



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

October 29, 2019

PUBLIC ACCESS OPINION 19-010
(Request for Review 2019 PAC 58962)

FREEDOM OF INFORMATION ACT:
Disclosure of Body Camera Footage
of an Arrestee's Death

Mr. Chris J.D. Blanks
409 Oak Street
Waukegan, Illinois 60085

Mr. Douglas Dorando
Daniels, Long & Pinsel, LLC
The Daniels Law Building
19 North County Street
Waukegan, Illinois 60085

Honorable Janet E. Kilkelly, City Clerk
City of Waukegan
Waukegan City Hall
100 N. Martin Luther King, Jr. Avenue
Waukegan, Illinois 60085

Dear Mr. Blanks, Mr. Dorando, and Ms. Kilkelly:

This is a binding opinion issued by the Attorney General pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2018)). For the reasons discussed below, this office concludes that the City of Waukegan (City) violated the requirements of FOIA by improperly denying Mr. Chris Blanks' FOIA request seeking copies of law enforcement officer-worn body camera recordings concerning an in-custody death occurring on June 27, 2019.

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BACKGROUND

On July 1, 2019, Mr. Blanks submitted, and the City received, a FOIA request seeking copies of "all dash Cam, body camera video and audio recordings leading up to as well as the attempted arrest and death of Avion Cotton * * * [on] Thursday, June 27, 2019."¹ On July 10, 2019, the City's corporation counsel provided copies of certain information related to the incident of June 27, 2019, but denied the requested video and audio recordings pursuant to sections 7(1)(d)(i) and 7(1)(d)(vii) of FOIA (5 ILCS 140/7(1)(d)(i), (1)(d)(vii) (West 2018)), stating that there was "an open criminal investigation[.]"² The City's FOIA response also cited the Law Enforcement Officer-Worn Body Camera Act (Body Camera Act) (50 ILCS 706/10-1 *et seq.* (West 2018)) as a basis for withholding the video and audio recordings. In a letter dated July 15, 2019, and received by the Public Access Bureau on July 18, 2019, Mr. Blanks submitted a Request for Review to the Public Access Counselor.³

On July 22, 2019, the Public Access Bureau sent a copy of the Request for Review to the law firm of Daniels, Long & Pinsel, which serves as the City's corporation counsel. The Public Access Bureau also sent the City's corporation counsel a letter requesting unredacted copies of the responsive audio and video recordings for this office's confidential review, together with a detailed explanation of the legal and factual bases for the asserted exemptions.⁴

By letter dated August 1, 2019, the City's corporation counsel provided this office with unredacted copies of the responsive body-camera recordings, and certain related records.

¹Freedom of Information Act Request form with attachment from Christopher J. D. Blanks to Office of the City Clerk, Waukegan (July 1, 2019).

²Letter from Douglas Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Chris Blanks (July 10, 2019).

³Letter from Chris "Brotha" Blanks, Founding Chief President and CEO, Black Abolition Movement for the Mind, to Public Access Counselor (PAC) (July 15, 2019).

³This office notes that the City's response to Mr. Blanks provided him with copies of some records, in addition to withholding the body worn camera videos and certain other records. Mr. Blanks explained to this office that his Request for Review only disputes the denial of body camera videos. (Telephone conversation between Josh Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, and Chris Blanks (August 9, 2019)).

⁴Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Douglas Dorando, Attorney, Daniels, Long & Pinsel, LLC (July 22, 2019).

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The City's corporation counsel also sent this office two versions of the City's written answer: one for this office's confidential review⁵ and a redacted version for forwarding to Mr. Blanks.⁶ The answer cited sections 7(1)(d)(i), 7(1)(d)(ii), 7(1)(d)(iii), 7(1)(d)(iv), 7(1)(d)(v), 7(1)(d)(vi), and 7(1)(d)(vii) of FOIA (5 ILCS 140/7(1)(d)(i) through 7(1)(d)(vii) (West 2018)), asserting that "there are two open investigations" related to Mr. Cotton "of which premature disclosure would inhibit impartial resolution."⁷ The City identified one of the two investigations as "being conducted by the Illinois State Police (ISP) into the in custody death of Mr. Cotton."⁸ The City asserted that this "investigation will determine the potential culpability of the Waukegan Police Officers involved in this incident and it is up to the Lake County State's Attorney's Office * * * to determine whether any criminal conduct occurred."⁹ The City redacted all of its explanation concerning the other investigation.

