



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

July 7, 2020

PUBLIC ACCESS OPINION 20-005
(Request for Review 2020 PAC 62350)

FREEDOM OF INFORMATION ACT:
Disclosure of Police Dashboard
Camera Video, Dispatch Audio,
and Written Critique

Mr. Jeff Kolkey
Staff Writer
Rockford Register Star
99 East State Street
Rockford, Illinois 61104

Mr. Mark Karner
Deputy Chief
Winnebago County Sheriff's Office
650 West State Street
Rockford, Illinois 61102

Dear Mr. Kolkey and Mr. Karner:

This binding opinion is issued 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 Winnebago County Sheriff's Office (Sheriff's Office) violated the requirements of FOIA by improperly withholding records responsive to Mr. Jeff Kolkey's FOIA request.

BACKGROUND

On March 9, 2020, Mr. Kolkey, on behalf of the *Rockford Register Star*, submitted a FOIA request to the Sheriff's Office seeking:

Mr. Jeff Kolkey
Mr. Mark Karner
July 7, 2020
Page 2

[a] copy of any squad car camera footage before, during and after the Feb. 8, 2016, police chase and fatal crash that killed [a named individual], emergency dispatch audio concerning that chase, crash and incident, and any written critique, review or report concerning the attempted traffic stop and fatal crash.^[1]

On March 16, 2020, the Sheriff's Office acknowledged receipt of the FOIA request and requested an extension of five days.² On March 23, 2020, the Sheriff's Office denied the request pursuant to section 7(1)(d)(iii) of FOIA (5 ILCS 140/7(1)(d)(iii) (West 2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019).³ The Sheriff's Office asserted that "disclosure would deprive both the County of Winnebago and Sheriff's Deputy Christopher Moski of their rights to a fair trial or an impartial adjudication. The trial is pending in 2016-L-239, *Lambert v. Winnebago County*["]."⁴ The Sheriff's Office further asserted that release of the requested records "would seriously interfere with the fairness of the proceedings since a jury trial is demanded and disclosure of the documents sought could prejudice the pool of potential jurors who would adjudicate the case."⁵

Mr. Kolkey submitted a Request for Review to the Public Access Bureau on March 23, 2020, contesting the denial of his request.⁶ Mr. Kolkey noted that the requested records were the subject of an earlier Request for Review, file No. 2016 PAC 40205, where the Sheriff's Office had denied a request for the same records citing section 7(1)(d)(iii), among other

¹E-mail from Jeff Kolkey, Staff Writer, *Rockford Register Star*, to Sgt. [Tammie] Stanley (March 9, 2020).

²Letter from Deputy Chief Mark Karner, Winnebago County Sheriff's Department, to Jeff [Kolkey] (March 16, 2020). Although the Sheriff's Office did not provide a reason for the extension, FOIA authorizes a public body to unilaterally extend its response time by five business days for any of seven enumerated reasons set out in section 3(e) of FOIA. See 5 ILCS 140/3(e)(i) through 3(e)(vii) (West 2018), as amended by Public Act 101-081, effective July 12, 2019.

³Letter from Deputy Chief Mark Karner, Office of the Sheriff, Winnebago County, to Jeff Kolkey, *Rockford Register Star* (March 23, 2020).

⁴Letter from Deputy Chief Mark Karner, Office of the Sheriff, Winnebago County, to Jeff Kolkey, *Rockford Register Star* (March 23, 2020), at 1.

⁵Letter from Deputy Chief Mark Karner, Office of the Sheriff, Winnebago County, to Jeff Kolkey, *Rockford Register Star* (March 23, 2020), at 1.

⁶E-mail from Jeff Kolkey, Staff Writer, *Rockford Register Star*, to Public Access [Bureau, Office of the Attorney General] (March 23, 2020).

