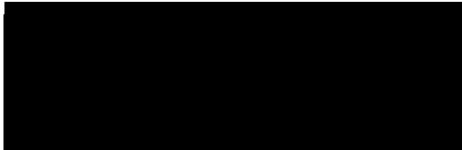


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 27, 2018

Via electronic mail



Via electronic mail

Mr. Kerry Sutton
Legal Counsel
Illinois State Police
801 South Seventh Street, 1000-S
Springfield, Illinois 62703
kerry_sutton@isp.state.il.us

RE: FOIA Request for Review – 2018 PAC 52348; ISP FOIR 18-0441

Dear [REDACTED] and Mr. Sutton:

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 the response by the Illinois State Police (ISP) to [REDACTED] February 13, 2018, request violated the requirements of FOIA. [REDACTED]

On that date [REDACTED] submitted a FOIA request to ISP seeking copies of any and all records involving the investigation of specific individuals within the New Lenox Police Department concerning an August 2016 incident. On February 20, 2018, ISP extended its time for response by five business days. On March 7, 2018, ISP denied the request in its entirety pursuant to section 7(1)(d)(iii) of FOIA (5 ILCS 140/7(1)(d)(iii) (West 2017 Supp.)). ISP asserted:

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The information requested could create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing if the information were made public, as this case has not yet been adjudicated. The entirety of the evidence in this case is related to statements made by law enforcement officers against another law enforcement officer. The Appellate Prosecutor is currently reviewing this case for possible charges against the accused. With the recent rash of news stories presenting law enforcement officials in a bad light, release of this information at this time would serve to taint a jury pool, thus preventing the accused officer from receiving a fair trial.^[1]

On March 16, 2018 [REDACTED] submitted this Request for Review contesting ISP's denial.

On April 11, 2018, this office sent a copy of the Request for Review to ISP and asked it to furnish this office with unredacted copies of the requested records for this office's confidential review, together with a detailed written explanation of the factual and legal bases for the applicability of the asserted exemption. On April 18, 2018, ISP provided the requested materials and a written response, asserting:

This is still an active investigation. The Appellate Prosecutor's office has received the reports and is in the process of going through the reports to determine the next steps, if any. Upon review, the prosecutor may ask for additional interviews or follow up investigations. ISP's FOIA officer has personally spoken with the prosecutor's office and they have requested that no documents be released until their review has been completed.^[2]

ISP enclosed an e-mail from the appellate prosecutor's office asking that the requested information not be released yet. [REDACTED] did not submit a reply.

¹E-mail from Erin Davis, Freedom of Information Officer, to [REDACTED] (March 7, 2018).

²Letter from Lieutenant Kerry Sutton, Legal Counsel, to Mr. Christopher Boggs, Assistant [Attorney General], Office of the Attorney General (April 18, 2018).

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DETERMINATION

FOIA provides that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2016); *see also Southern Illinoisan v. Illinois Department 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 2016).

Section 7(1)(d)(iii) 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:

* * *

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

To demonstrate that records are exempt from disclosure under the corresponding provision in Federal FOIA (5 U.S.C. § 552 *et seq.* (1982 and Supp. 1988)),³ 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). In accordance with Illinois judicial precedent, the Attorney General has issued a binding opinion to ISP concluding that the mere existence of an ongoing investigation that could result in criminal charges 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, at 5.

ISP's assertion of section 7(1)(d)(iii) is largely conclusory. ISP's response to this office merely stated that the Appellate Prosecutor's office was in the process of reviewing the requested records to determine the next steps, *if any*. ISP has neither demonstrated that a trial or adjudication is pending or truly imminent, nor explained how the release of any specific records—much less all of the records—would create a substantial likelihood that a person would be deprived of a fair trial. Because ISP has not set forth facts demonstrating how the disclosure of the withheld records would create a substantial likelihood that a person would be deprived of a

³This provision exempts records compiled for law enforcement purposes to the extent that disclosure would "deprive a person of a right to a fair trial or an impartial adjudication[.]"

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fair trial or an impartial hearing, this office concludes that ISP has not met its burden of demonstrating by clear and convincing evidence that the requested records are exempt from disclosure in their entireties under section 7(1)(d)(iii) of FOIA.

Although ISP did not raise any other exemptions in its response to [REDACTED] FOIA request, this office notes that certain discrete portions of the responsive records that bear on the rights of third parties contain information that may be properly redacted. In particular, private information may be redacted under section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2017 Supp.)).⁴ In addition, dates of birth may be properly redacted under section 7(1)(c) of FOIA⁵ (5 ILCS 140/7(1)(c) (West 2017 Supp.)) and information identifying witnesses who provided information may be exempt from disclosure pursuant to section 7(1)(d)(iv) (West 2017 Supp.)). See II. Att'y Gen. Req. Rev. Ltr. 12887, issued July 20, 2011 (exempting names of public employees who provide information during the course of an administrative investigation of another employee).

In accordance with the conclusions expressed in this letter, this office requests that ISP provide [REDACTED] with copies of the requested records, subject only to permissible redactions of the records pursuant to section 7 of FOIA (5 ILCS 140/7 (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017).

The Public Access Counselor 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 Springfield address on the first page of this letter.

Very truly yours,
[REDACTED]

CHRISTOPHER R. BOGGS
Assistant Attorney General
Public Access Bureau

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⁴Section 7(1)(b) exempts from disclosure "private information," which FOIA defines to include personal telephone numbers, home addresses, and employee identification numbers. 5 ILCS 140/2(c-5) (West 2016).

⁵Section 7(1)(c) permits a public body to withhold information that "would constitute a clearly unwarranted invasion of personal privacy" if disclosed. The Attorney General has issued a binding opinion concluding that birth dates are exempt from disclosure pursuant to section 7(1)(c). III. Att'y Gen. Pub. Acc. Op. No. 16-009, issued November 7, 2016, at 12.