



**OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS**

Lisa Madigan
ATTORNEY GENERAL

October 22, 2010

PUBLIC ACCESS OPINION No. 10-003
(Request for Review 2010 PAC 8890, 9217)

FREEDOM OF INFORMATION ACT:
Autopsy Reports

Mr. Richard Velasquez
Special Counsel to the President
Freedom of Information Act Officer
George Dunne, Cook County Administration Building
69 W. Washington, 35th Floor
Chicago, Illinois 60602

Dear Mr. Velasquez:

This binding opinion is issued pursuant to Section 9.5(f) of the Freedom of Information Act (5 ILCS 140/9.5(f), added by Public Act 96-542, effective January 1, 2010).

Background

On September 12, 2009, Christopher Kelly, a businessman and fundraiser for former Governor Rod Blagojevich, committed suicide. In an unrelated case, on November 16, 2009, Michael W. Scott, the president of the Chicago Board of Education, committed suicide. The Office of the Cook County Medical Examiner (Medical Examiner) conducted post-mortem inquiries into the circumstances surrounding their deaths.¹

On January 4, 2010, Chris Fusco, a reporter for the *Chicago Sun-Times* (referred to collectively as the *Sun-Times*), e-mailed a Freedom of Information Act (FOIA) request to Cook County seeking to inspect "all reports/documents/records [and] photographs regarding two cases the Cook County Medical Examiner is believed to have closed." Specifically, Mr. Fusco sought

¹ For purposes of this Opinion, the term "County" includes both the Medical Examiner and Cook County, as the context requires.

access to "records [related to] the suicide of Christopher G. Kelly, deceased on Sept. 12, 2009" and "the suicide of Michael W. Scott, deceased on November 16, 2009." On January 5, 2010, the County submitted to the Public Access Counselor a document entitled "§ 9.5(b) Notice of Intent to Deny Pursuant to the § 7(1)(c) Privacy Exemption" (Notice of Intent to Deny) with regard to the *Sun-Times* request. Section 9.5(b) of FOIA (5 ILCS 140/9.5(b), added by Public Act 96-542, effective January 1, 2010), requires a public body that receives a request for records and asserts that the records are exempt from disclosure under, *inter alia*, Section 7(1)(c) of FOIA, to provide written notice of its intention to deny the request in whole or in part to both the requester and the Public Access Counselor. At the request of the Public Access Counselor, the County supplemented its notice with copies of 24 documents² and 23 photographs from the Medical Examiner's records relating to the investigation of Mr. Kelly, and 22 documents³ and 17 photographs relating to the investigation of Mr. Scott, which the County proposed to withhold from disclosure.

On February 1, 2010, Anne M. Sweeney, a reporter for the *Chicago Tribune* (referred to collectively as the *Tribune*), e-mailed a FOIA request to the County seeking copies of "any documents produced by the Special Counsel regarding any and all reports and documentation of the Michael Scott death investigation examination and autopsy" and "of any intent to deny Freedom of Information requests from any other news outlet." Ms. Sweeney sent a second e-mail to the County regarding Mr. Kelly's autopsy. On February 3, 2010, the County provided Brendan J. Healey, *Tribune* Senior Counsel, with an electronic copy of the County's notice to the *Sun-Times*, which set out the County's intention to deny media access to the Medical Examiner's records relating to the deaths of Mr. Kelly and Mr. Scott.

On February 17, 2010, Ms. Sweeney sent an e-mail to the County attaching copies of two FOIA request letters. The first letter "seeks the autopsy/examination report related to the examination of Michael Scott, including but not limited to the First Call Sheet, Intake Sheet, Release Documents, Investigator's Report, Toxicology Report, Autopsy Report, Histology Report, letters or communications from the family, police or insurance companies, and photographs." The second letter requests the same information related to the death of Mr. Kelly.

On February 25, 2010, the County submitted to the Public Access Counselor a second Notice of Intent to Deny, in this case asserting that the documents requested by the *Tribune* were also exempt from disclosure under Section 7(1)(c) of FOIA.

² The documents in the County's first supplemental production to this Office, which relate to Mr. Kelly consist of the following: the First Call Sheet; a personal effects inventory; the deceased remains transportation report; the medical examiner's case checklist; the authorization for release and removal; the medical examiner case report; the report of the postmortem examination; the results of toxicological analyses; and police reports.