On August 8, 2019, the Public Access Bureau forwarded to Mr. Blanks a copy of the City's redacted response and notified him of his opportunity to reply.¹⁰ Mr. Blanks replied in an e-mail submitted later that same day, arguing that disclosure of the recordings should not be left to the discretion of the Lake County State's Attorney's Office or the City.¹¹

In an August 9, 2019, telephone conversation with an Assistant Attorney General (AAG) in the Public Access Bureau, Mr. Blanks clarified that his reference to "audio recordings" in his FOIA request concerned the audio aspects of any dashboard camera or body camera videos showing Mr. Cotton being taken into custody (rather than other records such as police radio

⁵See 5 ILCS 140/9.5(d) (West 2018) ("The Public Access Counselor shall forward a copy of the answer to the person submitting the request for review, with any alleged confidential information to which the request pertains redacted from the copy.").

⁶Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 1, 2019).

⁷Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 1, 2019), at 1.

⁸Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 1, 2019), at 1.

⁹Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 1, 2019), at 1.

¹⁰Letter from Josh Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Chris Blanks (August 8, 2019).

¹¹E-mail from Chris "Brotha" Blanks to [Joshua] Jones (August 8, 2019).

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traffic).¹² Given that the City's August 1, 2019, answer to this office addressed a much broader category of records than those video and audio recordings, on August 9, 2019, the Public Access Bureau forwarded a copy of Mr. Blanks' reply to the City's corporation counsel along with a letter asking the City to clarify: (1) "whether there are any dash cam videos depicting any portion of the pursuit of Mr. Cotton through his removal from the scene"; and (2) "which (or at a minimum, how many) of the officers" at the scene had "viewed any of the footage depicting the pursuit of Mr. Cotton through his removal from the scene" or potentially had access to any of the dash cam or body cam footage.¹³ The letter also extended to the City the opportunity "to provide any further information regarding the City's legal and/or factual bases for withholding these particular recordings[.]"¹⁴

Also on August 9, 2019, the City's corporation counsel sent this office a copy of a letter from Michael G. Nerheim, Lake County State's Attorney, to the Waukegan Police Department.¹⁵ Mr. Nerheim asserted that the body camera recordings were exempt from disclosure under section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2018)), as well as sections 7(1)(d)(i), 7(1)(d)(iii), and 7(1)(d)(vii) of FOIA.¹⁶ Later that day, this office forwarded a copy of Mr. Nerheim's letter to Mr. Blanks and notified him of his opportunity to reply.¹⁷ Mr. Blanks replied that same day, arguing that withholding the footage was inconsistent with the public disclosure of the Lake County Coroner's report.¹⁸

¹²Telephone conversation between Chris "Brotha" Blanks and Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 9, 2019).

¹³Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Douglas Dorando, Attorney, Daniels, Long & Pinsel, LLC (August 9, 2019), at 1-2.

¹⁴Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Douglas Dorando, Attorney, Daniels, Long & Pinsel, LLC (August 9, 2019), at 1-2.

¹⁵E-mail from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to [Joshua] Jones (August 9, 2019).

¹⁶Letter from Michael G. Nerheim, Lake County State's Attorney, to Chief Wayne Waller, Waukegan Police Department (August 8, 2019).

¹⁷E-mail from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to [Chris "Brotha"] Blanks (August 9, 2019).

¹⁸Letter from Chris "Brotha" Blanks, Founding Chief President and CEO, Black Abolition Movement for the Mind, to all concerned parties (August 9, 2019).

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On August 15, 2019, the City's corporation counsel issued an answer to this office's August 9, 2019, letter. The supplemental answer stated that "[n]o dashcam footage exists[.]" explaining that the Waukegan Police Department (Department) phased out dash cams in exchange for body cameras.¹⁹ As to this office's question about which police officers had viewed the relevant body camera footage, the supplemental answer stated:

[W]e are unable to provide a complete list of the persons and officers who have viewed each video within the timeframe of this letter. However, after some spot checks, it is our belief that the majority of officers did review their own body camera footage only, and only on the date of the arrest. Thereafter, the Waukegan Police's Office of Professional Standards "locked down" the videos, limiting access to only [the Waukegan Police Department]'s Office of Professional Standards and the Chief of Police.^[20]

The City also reasserted that the disclosure of the recordings would interfere with investigations conducted by ISP and the State's Attorney's Office, and incorporated the arguments in Mr. Nerheim's letter by reference.²¹

On August 16, 2019, an AAG called the City's corporation counsel and asked whether any of the police officers at the scene were found not to have watched any of the body camera footage.²² Corporation counsel responded that every officer checked was found to have watched body camera footage of the incident. Also on August 16, 2019, this office forwarded a copy of the City's supplemental answer to Mr. Blanks and again notified him of his opportunity

¹⁹Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 15, 2019), at 2.

