



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 6, 2017

Via electronic mail

Mr. Jonah Meadows
North Shore Editor
Patch
jonah.meadows@patch.com

Via electronic mail

Mr. Phillip Love
Mr. Nicholas Wyatt
Freedom of Information Act Officers
Village of Skokie
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RE: FOIA Requests for Review – 2017 PAC 48891; 2017 PAC 49032

Dear Mr. Meadows, Mr. Love, and Mr. Wyatt:

This determination 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 stated below, the Public Access Bureau concludes that the Village of Skokie (Village) improperly denied in their entirety the requested police report, 9-1-1 recordings, and related records requested by Mr. Jonah Meadows.

Mr. Meadows, on behalf of Patch, submitted two FOIA requests to the Village seeking information about the retail theft at the Walmart on Touhy Avenue and subsequent emergency calls. These requested records concern a well-publicized theft of a knife and machete from a Walmart in Skokie and the stabbing and hacking death of an Uber driver, on May 30, 2017.¹

¹See, e.g., Tonya Francisco, Elyse Russo, and Gaynor Hall, *'Help me! I'm going to die': New details revealed in murder of Uber driver in Lincolnwood*, WGN9 (May 31, 2017, 3:51 p.m., updated June 1, 2017,

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On July 13, 2017, Mr. Meadows submitted a FOIA request to the Village seeking copies of calls for service regarding an incident on the [REDACTED] received by the Skokie Police Department between May 30, 2017, and June 1, 2017, and associated records. That same day the Village denied the request pursuant to sections 7(1)(d)(i) and 7(1)(d)(vii) of FOIA (5 ILCS 140/7(1)(d)(i), (1)(d)(vii) (West 2016)). On August 3, 2017, this office received Mr. Meadows's Request for Review (2017 PAC 49032) contesting that denial.

On July 20, 2017, Mr. Meadows submitted a FOIA request to the Village seeking a copy of "[a]ll incident and investigatory records concerning any reports of retail theft at the Wal-Mart, 3626 Touhy Avenue, between April 31 and July 1, 2017."² On July 25, 2017, the Village provided responsive records but redacted certain portions pursuant to sections 7(1)(a), 7(1)(b), 7(1)(c), and 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)(a), (1)(b), (1)(c), (1)(d)(iv) (West 2016)). On that same day, Mr. Meadows asked the Village if any records were withheld and the Village responded that report 17-04622 was withheld pursuant to section 7(1)(d)(i) of FOIA (5 ILCS 140/7(1)(d)(i) (West 2016)). On July 25, 2017, this office received Mr. Meadows' Request for Review (2017 PAC 48891) contesting the denial of the withheld report.

The Public Access Bureau forwarded a copy of each of Mr. Meadows' Requests for Review to the Village and asked it to provide copies of the withheld records, as well as a detailed written explanation of the factual and legal bases for withholding the requested records in their entirety. The Village provided this office the requested records for our confidential review, and a substantially similar response to each matter containing an affidavit from Robert LaMantia, Chief of Police for the Village of Lincolnwood, explaining why the records were withheld. This office forwarded a copy of each of the Village's responses including the affidavit to Mr. Meadows; he submitted a reply for each file. This office has consolidated these files for purposes of this determination because they involve the same parties and same issues.

4:11 a.m.), <http://wgntv.com/2017/05/31/help-me-im-going-to-die-new-details-revealed-in-murder-of-uber-driver-in-lincolnwood/>; Mitchell Armentrout, *Girl stole knife, machete before attacking Uber driver: prosecutors*, CHICAGO SUN-TIMES (June 3, 2017, 2:28 a.m.), <https://chicago.suntimes.com/news/police-34-year-old-man-stabbed-to-death-in-lincolnwood/>; Susan Berger, *Family of Uber driver killed with stolen knife, machete sues Walmart*, CHICAGO TRIBUNE (June 26, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-uber-driver-killed-family-sues-walmart-met-20170626-story.html>.

²E-mail from Jonah Meadows, North Shore Editor, Patch to [Skokie] FOIA (July 20, 2017).

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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 2016); *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 2016). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois Univ.*, 176 Ill. 2d 401, 408 (1997).