³ The documents in the County's second supplemental production to this Office, which relate to Mr. Scott, consist of the following: the First Call Sheet; the deceased remains transportation report; the medical examiner's case checklist; a personal effects inventory; an identification certification; the authorization for release; the medical examiner case report; the report of the postmortem examination; the results of toxicological analyses; the police reports; and a letter from the attorney for the Scott family.

Section 7(1)(c) (5 ILCS 140/7(1)(c), as amended by Public Act 96-542, effective January 1, 2010) exempts from inspection and copying “[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless disclosure is consented to in writing by the individual subjects of the information.” The exemption defines “[u]nwarranted invasion of personal privacy” as “the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject’s right to privacy outweighs any legitimate public interest in obtaining the information.” *Id.*

On June 4, 2010, and following review of the documents and photographs tendered by the Medical Examiner, the Public Access Counselor responded to the County’s Notice of Intent to Deny, granting in part and denying in part the County’s request to withhold these records and photographs pursuant to Section 7(1)(c). Specifically, the Public Access Counselor denied the County’s request to withhold the autopsy reports and the accompanying documents for Mr. Kelly and Mr. Scott, as well as photographs of the physical evidence contained in the Medical Examiner’s file relating to the death of Mr. Kelly, but approved the County’s request to withhold the post-mortem photographs depicting the bodies of Mr. Kelly and Mr. Scott.⁴ A copy of the Public Access Counselor’s response is attached as Exhibit A and is incorporated herein by reference.

On August 3, 2010, Mr. Fusco informed this Office that the County had yet to supply him with the autopsy reports, documents and the photographs of the physical evidence contained in the Medical Examiner’s files or to provide him with a formal denial of his FOIA request. On August 20, 2010, Mr. Healey informed this Office that he likewise had received no records in response to his request. A failure to comply with a FOIA request within the requisite time period is considered a denial of the request. (5 ILCS 140/3(d), as amended by Public Act 96-542, effective January 1, 2010.) Although the time for a public body to respond to a FOIA request is tolled until the Public Access Counselor concludes his or her review of a notice of intent to deny disclosure, the time for the County to respond had clearly lapsed by August 3 and 20, 2010.

Section 9.5 of FOIA (5 ILCS 140/9.5, added by Public Act 96-542, effective January 1, 2010), provides that a person whose request to inspect or copy a public record has been denied by a public body may, no later than 60 days after the date of the final denial, file a written request for review by the Public Access Counselor. Upon determining that further action is warranted, the Attorney General, acting through the Public Access Counselor, shall examine the issues and records, make findings of fact and conclusions of law, and issue a binding opinion to the requester and the public body. Upon receipt of a binding opinion requiring the public body to disclose records, “the public body shall either take necessary action immediately to comply with the directive of the opinion or shall initiate administrative review under Section 11.5 of FOIA” (5 ILCS 140/11.5, added by Public Act 96-542, effective January 1, 2010).

This Office initiated further review with regard to the *Sun-Times* request on August 20, 2010 and with regard to the *Tribune* request on August 25, 2010. On September 20, 2010, this Office sent

⁴ Unlike the file in Mr. Kelly’s case, the County provided this Office with no photographs of physical evidence relating to Mr. Scott’s death. All photographs related to Mr. Scott depict Mr. Scott’s body post-mortem.

a 21-day extension letter to the County pursuant to Section 9.5(f) of FOIA (5 ILCS 140/9.5(f), added by Public Act 96-542, effective January 1, 2010) and forwarded the County's response to both the *Tribune* and the *Sun-Times*.

Section 9.5(d) of the Freedom of Information Act (5 ILCS 140/9.5(d), added by Public Act 96-542, effective January 1, 2010) provides:

Within 7 working days after it receives a copy of a request for review and request for production of records from the Public Access Counselor⁵, the public body may, but is not required to, answer the allegations of the request for review. The answer may take the form of a letter, brief, or memorandum. 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. The requester may, but is not required to, respond in writing to the answer within 7 working days and shall provide a copy of the response to the public body.

The County responded to the allegations in correspondence dated September 15, 2010. The County noted the following with regard to the Medical Examiner's records relating to Mr. Scott and Mr. Kelly:

[T]he County makes the standing argument that the Chicago Sun-Times and the Chicago Tribune do not have a public interest greater than the interest in the privacy which the Scott and Kelly families have in the documents which are listed below as the information contained on the listed document do not shed light, whatsoever, on the workings of government, but rather only provide information concerning Mr. Scott and Mr. Kelly. Put another way, the private information contained in the following documents is not relevant to any function the County or any other public body. Just the same, the Chicago Sun-Times and the Chicago Tribune have not expressed the basis of the "legitimate public interest," and merely contend that a public interest exists. Further, the County's review of the documents at issue has not been for the purpose of communicating the presence of private information which is exempt pursuant to Section 7(1)(b); the County reserves the right to perform the redaction of private information on all records responsive to the Chicago Sun-Times and the Chicago Tribune's FOIA requests.