²⁰Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 15, 2019), at 3.

²¹Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 15, 2019), at 1.

²²Telephone conversation between Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, and Douglas Dorando, Daniels, Long & Pinsel, LLC (August 16, 2019).

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to reply.²³ On August 20, 2019, Mr. Blanks notified this office that he wished to add nothing further.²⁴

Pursuant to section 9.5(f) of FOIA, on September 5, 2019, this office extended the time within which to issue a binding opinion by 30 business days, to October 29, 2019.²⁵

ANALYSIS

FOIA embodies the public policy that access to public records "is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." 5 ILCS 140/1 (West 2018). Under FOIA, "[a]ll 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 2018). Bare assertions without a detailed rationale do not satisfy a public body's burden of explaining how exemptions are applicable. *Rockford Police Benevolent and Protective Ass'n v. Morrissey*, 398 Ill. App. 3d 145, 150-51 (2d Dist. 2010).

At the outset, this office notes that section 7.5(cc) of FOIA (5 ILCS 140/7.5(cc) (West 2018), as amended by Public Act 101-013, effective June 12, 2019) exempts from disclosure "[r]ecordings made under the Law Enforcement Officer-Worn Body Camera Act, except to the extent authorized under that Act." Section 10-20(b) of the Law Enforcement Officer-Worn Body Camera Act (Body Camera Act) (50 ILCS 706/10-20(b) (West 2018)) addresses the circumstances in which body camera recordings are subject to disclosure pursuant to FOIA and provides, in relevant part:

(b) Recordings made with the use of an officer-worn body camera are not subject to disclosure under the Freedom of Information Act, *except that*:

²³Letter from Josh Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Chris Blanks (August 16, 2019).

²⁴E-mail from Brotha Blanks to Public Access [Bureau, Office of the Attorney General] (August 20, 2019).

²⁵Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Chris "Brotha" Blanks and Douglas Dorando, Daniels, Long & Pinsel, LLC (September 5, 2019).

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(1) if the subject of the encounter has a reasonable expectation of privacy, at the time of the recording, any recording which is flagged, due to the filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm, shall be disclosed in accordance with the Freedom of Information Act if:

(A) the subject of the encounter captured on the recording is a victim or witness; and

(B) the law enforcement agency obtains written permission of the subject or the subject's legal representative;

(2) except as provided in paragraph (1) of this subsection
*(b) any recording which is flagged due to the filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm shall be disclosed in accordance with the Freedom of Information Act; * * **

* * *

For the purposes of paragraph (1) of this subsection (b), the subject of the encounter does not have a reasonable expectation of privacy if the subject was arrested as a result of the encounter. For purposes of subparagraph (A) of paragraph (1) of this subsection (b), "witness" does not include a person who is a victim or who was arrested as a result of the encounter.

Only recordings or portions of recordings responsive to the request shall be available for inspection or reproduction. Any recording disclosed under the Freedom of Information Act shall be redacted to remove identification of any person that appears on the recording and is not the officer, a subject of the encounter, or directly involved in the encounter. Nothing in this subsection (b) shall require the disclosure of any recording or portion of any recording which would be exempt from disclosure under the Freedom of Information Act. (Emphasis added.)

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Further, section 10-20(a)(7)(b)(iii) of the Body Camera Act (50 ILCS 706/10-20(a)(7)(b)(iii) (West 2018)) provides that "[a]n encounter is deemed to be flagged when: * * * (iii) death or great bodily harm occurred to any person in the recording[.]" Under the plain language of these provisions, the body camera recordings that Mr. Blanks requested were flagged and therefore must be disclosed under FOIA, unless they are exempt from disclosure under one of the exemptions set out in FOIA.

Section 7(1)(a) of FOIA

Section 7(1)(a) of FOIA exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." Under section 7(1)(a), "an exemption restricting the expansive nature of the FOIA's disclosure provisions must be explicitly stated, -that is, such a proposed disclosure must be *specifically* prohibited." (Emphasis in original.) *Better Gov't Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 816 (4th Dist. 2008); *but cf. Better Gov't Ass'n v. Zaruba*, 2014 IL App (2d) 140071, ¶21, 21 N.E.3d 516, 522 (2014):

This court has held that, even if a statute does not specifically provide that records are exempt from disclosure under the FOIA or otherwise contain an explicit prohibition against public disclosure, records are nevertheless exempt "where the plain language contained in a State or federal statute reveals that public access to the records was not intended." [Citation.] On the other hand, section 7(1)(a) does not apply "where a State or federal statute is ambiguous or silent in regard to the disclosure of public records." [Citation.]

