



**OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS**

Lisa Madigan
ATTORNEY GENERAL

March 16, 2012

**PUBLIC ACCESS OPINION 12-006
(Request for Review 2011 PAC 18379)**

**FREEDOM OF INFORMATION ACT:
Disclosure of Records Pertaining to
Arrests and Police Reports**

Mr. Bill Dwyer, Staff Writer
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Ms. Darlene Pugh
Freedom of Information Officer
Hillside Police Department
425 Hillside Avenue
Hillside, Illinois 60162-1215

Dear Mr. Dwyer and Ms. Pugh:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 120/9.5(f) (West 2010), as amended by Public Act 97-579, effective August 26, 2011). For the reasons discussed below, we conclude that the Village of Hillside (Village) violated section 3 of FOIA (5 ILCS 140/3 (West 2010)) by withholding police reports concerning an incident in which a public official was arrested.

BACKGROUND

On January 18, 2012, Mr. Bill Dwyer, a reporter for the Sun-Times Media/Pioneer Press submitted a FOIA request to the Village seeking "all police incident reports related to Emanuel 'Chris' Welch between November 1, 2001, and March 30, 2002[,] "records of"[a]ll 911 calls received between November 1, 2001 and March 30, 2002 related to reported batteries



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of [a]woman," and "any records of police and/or fire paramedic assistance to a battered woman" for the same time period.¹

On January 23, 2012, the Village's Police Department (Department) denied the FOIA request in its entirety pursuant to section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011),² which exempts personal information if disclosure would constitute an unwarranted invasion of personal privacy. However, the Department did not provide a detailed factual basis or any explanation for its assertion of section 7(1)(c), as required by section 9(a) of FOIA (5 ILCS 140/9(a) (West 2010)). On February 2, 2012, Mr. Dwyer requested that the Public Access Counselor review the Department's denial of his FOIA request.

On February 6, 2012, the Public Access Bureau forwarded to the Department a copy of the Request for Review and requested that the Department provide copies of the records that were withheld, together with a detailed explanation of the basis for its assertion that those records are exempt under section 7(1)(c). In its letter, the Public Access Bureau also requested that the Department "clarify whether any individual was arrested or charged in connection with the incident or incidents documented in the records."³

On February 14, 2012, the Department responded to the Public Access Bureau by providing un-redacted copies of a police incident report and supplemental reports, together with a written explanation of its assertion of section 7(1)(c). The Department's response letter indicated that "[t]here are no 911 tapes available for this incident and there was no Fire Paramedic[] assist involved in this incident. This is the only incident involving the individual mentioned" in the FOIA request for the relevant time frame.⁴ The Department's FOIA officer also stated that "[t]he fact that this individual is a political figure has no bearing in my decision for denying this request. The decision was made strictly on the basis of the release of personal information that need not be released to the public[.]" According to the Department, its investigation of the underlying incident was "closed in 2002 with no arrests and no complaints

¹Freedom of Information Request by Bill Dwyer, Sun-Times Media/Pioneer Press, to Village of Hillside (January 18, 2012).

²Letter from Darlene Pugh, Freedom of Information Officer, Village of Hillside Police Department, to Bill Dwyer, Sun-Times Media/Pioneer Press (January 23, 2012).

³Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Darlene Pugh, Freedom of Information Officer, Hillside Police Department (February 6, 2012).

⁴Letter from Darlene Pugh, Hillside Police FOIA Officer, Village of Hillside, to Steve Silverman, Assistant Attorney General, Public Access Bureau (February 14, 2012).

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signed."⁵ In a separate response letter clearly identified by the Department as "Attorney General Copy, Not to Release[.]" the Department provided additional information to explain its basis for asserting the section 7(1)(c) exemption. We have considered that additional information, but are prohibited from describing it in this binding opinion pursuant to section 9.5(c) of FOIA (5 ILCS 120/9.5(c) (West 2010), as amended by Public Act 97-579, effective August 26, 2011) ("To the extent that records or documents produced by a public body contain information that is claimed to be exempt from disclosure under Section 7 of this Act, the Public Access Counselor shall not further disclose that information").

