



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

June 2, 2021

PUBLIC ACCESS OPINION 21-005
(Request for Review 2021 PAC 67100)

FREEDOM OF INFORMATION ACT:
Duty to Disclose Employee Attendance Records

Mr. David Sutherland
Organizer
Northwest Side Coalition Against Racism & Hate
[REDACTED]
[REDACTED]

Ms. Teresa Hoffman Liston
Corporation Counsel
Village of Morton Grove
6101 Capulina Avenue
Morton Grove, Illinois 60053

Dear Mr. Sutherland and Ms. Liston:

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 Village of Morton Grove (Village) Police Department (Police Department) violated the requirements of FOIA by improperly partially denying Mr. David Sutherland's FOIA request for employee attendance records.

BACKGROUND

On January 19, 2021, Mr. Sutherland, on behalf of the Northwest Side Coalition Against Racism & Hate (Coalition), submitted a FOIA request to the Police Department seeking copies of:

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Records sufficient to show the names, star numbers, respective dates, and the type of time off of all police officers and/or employees who requested any personal time off, vacation days, personal days, furlough days, or any other time off for the dates of, on, or between Jan 1, 2021 and January 8, 2021 AS WELL AS the dates of, on, or between Jan 1, 2020 and January 8, 2020.^[1] (Emphasis in original.)

On January 29, 2021, the Police Department extended its time to respond by five business days pursuant to section 3(e)(vi) of FOIA (5 ILCS 140/3(e)(vi) (West 2019 Supp.)).² On February 5, 2021, the Police Department responded by providing Mr. Sutherland with copies of responsive schedules, but redacted all of the substantive content, citing section 7(1)(v) of FOIA (5 ILCS 140/7(1)(v) (West 2019 Supp.)).³ The Police Department disclosed eleven column headings for the schedule (e.g. "Name," "Position," "Fri 1/1/2021") but redacted all of the data identifying police officers who worked on indicated dates. The Police Department set forth no factual basis for redacting this information, rather it merely quoted the language of the statutory exemption.

On February 19, 2021, Mr. Sutherland submitted a Request for Review on behalf of the Northwest Side Coalition contesting the partial denial of its FOIA request.⁴ Mr. Sutherland's Request for Review stated, "[w]e seek to understand what law enforcement officers were attending the 1/6/2021 coup on the Capitol. All local [police departments] were transparent with their resulting records except for Morton Grove who blacked out ALL of the spreadsheets in entirety[.]" (Emphasis in original.)⁵ He further noted: "[w]e deserve to know if any of our local law enforcement officers could possibly be involved with this attack on our country and therefore be a threat to our communities."⁶

¹FOIA request from Northwestside Coalition to Whom It May Concern (January 19, 2021).

²Village of Morton Grove public records portal message to [David Sutherland] (January 29, 2021).

³Village of Morton Grove public records portal message from Teresa Hoffman Liston, Corporation Counsel, to [David Sutherland] (February 5, 2021).

⁴E-mail from David Sutherland to Public Access [Bureau, Office of the Attorney General] (February 19, 2021).

⁵E-mail from David Sutherland to Public Access [Bureau, Office of the Attorney General] (February 19, 2021).

⁶E-mail from David Sutherland to Public Access [Bureau, Office of the Attorney General] (February 19, 2021).

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On February 26, 2021, the Public Access Bureau sent a copy of the Request for Review to the Village's Corporation Counsel. The Public Access Bureau also sent the Corporation Counsel a letter asking for unredacted copies of the responsive records for this office's confidential review, and a detailed explanation of the legal and factual bases for the applicability of the section 7(1)(v) exemption.⁷

On March 4, 2021, the Village provided this office with the requested materials on behalf of the Police Department.⁸ In its written answer, the Village additionally cited section 7(1)(d)(vi) of FOIA (5 ILCS 140/7(1)(d)(vi) (West 2019 Supp.)) as a basis for partially denying Mr. Sutherland's request.⁹ The following day, this office forwarded a copy of the Village's answer to Mr. Sutherland and notified him of the Coalition's opportunity to reply.¹⁰ On March 12, 2021, Mr. Sutherland submitted a reply.¹¹