In his letter in support of withholding the records in question, the Lake County State's Attorney stated that ISP was investigating Mr. Cotton's death because section 1-10(b) of the Police and Community Relations Improvement Act (50 ILCS 727/1-10(b) (West 2018)) prohibits a police department from conducting an investigation under that Act into the conduct of one of its own police officers. Section 1-10(d) of that Act (50 ILCS 727/1-10(d) (West 2018)), provides that ISP must provide a copy of its investigation report to the State's Attorney's Office. Section 1-10(e) of that Act (50 ILCS 727/1-10(e) (West 2018)) further provides that "[i]f the State's Attorney, or a designated special prosecutor, determines there is no basis to prosecute the law enforcement officer involved in the officer-involved death, or if the law enforcement officer is not otherwise charged or indicted, the investigators shall publicly release a report." In support of the assertion of section 7(1)(a), the Lake County State's Attorney argued that "[t]he Act requires that the investigation report remain confidential until after the State's Attorney reviews

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the report. It would be absurd to require the City of Waukegan to disclose videos which will be central to the investigation report. Disclosure of the videos would negate the confidentiality the Act provides."²⁶

The section 7(1)(a) exemption is at issue here because the City's supplemental answer incorporated the State's Attorney's arguments. The City did not, however, demonstrate that the body camera recordings are specifically prohibited from disclosure. No provision of the Police and Community Relations Improvement Act states that body camera recordings related to an "officer-involved death" must be kept confidential until ISP issues its investigation report; rather, that Act mandates disclosure of the investigation report if the law enforcement officer that is the subject of the report is not indicted or charged.

Even under the less stringent standard adopted by the Appellate Court in *Zaruba*, the plain language of the Police and Community Relations Improvement Act does not demonstrate that the General Assembly intended body camera recordings related to an "officer-involved death" to be confidential during a pending ISP investigation. Section 1-10(e) of the Act plainly applies to the "investigation report" and is silent as to the disclosure of any underlying records such as body camera recordings. "Where an enactment is clear and unambiguous," a reviewing body "is not at liberty to read into it exceptions, limitations, or conditions that the legislature did not express[]" or to "search for any subtle or not readily apparent intention of the legislature." *People v. Laubscher*, 183 Ill. 2d 330, 337 (1998). The assertion that it would be absurd to require disclosure of the recordings before the Lake County State's Attorney's Office reviews ISP's investigation report overlooks this rule of statutory construction and fails to satisfy the public body's burden of proving that an exemption applies. Section 10-20(b) of the Body Camera Act and section 1-10 of the Police and Community Relations Improvement Act both took effect on January 1, 2016, and neither section has since been amended. If the General Assembly believed all body camera videos should be maintained confidentially until a prosecutor has reviewed an investigation report of an "officer-involved death," it could have inserted a specific prohibition against disclosure in either or both statutes. It did not. Therefore, the City did not prove by clear and convincing evidence that the responsive body camera recordings are exempt from disclosure pursuant to section 7(1)(a) of FOIA.

Section 7(1)(d) of FOIA

The provisions of section 7(1)(d) of FOIA exempt from disclosure:

²⁶Letter from Michael G. Nerheim, Lake County State's Attorney, to Chief Wayne Waller, Waukegan Police Department (August 8, 2019), at 2.

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(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;

(ii) interfere with active administrative enforcement proceedings conducted by the public body that is the recipient of the request;

(iii) create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing;

(iv) 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; * * *

(v) disclose unique or specialized investigative techniques other than those generally used and known or disclose internal documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct, and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request;

(vi) endanger the life or physical safety of law enforcement personnel or any other person; or

(vii) obstruct an ongoing criminal investigation by the agency that is the recipient of the request.