On February 28, 2012, a managing editor for the Sun-Times Media/Pioneer Press replied to the Department's response to the allegations in the Request for Review by emphasizing that Mr. Welch is a longtime public figure who was a member of the School Board at the time of the incident and currently serves as Board president, and that he is also a candidate for election to the General Assembly:

Mr. Welch has placed himself in the public eye. We believe that Welch's expectation of privacy is superseded by his status as [a] public official and public figure – both at the time of the incident and today – and that the public's right to know should take precedence. Moreover, our request bears on the performance of public duties by officers of the Hillside Police Department and particularly on important public concerns over whether favoritism influenced their response to this incident.⁶

The reply also indicated that the newspaper welcomes "the redaction of any name(s) or information that identifies the victim(s). We are only interested in the report as it relates to Mr. Welch."⁷

⁵Letter from Darlene Pugh, Hillside Police FOIA Officer, Village of Hillside, to Steve Silverman, Assistant Attorney General, Public Access Bureau (February 14, 2012).

⁶E-mail from Jennifer Clark, Managing Editor, Sun Times Media/Pioneer Press, to Steve Silverman, Assistant Attorney General, Public Access Bureau (February 28, 2012).

⁷E-mail from Jennifer Clark, Managing Editor, Sun Times Media/Pioneer Press, to Steve Silverman, Assistant Attorney General, Public Access Bureau (February 28, 2012).

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ANALYSIS

All public records in the possession or custody of a public body are presumed to be open to inspection and copying. 5 ILCS 140/1.2 (West 2010). Section 3 of FOIA provides, in pertinent part:

(a) Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act. * * *

(b) Subject to the fee provisions of Section 6 of this Act, each public body shall promptly provide, to any person who submits a request, a copy of any public record required to be disclosed by subsection (a) of this Section and shall certify such copy if so requested.

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 2010).

Section 2.15 of FOIA

We have reviewed copies of the records in question, which contradict the Department's characterization of the underlying incident in one critical aspect: the narrative of the incident report plainly states that Mr. Welch was taken into custody by police officers. Consequently, it must initially be determined whether Mr. Welch's detention constituted an "arrest" that triggered the disclosure requirements of section 2.15(a) of FOIA (5 ILCS 140/2.15(a) (West 2010)), which provides:

Arrest reports. The following chronologically maintained arrest and criminal history information maintained by State or local criminal justice agencies shall be furnished as soon as practical, but in no event later than 72 hours after the arrest, notwithstanding the time limits otherwise provided for in Section 3 of this Act:

- (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

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individual is incarcerated, the time and date that the individual was received into, discharged from, or transferred from the arresting agency's custody.

Unambiguous statutory language should be interpreted in accordance with its plain meaning. *People v. Davis*, 199 Ill. 2d 130, 135 (2002). When terms used in a statute have acquired a technical meaning in the law, they will be given their technical meaning if that is the context in which they are employed. *Stockton v. Oldenburg*, 305 Ill. App. 3d 897, 903-904 (4th Dist. 1999); see *Galowich v. Beech Aircraft Corp.*, 92 Ill. 2d 157, 165-166 (1982). The term "arrest" is such a term.

Black's Law Dictionary defines "arrest" as a "seizure or forcible restraint" and the "taking or keeping of a person in custody by legal authority, esp. in response to a criminal charge." *Black's Law Dictionary* 104 (7th ed. 1999). Illinois courts have distinguished an arrest from a brief, involuntary detention that does not require probable cause under the fourth amendment to the United States Constitution. *People v. Jackson*, 96 Ill. App. 3d 1057, 1059 (1st Dist. 1981) ("The elements of an arrest are: (1) the authority to arrest; (2) the assertion of that authority with the intent to arrest; and (3) the restraint of the person arrested"); see also *People v. Williams*, 303 Ill. App. 3d 33, 40 (1st Dist. 1999) ("In determining whether an arrest has occurred, the court must determine whether a reasonable person, innocent of any crime, would have believed that he was not free to leave"). In *People v. Jackson*, 348 Ill. App. 3d 719, 728-729 (1st Dist. 2004), the court stated that in deciding whether an arrest occurred, it must consider the "totality of the circumstances," including:

(1) the time, place, length, mood and mode of the encounter between the defendant and the police; (2) the number of police officers present; (3) any indicia of formal arrest or restraint, such as the use of handcuffs or drawing of guns; (4) the intention of the officers; (5) the subjective belief or understanding of the defendant; (6) whether defendant was told he could refuse to accompany police; (7) whether the defendant was transported in a police car; (8) whether the defendant was told he was free to leave; (9) whether the defendant was told he was under arrest; and (10) the language used by officers.

Based on the confidential information in the police incident report provided to this office, we conclude, contrary to Ms. Pugh's statement,⁸ that the police did take Mr. Welch into

⁸Letter from Darlene Pugh, Hillside Police FOIA Officer, to Steve Silverman, Assistant Attorney General, Public Access Bureau (February 14, 2012).

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custody and arrest him on January 2, 2002, notwithstanding that he was released from custody the same day, no criminal charges were filed, and it appears that he never reached the point of being processed in connection with this arrest.

Section 7(1)(c) and Section 2.15 of FOIA

Section 7(1)(c) of FOIA exempts from inspection and copying "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information." The exemption defines "unwarranted invasion of personal privacy" as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information."

The requirements of section 2.15(a) of FOIA demonstrate that the General Assembly has recognized a strong public interest in the disclosure of information concerning arrests that outweighs an arrestee's right to privacy. Ill Att'y Gen. Pub. Acc. Op. No. 11-001, issued February 18, 2011. Because Mr. Welch was arrested, the information referenced in subsection (i) and (ii) of section 2.15(a) of FOIA relating to his arrest is subject to disclosure. Information referenced in the remaining subsections of section 2.15(a) may be withheld only if "disclosure would: (i) interfere with pending or actually and reasonably contemplated 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 2010). The Department asserted in response to the allegations in the Request for Review that its investigation is closed, and there is no indication that disclosure of the information would endanger any individual or compromise the security of any correctional facility. Accordingly, the categories of information listed in section 2.15(a) of FOIA must also be disclosed to the requester. Because the disclosure of this information is governed by the more specific provisions of section 2.15 of FOIA, it may not be withheld pursuant to the general provisions of section 7(1)(c) of FOIA. *See generally Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 233 (2007).

With respect to the remaining information contained in the incident reports, interpretations of similar provisions of the federal Freedom of Information Act are instructive in balancing Mr. Welch's right to privacy against the public interest in disclosure.⁹ Of particular relevance are analyses of 5 U.S.C. § 552(b)(7)(c) (5 U.S.C. § 552(b)(7)(c) (2006), as amended by Pub. L. 111-83, Title V, § 564(b), effective Oct. 28, 2009), which exempts from disclosure

⁹Although not controlling, federal precedent may be considered in construing the Illinois FOIA because both statutes promote full disclosure of public records subject only to limited exceptions. *See Margolis v. Director, Illinois Dept. of Revenue*, 180 Ill. App. 3d 1084, 1087 (1st Dist. 1989).

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"records or information compiled for law enforcement purposes, but only to the extent that" disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Under the federal FOIA, arrestees are considered "essentially public personages" with a "limited" and "qualified" right to privacy, "and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest" that are subject to disclosure. *Tennessean Newspaper, Inc. v. Levi*, 403 F.Supp. 1318, 1321 (D.C.Tenn. 1975). There also is a strong public interest in information that sheds light on the manner in which law enforcement officials perform their public duties. *See Lissner v. United States Customs Service*, 241 F.3d 1220, 1223 (9th Cir. 2001) (information that "sheds light on the propriety" of a federal law enforcement agency's handling of an incident in which two police officers were arrested and fined "raises a cognizable public interest under the federal FOIA"); *see also Hammons v. Scott*, 423 F. Supp. 625, 628 (N.D. Cal. 1976) (holding that disclosure of records of arrests that did not result in criminal charges does not violate a subject's constitutional right to privacy).

