



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 28, 2015

PUBLIC ACCESS OPINION 15-009
(Request for Review 2015 PAC 35840)

FREEDOM OF INFORMATION ACT:
Disclosure of Surveillance Video Recordings

Ms. Judy Flanagan
Paralegal
Lashly & Baer, P.C.
20 East Main Street
Belleville, Illinois 62220-1602

Mr. Matthew D. Dougherty
Assistant Chief Counsel
Acting FOIA Officer
Illinois Department of Transportation
Office of the Chief Counsel, Room 313
2300 South Dirksen Parkway
Springfield, Illinois 62764

Dear Ms. Flanagan and Mr. Dougherty:

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 2014)). For the reasons discussed below, this office concludes that the Illinois Department of Transportation (IDOT) violated the requirements of FOIA by denying Ms. Judy Flanagan's request for surveillance videos related to a fatal traffic accident.

BACKGROUND

On June 1, 2015, Ms. Flanagan submitted a FOIA request to IDOT stating:

Ms. Judy Flanagan
Mr. Matthew D. Dougherty
September 28, 2015
Page 2

I request that a copy of the following documents be provided to me: Copy of all surveillance videos for the east side and west side of the Rend Lake Rest Area on Interstate 57, mile marker 73 in Franklin County, Illinois regarding a pedestrian versus tractor trailer accident occurring on May 27, 2015 at approximately 5:00 pm involving [two named individuals], incident report unknown at this time. If said videos cannot be produced at this time, please preserve said videos indefinitely.^[1] (Emphasis in original.)

On June 16, 2015, Mr. Matthew D. Dougherty, Assistant Chief Counsel and Acting FOIA Officer for IDOT, denied Ms. Flanagan's request, stating:

We conducted a search and found responsive recorded video. However, this responsive material is being withheld pursuant to FOIA exemption 5 ILCS 140/7(1)(c), which exempts public records where "the[ir] disclosure. . . would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information."^[2]

On June 17, 2015, the Public Access Bureau received Ms. Flanagan's Request for Review of the denial of her FOIA request.³

On June 22, 2015, this office forwarded a copy of the Request for Review to IDOT and asked it to provide copies of the responsive recordings for our confidential review, together with a detailed explanation of the factual and legal bases for its assertion of section 7(1)(c) of FOIA.⁴ On July 1, 2015, IDOT furnished a written response and indicated that a copy

¹Letter from Judy Flanagan, Lashly & Baer, P.C., to FOIA Officer, Illinois Department of Transportation (June 1, 2015).

²E-mail from Matthew D. Dougherty, Assistant Chief Counsel, Acting FOIA Officer, Illinois Department of Transportation, to Judy A. Flanagan (June 16, 2015).

³Letter from Judy Flanagan, Lashly & Baer, P.C., to Public Access Counselor, Office of the Attorney General (June 17, 2015).

⁴Letter from Lindsey C. Johnson, Assistant Attorney General, Public Access Bureau, to Matthew [D]. Dougherty, Assistant Chief Counsel, FOIA Officer, Illinois Department of Transportation (June 19, 2015), transmitted via e-mail by Christina Giusto, Office of the Attorney General, to Matthew Dougherty and Judy Flanagan (June 22, 2015).

Ms. Judy Flanagan
Mr. Matthew D. Dougherty
September 28, 2015
Page 3

of the requested video recordings would be forthcoming.⁵ On July 9, 2015, this office forwarded IDOT's response letter to Ms. Flanagan and offered her an opportunity to reply.⁶ Ms. Flanagan did not reply. On August 4, 2015, IDOT furnished this office with copies of two responsive video recordings for our confidential review.⁷

On August 12, 2015, this office sent a letter to the parties extending the time in which to issue a binding opinion to September 16, 2015.⁸ However, that letter inadvertently misstated the deadline for the extension. On August 21, 2015, this office sent a second letter stating that, pursuant to section 9.5(f) of FOIA (5 ILCS 140/9.5(f) (West 2014)), we were properly extending the time in which to issue a binding opinion by 30 business days, to September 28, 2015.⁹

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 2014). FOIA provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." 5 ILCS 140/3(a) (West 2014). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

⁵Letter from Matthew D. Dougherty, Assistant Chief Counsel, Illinois Department of Transportation, Office of Chief Counsel, to Lindsey C. Johnson, Assistant Attorney General, Public Access Bureau, Illinois Office of Attorney General, c/o Christina Giusto (July 1, 2015).

⁶Letter from Lindsey C. Johnson, Assistant Attorney General, Public Access Bureau, to Judy Flanagan, Paralegal, Lashly & Baer, P.C. (July 6, 2015), transmitted via e-mail by Kathleen Jedlicka, Office of the Attorney General, to Judy Flanagan (July 9, 2015).

⁷Letter from Lisa A. Brown on behalf of Matthew D. Dougherty, Assistant Chief Counsel, Illinois Department of Transportation, Office of Chief Counsel, to Lindsey C. Johnson, Assistant Attorney General, Office of the Attorney General, State of Illinois, Public Access Bureau (August 4, 2015).

