



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

October 26, 2020

Via electronic mail

Mr. Felix Sarver
News Reporter
The Herald-News
2175 Oneida Street
Joliet, Illinois 60435
fsarver@shawmedia.com

Via electronic mail

Ms. Rita Tinker
FOIA Officer
Lockport Police Department
1212 Farrell Road
Lockport, Illinois 60441
rtinker@lockportpolice.info

RE: FOIA Request for Review – 2020 PAC 61964

Dear Mr. Sarver and Ms. Tinker:

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 2018)). For the reasons that follow, the Public Access Bureau concludes that the Lockport Police Department (Police Department) improperly denied Mr. Felix Sarver's February 19, 2020, FOIA request.

On that date, Mr. Sarver, on behalf of *The Herald-News*, submitted a FOIA request to the Police Department seeking copies of any and all police reports, supplementary police reports, dash camera footage, and any other video footage concerning the arrest of a named person on February 14, 2020. On February 28, 2020, the Police Department provided Mr. Sarver with copies of a case report, citations, and what appears to be a booking photo, but redacted certain information and withheld entire records pursuant to section 7(1)(d)(vii) of FOIA (5 ILCS 140/7(1)(d)(vii) (West 2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019). Later that day,

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Mr. Sarver submitted the above-referenced Request for Review disputing the Police Department's redactions of the arrest narratives and its withholding of requested video footage.

On March 9, 2020, this office sent a copy of the Request for Review to the Police Department and asked it to provide copies of the withheld records for this office's confidential review, and a detailed explanation of the factual and legal bases for the applicability of section 7(1)(d)(vii) of FOIA. In particular, this office asked the Police Department to specify how disclosure of the responsive records would create a substantial likelihood that the accused person would be deprived of a fair or impartial hearing. On March 10, 2020, the Police Department provided this office with unredacted copies of the responsive paper records and a written response. On June 3, 2020, the Police Department provided this office with copies of the responsive video recordings.

DETERMINATION

"All 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 2018); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body that withholds records "has the burden of proving by clear and convincing evidence" that the records are exempt from disclosure. 5 ILCS 140/1.2 (West 2018). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

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

Section 7(1)(d)(vii) 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:

* * *

(vii) obstruct an ongoing criminal investigation by the agency that is the recipient of the request.

Conclusory statements that the disclosure of requested records would obstruct a law enforcement proceeding are insufficient to demonstrate that law enforcement records are exempt from disclosure under FOIA. *See Day v. City of Chicago*, 388 Ill. App. 3d 70, 74-77 (1st Dist. 2009).

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In *Day*, the court explained: "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*, 388 Ill. App. 3d at 76; *see also* Ill. Att'y Gen. Pub. Acc. Op. No. 17-011, issued August 14, 2017, at 7-8 (public body improperly withheld record under section 7(1)(d)(vii) because it failed to demonstrate that disclosure would interfere with law enforcement); *Baudin v. City of Crystal Lake*, 192 Ill. App. 3d 530, 536 (2nd Dist. 1989) ("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.").

In its response to this office, the Police Department asserted that it partially denied the request pursuant to section 7(1)(d)(vii) because of "ongoing open litigation," and that the report would be made available in its entirety at the conclusion of court proceedings.¹ The only other explanation the Police Department provided is as follows:

- The Defendant in this report was first chair to the Will County States Attorney and is now a criminal defense attorney.
- There is a special prosecutor from DuPage County assigned to this case.
- Judge has requested a Substitution of Judge
- The Attorney Registration & Disciplinary Commission (ARDC) has sent a subpoena for all records and videos for review.^[2]

The Police Department's explanation for the applicability of the exemption is conclusory. The Police Department did not provide facts from which this office could conclude that any of the responsive records are exempt from disclosure under section 7(1)(d)(vii). Furthermore, the Police Department did not explain *how* the release of these records would interfere with any criminal investigation, despite this office's specific request for that information. As discussed above, Illinois courts have made it clear that the mere existence of an ongoing investigation is an inadequate basis for denying a request. Therefore, this office concludes that the Police Department improperly denied the responsive narratives and video recordings pursuant to section 7(1)(d)(vii) of FOIA.

¹E-mail from Rita Tinker, FOIA Officer, Lockport Police Department, to [Christina] Lucente-McCullough (March 10, 2020).


²E-mail from Rita Tinker, FOIA Officer, Lockport Police Department, to [Christina] Lucente-McCullough, Assistant Attorney General, Public Access Bureau (March 10, 2020).

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To remedy its improper denial, this office requests that the Police Department disclose to Mr. Sarver copies of the narrative and video recordings, subject only to permissible redactions under section 7 of FOIA (5 ILCS 140/7 (West 2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019). Specifically, the Police Department may properly redact information that meets the definition of "private information" pursuant to section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019),³ and dates of birth and information that would unavoidably identify third parties who were not arrested pursuant to section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019). If the Police Department redacts any such information, it should issue to Mr. Sarver a notice of denial that meets the requirements of section 9(a) of FOIA (5 ILCS 140/9(a) (West 2018)).

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 file. Please contact me at (312) 814-5383 or the Chicago address on the first page of this letter if you have any questions.

Very truly yours,


CHRISTINA M. LUCENTE-MCCULLOUGH
Assistant Attorney General
Public Access Bureau

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³ Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2018)) defines "private information" 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.