Mr. Jeff Kolkey
Mr. Mark Karner
July 7, 2020
Page 3

bases.⁷ In a non-binding determination, the Public Access Counselor concluded that the Sheriff's Office had improperly denied Mr. Kolkey's request. Ill. Att'y Gen. Req. Rev. Ltr. 40205, issued December 27, 2019. Mr. Kolkey asserted that the second denial by the Sheriff's Office "[a]ppears to cite the same discredited 'fair trial' grounds as [the response to] the original FOIA request, but instead uses a wrongful death civil trial as the basis of the denial instead of a criminal trial."⁸

On April 3, 2020, the Public Access Bureau sent a copy of the Request for Review to the Sheriff's Office and asked it to provide copies of the withheld dashboard video, dispatch audio, and written critique for this office's confidential review.⁹ The April 3, 2020, letter also asked the Sheriff's Office to provide a detailed explanation of the factual and legal bases for the applicability of section 7(1)(d)(iii) to those records.¹⁰ On April 14, 2020, the Sheriff's Office e-mailed this office copies of its written answer dated April 13, 2020, the second amended complaint in *Lambert v. Winnebago County Sheriff's Office*, Case No. 16-L-239 (Circuit Court, Winnebago County), and the written critique of the incident.¹¹ The Sheriff's Office submitted copies of the remaining requested materials via the United States Postal Service.¹² On April 15, 2020, the Public Access Bureau forwarded a copy of the Sheriff's Office's written response to Mr. Kolkey,¹³ he did not reply.

⁷E-mail from Jeff Kolkey, Staff Writer, *Rockford Register Star*, to Public Access [Bureau, Office of the Attorney General] (March 23, 2020).

⁸E-mail from Jeff Kolkey, Staff Writer, *Rockford Register Star*, to Public Access [Bureau, Office of the Attorney General] (March 23, 2020).

⁹Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Deputy Chief Mark Karner, Winnebago County Sheriff's Office (April 3, 2020), at 1.

¹⁰Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Deputy Chief Mark Karner, Winnebago County Sheriff's Office (April 3, 2020), at 1.

¹¹E-mail from Deputy Chief Mark Karner to Attorney [Teresa] Li[m] (April 14, 2020).

¹²Letter from Mark Karner, Deputy Chief and FOIA Officer, Office of the Winnebago County Sheriff, to Teresa Lim, Assistant Attorney General (April 13, 2020). The Public Access Bureau received the remaining requested materials on April 17, 2020.

¹³Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Jeff Kolkey, Staff Writer, *Rockford Register Star* (April 15, 2020).

Mr. Jeff Kolkey
Mr. Mark Karner
July 7, 2020
Page 4

Pursuant to section 9.5(f) of FOIA, on May 15, 2020, this office properly extended the time within which to issue a binding opinion by 30 business days, to July 7, 2020.¹⁴

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 2018). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2018), as amended by Public Act 101-081, effective July 12, 2019) further 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 8.5¹⁵ of this Act." The exemptions from disclosure contained in section 7 of FOIA (5 ILCS 140/7 (West 2018)) are to be construed narrowly. *See Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

Section 7(1)(d)(iii) of FOIA

Section 7(1)(d)(iii) of FOIA exempts from disclosure:

(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:

* * *

(iii) create a substantial likelihood that a person will be deprived of a fair trial or impartial hearing[.]

To demonstrate that records are exempt from disclosure under the comparable provision of the

¹⁴Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Jeff Kolkey, Staff Writer, *Rockford Register Star*, and Mark Karner, Deputy Chief, Winnebago County Sheriff's Office (May 15, 2020).

¹⁵Section 8.5 of FOIA (5 ILCS 140/8.5 (West 2018) excludes from the copying requirement those public records that are published on a public body's website.