On October 8, 2010, Esther J. Seitz of the law firm of Donald M. Craven, P.C., submitted a written response on behalf of the *Chicago Tribune*. The *Tribune* agreed with the Public Access Counselor's previous determination that the Medical Examiner's documents, reports and photographs of physical evidence are not exempt from disclosure under Section 7(1)(c). The *Tribune* disagreed, however, with the Public Access Counselor's determination regarding withholding the post-mortem photographs of the bodies, stating:

⁵ In this case, the documents in question had already been furnished to the Public Access Counselor in connection with its review of the County's Notices of Intent to Deny.

[W]e respectfully disagree with [the Public Access Counselor's] strong reliance on *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004) in interpreting section 7(1)(c) of the FOIA. *Favish* specifically construed the federal FOIA's privacy exemption which is expressly more expansive than the privacy exemption articulated in the Illinois FOIA at issue here. Compare 5 U.S.C. §552(b)(7)(C), with 5 ILCS 140/7(1)(c). And the public interest in disclosure asserted in *Favish* was of lesser import than the press' right to gather and disseminate news implicated by this Request.

Analysis

Under Section 1.2 of FOIA (5 ILCS 140/1.2, added by Public Act 96-542, effective January 1, 2010) "[a]ll records in the custody or possession of a public body are presumed to be open for inspection or copying." Section 1.2 further requires that "[a]ny public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing that it is exempt."⁶ The County has not asserted that the records in question are not "public records" to which the provisions of FOIA are generally applicable, but only that as public records they are subject to exemption from inspection or production under Section 7(1)(c) of FOIA. Specifically, the County asserts that the disclosure of any of the autopsy records and photographs would result in a clearly unwarranted invasion of the surviving family members' personal privacy.

That the common law recognizes the existence of a right to personal privacy is axiomatic, although the boundaries of that right have yet to be fully defined. The Illinois Appellate Court has not had occasion to determine whether the personal privacy interests of surviving family members may be considered in determining whether the disclosure of documents related to their relative's death would constitute an unwarranted invasion of personal privacy for purposes of FOIA. Illinois courts have recognized, however, that because Illinois' FOIA statute is based upon the Federal FOIA statute, decisions construing the latter, while not controlling, may provide relevant and helpful precedents in construing the State Act. *Margolis v. Director, Illinois Dept. of Revenue*, 180 Ill.App.3d 1084, 1087, *appeal denied*, 126 Ill. 2d 560 (1989). Based on Federal precedent, Illinois' courts have concluded that resolution of a personal privacy exemption claim requires the balancing of the public's interest in disclosure against the individual's (or in this case, the family's) interest in privacy. See *Gibson v. Illinois State Board of Education*, 289 Ill. App. 3d 12, 20-21 (1997).

Further, under Federal FOIA, the courts have recognized that a decedent's surviving family members do possess a separate personal privacy interest in "their close relative's death-scene images" and similar records. See *National Archives & Records Administration v. Favish*, 541 U.S. 157, 123 S. Ct. 1570 (2004), *rehearing denied*, 541 U.S. 1057, 124 S. Ct. 2198 (2004) (a decedent's surviving family members have a personal privacy interest under Federal FOIA in "their closest relative's death scene images"); see also *Katz v. National Archives & Records*

⁶ In its September 15 response, the County asserts that the "Chicago Sun-Times and the Chicago Tribune have not expressed the basis of the 'legitimate public interest,' and merely contend that a public interest exists." We note that Section 1.2 states that the burden of demonstrating that a document is exempt from disclosure lies exclusively with the public body. Accordingly, the *Sun-Times* and the *Tribune* are under no obligation to demonstrate that a legitimate public interest exists.

Administration, 862 F.Supp 476, 485-86 (D.D.C. 1994), *aff'd on other grounds*, 68 F.3d 1348 (D.C. Cir. 1995) ("allowing access to the autopsy photographs of [President Kennedy] would constitute a clearly unwarranted invasion of the Kennedy family's privacy under Federal FOIA"); *New York Times Co. v. National Aeronautics & Space Administration*, 782 F.Supp. 628, 630 (D.D.C. 1991) (sustaining the families' claim under Federal FOIA to a privacy interest in "all voice and communications" recorded aboard the space shuttle Challenger before it disintegrated).

