



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

October 5, 2023

Via electronic mail



Via electronic mail

Ms. Rhiann M. Martynowski
Executive I – FOIA Appeals Manager
Office of the Director
Illinois State Police
801 South Seventh Street, Suite 1000-S
Springfield, Illinois 62703
ISP.FOIA.Officer@illinois.gov

RE: FOIA Request for Review – 2023 PAC 77159; ISP no. 05916831

Dear [REDACTED] and Ms. Martynowski:

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)).

On June 14, 2023, [REDACTED] submitted a FOIA request to the Illinois State Police (ISP) seeking "[a] report from the forensic interview of [her child] which occurred on 12/21/2020, as well as that investigation of sexual abuse."¹ On June 28, 2023, ISP responded by denying the request as an unduly burdensome repeated request under section 3(g) of FOIA (5 ILCS 140/3(g) (West 2022)); ISP stated that [REDACTED] had made a request for the same records on June 12, 2023, and that it had responded to that request on June 27, 2023, under file no. 05915686. On June 30, 2023, [REDACTED] submitted the above-referenced Request for Review asking for assistance in obtaining documentation regarding the initial Children's Advocacy Center (CAC) interview of her child in December 2020.

¹FOIA Request from [REDACTED] to ISP FOIA (June 14, 2023).

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On July 13, 2023, this office sent a copy of the Request for Review to ISP and asked it to provide a detailed written explanation for denying [REDACTED] June 14, 2023, FOIA request an unduly burdensome repeated request under section 3(g). This office asked ISP to explain when it either previously provided or properly denied the same records [REDACTED] requested on June 14, 2023, and to provide evidence of the previous response. On July 21, 2023, ISP responded, asserting that it previously provided [REDACTED] with copies of paper records responsive to her request on June 27, 2023, and that it advised [REDACTED] of its backlog of video requests on June 26, 2023. ISP also attached copies of its May 11, 2023, and June 27, 2023, responses to [REDACTED], which both included links to responsive records. That same day, this office forwarded a copy of ISP's written response to [REDACTED]. On July 24, 2023, [REDACTED] submitted a reply.

On July 26, 2023, an Assistant Attorney General (AAG) in the Public Access Bureau contacted ISP to clarify which of the records in its May 11, 2023, and June 27, 2023, responses to [REDACTED] were the records from the forensic interview of her child in December 2020. That same day, ISP responded by identifying certain pages of the response to FOIA no. 05892001 (the response provided on May 11, 2023), and, for the first time, asserted that video(s) of the forensic interview were exempt pursuant to section 7.5(tt) of FOIA.² On August 21, 2023, after additional follow-up by the AAG, ISP stated that "[t]he entire ISP investigative file (that is available for release via FOIA minus the forensic interviews and medical records) has been provided to the requester[,]" through ISP request nos. 05892001 (259 pages) and 05915686 (482 pages).³ On that same date, ISP re-sent links to those two sets of records to [REDACTED]

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 2022); *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 2022).

As an initial matter, the Public Access Counselor's authority to resolve disputes is limited to alleged violations of FOIA and the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2022)). *See* 15 ILCS 205/7(c)(3) (West 2022). FOIA governs the disclosure of public records in a public body's possession; an allegation that a public body should have, but did not, obtain

²5 ILCS 140/7.5(tt) (West 2022), as amended by Public Acts 103-008, effective June 7, 2023; 103-034, effective June 9, 2023.

³E-mail from Rhiann M. Martynowski, Executive I – FOIA Appeals Manager, Office of the Director, Illinois State Police, to [Katie] Goldsmith (August 21, 2023).

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certain records or choose to include certain documentation in a particular file does not indicate that the public body violated FOIA because it does not suggest that the public body improperly withheld records. Similarly, the Public Access Bureau does not have the authority to intervene in ISP or Department of Children and Family Services (DCFS) investigations. Therefore, this office is unable to assist with those matters, and this letter is limited to analyzing whether ISP responded improperly to [REDACTED] June 14, 2023, FOIA request.

Section 3(g) of FOIA provides, in pertinent part, that "[r]epeated requests from the same person for the same records that are unchanged or identical to records *previously provided or properly denied* under this Act shall be deemed unduly burdensome under this provision." (Emphasis added.)

This office's review of the records that ISP previously provided [REDACTED] and provided to [REDACTED] again on August 21, 2023, confirmed that ISP disclosed the investigative report from the forensic interview of her child in December 2020 (pages 253-54 of the 259-page PDF). With respect to [REDACTED] claim that "[o]ther investigations of my children have had outlines of the CAC interview included in the investigative report. This one simply says that no full disclosure was made[,]"⁴ there is no indication that ISP withheld an outline of the interview. Rather, the narrative of the report suggests that no such outline was ever made for this interview:

Below is an interview summary. It is not intended to be a verbatim account and does not memorialize all statements made during the interview. Communications by the parties were electronically recorded onto a digital video recorder. The DVD recording captures the actual words spoken.^[5]

A public body is not required to create new records to comply with a FOIA request. *Kenyon v. Garrels*, 184 Ill. App. 3d 28, 32 (1989). Instead, "[a] requester is entitled only to records that an agency has in fact chosen to create and retain." *Yeager v. Drug Enforcement Administration*, 678 F.2d 315, 321 (D.C. Cir. 1982). Under these circumstances, this office is unable to conclude that ISP failed to disclose written records of that forensic interview.

As to video footage of the forensic interview, ISP acknowledged that there was video footage responsive to [REDACTED] request in its June 26, 2023, denial letter, but did not grant or deny the video. Rather, ISP stated:

⁴E-mail from [REDACTED] to Public Access [Bureau] (June 30, 2023).