Here, the information at issue may be highly personal to Mr. Welch, but his right to privacy is significantly diminished in this instance by his status as an arrestee. There also is a strong public interest in arrests in general, as demonstrated by the General Assembly's enactment of section 2.15(a). Under these circumstances, the public interest in disclosure significantly outweighs the subject's right to privacy. Therefore, disclosure of the remaining portions of the records in question would not constitute an unwarranted invasion of personal privacy within the scope of section 7(1)(c).

By failing to disclose the records in question pursuant to Mr. Dwyer's FOIA request, the Department has violated section 3 of the Act. The Department is obligated to provide Mr. Dwyer with copies of the records, subject only to appropriate redactions for "private information" under section 7(1)(b) (5 ILCS 140/7(1)(b) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011). Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2010), as amended by Public Act 97-579, effective August 26, 2011) defines "private information" as:

[u]nique 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

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otherwise provided by law or when compiled without possibility of attribution to any person.

As previously noted, Mr. Dwyer and Ms. Clark have specifically stated that the Department is free to redact any name(s) or information that identifies the victim(s).

FINDINGS AND CONCLUSIONS

After full review and giving due consideration to the arguments of the parties, the Public Access Counselor's findings, and the applicable law, the Attorney General finds that:

1) On January 18, 2012, Mr. Dwyer submitted a FOIA request to the Village seeking copies of police incident reports related to Emanuel 'Chris' Welch between November 1, 2001, and March 30, 2002, and records of 911 calls and police and paramedic calls related to a battered woman for the same time period.

2) On January 23, 2012, the Village's Police Department denied Mr. Dwyer's request pursuant to section 7(1)(c) of FOIA.

3) On February 2, 2012, the Public Access Counselor received Mr. Dwyer's Request for Review of the denial of his FOIA request. Mr. Dwyer's Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA. 5 ILCS 140/9.5(a) (West 2010), as amended by Public Act 97-579, effective August 26, 2011. Therefore, the Attorney General may properly issue a binding opinion with respect to the disclosure of the requested records.

4) On February 6, 2012, the Public Access Bureau determined that action was warranted and issued a letter to the Department requesting that it provide for review copies of the records in question, together with a detailed summary for the assertion of the section 7(1)(c) exemption, including a clarification as to whether any individual was arrested in connection with the underlying incident.

5) On February 14, 2012, the Department responded by providing the Public Access Counselor with a detailed summary of its reasons for the assertion of section 7(1)(c) together with copies of the records in question.

6) The Department stated in its response that no one was arrested in connection with the incident documented in the records. Based upon this office's review of the records, however, we conclude that Mr. Welch was, as a matter of law, arrested in connection with the underlying incident.

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7) Because Mr. Welch was arrested, and because the Department has stated that its investigation is closed and there is no indication that disclosure of information relating to his arrest would endanger any individual or compromise the security of any correctional facility, the information referenced in section 2.15(a) of FOIA is not exempt from disclosure.

8) Further, the Department failed to demonstrate by clear and convincing evidence that any other information in the incident report is exempt from disclosure pursuant to section 7(1)(c).

Therefore, it is the opinion of the Attorney General that the Department violated FOIA by improperly denying Mr. Dwyer's, January 18, 2012, FOIA request for copies of police incident reports related to Emanuel 'Chris' Welch between November 1, 2001, and March 30, 2002. Accordingly, the Department is directed to take immediate and appropriate action to comply with this opinion by furnishing Mr. Dwyer with copies of those records, subject only to appropriate redactions under sections 7(1)(b) of FOIA. Under section 9.5(f) of FOIA, the Department must either immediately comply with this binding opinion or initiate administrative review under section 11.5 of FOIA (5 ILCS 140/9.5 (West 2010)).

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2010). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Mr. Bill Dwyer as defendants. *See* 5 ILCS 140/11.5 (West 2010).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
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