Autopsy Records (Other Than Post-Mortem Photographs)

When a person in Illinois dies a "sudden or violent death, whether apparently suicidal, homicidal or accidental," it is the duty of the coroner (or the Medical Examiner, in the case of Cook County⁷) to investigate the cause of death. 55 ILCS 5/3-3013 (West 2008). Both Mr. Kelly and Mr. Scott's deaths were the result of suicide. Thus, the circumstances surrounding their deaths necessarily became a public matter, and the records relating to the investigation of their deaths constitute public records which are generally subject to FOIA. These records are presumptively open to inspection and copying. (5 ILCS 140/1.2, added by Public Act 96-542, effective January 1, 2010.) The inquiry does not, however, end at this point. Cook County has asserted that the disclosure of the autopsy records would result in a clearly unwarranted invasion of the surviving families' personal privacy rights, and that the records are therefore exempt from disclosure under Section 7(1)(c).⁸

Surviving family members (including the families of Mr. Kelly and Mr. Scott) have a cognizable personal privacy interest in autopsy records relating to the death of a close relative, which interest must be considered. Accordingly, in order to determine whether Section 7(1)(c) of FOIA exempts those records from disclosure, the interests of the public in accessing the information contained in the specific records requested must be balanced against the family members' interests in limiting public dissemination of that information.⁹ See, e.g., *Schessler v. Department of Conservation*, 256 Ill. App. 3d 198 (4th Dist. 1994) (In determining whether the disclosure of information would constitute a clearly unwarranted invasion of personal privacy, the courts apply a balancing test in which the following factors are considered: (1) the plaintiff's interest in disclosure; (2) the public interest in disclosure; (3) the degree of invasion of privacy; and (4) the availability of alternative means of obtaining the records.)

With respect to Mr. Kelly's investigation, Cook County provided to the Public Access Counselor for review copies of 24 documents and 23 photographs (9 of which depict the autopsy, and which will be addressed below.) The documents consist of: the first call sheet; a personal effects

⁷ The Office of the Medical Examiner of Cook County was established December 6, 1976, following a referendum to abolish the Office of the Coroner. The Medical Examiner has essentially the same duties and responsibilities as a coroner.

⁸ The County has not offered specific arguments regarding any particular information in the records. Instead, the County has made the assertion that all of the records are exempt under Section 7(1)(c).

⁹ It is not necessary, for resolution of this question, to determine to what degree of affinity the right to privacy extends. In both of these circumstances, the interests of surviving spouses and/or children of the decedents are implicated.

inventory; the deceased remains transportation report; the medical examiner's case checklist; authorization for release and removal; the medical examiner's case report; the report of the postmortem examination; the results of toxicological analyses; the police reports; and the photographs of physical evidence secured by investigators. With respect to Mr. Scott's investigation, Cook County provided for review 22 documents and 17 photographs (all of which depict Mr. Scott post-mortem). The documents consist of: the first call sheet; the deceased remains transportation report; the medical examiner's case checklist; a personal effects inventory; an identification certification; the authorization for release; the medical examiner's case report; the report of the postmortem examination; the results of toxicological analyses; the police reports; and a letter from the attorney for the Scott family. (For a more detailed catalogue of the general contents of the Medical Examiner's documents, see Exhibit A at 4.)

As previously noted, because of the nature of the deaths of Mr. Kelly and Mr. Scott, the law required the Medical Examiner to investigate. The duty to investigate deaths that occur under questionable or suspicious circumstances is a duty to the public generally, and the public has a legitimate interest in accessing the records that result from the performance of these public duties, at least to the extent that personal privacy rights are not affected or are outweighed by the public's interest.

With regard to the documents and physical evidence photographs contained in the Medical Examiner's files, the County has failed to meet its burden of demonstrating by clear and convincing evidence that these documents are highly personal or that disclosure of these documents would be objectionable to a reasonable person, for purposes of Section 7(1)(c). The documents simply record various aspects of the Medical Examiner's investigation and the results thereof. Although the disclosure of some of the information contained in these records could be undesirable to surviving family members, on balance the rights of the public to a full and complete account of the investigation of Mr. Kelly's and Mr. Scott's deaths outweigh the privacy rights of the surviving family members.

