



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

August 19, 2014

PUBLIC ACCESS OPINION 14-008
(Request for Review 2014 PAC 29297)

FREEDOM OF INFORMATION ACT:
Disclosure of Photographs of a Former
Auxiliary Deputy Sheriff

Mr. Joseph Hosey
Patch.com
908 Stafford Court
New Lenox, Illinois

Mr. Jerome A. Nudera, Jr.
FOIA Officer
Will County Sheriff's Office
20 West Washington Street
Joliet, Illinois 60432

RE: FOIA Request for Review – 2014 PAC 29297

Dear Mr. Hosey and Mr. Nudera:

This is a binding opinion issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2012)). For the reasons discussed below, this office concludes that the Will County Sheriff's Office (Sheriff's Office) violated the requirements of FOIA by denying Mr. Joseph Hosey's FOIA request seeking photographs of a former Sheriff's Office auxiliary deputy.

BACKGROUND

On May 2, 2014, Mr. Hosey, on behalf of Patch.com, submitted a FOIA request to the Sheriff's Office for "[a]ll personnel and any other photographs of former auxiliary deputy

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Tony Marquez."¹ In an e-mail dated May 7, 2014, but sent on May 8, 2014, Jerome Nudera, FOIA Officer for the Sheriff's Office, denied Mr. Hosey's request, citing sections 2(c-5) and 7(1)(b) of FOIA (5 ILCS 140/2(c-5) (West 2012); 5 ILCS 140/7(1)(b) (West 2013 Supp.)).² Section 7(1)(b) exempts "private information" from disclosure.³ Section 2(c-5) defines "private information" to include:

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.

The Sheriff's Office asserted in its response that the "[p]hotographs [of Mr. Marquez] are considered 'private information' due to the 'biometric identifiers' they contain."⁴ On May 8, 2014, the Public Access Bureau received Mr. Hosey's Request for Review of the denial of his FOIA request.⁵

On May 14, 2014, this office forwarded a copy of the Request for Review to the Sheriff's Office and asked it to provide copies of the photographs it had withheld, as well as any additional factual information and legal arguments in support of its assertion of section 7(1)(b) of

¹E-mail from Joseph Hosey, [Patch], to Kathy Hoffmeyer, [Will County Sheriff's Office] (May 2, 2014).

²These are the only two provisions of FOIA that the Sheriff's Office asserted as its bases for withholding Mr. Marquez's photographs. Therefore, this binding opinion is limited to addressing the applicability of those provisions. This office does not make any findings as to whether other exemptions in section 7 of FOIA (5 ILCS 140/7 (West 2013 Supp.)) could potentially provide a valid basis for a public body to withhold photographs of law enforcement officials in other circumstances.

³E-mail from Jerome A. Nudera, Jr., FOIA Officer, Will County Sheriff's Office, to Joseph Hosey (May 8, 2014).

⁴E-mail from Jerome A. Nudera, Jr., FOIA Officer, Will County Sheriff's Office, to Joseph Hosey (May 8, 2014).

⁵E-mail from Joseph Hosey, to the Public Access Bureau (May 8, 2014).

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FOIA.⁶ This office received the Sheriff's Office's response, including copies of the photographs, on June 3, 2014.⁷ The Sheriff's Office's response asserted that photographs of any part of the human body are "biometric identifiers" because they can be used to identify biological attributes.⁸ Thus, the Sheriff's Office maintained, the "[p]hotographs of former auxiliary deputy Tony Marquez contain 'biometric information' as defined, and should be subject to the [section 7(1)(b)] exemption as stated."⁹ The Sheriff's Office's response letter was forwarded to Mr. Hosey on June 4, 2014.¹⁰ He did not reply.

On July 1, 2014, the Public Access Counselor properly extended the time to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.

ANALYSIS

"All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2012). FOIA requires that "[e]ach public body shall make available to any person for inspection and copying all public records, except as otherwise provided in Section 7 of this Act." 5 ILCS 140/3(a) (West 2012). 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)(b) of FOIA

Section 7(1)(b) of FOIA exempts from inspection and copying "[p]rivate information, unless disclosure is required by another provision of this Act, a State or federal law or a court order." As previously noted, "private information" is defined to include "biometric

⁶Letter from Matt Hartman, Assistant Attorney General, Public Access Bureau, to Jerome A. Nudera, Jr., FOIA Officer, Will County Sheriff's Office (May 14, 2014).

⁷Letter from Jerome A. Nudera, Jr., to Matt Hartman, Office of the Attorney General of Illinois (May 23, 2014).

⁸Letter from Jerome A. Nudera, Jr., to Matt Hartman, Office of the Attorney General of Illinois (May 23, 2014).

⁹Letter from Jerome A. Nudera, Jr., to Matt Hartman, Office of the Attorney General of Illinois (May 23, 2014).

