



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

March 11, 2020

Via electronic mail

Ms. Gabriela Velazquez
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Via electronic mail

The Honorable Janet L. Kilkelly
City of Waukegan
City Clerk and FOIA Officer
100 North Martin Luther King Jr., Avenue
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RE: FOIA Request for Review – 2019 PAC 61099; 2019-48357

Dear Ms. Velazquez and Ms. Kilkelly:

This determination 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 response by the City of Waukegan (City) improperly withheld certain portion of records responsive to Ms. Gabriela Velazquez's December 5, 2019, FOIA request.

On December 5, 2019, Ms. Velazquez, on behalf of the Consumer Law Group, submitted a FOIA request to the City seeking the complete incident report for case number 2019-48357. On December 13, 2019, counsel for the City denied the request in its entirety pursuant to section 7(1)(d)(i) of FOIA (5 ILCS 140/7(1)(d)(i) (West 2018), as amended by Public Act 101-455, effective August 23, 2019). Specifically, the City asserted that this incident report should not be disclosed because of an active investigation. On December 16, 2019, Ms. Velazquez submitted the above-referenced Request for Review disputing the redaction of the

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information concerning the incident and the victim, who she identified as her client, that wouldn't compromise pending proceedings.

On January 21, 2020, this office sent a copy of the Request for Review to the City and asked it to provide unredacted copies of the responsive records for this office's confidential review, together with a detailed explanation of the legal and factual bases for the applicability of section 7(1)(d)(i). In particular, this office asked the City to explain how and the extent to which disclosure of the incident report would interfere with the City Police Department's active investigation. On February 24, 2020, counsel for the City provided this office with copies of the complete incident report and its written answer. Later that day, this office forwarded a copy of the City's response letter to Ms. Velazquez; she did not reply.

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 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).

Section 2.15 of FOIA

As a threshold matter, the records in question document the arrests of two individuals. Section 2.15(a) of FOIA (5 ILCS 140/2.15 (West 2018), as amended by Public Act 101-433, effective August 20, 2019) generally requires the release of the following arrest records:

(i) information that identifies the individual, including the name, age, address, and photograph, when and if available; (ii) information detailing any charges relating to the arrest; (iii) the time and location of the arrest; (iv) the name of the investigating or arresting law enforcement agency; (v) if the individual is incarcerated, the amount of any bail or bond; and (vi) if the individual is incarcerated, the time and date that the individual was received into, discharged from, or transferred from the arresting agency's custody.

Information referenced in subsections (iii) through (vi) of section 2.15(a) may be withheld, but only if its "disclosure would: (i) interfere with pending or actually and reasonably contemplated

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law enforcement proceedings conducted by any law enforcement agency; (ii) endanger the life or physical safety of law enforcement or correctional personnel or any other person; or (iii) compromise the security of any correctional facility." 5 ILCS 140/2.15(c) (West 2018), as amended by Public Act 101-433, effective August 20, 2019.

Thus, disclosure of the information in subsections (i) and (ii) of section 2.15(a) is mandatory. In this matter, some of the documentation contained in the requested incident report, particularly arrest cards and complaint citations identifying arrestees and charges, are not among the four types of arrest report information that may be withheld under section 2.15(c) if disclosure would interfere with a pending law enforcement proceeding. Accordingly, this office concludes that, at a minimum, the City improperly withheld the information listed in section 2.15(a)(i) and (ii) of FOIA.

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

With respect to the remaining information, section 7(1)(d)(i) 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:

(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[.]

"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 (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). 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) of FOIA. 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.

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In her Request for Review, Ms. Velazquez explained that she no longer requires the complete incident report but rather requests a redacted copy of this report from the City. She modified her request to include a report "where any and all information that is suspected to interfere with law enforcement proceedings is REDACTED and where enough information about the incident and victim/complainant is included without compromising any pending proceedings."¹ In its response to this office, counsel for the City argued that disclosure of the incident report, even redacted, would interfere with Waukegan Police Department's active investigation. The City stated that:

The suspects involved in the case are currently still incarcerated and are suspected to have committed other crimes. The suspects have pending court dates on[,] today, February 24th, March 26th[,] and April 13th. The report includes references to other cell phone robberies and suspects that may have been involved. The names of those persons and the method used to commit other crimes is also in the report.^[2]

This office has reviewed the City's response as well as an unredacted copy of the records at issue. Although its response was somewhat generalized, the City did provide clear facts and details about the status of the City's Police Department's investigation and described how disclosure of some portions of the report would interfere with that investigation. Specifically, counsel for the City explained how release of information concerning any other suspects and robberies that have yet to result in arrests could thwart the investigation into those suspects and robberies. However, the City has not demonstrated how the remaining information that directly concerns the arrestees and the incidents for which they were arrested would interfere with pending law enforcement proceedings conducted by the City's Police Department. Accordingly, this office concludes that the City has not sustained its burden of demonstrating by clear and convincing evidence that those portions of the records are exempt from disclosure under section 7(1)(d)(i) of FOIA.

Therefore, this office requests that the City provide Ms. Velazquez with documentation responsive to her request that does not contain specific information regarding any other suspects who have not been arrested and any other incidents that not have resulted involved in this incident. The City also may redact "unique identifiers" that constitute "private information" under section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2018), as amended by

¹Letter from Gabriela Velazquez, Paralegal, Consumer Law Group, LLC, to Public Access Counselor, Office of the Attorney General (December 16, 2019).

²E-mail from Witherspoon Legal to Christina Lucente-McCullough, Assistant Attorney General, Public Access Bureau (February 24, 2020).

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Public Act 101-455, effective August 23, 2019);³ photos or identifying information of any individuals in line-up photos who were not arrested pursuant to section 7(1)(c)⁴ (5 ILCS 140/7(1)(c) (West 2018), as amended by Public Act 101-455, effective August 23, 2019); and information identifying any witnesses who provided information to police but were not arrested pursuant to section 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)(d)(iv) (West 2018), as amended by Public Act 101-455, effective August 23, 2019)⁵ If any such information is redacted, the City must provide a written notice of denial that includes "a detailed factual basis for the application of any exemption claimed[.]" 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 shall serve to close this matter. If you have any questions, please contact me at (312) 814-5383, clucentemccullough@atg.state.il.us, or the Chicago address listed on the first page of this letter.

Very truly yours,


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

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³FOIA 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. 5 ILCS 140/2(c-5) (West 2018).

⁴Section 7(1)(c) exempts from disclosure information that would constitute an unwarranted invasion of personal privacy if disclosed.

⁵Section 7(1)(d)(iv) of FOIA exempts from disclosure 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[.]

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cc: *Via electronic mail*
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