Mr. Jeff Kolkey
Mr. Mark Karner
July 7, 2020
Page 5

Federal FOIA (5 U.S.C.A. § 552(b)(7)(B) (2018)),¹⁶ an agency must establish: "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." *Chiquita Brands International Inc. v. S.E.C.*, 805 F.3d 289, 294 (D.C. Cir. 2015) (quoting *Washington Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988)). "[S]peculation about potential publicity and its effect on a future jury * * * does not satisfy the level of certainty required by [Federal] FOIA Exemption 7(B). * * * Exemption 7(B) expressly requires that disclosure 'would' compromise the fairness of a proceeding." *Chiquita Brands International v. United States Securities and Exchange Commission*, 10 F. Supp. 3d 1 (D.D.C. 2013), *aff'd sub nom. Chiquita Brands International Inc. v. S.E.C.*, 805 F.3d 289.

In binding opinion No. 19-008, issued September 24, 2019, this office considered, among other things, whether a police department properly redacted certain portions of police report narratives pursuant to section 7(1)(d)(iii) of FOIA. The opinion determined that the police department failed to "explain *how* or *why* disclosure of the information it redacted from the particular narratives at issue would deprive the specific defendants of fair trials or impartial hearings." (Emphases in original.) Ill. Att'y Gen. Pub. Acc. Op. No. 19-008, at 8. Because the police department did not present facts to demonstrate that disclosure of the redacted information would create a substantial likelihood that defendants would be deprived of a fair trial under the circumstances at issue, the opinion concluded that the police department did not meet its burden of demonstrating that the redacted information was exempt from disclosure pursuant to section 7(1)(d)(iii). Ill. Att'y Gen. Pub. Acc. Op. No. 19-008, at 8.

State courts in other jurisdictions have similarly emphasized that, to justify withholding records requested under their FOIA statutes for reasons similar to the exemption in section 7(1)(d)(iii), particularized facts or reasons must demonstrate that disclosure of the records would deprive a defendant of a fair trial. *See, e.g., Seattle Times Co. v. Serko*, 170 Wash. 2d 581, 596, 243 P.3d 919, 928 (Wash. 2010) (reversing a lower court's order that "does not identify with particularity the unfairness or prejudice that would result from release of the records at issue[.]"); *State ex rel. Cincinnati Enquirer v. Heath*, 2009-Ohio-3415, ¶20, 183 Ohio App. 3d 274, 280, 916 N.E.2d 1090, 1094 (Ohio Ct. App. 2009) (reversing trial court order sealing records related to a murder prosecution partly because "respondents did not articulate particularized findings regarding how [defendant] would be prejudiced or deprived of a fair trial by the disclosure of the requested records"); *Meredith Corp. v. City of Flint*, 256 Mich. App.

¹⁶Exemption 7(B) of Federal of FOIA applies to records that "would deprive a person of a right to a fair trial or an impartial adjudication[.]" Illinois courts have recognized that because Illinois' FOIA statute is based on the Federal FOIA statute, decisions construing the latter, while not controlling, may provide helpful and relevant precedents in construing the state Act. *Margolis v. Director, Ill. Department of Revenue*, 180 Ill. App. 3d 1084, 1087 (1st Dist. 1989).

Mr. Jeff Kolkey
Mr. Mark Karner
July 7, 2020
Page 6

703, 717, 671 N.W.2d 101, 109 (Mich. Ct. App. 2003) (remanding case for award of punitive damages for improper denial where "defendant consistently failed to articulate any specific reasons why disclosure of the tape would deprive the minor of a fair trial, other than that the tape would receive extensive media attention.").

The Sheriff's Office's answer to this office maintained that disclosure of the records would deprive the defendants, specifically the Sheriff's Office, Sheriff Gary Caruana, and Sheriff's Deputy Moski "of their rights to a fair trial or an impartial adjudication" in *Lambert v. Winnebago County*.¹⁷ In particular, the Sheriff's Office stated that a pending civil lawsuit related to the fatal traffic accident had been filed and that the plaintiff had requested a jury trial.¹⁸ The Sheriff's Office provided this office with a copy of the most recent amended complaint for that lawsuit.¹⁹ Directing this office to the complaint, the Sheriff's Office asserted that many of the plaintiff's claims "go to occurrences before, during and after" the fatal traffic accident and that "[t]here can be no doubt that the documents requested by Mr. Kolkey will be presented to the jury for deliberation."²⁰ The Sheriff's Office contended:

The disclosure to anyone of the documents requested by Mr. Kolkey could taint the jury pool for the trial in the pending civil lawsuit involving the fatal accident. Mr. Kolkey's *[sic]* status as a newspaper reporter, however, simply increases the likelihood that the information will be more widely circulated in a manner that would be seen by potential jurors and could bias their views making it difficult to select a fair and impartial jury.^[21] (Emphasis in original.)