On April 14, 2021, this office extended the time within which to issue a binding opinion by 30 business days, to June 2, 2021, pursuant to section 9.5(f) of FOIA.¹²

ANALYSIS

Section 1 of FOIA (5 ILCS 140/1 (West 2018)) declares that "it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government." Under FOIA, "[a]ll records in the custody or possession of a public body are presumed to be open to inspection

⁷Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Teresa Hoffman Liston, Corporation Counsel, Village of Morton Grove (February 26, 2021).

⁸E-mail from Teresa Hoffman Liston, Corporation Counsel, Village of Morton Grove, to Deputy Bureau Chief Jones (March 4, 2021).

⁹E-mail from Teresa Hoffman Liston, Corporation Counsel, Village of Morton Grove, to Deputy Bureau Chief Jones (March 4, 2021).

¹⁰Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to David Sutherland, Organizer, Northwest Side Coalition Against Racism & Hate (March 5, 2021).

¹¹E-mail from David Sutherland, Organizer, Northwest Side Coalition Against Racism & Hate to Joshua Jones (March 12, 2021).

¹²Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to David Sutherland, Organizer, Northwest Side Coalition Against Racism & Hate, and Teresa Hoffman Liston, Corporation Counsel, Village of Morton Grove (April 14, 2021).

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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).

As a preliminary matter, because this is an issue common to many public bodies, it bears highlighting that FOIA expressly requires a public body to do more than quote the language of an exemption when denying a FOIA request in whole or in part. *See* 5 ILCS 140/9(b) (West 2018) ("When a request for public records is denied on the grounds that the records are exempt under Section 7 of this Act, the notice of denial shall specify the exemption claimed to authorize the denial and the specific reasons for the denial, including a detailed factual basis and a citation to supporting legal authority."). All public bodies including the Village should be mindful of their obligation to adhere to this requirement.

Turning to the specifics of this Request for Review, the Village has asserted two bases for withholding the requested information, sections 7(1)(d)(vi) and 7(1)(v) of FOIA.

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

Section 7(1)(d)(vi) of FOIA exempts from disclosure qualifying law enforcement records and provides:

(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:

* * *

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

The corresponding exemption in the Federal FOIA¹³ requires an agency to "demonstrate with sufficient specificity that releasing such information reasonably could be expected to" lead to harm. *Long v. U.S. Dep't of Justice*, 450 F. Supp. 2d 42, 80 (D.D.C. 2006). That standard cannot be satisfied with "conclusory assertions that disclosure will increase the chances that third parties will be harmed in some way." *Long*, 450 F. Supp. 2d at 80.

¹³Exemption 7(F) (5 U.S.C. § 552(b)(7)(F) (2018)) permits records to be withheld if disclosure "could reasonably be expected to endanger the life or physical safety of any individual[.]"

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In its answer to this office, the Village argued that the section 7(1)(d)(vi) exemption applies because:

Providing these records would define Morton Grove Police Department staffing protocols that would affect our response policies to calls for service and critical incidents, thus endangering the life and physical safety of the general public and Morton Grove Police Department officers and civilian staff. This information could also be used to predict future staffing practices in order to target specific individual police officers and civilian staff.¹⁴

In his reply, Mr. Sutherland claimed that the Village's arguments are unique among the local police departments from which the Coalition requested similar information. He argued that the Village set forth an insufficient factual basis for denying the "past factual information" he is seeking.¹⁵