⁵Investigative Police Report, Illinois State Police, Master Sgt. William Sandusky, Effingham, Illinois, Case no. 20-41655200401, December 22, 2020.

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A reasonable search for the requested video was conducted and ISP found video responsive to your request.

ISP currently has a backlog of video requests which have already been paid for and are still in process. Accordingly, your request is on hold and has been placed on the waitlist in the order in which it was received. To ensure video requests are completed timely upon receipt of payment, we will only be accepting payment as they come up on the waitlist. At that time, you will be sent a CD/DVD Request Form for your request. We will respond to your video request as soon as possible. Thank you for your patience and understanding.^[6]

On July 26, 2023, ISP confirmed to this office that there was video responsive to [REDACTED] request of a forensic interview of her child, but that it was withholding that video under section 7.5(tt) of FOIA. In ISP's August 21, 2023, e-mail to [REDACTED] in which it re-sent the two PDFs of records, ISP also notified her for the first time that it would withhold any video recordings of the forensic interview under section 7.5(tt):

ISP currently has an extensive backlog for video requests. Once we're able to process your request, we will provide you with a CD/DVD Request Form along with payment instructions. Any CAC interview videos will not be released pursuant to Section 7.5(tt) of FOIA and the Children's Advocacy Center Act ("A forensic interview, an electronic recording, or a forensic interview transcription or electronic recording is confidential and exempt from public inspection and copying under Section 7.5 of the Freedom of Information Act and may only be viewed by a court, attorneys, investigators, or experts for the purpose of judicial and administrative hearings and shall not be disseminated except pursuant to a court's protective order." 55 ILCS 80/4.5(b)). If it is determined that ISP only maintains video related to the forensic interviews, you will receive a supplemental response advising that your request is denied in its entirety[.]^[7]

⁶E-mail from Illinois State Police, Freedom of Information Act Unit, Sarah Wheeler – FOIA Officer, to meredith.gardner90@gmail.com (June 26, 2023).

⁷E-mail from Rhiann Martynowski, Executive I – FOIA Appeals Manager, Office of the Director, Illinois State Police, to meredith.gardner90@gmail.com (August 21, 2023).

Section 7.5(tt) of FOIA exempts from disclosure "[r]ecordings made under the Children's Advocacy Center Act, except to the extent authorized under that Act." Correspondingly, section 4.5(b) of the Children's Advocacy Center Act (55 ILCS 80/4.5(b) (West 2022)) provides:

A forensic interview, an electronic recording, or a forensic interview transcription or electronic recording is confidential and exempt from public inspection and copying under Section 7.5 of the Freedom of Information Act and may only be viewed by a court, attorneys, investigators, or experts for the purpose of judicial and administrative hearings and shall not be disseminated except pursuant to a court's protective order.

By its plain language, this provision specifically prohibits disclosure of video recordings of CAC forensic interviews. This provision contains no exception allowing disclosure to a parent of a minor subject of a forensic interview. Accordingly, ISP does not violate FOIA by withholding responsive video(s) of a CAC forensic interview under section 7.5(tt).

Nonetheless, ISP's current response process for FOIA requests for copies of video recordings clearly does not meet the requirements of FOIA. ISP's July 21, 2023, response letter to this office stated:

ISP receives on average over 550 FOIA requests each month. ISP does not maintain the resources to compile, review, redact, and subsequently produce every record responsive to every FOIA request in 10 business days. In an effort to comply with section 3(d) of FOIA, which mandates a response within 5 business days, ISP sends requesters detailed communications to keep them apprised of the status of their request if it is not handled completely within the 10 days.^[8]

ISP has misapplied the plain language of section 3(d) of FOIA (5 ILCS 140/3(d) (West 2022)), which provides, in relevant part, that "[e]ach public body shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request, unless the time for response is properly extended under subsection (e) of this Section." Section 3(d) does not merely require that a public body provide "a response"; it requires the public body to comply with the request by disclosing records, deny the request pursuant to exemptions set forth in

⁸Letter from Amelia Finch, Technical Advisor III, Illinois State Police, Legal Office, to Katie Goldsmith, Assistant Attorney General, Public Access Bureau (July 21, 2023), at [2].

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FOIA, or extend its time to respond by "not more than 5 business days" pursuant to section 3(e) (5 ILCS 140/3(e) (West 2022)). FOIA does not permit a public body to further extend its time to respond to a FOIA request absent the requester's written agreement. *See* 5 ILCS 140/3(e) (West 2022). ISP did not assert or provide information suggesting that [REDACTED] agreed in writing to an indefinite extension of ISP's time to grant or deny the portion of her request for video footage.

Section 1 of FOIA (5 ILCS 140/1 (West 2022)) declares:

The General Assembly recognizes that this Act imposes fiscal obligations on public bodies to provide adequate staff and equipment to comply with its requirements. The General Assembly declares that providing records in compliance with the requirements of this Act is a primary duty of public bodies to the people of this State, and this Act should be construed to this end, fiscal obligations notwithstanding.

This provision signifies that the General Assembly expressly rejected the notion that a public body may refuse to timely grant or deny a request in writing due to a claim of insufficient resources. FOIA requires ISP to devote adequate staff and equipment to processing FOIA requests rather than indefinitely delaying responses to requests for video recordings by alluding to the large number of such requests that ISP receives. This office reminds ISP that the requirements of sections 3(d) and 3(e) of FOIA are mandatory.

The Public Access Counselor has determined that resolution of this issue does not require the issuance of a binding opinion. This letter serves to close the matter. If you have any questions, please contact me at katherine.goldsmith@ilag.gov or the Chicago address listed on the first page of this letter.

Very truly yours,

[REDACTED]

KATIE GOLDSMITH
Assistant Attorney General
Public Access Bureau

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