In *Kelly v. Village of Kenilworth*, 2019 IL App (1st) 170780, __ N.E.3d __ (2019), the requester sought records concerning the investigation into a nearly 50-year old

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unsolved murder that occurred in the Village of Kenilworth. *Kelly*, 2019 IL App (1st) 170780, ¶1, __ N.E.3d __. He submitted FOIA requests to Kenilworth, ISP, and the Cook County State's Attorney's Office, among other public bodies. *Kelly*, 2019 IL App (1st) 170780, ¶1, __ N.E.3d __. Because ISP and the Cook County State's Attorney's Office were not conducting an investigation, the requester argued that they could not rely on Kenilworth's ongoing investigation to claim an exemption. *Kelly*, 2019 IL App (1st) 170780, ¶6, __ N.E.3d __. The court, however, found that "Illinois law and practical necessity require that law enforcement agencies in this state cooperate with one another to investigate and prosecute crime." *Kelly*, 2019 IL App (1st) 170780, ¶33, __ N.E.3d __. The court stated that "while ISP is no longer the primary agency working on the case, ISP's resources have assisted Kenilworth as recently as this year." *Kelly*, 2019 IL App (1st) 170780, ¶33, __ N.E.3d __. The court held that "Kenilworth could assert an exemption over the other defendants' records in this case[.]" stating that "[w]ere it otherwise, law enforcement agencies would be discouraged from cooperating due to the risk of harmful disclosures and the people of Illinois would be denied effective law enforcement." *Kelly*, 2019 IL App (1st) 170780, ¶33, __ N.E.3d __. Nonetheless, the court concluded that the defendants did not sustain their burden to deny the records in their entireties pursuant to sections 7(1)(d)(i) and 7(1)(d)(vii) because "they did demonstrate why this is the rare case in which nothing is left after redacting all material that is exempt under section 7(1)(d)." *Kelly*, 2019 IL App (1st) 170780, ¶42, __ N.E.3d __.

Indeed, "[t]he 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).²⁷ Thus, merely stating that an investigation is ongoing and claiming that the disclosure of records could interfere with a State's Attorney's office's decisions regarding potential criminal charges and possible prosecution is insufficient to prove that police records are exempt from disclosure. Ill. Att'y Gen. Pub. Acc. Op. No. 17-001, issued March 14, 2017, at 5.

In the non-confidential portion of the City's August 1, 2019, answer to this office, the City's corporation counsel explained the City's assertions of sections 7(1)(d)(i), 7(1)(d)(iii), 7(1)(d)(v), and 7(1)(d)(vi) as follows:

Prior to this response, I have spoken with Mr. Jeff Pavletic, the Chief Deputy for the [Lake County State's Attorney's Office], who

²⁷The *Baudin* court reviewed section 7(e) of FOIA (Ill. Rev. Stat. 1987, ch. 116, par. 207(e)), which was an earlier version of section 7(1)(d)(i) and which exempted from disclosure "[r]ecords of State and local law enforcement agencies and correctional agencies that are related to the detection and investigation of crime."

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specifically requested that we not provide these materials to the public, as it is his professional belief that their premature release can taint both the ISP investigation, and the [State's Attorney's Office's] investigation. Specifically, he notes that statements made have a propensity to change witness' recollections which hinder[s] the ability of investigators to determine exactly what occurred. This temporary position where this information is withheld to protect the integrity of their investigations into the officers and specifics of actions taken at the time of this incident should, for the duration of the investigation, outweigh Mr. Blanks' attempts to review these videos, and avoid putting us and the individual police officers into a position where a bell cannot be un-rung by making this information public prior to the investigation[']s completion.^[28]

The City also provided this office with confidential information about a second investigation.

In the State's Attorney's Office's August 8, 2019, letter, Mr. Nerheim added:

[T]he Lake County State's Attorney asserts that disclosure is exempt pursuant to Sections 7(1)(d)(i),(d)(iii),(d)(vii) [sic]. Disclosure of this information at this time could reasonably be expected to interfere with the investigation, determination of potential criminal charges and possible prosecution. Disclosure of videos of the incident under review compromises the integrity of the State's Attorney review and prosecution. Public disclosure would make it difficult to verify statements by future witnesses and can discourage new witnesses or confidential informants from coming forward in this case or in future investigations. Also, disclosure presents a risk to the safety and the potential of intimidation of witnesses and their families. If a prosecution were to follow public disclosure would clearly taint the jury pool.^[29]

²⁸Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 1, 2019), at 1-2.

²⁹Letter from Michael G. Nerheim, Lake County State's Attorney, to Chief Wayne Waller, Waukegan Police Department (August 8, 2019), at 2.