The Village's argument for the applicability of the section 7(1)(d)(vi) exemption is unpersuasive. The Village's speculative and generalized claims do not establish a reasonable inference that disclosing the attendance records would endanger the life or physical safety of police officers or anyone else. A basic employee attendance record simply does not contain the kind of sensitive information that could fall within the scope of the section 7(1)(d)(vi) exemption. *Compare Electronic Privacy Information Center v. U.S. Dep't of Homeland Security*, 777 F.3d 518, 525, 528 (D.C. Cir. 2015) (Department of Homeland Security protocol for shutting down wireless networks during critical emergencies exempt because it could be used to interfere with law enforcement strategy to prevent triggering radio-activated improvised explosive devices, endangering lives and physical safety); *Public Employees for Environmental Responsibility v. United States Section, International Boundary and Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 206 (D.C. Cir. 2014) (dam inundation maps exempt as sensitive information pertaining to critical infrastructure that would endanger the population if disclosed because "[t]errorists or criminals could use that information to determine whether attacking a dam would be worthwhile, which dam would provide the most attractive target, and what the likely effect of a dam break would be."); *Galloway v. Office of Pennsylvania Attorney General*, 63 A.3d 485, 487 (Pa. Commw. Ct. 2013) (information related to the relocation of a named witness through a law enforcement witness protection program exempt because disclosure would endanger witness' life or physical safety). The Village cited no legal authority supporting the

¹⁴E-mail from Teresa Hoffman Liston, Corporation Counsel, Village of Morton Grove, to Deputy Bureau Chief Jones (March 4, 2021).

¹⁵E-mail from David Sutherland, Organizer, Northwest Side Coalition Against Racism & Hate to Joshua Jones (March 12, 2021).

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applicability of the exemption to routine employee attendance records nor did it provide sufficient specificity of how releasing the requested information could result in harm to others. Therefore, the Village failed to sustain its burden of proving by clear and convincing evidence that the redacted information is exempt from disclosure under section 7(1)(d)(vi).

Section 7(1)(v) of FOIA

Section 7(1)(v) of FOIA exempts from disclosure information that could result in attacks on a community's population or systems and provides:

Vulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public. Information exempt under this item may include such things as details pertaining to the mobilization or deployment of personnel or equipment, to the operation of communication systems or protocols, or to tactical operations. (Emphasis added.)

In a previously issued binding opinion, this office concluded that records showing the number of sworn police officers assigned to each district were not assessments, measures, policies, or plans within the scope of the section 7(1)(v) exemption. Ill. Att'y Gen. Pub. Acc. Op. No. 11-002, issued February 25, 2011, at 3.

In its response to this office, the Village stated:

It is the Village's position that providing the requested records would divulge information regarding staffing levels leading up to specific events such as the Certification of the Electoral College votes which could be used to predict staffing levels for future events for criminal purposes, jeopardizing the ability of the Morton Grove Police Department to effectively plan for critical incidents in the future, thus endangering the life and

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physical safety of the general public and Morton Grove Police Department personnel.^{16]}

By its plain language, section 7(1)(v) applies to vulnerability assessments, security measures, and response policies or plans created for the purpose of identifying, preventing, or responding to potential attacks on a community or its infrastructure. In construing a statute, "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). Routine employee attendance records are not vulnerability assessments, security measures, or response policies or plans. Further, attendance records are not designed for the particular purpose of identifying, preventing, or responding to such attacks, nor do they consist of the type of homeland security or other emergency preparation information that is contemplated by the plain language of section 7(1)(v).

Even if the language of section 7(1)(v) could be deemed ambiguous, the legislative history behind section 7(1)(v) supports the interpretation that the provision concerns records involved in counterterrorism planning. Representative James H. Meyer, one of the House sponsors of the bill that added the exemption, stated during legislative debate that the bill "exempts documents prepared for emergency and security procedures from being disclosed from homeland security where that would be compromised." Remarks of Rep. Meyer, May 31, 2003, House Debate on House Bill No. 954 (which as Public Act 93-422, effective August 5, 2003, created the section 7(1)(v) exemption), at 107. Because the responsive employee attendance records are basic, routine personnel records rather than vulnerability assessments, security measures, or response policies or plans designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations, the Police Department improperly denied the substantive portions of the responsive records pursuant to section 7(1)(v).

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:

¹⁶E-mail from Teresa Hoffman Liston, Corporation Counsel, Village of Morton Grove, to Deputy Bureau Chief Jones (March 4, 2021).