¹⁰Letter from Matthew Hartman, Assistant Attorney General, Public Access Bureau, to Joseph Hosey, Patch.com (June 4, 2014).

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identifiers." The term "biometric identifier," however, is not defined in FOIA. It is well established that undefined statutory terms must be given their ordinary and popularly understood meaning. *People v. Comage*, 241 Ill. 2d 139, 157 (2011).

The term "biometrics" is commonly understood to refer to "the measurement and analysis of unique physical or behavioral characteristics (as fingerprint or voice patterns) especially as a means of verifying personal identity."¹¹ Similarly, the term "identifier" means "one that identifies[.]"¹² Accordingly, the phrase "biometric identifier" is commonly understood to refer to the measurement and analysis of a unique physical or behavioral characteristic that identifies a person, such as a fingerprint or voice pattern.

Applying the commonly understood meaning of biometric identifier to the photographs in question, it does not appear that the photographs constitute biometric identifiers. This office was provided with copies of six photographs of Mr. Marquez. One photograph is found on a Sheriff's Office identification card and shows Mr. Marquez's face and head; the photograph is similar to one found on a driver's license or other identification card. Four other photographs show Mr. Marquez's head, face, and shoulders. The sixth photograph includes Mr. Marquez's head, face, and shoulders, but also includes his torso. The photographs are all general in nature; they do not focus on a unique physical attribute or particular characteristic associated with Mr. Marquez. Consequently, the photographs are not biometric identifiers as that phrase is commonly used in Illinois law.

This conclusion is consistent with other Illinois statutory provisions. The Biometric Information Privacy Act (740 ILCS 14/1 *et seq.* (West 2012)), an act intended to regulate the collection, possession, and use of biometric identifiers by private entities engaged in business and security screening, for example, defines "biometric identifier" to include "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." 740 ILCS 14/10 (West 2012). That Act also expressly excludes from the definition of biometric identifier "writing samples, written signatures [and] *photographs*[" (Emphasis added.) 740 ILCS 14/10 (West 2012).

In addition, the rules of statutory construction also support the conclusion that photographs are not biometric identifiers. The maxim of *inclusio unius est exclusio alterius* is

¹¹ *Biometrics*, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/biometrics> (last visited August 15, 2014); *see also* Allison v. Commission for Lawyer Discipline, 374 S.W.3d 520, 523 (Tx. Ct. App. 2012), citing Merriam-Webster.com.

¹² *Identifier*, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/identifier> (last visited August 15, 2014).

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applicable to the definition of "private information" in section 2(c-5). Under that principle, "where a statute lists the thing or things to which it refers, the inference is that all omissions are exclusions, even in the absence of limiting language." *McHenry County Defenders, Inc., v. City of Harvard*, 384 Ill. App. 3d 265 (2nd Dist. 2008). Had the General Assembly intended to exempt photographs from disclosure under section 7(1)(b), it may be assumed that it would have specifically referenced photographs in the definition of "private information" in section 2(c-5) of FOIA. It did not. Therefore, it may be assumed that photographs do not constitute "private information."

Along with omitting the word "photograph" from the definition of "private information," the General Assembly specifically included photographs in FOIA's definition of "public records." Section 2(c) of FOIA (5 ILCS 140/2(c) (West 2012)) defines "public records" as "all records, reports forms, writings, letters, memoranda, books, papers, maps, [and] photographs[.]" Section 2.15(a) of FOIA (5 ILCS 140/2.15(a) (West 2012)) also provides that a photograph of an individual who has been arrested must be disclosed no later than 72 hours after an arrest. These specific references to photographs in FOIA indicate that the General Assembly did not intend for all photographs of people to be exempt from disclosure.

Indeed, the intent of FOIA is to provide the public with "full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees[.]" 5 ILCS 140/1 (West 2012). Given that intent, it seems highly unlikely that the General Assembly intended for all photographs of people to be exempt from disclosure. If the term "biometric identifiers" in section 2(c-5) of FOIA encompassed all photographs of people, as the Sheriff's Office contends, a photograph of the Governor taking the oath of office and other photographs of public officials and employees performing public duties would be exempt from disclosure under section 7(1)(b) of FOIA. It is a well-known principle of statutory construction that where a literal reading of the statute would lead to consequences which the General Assembly could not have contemplated, the statute must "be construed in a manner that avoids absurd or unjust results." *Croissant v. Joliet Park District*, 141 Ill. 2d 449, 455 (1990).

The Sheriff's Office notes in its response that the FBI defines biometrics as "the **measurable** (anatomical and physiological) or behavioral characteristics used for identification of an individual. Fingerprints are a common biometric modality, but others include things like DNA, irises, voice patterns, palmprints, and facial patterns."¹³ (Emphasis added.) In support of its assertion that biometric identifiers include photographs, the Sheriff's Office cites a definition from the Biometrics Institute Limited, which is described as an impartial international forum for

¹³*Fingerprints & Other Biometrics*, Criminal Justice Info. Serv., Fed. Bureau of Investigation, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics (last visited June 24, 2014).