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Additionally, in the City's August 15, 2019, supplemental answer,³⁰ the City "reassert[ed] its exemption for the ongoing investigation[]" into the Department's conduct in connection with Mr. Cotton's death, and stated: "[W]e still maintain our claims under the ongoing [second] investigation."³¹ The City's corporation counsel gave a detailed description of the Department's pursuit and apprehension of Mr. Cotton depicted in the responsive body camera recordings.³² The corporation counsel's letter then stated:

[W]e are not the ISP investigators nor the State's Attorney, and are not in a position to state definitively if any culpability exists on the part of the officers involved. That is now in the hands of those investigators, and they should be allowed to be [sic] complete their work without the influence of the Court of Public Opinion pressuring investigators, influencing witnesses' memories (including both the officers involved and the neighbors), and, if charged, to not taint the jury pool. To release this material now would be only due to a literal reading of the statute which would lead to the "unjust and absurd results" of which *Kelly* warns us, and would produce a chilling effect on cooperation in law enforcement investigations.^[33]

The letter further referenced "the officer's rights to fair trials and impartial investigation[.]" but stated that "Waukegan Police fervently believes that this footage will absolve both the officers and the City of responsibility for Mr. Cotton's unfortunate death[.]" and that "the City fully intends to release the video as soon as the investigations [are] complete or the ISP and [State's Attorney's Office] give us their permission to release it, whichever comes first."³⁴

³⁰This office notes that in the paragraph that begins at the bottom of page one of its supplemental answer, the City discusses records that are not at issue in this matter because they are not body camera recordings depicting the lead up to and attempted arrest and death of Mr. Cotton.

³¹Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 15, 2019), at 1.

³²Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 15, 2019), at 2.

³³Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 15, 2019), at 2.

³⁴Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 15, 2019), at 3.

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As set forth above, although the City cited all seven of the section 7(1)(d) exemptions, the City did not assert that the responsive recordings concern or involve an active administrative enforcement proceeding for purposes of section 7(1)(d)(ii). It is not apparent that the body-camera recordings depict any confidential informants or other individuals who provided the City or Department with information within the meaning of section 7(1)(d)(iv); even if the recordings did depict such individuals, section 10-20(b)(2) of the Law Enforcement Officer-Worn Body Camera Act (Body Camera Act) (50 ILCS 706/10-20(b)(3) (West 2018)) requires redaction of their identifying information.³⁵ There is no indication that the body-camera recordings reveal unique or specialized investigative techniques within the scope of section 7(1)(d)(v). Therefore, as a preliminary matter, the City did not prove by clear and convincing evidence that any of those three exemptions are applicable. In addition, the only information the City set forth concerning the section 7(1)(d)(vi) exemption is Mr. Nerheim's sentence about disclosure posing a safety and intimidation risk to the witnesses and their families. The City did not explain how or why disclosure would pose a risk to the life or physical safety of any such parties. The City did not identify any such witnesses or set forth any facts about physical safety concerns that are particular to this incident. Therefore, the City did not prove by clear and convincing evidence that the section 7(1)(d)(vi) exemption is applicable.

As to the sections 7(1)(d)(i) and 7(1)(d)(vii) exemptions, when applying the holding in *Kelly*, the City's argument is similarly generalized and conclusory. The City did not set forth facts as to why disclosure of these particular body camera recordings would interfere with any ongoing investigation or other law enforcement proceedings. *See Day v. City of Chicago*, 388 Ill. App. 3d 70, 76 (1st Dist. 2009) (a public body must explain how the disclosure of records would specifically obstruct an investigation to meet its burden for the ongoing investigation exemption).³⁶ In arguing that "statements made have a propensity to change witness' recollections which hinder the ability of investigators to determine exactly what occurred[.]"³⁷ it is unclear what statements the City is referring to and how those statements relate to the footage at issue. Similarly vague is the Lake County State's Attorney's argument that "[p]ublic disclosure would make it difficult to verify statements by future witnesses and can discourage new witnesses or confidential informants from coming forward in this case or in

³⁵Section 10-20(b)(3) of the Act provides that "[a]ny recording disclosed under the Freedom of Information Act shall be redacted to remove identification of any person that appears on the recording and is not the officer, a subject of the encounter, or directly involved in the encounter."

³⁶The court in *Day* construed prior but substantively identical versions of sections 7(1)(d)(i) and 7(1)(d)(vii). *See* 5 ILCS 140/7(1)(c)(i), (1)(c)(viii) (West 2006).

³⁷Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 1, 2019), at 1-2.