This office has reviewed the records at issue and considered the written response of the Sheriff's Office as to why disclosure of the records would deprive the defendants of a fair

¹⁷Letter from Mark Karner, Deputy Chief and FOIA Officer, Office of the Winnebago County Sheriff, to Teresa Lim, Assistant Attorney General (April 13, 2020), at 1.

¹⁸Letter from Mark Karner, Deputy Chief and FOIA Officer, Office of the Winnebago County Sheriff, to Teresa Lim, Assistant Attorney General (April 13, 2020), at 1.

¹⁹Second Amended Complaint, *Lambert v. Winnebago County Sheriff's Office, et al*, 2016-L-0000239, 17th Judicial Circuit Court, Winnebago County (June 6, 2017).

²⁰Letter from Mark Karner, Deputy Chief and FOIA Officer, Office of the Winnebago County Sheriff, to Teresa Lim, Assistant Attorney General (April 13, 2020), at 1-2.

²¹Letter from Mark Karner, Deputy Chief and FOIA Officer, Office of the Winnebago County Sheriff, to Teresa Lim, Assistant Attorney General (April 13, 2020), at 2.

Mr. Jeff Kolkey
Mr. Mark Karner
July 7, 2020
Page 7

trial. The Sheriff's Office's arguments emphasize the pending lawsuit related to the fatal traffic accident and the plaintiff's request for a jury trial in that matter. That generic explanation applies to records concerning most pending lawsuits involving automobile fatalities. However, "[t]o meet its burden * * *, the public body must provide a detailed justification for its claim of exemption, addressing the requested records specifically and in a manner allowing for adequate adversarial testing." *Rockford Police Benevolent & Protective Ass'n v. Morrissey*, 398 Ill. App. 3d 145, 150 (2d Dist. 2010).

The Sheriff's Office has neither demonstrated that a trial or adjudication is pending or truly imminent, nor explained with specificity how disclosure of the records at issue would create a substantial likelihood that any person would be deprived of a fair trial. Although the lawsuit pertains to the fatal traffic accident that is the general subject matter of the records, the Sheriff's Office did not provide facts illustrating how the details in the records, if disclosed, would seriously interfere with the fairness of those proceedings. The written critique does not include highly detailed information such as a narrative of the incident or witness statements, and most of the videos do not depict the fatal traffic accident. The one video that does include footage of the accident was recorded from a considerable distance. The Sheriff's Office's claim that release of the records could taint the jury pool is conclusory—the possibility that the records may be disseminated to the public by Mr. Kolkey and viewed by possible jurors is insufficient to demonstrate the applicability of the section 7(1)(d)(iii) exemption. *See, e.g., Dow Jones Co. v. F.E.R.C.*, 219 F.R.D. 167, 175 (C.D. Cal. 2003) (finding that the "defendant has failed to demonstrate that disclosure of the appendix would generate pretrial publicity that could deprive the companies or any of their employees of their right to a fair trial" under the corresponding Exemption 7(B) of Federal FOIA); *Playboy Enterprises, Inc. v. U.S. Dep't of Justice*, 516 F. Supp. 233, 246 (D.D.C. 1981), *aff'd in part, modified in part sub nom. Playboy Enterprises, Inc. v. Dep't of Justice*, 677 F.2d 931 (D.C. Cir. 1982) (finding "the degree of publicity that might come about as a result of the disclosure of [a task force report] is speculative at best" with regard to defendant's claims concerning the applicability of Exemption 7(B) to the report). Because the Sheriff's Office did not set forth clear and convincing evidence that disclosure of the records at issue would create a substantial likelihood that any person would be deprived of a fair trial under the circumstances surrounding the *Lambert v. Winnebago County* case, the Sheriff's Office did not sustain its burden to withhold the records pursuant to section 7(1)(d)(iii) of FOIA.

