances because the two individuals involved in the underlying police investigation had already been convicted, so no law enforcement proceedings were pending at the time of the request. She also argued that the requested records—police reports of interviews with a DCFS investigator who visited an eight-year-old boy one month before his death—involved a matter of public interest.

On January 22, 2024, the Public Access Bureau forwarded a copy of the Request for Review to the City and requested unredacted copies of the contested records for this office's confidential review, along with a detailed explanation of the factual and legal bases for the asserted exemptions. On January 30, 2024, the City furnished the reports and a written response asserting that the requested reports were properly withheld pursuant to sections 7(1)(d)(i) and 7(1)(d)(iii). The City argued that because the reports were related to the murder prosecutions of two individuals who were convicted less than a week before the FOIA request, and because those individuals had the legal right to file post-judgment motions or appeals challenging their convictions within 30 days, "a release of the reports could have interfered with pending proceedings or deprive a person of a fair trial if the matters were to be re-tried."³ On January 31, 2024, this office forwarded the City's response to Ms. Newman; she did not reply.

DETERMINATION

All public records in the possession or custody of a public body are "presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2022); *see also Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill. 2d 390, 415 (2006). 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 2022).

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

Sections 7(1)(d)(i) and 7(1)(d)(iii) of FOIA⁴ exempt the disclosure of:

(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:

³Letter from Chrissie L. Kapustka, Deputy Corporation Counsel, City of Peoria, to Michael J. Knight, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (January 30, 2024), at 3.

⁴5 ILCS 140/7(1)(d)(i), (1)(d)(iii) (West 2022), as amended by Public Acts 103-154, effective June 30, 2023; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023.

(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; [or]

* * *

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

"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). "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." *Day v. City of Chicago*, 388 Ill. App. 3d 70, 76 (2009) (quoting *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 470 (2003)). Accordingly, the Attorney General has issued a binding opinion concluding that the mere commencement of an investigation or prosecution does not constitute clear and convincing evidence that any records are exempt from disclosure. Ill. Att'y Gen. Pub. Acc. Op. No. 17-001, issued March 14, 2017.

In its written response to this office, the City did not provide objective indicia or articulate with sufficient facts how or why the disclosure of these records would interfere with law enforcement proceedings conducted by the Police Department. Because both defendants were convicted before Ms. Newman submitted her request,⁵ there is no indication that the City's Police Department was conducting an active law enforcement proceeding at the time of the request. While the city argued that the proceedings were not final because the defendants had a right to file post-judgment motions or appeals that could have resulted in a new trial, the mere possibility of a new trial is too speculative to conclude that additional law enforcement proceedings were "reasonably contemplated[]" under section 7(1)(d)(i). Even if law enforcement proceedings were reasonably contemplated, that possibility alone does not provide a sufficient basis for withholding the records at issue. The City has not explained how disclosure of the specific records Ms. Newman requested would interfere with any potential law enforcement proceedings. Accordingly, the City did not sustain its burden of demonstrating that those reports are exempt from disclosure pursuant to section 7(1)(d)(i) of FOIA.

⁵The City's response acknowledges that the victim's parents were convicted before the FOIA request was submitted. Brandon Walker was convicted by a jury of first-degree murder on December 15, 2023; Stephanie Jones pled guilty to first-degree murder on December 7, 2023. Collin Schopp, *Brandon Walker found guilty of first-degree murder in death of 8-year-old Navin Jones*, WCBU (December 15, 2023), <https://www.wcbu.org/local-news/2023-12-15/brandon-walker-found-guilty-of-first-degree-murder-in-death-of-eight-year-old-navin-jones>.

Similarly, with respect to section 7(1)(d)(iii) of FOIA, the City has not shown by clear and convincing evidence that the release of the reports would create a substantial likelihood that a person will be deprived of a fair trial or impartial hearing. In order to demonstrate that records are exempt from disclosure under the corresponding provision of the Federal FOIA (5 U.S.C.A. §552(b)(7)(B) (West 2024)), an agency must establish: "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." *Washington Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988).

As discussed above, because the subjects of the criminal proceedings were convicted before the FOIA request was submitted, and the possibility of a new trial is mere speculation, it cannot be said that "a trial or adjudication is pending or truly imminent." *Washington Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988). Moreover, the City has not articulated a factual basis as to how the disclosure of the reports would seriously interfere with the fairness of any proceeding, even if a new trial were granted. The City's response provides only a conclusory assertion that the release of the reports "could have" deprived a person of a fair trial if the cases were re-tried.⁶ Accordingly, this office concludes that the City did not sustain its burden of demonstrating that responsive reports are exempt from disclosure pursuant to section 7(1)(d)(iii) of FOIA.

In accordance with the conclusions expressed in this letter, this office requests that the City provide Ms. Newman with copies of the requested records. The City may redact information that meets the definition of "private information," such as home addresses, pursuant to section 7(1)(b) of FOIA.⁷ The City also may redact, pursuant to section 7(1)(c) of FOIA, which exempts information that would constitute an unwarranted invasion of privacy,⁸ the names and identifying information of any victims other than the decedent as well as the identifying information of any third parties who appear incidentally in the records. *Coleman v. F.B.I.*, 13 F. Supp. 2d 75, 80 (D.D.C. 1998) (exempting from disclosure information that "would reveal the identities of innocent third parties, witnesses or victims.").

⁶Letter from Chrissie L. Kapustka, Deputy Corporation Counsel, City of Peoria, to Michael J. Knight, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (January 30, 2024), at 3.

⁷5 ILCS 140/7(1)(b) (West 2022), as amended by Public Acts 103-154, effective June 30, 2023; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023.

⁸5 ILCS 140/7 (West 2022), as amended by Public Acts 103-154, effective June 30, 2023; 103-423, effective January 1, 2024; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023; 103-540, effective January 1, 2024; 103-554, effective January 1, 2024.

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The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, please contact me at michael.knight@ilag.gov or (773) 550-7485.

Very truly yours,



MICHAEL J. KNIGHT
Assistant Attorney General
Public Access Bureau

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