Consolidation

As a preliminary matter we note that in his Request for Review (2017 PAC 48891), Mr. Meadows informed our office that he had no objection to consolidating his file with other Requests for Review concerning the same records, such as 2017 PAC 48351. Indeed, this office previously received a Request for Review from Mr. Andrew Schroedter, on behalf of CBS 2 Chicago, seeking reports related to the shoplifting incident at the Walmart and related 9-1-1 calls (2017 PAC 48351). The Village inadvertently sent Mr. Schroedter copies of the withheld police report, communications event report, and 9-1-1 audio and, therefore, that matter was closed. Because the Village inadvertently disclosed the records, its disclosure to Mr. Schroedter was not an intentional relinquishment, and thus it did not waive its right to assert exemptions in the present matters. *See Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007) ("[w]aiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right.") (internal citations omitted). Therefore, we will review Mr. Meadows's matters on the merits.

Section 7(1)(d) of FOIA

Section 7(1)(d) of FOIA exempts from disclosure, in pertinent part:

(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[.]

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* * *

(iii) create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing;

* * *

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

7(1)(d)(iii) of FOIA

Section 7(1)(d)(iii) of FOIA corresponds with a provision of Federal FOIA (5 U.S.C. 552(b)(7)(B) (2012)) which exempts from disclosure 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." Illinois courts have recognized that because Illinois' FOIA statute is based on the Federal FOIA statute, decisions construing the latter, while not controlling, may provide helpful and relevant precedents in construing the state Act. *See Margolis v. Director, Ill. Department of Revenue*, 180 Ill. App. 3d 1084, 1087 (1st Dist. 1989). While there are no published decisions by Illinois courts analyzing the applicability of section 7(1)(d)(iii), Federal courts have held that in order to withhold records pursuant to the "fair trial" exemption, a public body 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); *see also Chiquita Brands Int'l Inc. v. S.E.C.*, 805 F.3d 289, 298 (D.C. Cir. 2015) (the exemption applies "when the release of documents would likely deprive a party of a fair trial[.]").

In his affidavit Chief LaMantia stated that a 16-year old juvenile was arrested and "charged with first degree murder for the death of Mr. Nelson."³ Chief LaMantia also stated that releasing the records may deprive the suspect of a fair trial because the records would likely receive significant media attention and make it more difficult to assemble a non-biased jury. Mr. Meadows contends that the Cook County State's Attorney's Office has already released a great deal of the highly inflammatory information, both at the initial bond hearing and subsequent court hearings, making it unlikely that anything within the records would deprive the suspect of a fair trial.

³ Affidavit of Robert LaMantia, Chief of Police, Village of Lincolnwood (July 10, 2017), at ¶5.

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The Public Access Bureau has reviewed the withheld records which consist of an eight page police report, an eight page communications event report, and audio of three 9-1-1 emergency calls. A review of these records and of a sample of information already in the public domain at the time of the FOIA requests reveals that much of the potentially inflammatory information concerning this highly-publicized incident has already been disclosed to the public.⁴ Further, the Village's explanation for the applicability of section 7(1)(d)(iii) is largely conclusory. The Village has not provided any information on how providing these particular records to Mr. Meadows would hamper the selection of a non-biased jury or otherwise make it more probable not that the defendant would be deprived of fair trial or impartial hearing. Accordingly, this office concludes that the Village did not sustain its burden of proving by clear and convincing evidence that the records are exempt from disclosure under section 7(1)(d)(iii) of FOIA.

7(1)(d)(i) and 7(1)(d)(vii)

As a threshold matter, Mr. Meadows contends that sections 7(1)(d)(i) and 7(1)(d)(vii) are inapplicable to the records in question because the Lincolnwood Police Department rather than the Skokie Police Department is the agency conducting the investigation. In his affidavit, Chief LaMantia averred that Lincolnwood's Police Department is the lead agency in charge of investigating the death, and that it has been assisted in the investigation by the Skokie Police Department and the North Regional Major Crimes Task Force, and that the Skokie Police Department maintains portions of the investigation file. Because the available information indicates that the records at issue concern a pending, ongoing investigation in which the Skokie Police Department is actively participating, the Village is not precluded from asserting that the records are exempt from disclosure pursuant to sections 7(1)(d)(i) and 7(1)(d)(vii) of FOIA.

"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. Department of Crystal Lake*, 192 Ill. App. 3d 530, 536 (2d Dist. 1989). Conclusory statements that the disclosure of records would obstruct a law enforcement proceeding are insufficient to support the assertion of the pending law enforcement proceeding exemption. *Day v. City of Chicago*, 388 Ill. App. 3d 70, 74-77 (1st Dist. 2009) (reciting the language of FOIA exemption, without describing *how* disclosure would obstruct proceedings, is inadequate); *see also* Ill. Att'y Gen. Pub. Acc. Op. No. 17-001, issued March 14, 2017 (the mere commencement of an

⁴See, e.g. footnote 1 above.