FINDINGS AND CONCLUSIONS

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

1) On March 9, 2020, Mr. Jeff Kolkey, on behalf of the *Rockford Register Star*, submitted a FOIA request to the Winnebago County Sheriff's Office seeking copies of the squad

Mr. Jeff Kolkey
Mr. Mark Karner
July 7, 2020
Page 8

car video, dispatch audio, and written critique of an attempted traffic stop and fatal traffic accident that occurred on February 8, 2016.

2) On March 23, 2020, the Sheriff's Office denied the request in its entirety pursuant to section 7(1)(d)(iii) of FOIA.

3) On March 23, 2020, Mr. Kolkey submitted a Request for Review to the Public Access Bureau contesting the denial by the Sheriff's Office of his 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 April 3, 2020, the Public Access Bureau sent a copy of the Request for Review to the Sheriff's Office and asked it to provide copies of the responsive squad car video, dispatch audio, and written critique for this office's confidential review. This office also asked the Sheriff's Office to provide a detailed explanation of the factual and legal bases for withholding those records.

5) On April 14, 2020, the Sheriff's Office furnished a written answer and a copy of a written critique by e-mail; the remaining requested materials were submitted via the United States Postal Service and received by this office on April 17, 2020.

6) On April 15, 2020, the Public Access Bureau forwarded a copy of the Sheriff's Office's written answer to Mr. Kolkey; he did not reply to the response.

7) Pursuant to section 9.5(f) of FOIA, on May 15, 2020, this office extended the time within which to issue a binding opinion by 30 business days, to July 7, 2020. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

8) Section 7(1)(d)(iii) of FOIA exempts from disclosure law enforcement records when their disclosure would "create a substantial likelihood that a person will be deprived of a fair trial or impartial hearing." The Sheriff's Office identified a pending civil lawsuit related to the fatal traffic accident and provided a conclusory assertion that disclosure of the requested records would taint the jury pool for that case. However, it did not explain with specific facts how disclosure of the records at issue would deprive the defendants in that matter of a fair trial. Therefore, the Sheriff's Office did not sustain its burden of demonstrating by clear and convincing evidence that the records are exempt from disclosure pursuant to section 7(1)(d)(iii).

Therefore, it is the opinion of the Attorney General that the Sheriff's Office's response to Mr. Kolkey's Freedom of Information Act request violated the requirements of

Mr. Jeff Kolkey
Mr. Mark Karner
July 7, 2020
Page 9

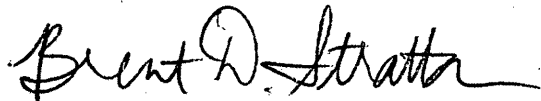
FOIA. Accordingly, the Sheriff's Office is directed to take immediate and appropriate action to comply with this opinion by disclosing to Mr. Kolkey copies of the responsive records.

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 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 Jeff Kolkey as defendants. *See* 5 ILCS 140/11.5 (West 2018).

Very truly yours,

KWAME RAOUL
ATTORNEY GENERAL

By:

A handwritten signature in cursive script, appearing to read "Brent D. Stratton".

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 20-005) upon:

Mr. Jeff Kolkey
Staff Writer
Rockford Register Star
99 East State Street
Rockford, Illinois 61104
jkolkey@rrstar.com

Mr. Mark Karner
Deputy Chief
Winnebago County Sheriff's Office
650 West State Street
Rockford, Illinois 61102
KarnerM@WCSO-IL.us

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 July 7, 2020.


SARAH L. PRATT
Public Access Counselor

SARAH L. PRATT
Public Access Counselor
Office of the Attorney General
500 South Second Street
Springfield, Illinois 62701
(217) 557-0548