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future investigations."³⁸ It is not clear how disclosure of the footage depicting the police interaction with Mr. Cotton would make any statements more difficult to verify or discourage new witnesses or confidential informants from providing information relevant to the investigation. Likewise, it is not clear how disclosure of the specific body camera recordings responsive to the express language of the request—the recordings that show the pursuit of Mr. Cotton through his attempted arrest and death—would compromise the "ongoing [second] investigation" the City referenced in its supplemental answer.³⁹ Neither the City nor the State's Attorney's Office has identified any eyewitnesses located near the interaction at issue or expressly assert the involvement of police personnel other than those depicted in the videos, all of whom the City confirmed had already watched body camera footage of the incident. The desire to keep the recordings confidential until ISP completes its investigation, moreover, does not constitute clear and convincing evidence proving the applicability of the exemptions. Therefore, the City did not sustain its burden to deny the body camera recordings under sections 7(1)(d)(i) or 7(1)(d)(vii) of FOIA.

The remaining exemption, that the City asserted, section 7(1)(d)(iii), applies to records that would "create a *substantial likelihood* that a person will be deprived of a fair trial or an impartial hearing[.]" (Emphasis added.) In construing a statutory provision such as section 7(1)(d)(iii), the primary objective is to ascertain and give effect to the intent of the General Assembly. *Southern Illinoisan v. Illinois Dep't of Public Health*, 218 Ill. 2d 390, 415 (2006). "[T]he surest and most reliable indicator of" legislative intent "is the statutory language itself, given its plain and ordinary meaning." *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, ¶24, 77 N.E.3d 625, 630 (2017). "When the statutory language is clear and unambiguous, it must be applied as written, without resort to extrinsic aids of statutory construction." *Solon v. Midwest Medical Records Ass'n, Inc.*, 236 Ill. 2d 433, 440 (2010).

Under the plain language of section 7(1)(d)(iii), a public body cannot meet its burden by demonstrating a mere possibility that a person will be deprived of a fair trial or an impartial hearing if the records are disclosed; a public body must demonstrate a *substantial likelihood* that such an outcome will result. In this instance, the City has not even asserted that there will likely be a trial or hearing regarding the police interaction with Mr. Cotton depicted in the responsive body camera recordings. To the contrary, in stating that "Waukegan Police

³⁸Letter from Michael G. Nerheim, Lake County State's Attorney, to Chief Wayne Walles, Waukegan Police Department (August 8, 2019), at 2.

³⁹Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 15, 2019), at 1.

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fervently believes that this footage will absolve both the officers and the City of responsibility for Mr. Cotton's unfortunate death[.]⁴⁰ the City has suggested that the investigators' review of the body camera recordings will exonerate the involved officers and therefore no charges will be filed. The only claim the City made about the possibility that the harms section 7(1)(d)(iii) is aimed at avoiding may occur is that *if* there is a trial, disclosure may taint the jury pool. The City did not explain how or why disclosure would taint the jury pool, nor did it set forth facts demonstrating a substantial likelihood of that consequence. Accordingly, the City did not sustain its burden of demonstrating that the body camera recordings are exempt from disclosure under section 7(1)(d)(iii) of FOIA.

FINDINGS AND CONCLUSIONS

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

1) On July 1, 2019, Mr. Chris Blanks submitted a FOIA request to the City seeking copies of all dashboard camera and body camera recordings depicting the lead up to and attempted arrest and death of Mr. Avion Cotton on June 27, 2019.

2) On July 10, 2019, the City denied the request pursuant to sections 7(1)(d)(i) and 7(1)(d)(vii) of FOIA.

3) In a letter dated July 15, 2019, and received by the Public Access Bureau on July 18, 2019, Mr. Blanks submitted a Request for Review contesting the City's denial of his FOIA request. 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 2018)).

4) On July 22, 2019, the Public Access Bureau forwarded a copy of Mr. Blanks' Request for Review to the City's corporation counsel and asked it to provide unredacted copies of the responsive recordings for this office's confidential review, together with a detailed explanation of the legal and factual basis for the asserted exemptions.

5) On August 1, 2019, this office received copies of the recordings and two versions of the City's written answer: a complete version for this office's confidential review and a redacted version for forwarding to Mr. Blanks. The City cited sections 7(1)(d)(i), 7(1)(d)(ii), 7(1)(d)(iii), 7(1)(d)(iv), 7(1)(d)(v), 7(1)(d)(vi), and 7(1)(d)(vii) of FOIA.