⁸Letter from Lindsey C. Johnson, Assistant Attorney General, Public Access Bureau, to Judy Flanagan, Paralegal, Lashly & Baer, P.C., and Matthew [D]. Dougherty, Assistant Chief Counsel, FOIA Officer, Illinois Department of Transportation (August 12, 2015).

⁹Letter from Lindsey C. Johnson, Assistant Attorney General, Public Access Bureau, to Judy Flanagan, Paralegal, Lashly & Baer, P.C., and Matthew [D]. Dougherty, Assistant Chief Counsel, FOIA Officer, Illinois Department of Transportation (August 21, 2015).

Ms. Judy Flanagan
Mr. Matthew D. Dougherty
September 28, 2015
Page 4

IDOT denied Ms. Flanagan's request for surveillance videos under section 7(1)(c) of FOIA, which 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." 5 ILCS 140/7(1)(c) (West 2014). A public body's contention that the release of information would constitute an unwarranted invasion of personal privacy is evaluated on a case-by-case basis. *Chicago Journeymen Plumbers' Local Union 130, U.A. v. Dep't of Public Health*, 327 Ill. App. 3d 192, 196 (2001).

In her Request for Review, Ms. Flanagan emphasizes that her office represents the defendant in the case involving the accident and that the records are needed to move forward with the defense's investigation.¹⁰ IDOT's response to the allegations in the Request for Review stated, in relevant part:

We believe that disclosure of this video to the public pursuant to a FOIA request would constitute a clearly unwarranted invasion of the personal privacy of the deceased, as well as the deceased's family and loved ones who would be impacted by public availability of the video. Because the deceased is not able to give written consent to release the video, the Department should withhold the video from disclosure under FOIA without exception in this instance.¹¹

At common law, a person's right to privacy does not ordinarily survive beyond his or her death. *See Trent v. Office of Coroner of Peoria County*, 349 Ill. App. 3d 276, 282 (3rd Dist. 2004), Holdridge, P.J., *specially concurring*. Accordingly, under the common law, which has not been abrogated in this regard in Illinois (*see* 5 ILCS 50/1 (West 2014)), disclosure of the videos would not constitute an invasion of the decedent's personal privacy. A number of Federal and State courts, as well as this office (*see* Ill. Att'y Gen. Pub. Acc. Op. No 10-003, issued

¹⁰Letter from Judy Flanagan, Lashly & Baer, P.C., to Public Access Counselor, Office of the Attorney General (June 17, 2015).

¹¹Letter from Matthew D. Dougherty, Assistant Chief Counsel, Illinois Department of Transportation, Office of Chief Counsel, to Lindsey C. Johnson, Assistant Attorney General, Public Access Bureau, Illinois Office of Attorney General c/o Christina Giusto (July 1, 2015).

Ms. Judy Flanagan
Mr. Matthew D. Dougherty
September 28, 2015
Page 5

October 22, 2010, at 5-6), however, have concluded that close family members of a decedent possess a separate and distinct right of privacy in the disclosure of sensitive information concerning the decedent and that this right is protected by statutes such as FOIA. For example, the United States Supreme Court has held that family members have a protectable privacy interest in the disclosure of "graphic details surrounding their relative's death" under a provision of the Federal Freedom of Information Act (*see* 5 U.S.C. § 552 (b)(7)(C) (West 2002)) which contains language similar to that of section 7(1)(c) of the Illinois FOIA.¹² *National Archives and Records Administration v. Favish*, 541 U.S. 157, 171, 124 S. Ct. 1570, 1580 (2004). Similarly, in *Katz v. National Archives & Records Administration*, 862 F.Supp. 476, 485-486 (D.D.C. 1992), the court held that the privacy rights of family members justified withholding autopsy photographs under Exemption 6 of the Federal FOIA (5 U.S.C. § 552 (b)(6) (1988)), which also contains language similar to that of section 7(1)(c) of the Illinois FOIA.¹³

The resolution of a personal privacy exemption claim requires the balancing of the public's interest in disclosure of specific information against the individual's (or in this case, the family's) privacy interests. *See Gibson v. Illinois State Board of Education*, 289 Ill. App. 3d 12, 20-21 (1st Dist. 1997). This determination is made by considering and weighing four factors: "(1) the [requester's] interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information." *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 3d 1, 13 (1st Dist. 2010). The General Assembly's use of the language "clearly unwarranted invasion of personal privacy" evinces a "stricter standard to claim exemption" which the public body possessing the records bears the burden of sustaining. (Emphasis in original.) *Schessler v. Department of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994).

With respect to the first two factors, the requested videos were recorded at or near the time of a fatal accident involving a pedestrian and a tractor trailer. One of the videos shows the interior of a highway rest area,¹⁴ and the other video shows the sidewalk and the road outside

¹²Exemption 7(C) of the Federal FOIA applies to "records or information compiled for law enforcement purposes, *but only to the extent that the production of such law enforcement records or information * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy*["] (Emphasis added.)