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biometric users.¹⁴ Specifically, the Sheriff's Office quoted portions of the Frequently Asked Questions section of the Biometrics Institute Limited website, which states, in pertinent part:

A biometric is any biological attribute that can be used for identification - hence strictly a photo qualifies, as does in fact a picture or video of any part of the body. However just because a selection of photos exists of employees for instance * * * this does not mean there is the capability or intention to do anything biometric with the photos.

In other words they could be called 'latent' biometrics - similar to a latent fingerprint that is left on a surface but that may not be used. Any clear photo of a person contains some biometric information - but if there is no intention to convert it to a template or match it against a facial gallery then I would say it is open to debate as to its status as a biometric in the technical or legal sense.¹⁵

Reading these materials in a light most favorable to the position of the Sheriff's Office, they are not unequivocal with regard to whether a general photograph of a subject should be considered a "biometric identifier." The FBI information also does not reference photographs as biometric identifiers. In addition, the Sheriff's Office does not assert that the requested photographs contain **measurable** (anatomical and physiological) or behavioral characteristics used for identification of an individual as defined by the FBI.

The Sheriff's Office's reliance on these equivocal statements discussing the term "biometric identifiers" to support its denial of Mr. Hosey's FOIA request is not persuasive, particularly given that the General Assembly specifically defined "public records" in FOIA to include photographs. Accordingly, this office concludes the Sheriff's Office has not sustained its burden of demonstrating that the requested photographs are exempt from disclosure pursuant to section 7(1)(b) of FOIA.

¹⁴Biometrics Institute Limited, <http://www.biometricsinstitute.org/pages/about-us.html> (last visited July 29, 2014).

¹⁵*Is a Photo a Biometric?*, Frequently Asked Questions, Biometrics Inst. Ltd., <http://www.biometricsinstitute.org/pages/faq-16.html> (last visited July 29, 2014).

FINDINGS AND CONCLUSIONS

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

- 1) On May 2, 2014, Mr. Joseph Hosey, on behalf of Patch.com, submitted a FOIA request to the Will County Sheriff's Office seeking "[a]ll personnel and any other photographs of former auxiliary deputy Tony Marquez."
- 2) In an e-mail dated May 7, 2014, and sent on May 8, 2014, the Sheriff's Office denied Mr. Hosey's request citing sections 2(c-5) and 7(1)(b) of FOIA and asserting that the requested photographs are "biometric identifiers" and therefore are exempt "private information" as defined in section 2(c-5) of FOIA.
- 3) On May 8, 2014, Mr. Hosey submitted a Request for Review that was received by the Public Access Counselor on the same day. The Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2012)).
- 4) On May 14, 2014, the Public Access Bureau forwarded a copy of the Request for Review to the Sheriff's Office and requested copies of all photographs that it had withheld, together with its factual and legal arguments in support of the assertion of the section 7(1)(b) exemption.
- 5) By letter dated May 23, 2014, and received on June 3, 2014, the Sheriff's Office furnished this office with copies of the withheld photographs, and reasserted its position that the photographs are exempt from disclosure because they contain biometric information.
- 6) On July 1, 2014, the Public Access Counselor properly extended the time to issue a binding opinion by 30 business days, to August 19, 2014. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.
- 7) Section 2(c) of FOIA defines "public records" as "all records, reports, forms, writings, letters, memoranda, books, papers, maps, [and] photographs[.]"
- 8) Section 7(1)(b) of FOIA exempts "private information" from inspection and copying. Section 2(c-5) of FOIA defines "private information" to include "biometric identifiers." The term "biometric identifier" is not defined in section 2(c-5) or elsewhere in FOIA.

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9) The term "biometric identifier," however, is commonly understood to refer to the measurement and analysis of a unique physical or behavioral characteristic that identifies a person.

10) The photographs in question are all general in nature and do not focus on a unique physical attribute or characteristic of Mr. Marquez. This office concludes that the requested photographs are not biometric identifiers as that phrase is commonly used and do not constitute "private information" exempt from disclosure under section 7(1)(b) of FOIA.

Therefore, it is the opinion of the Attorney General that the Sheriff's Office improperly denied Mr. Hosey's Freedom of Information Act request in violation of the requirements of the FOIA. Accordingly, the Sheriff's Office is directed to take immediate and appropriate action to comply with this binding opinion by disclosing the requested photographs of former auxiliary deputy Tony Marquez to Mr. Hosey.

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 2012). 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. Joseph Hosey as defendants. *See* 5 ILCS 140/11.5 (West 2012).

Sincerely,

LISA MADIGAN
ATTORNEY GENERAL

By:


Michael J. Luke
Counsel to the Attorney General