⁴⁰Letter from Douglas S. Dorando, Attorney, Daniels, Long & Pinsel, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (August 15, 2019), at 3.

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6) On August 8, 2019, the Public Access Bureau forwarded to Mr. Blanks a copy of the City's redacted answer and notified him of his opportunity to reply. On that same date, Mr. Blanks submitted a reply to the City's answer.

7) On August 9, 2019, after Mr. Blanks confirmed that he was seeking only body camera recordings, the Public Access Bureau sent a second letter to the City posing follow-up questions and inviting the City to submit a supplemental answer tailored to the specific scope of this Request for Review.

8) Also on August 9, 2019, the City sent this office a letter from the Lake County State's Attorney, who asserted that the body camera recordings were exempt from disclosure under sections 7(1)(a), 7(1)(d)(i), 7(1)(d)(iii), and 7(1)(d)(vii) of FOIA.

9) Later on August 9, 2019, this office forwarded a copy of the Lake County State's Attorney's letter to Mr. Blanks and notified him of his opportunity to reply. Later still on that date, Mr. Blanks submitted a reply.

10) On August 15, 2019, this office received the City's answer to this office's August 9, 2019, follow up letter.

11) On August 16, 2019, this office forwarded a copy of the City's supplemental answer to Mr. Blanks and again notified him of his opportunity to reply. On August 20, 2019, Mr. Blanks notified this office that he wished to add nothing further.

12) On September 5, 2019, pursuant to section 9.5(f) of FOIA, this office extended the time within which to issue a binding opinion by 30 business days, to October 29, 2019. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

13) Section 10-20(b) of the Law Enforcement Officer-Worn Body Camera Act provides that body camera recordings that are flagged "due to the filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm" must be disclosed pursuant to FOIA unless one or more of the exemptions in FOIA applies. The body camera recordings at issue were flagged and therefore subject to disclosure unless the City proves by clear and convincing evidence that they are exempt.

14) Section 7(1)(a) of FOIA exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The Police and Community Relations Improvement Act

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does not specifically prohibit disclosure of the body camera recordings. Therefore, section 7(1)(a) is inapplicable as a basis for withholding the requested records.

15) Section 7(1)(d) of FOIA contains seven exemptions for law enforcement records. Although it cited all seven exemptions, the City set forth arguments for only sections 7(1)(d)(i), 7(1)(d)(iii), 7(1)(d)(vi), and 7(1)(d)(vii).

16) Section 7(1)(d)(vi) of FOIA exempts from disclosure law enforcement records only to the extent that disclosure would "endanger the life or physical safety of law enforcement personnel or any other person[.]" The City did not explain how disclosure would pose a risk to the life or physical safety of any person.

17) Sections 7(1)(d)(i) and 7(1)(d)(vii) of FOIA exempt from disclosure law enforcement records only to the extent that disclosure would "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" or "obstruct an ongoing criminal investigation by the agency that is the recipient of the request[.]" respectively. The City did not set forth facts as to how disclosure of these particular body camera recordings would interfere with any ongoing investigation or other law enforcement proceedings.

18) Section 7(1)(d)(iii) of FOIA exempts from disclosure law enforcement records only to the extent that disclosure would "create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing." The City neither asserted that there will likely be a trial or hearing regarding the police interaction with Mr. Cotton depicted in the responsive body camera recordings, nor did it set forth facts demonstrating a substantial likelihood that disclosure will deprive a person of a fair trial or an impartial hearing.

Therefore, it is the opinion of the Attorney General that the City's denial of the body camera recordings responsive to Mr. Blanks' Freedom of Information Act request violated the requirements of FOIA. Accordingly, the City is hereby directed to take immediate and appropriate action to comply with this opinion by providing Mr. Blanks with copies of the body camera recordings responsive to his July 1, 2019, FOIA request, subject only to redactions required by the Body Camera Act.

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 2018). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review with the Circuit Court of Cook or Sangamon County within

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35 days of the date of this decision naming the Attorney General of Illinois and Mr. Chris J.D. Blanks as defendants. *See* 5 ILCS 140/11.5 (West 2018).

Very truly yours,

KWAME RAOUL
ATTORNEY GENERAL

By:


Brent D. Stratton
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

Sarah L. Pratt, Public Access Counselor, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 19-010) upon:

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Waukegan City Hall
100 N. Martin Luther King, Jr. Avenue
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by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Springfield, Illinois on October 29, 2019.


SARAH L. PRATT
Public Access Counselor

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