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investigation or prosecution does not constitute clear and convincing evidence that any records are exempt from disclosure). Rather, a public body must demonstrate *how* disclosure of records would interfere with or obstruct a criminal prosecution or investigation in order to properly withhold records pursuant to section 7(1)(d)(i) or 7(1)(d)(vii) of FOIA.

In his affidavit Chief LaMantia averred that (1) the release of records will obstruct an ongoing investigation because witnesses are still being interviewed, may need to be re-interviewed as new evidence is obtained from forensic testing and subpoenas, and therefore, the release of the records may cause witnesses to alter his or her testimony, make them less likely to cooperate, or cause subpoenaed recipients to withhold or destroy evidence;⁵ and (2) release of the records will interfere with the pending law enforcement proceeding because (a) it would make it harder for the investigating agencies to bring the investigation to a proper conclusion and to obtain a plea deal or conviction; and (b) it would be more difficult to identify fake tips from real tips.⁶ Mr. Meadows contends that these arguments are highly speculative.

The concerns presented in the affidavit are mostly generalized, and do not explain how disclosure of specific types of records or information could interfere with or obstruct the investigation. A public body sustains its burden of proving by clear and convincing evidence that requested records fall within an exemption by providing "a *detailed* justification for its claimed exemption, addressing the requested documents specifically[.]" *Day*, 388 Ill. App. 3d at 74 (emphasis in original and internal quotation marks omitted). Chief LaMantia's claims that release of the records would interfere with the pending law enforcement proceeding by (1) making it harder to bring the investigation to a proper conclusion and to obtain a plea deal; (2) discouraging witness cooperation; or (3) causing recipients of subpoena to destroy evidence are conclusory. Although Chief LaMantia's assertion that release of the records will make it more difficult to distinguish fake tips from legitimate tips is a valid concern in such a highly publicized matter, much of the information in these records appears to have already been provided to the public. Further, if the Village could demonstrate that disclosure of any specific information in the records that had not been provided to the public would make it more likely to receive fake tips, it could have asserted that those specific portions are exempt from disclosure pursuant to sections 7(1)(d)(i) and 7(1)(d)(vii) and redacted them from the records. Instead the Village withheld the records in their entirety. Therefore, the Village has not sustained its burden of proving by clear and convincing evidence that the withheld records are exempt from disclosure in their entirety under sections 7(1)(d)(i) or 7(1)(d)(vii) of FOIA.

⁵Affidavit of Robert LaMantia, Chief of Police, Village of Lincolnwood (July 10, 2017), at ¶8.

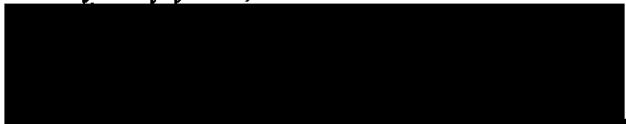
⁶Affidavit of Robert LaMantia, Chief of Police, Village of Lincolnwood (July 10, 2017), at ¶¶9-

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In accordance with the conclusions discussed above, this office requests that the Village to provide Mr. Meadows with copies of the withheld records subject only to permissible redactions under 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). Specifically, home addresses and personal telephone numbers may be redacted pursuant to sections 7(1)(b) of FOIA⁷ (5 ILCS 140/7(1)(b) (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017); names of the callers and witnesses may be redacted pursuant to section 7(1)(d)(iv) of FOIA⁸ (5 ILCS 140/7(1)(d)(iv), (West 2016), as amended by Public Acts 100-026, effective August 4, 2017; 100-201, effective August 18, 2017); and the dates of birth and races of subjects may be redacted pursuant section to 7(1)(c) of FOIA⁹ (5 ILCS 140/7(1)(c) (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 file is closed. If you have any questions, please contact me at 312-814-5201 or at the Chicago address listed on the first page of this letter.

Very truly yours,


EDIE STEINBERG
Assistant Attorney General
Public Access Bureau

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⁷Section 7(1)(b) exempts from disclosure "private information," which section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2016)) defines to include "home or personal telephone numbers" and "home address * * * except as otherwise provided by law or when compiled without possibility of attribution to any person."

⁸Section 7(1)(d)(iv) of FOIA permits a public body to redact information that would "unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies[.]"

⁹Section 7(1)(c) of FOIA exempts "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"