¹³Exemption 6 of the Federal FOIA exempts from disclosure "personnel and medical files and similar files *the disclosure of which would constitute a clearly unwarranted invasion of personal privacy*["] (Emphasis added.)

¹⁴Illinois Department of Transportation surveillance video of Rend Lake Rest Area, (May 27, 2015), Video CD (on file with the office), 4:36:00-5:03:40.

Ms. Judy Flanagan
Mr. Matthew D. Dougherty
September 28, 2015
Page 6

the same highway rest area.¹⁵ There is a public interest in the disclosure of information concerning the circumstances relating to a traffic fatality. Such information may also be relevant to the resolution of any legal rights or remedies arising from the accident. Accordingly, Ms. Flanagan's interest is aligned with the public interest in disclosure of the recording.

The third factor to be considered is the degree of invasion of the personal privacy of the decedent's family if the videos are disclosed. Without revealing details of the videos in question, which have been furnished to us for confidential review, we note that they do not depict the accident itself or show the decedent after the accident occurred; the videos do not contain graphic or gruesome details comparable to autopsy photographs. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 10-003 (concluding that the disclosure of autopsy photographs of two public figures would constitute a clearly unwarranted invasion of privacy for purposes of section 7(1)(c)). Accordingly, the degree of invasion of personal privacy is not significant.

With respect to the final factor, there does not appear to be any alternative means by which Ms. Flanagan can obtain copies of the videos except, perhaps, through judicial process.

Based on our analysis of the four factors set out above, this office concludes that the disclosure of the videos would not constitute a clearly unwarranted invasion of personal privacy. There is a significant public interest in the disclosure of information that sheds light on the circumstances surrounding a fatal traffic accident. Further, the videos do not contain graphic or gruesome details of the accident or depict the decedent after it occurred. Even assuming that the disclosure of the videos would constitute an invasion of the privacy of the decedent's surviving family members, IDOT has not presented clear and convincing evidence from which we could conclude that the family's right to privacy outweighs the public's interest in disclosure of the video recordings. In other words, the invasion of the family's privacy would not be "clearly unwarranted." Accordingly, we conclude that IDOT has not sustained its burden of demonstrating that the videos are exempt from disclosure pursuant to section 7(1)(c) of FOIA.

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 June 1, 2015, Ms. Judy Flanagan submitted a FOIA request to IDOT seeking copies of surveillance videos for a specific rest area at which a fatal traffic accident occurred on May 27, 2015.

¹⁵Illinois Department of Transportation surveillance video of Rend Lake Rest Area, (May 27, 2015), Video CD (on file with the office), 4:36:00-5:03:40.

Ms. Judy Flanagan
Mr. Matthew D. Dougherty
September 28, 2015
Page 7

2) On June 16, 2015, IDOT denied Ms. Flanagan's request, citing as its basis section 7(1)(c) of FOIA.

3) On June 17, 2015, the Public Access Bureau received Ms. Flanagan's Request for Review of the denial of her FOIA request.

4) By letter dated June 19, 2015, and transmitted via e-mail on June 22, 2015, the Public Access Bureau provided a copy of the Request for Review to IDOT and asked it to provide copies of responsive records for this office's confidential review, as well as a detailed explanation of the legal and factual bases for its assertion that the video recordings are exempt from disclosure under section 7(1)(c) of FOIA.

5) By letter dated July 1, 2015, IDOT provided a written response reiterating its assertion that the responsive records are exempt from disclosure in their entirety pursuant to section 7(1)(c) of FOIA. On August 4, 2015, this office received copies of the responsive records from IDOT.

6) On August 21, 2015, the Public Access Bureau properly extended the time in which to issue a binding opinion pursuant to section 9.5(f) of FOIA, to September 28, 2015. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) 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." Section 7(1)(c) 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."

8) A decedent's right to privacy does not ordinarily survive beyond his or her death. Close family members, however, may have independent privacy interests in the disclosure of records concerning the decedent. With respect to these video recordings, however, we conclude that the public interest in the disclosure of the videos, which do not contain graphic or gruesome details, clearly outweighs any privacy rights of the decedent's family members. IDOT has failed to meet its burden of demonstrating by clear and convincing evidence that the records are exempt from disclosure pursuant to section 7(1)(c) of FOIA.

For the reasons stated above, it is the opinion of the Attorney General that IDOT improperly denied Ms. Flanagan's Freedom of Information Act request in violation of the

Ms. Judy Flanagan
Mr. Matthew D. Dougherty
September 28, 2015
Page 8

requirements of the FOIA. Accordingly, IDOT is directed to take immediate action to comply with this binding opinion by providing Ms. Flanagan with the requested videos.

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 2014). 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 Ms. Judy Flanagan as defendants. See 5 ILCS 140/11.5 (West 2014).

Sincerely,

LISA MADIGAN
ATTORNEY GENERAL

By:

A handwritten signature in black ink that reads "Michael J. Luke" with a stylized flourish at the end.

Michael J. Luke
Counsel to the Attorney General