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1) On January 19, 2021, Mr. David Sutherland, on behalf of the Northwest Side Coalition Against Racism & Hate, submitted a FOIA request to the Morton Grove Police Department seeking copies of attendance records of police officers and other employees from January 1, 2020, through January 8, 2020, and January 1, 2021, through January 8, 2021.

2) On January 29, 2021, the Police Department extended its time to respond by five business days pursuant to section 3(e)(vi) of FOIA.

3) On February 5, 2021, the Police Department responded by providing Mr. Sutherland with copies of responsive schedules but redacted, pursuant to section 7(1)(v) of FOIA, all substantive entries reflecting which employees worked at which times.

4) In an e-mail transmitted to the Public Access Bureau on February 23, 2021, Mr. Sutherland, on behalf of the Northwest Side Coalition Against Racism & Hate, submitted a Request for Review contesting the Police Department's redactions under section 7(1)(v) of FOIA. 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)).

5) On February 26, 2021, the Public Access Bureau sent the Village of Morton Grove's Corporation Counsel a copy of the Request for Review. The Public Access Bureau also sent the Corporation Counsel a letter asking her to provide unredacted copies of the responsive records for this office's confidential review, and a detailed explanation of the legal and factual bases for the applicability of section 7(1)(v).

6) On March 4, 2021, this office received those materials from the Village. In addition to section 7(1)(v), the Village also cited the section 7(1)(d)(vi) exemption to justify the partial denial of Mr. Sutherland's request.

7) On March 5, 2021, the Public Access Bureau forwarded to Mr. Sutherland a copy of the Village's answer and notified him of the Coalition's opportunity to reply. On March 12, 2021, Mr. Sutherland submitted a reply on behalf of the Coalition to the Village's answer.

8) On April 14, 2021, this office extended the time in which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

9) Section 9(b) of FOIA provides that "[w]hen a request for public records is denied on the grounds that the records are exempt under Section 7 of this Act, the notice of denial shall specify the exemption claimed to authorize the denial and the specific reasons for the denial, including a detailed factual basis and a citation to supporting legal authority." The Police

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Department set forth no factual basis for its redactions in the notice of partial denial sent to Mr. Sutherland in response to the Coalition's request. The Police Department is directed to comply with this requirement in the future.

10) Section 7(1)(d)(vi) of FOIA exempts from disclosure law enforcement records created for law enforcement purposes only to the extent that disclosure would endanger the life or physical safety of law enforcement personnel or any other person. A basic employee attendance record is not the type of sensitive record that could potentially jeopardize the life or physical safety of Police Department employees or others. The Village set forth no facts or legal authority demonstrating that the redacted information is exempt from disclosure under section 7(1)(d)(vi).

11) Section 7(1)(v) of FOIA exempts from disclosure "[v]ulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations," when destruction or contamination would pose a clear and present danger and disclosure could reasonably be expected to jeopardize the effectiveness of the measures or personal safety. The Village did not demonstrate that basic employee attendance records fall within the plain language of the section 7(1)(v) exemption.

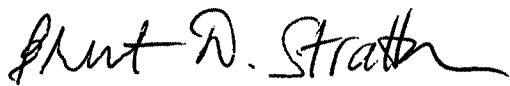
Therefore, it is the opinion of the Attorney General that the Village of Morton Grove Police Department violated the requirements of FOIA by improperly denying the attendance record entries responsive to Mr. Sutherland's Freedom of Information Act request. Accordingly, the Police Department is hereby directed to take immediate and appropriate action to comply with this opinion by providing Mr. Sutherland and the Coalition with unredacted copies of the attendance records responsive to his January 19, 2021, FOIA request.

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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 35 days of the date of this decision naming the Attorney General of Illinois, Mr. David Sutherland, and the Northwest Side Coalition Against Racism & Hate 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 21-005) upon:

Mr. David Sutherland
Organizer
Northwest Side Coalition Against Racism & Hate
[REDACTED]
dave@nwscoalition.com

Ms. Teresa Hoffman Liston
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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 June 2, 2021.


SARAH L. PRATT
Public Access Counselor

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