In its Notice of Intent to Deny, the County also cited *Trent v. Office of Coroner of Peoria County*, 349 Ill.App.3d 276 (2004). In *Trent*, the Court found that the disclosure of an individual's medical records would constitute an unwarranted invasion of personal privacy. *Trent*, 349 Ill.App.3d 276, 279.¹⁰ Upon review of the documents and the reports in the Medical Examiner's files in both Mr. Kelly and Mr. Scott's cases, however, the Public Access Counselor concluded that such documents and reports are not "medical records." The County has provided no additional support for its claim that they are such records.

Post-mortem Photographs

With respect to disclosure of the post-mortem photographs depicting the bodies of Mr. Kelly and Mr. Scott, other factors must be considered. Unlike the documentary records discussed immediately above, autopsy photographs are, by nature, graphic and gruesome. Further,

¹⁰ The court's opinion in *Trent* does not describe the "medical records" at issue in that case. The concurrence, however, implies that the "medical records" are records that were obtained by the coroner from attending physicians who rendered medical treatment to the decedent. *Trent*, 349 Ill.App.3d at 282.

surviving family members have legally-recognized rights in the depiction of a decedent's remains. As the court stated in *Melton v. Board of County Commissioners*, 267 F. Supp.2d 859, 864 (S. D. Ohio, 2003):

It is not difficult in the light of *Brotherton [v. Cleveland]*, 923 F.2d 477 (6th Cir., 1991) (holding that under Ohio law a spouse had a "legitimate claim of entitlement" in the body of her husband, such that her rights to that body were protected by the due process clause of the Fourteenth Amendment)] to find that families have a right not to be embarrassed or humiliated by the outrageous display or exposure to public view of the remains of a loved one. This is not to say that the official photography of decedent at the scene of death or in an autopsy report would provide the basis for * * * a claim [of invasion of privacy], *as long as such official photos remained in the files of the coroner and they were not released to the public.* (Emphasis added.)

Illinois law likewise recognizes that the nearest surviving relatives of a decedent have a "quasi-property" right in the decedent's body. See *In re Estate of Medlen*, 286 Ill.App.3d 860, 864 (1997).

The Public Access Counselor followed the Federal FOIA precedent in *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004), in making the following determinations in response to the County's Notice of Intent to Deny:

The Kelly family has a cognizable, personal privacy interest in the release of the Medical Examiner's photographs. In determining whether these records are subject to disclosure, this privacy interest must be weighed against "any legitimate public interest in obtaining the information." In seeking access to all of the information in the Medical Examiner's files, the Tribune asserted that because Kelly was involved in public controversies and his death was highly publicized, the public has an interest in information regarding his death. While Kelly was a public figure, there has been no showing that the disclosure of photographs of his body during the autopsy is likely to advance the public interests referenced in the Tribune's FOIA request. See generally *Favish*, 541 U.S. at 172-73, 124 S. Ct. at 1580-81. In this regard, at least one Illinois court has noted in construing the personal privacy exemption that FOIA is intended to "guarantee 'that the Government's activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.'" (Emphasis in original.) *Trent v. Office of Coroner of Peoria County*, 349 Ill. App. 3d 276, 281 (2004), *appeal denied*, 212 Ill. 2d 556 (2004), citing *Lakin Law Firm v. Federal Trade Comm'n*, 352 F.3d 1122, 1123 (7th Cir. 2003). On balance, the privacy interests of the Kelly family in the graphic photographs of Mr. Kelly's body postmortem outweigh the very generalized public interest in obtaining access to these photographs. Accordingly, the County's request to deny the disclosure of the autopsy photographs of Mr. Kelly's body is approved.

The Public Access Counselor applied a similar analysis with respect to the post-mortem photographs of Mr. Scott's body:

Similarly, the County's use of the section 7(1)(c) exemption with regard to the Medical Examiner's photographs of Scott's body is approved. Based on our review of the Medical Examiner's files, each of the 17 photographs that depict Scott's body postmortem. As noted above, the courts have determined that autopsy photographs are records that are highly personal and their release would be objectionable to reasonable persons. Further, you have indicated that the Scott family has requested privacy. In fact, on behalf of the Scott family, their attorney submitted a letter to the County "requesting that any and all records compiled by your office or in your possession relating to or in any way connected with the death of Michael W. Scott be withheld from public dissemination." See Letter from Enrico J. Mirabelli, Nadler, Pritikin & Mirabelli, LLC, to Dr. Mitra B. Kalelkar, Office of Cook County Medical Examiner (December 17, 2009).

Like Mr. Kelly, Scott was also a public figure. In seeking access to the Medical Examiner's records, the Tribune noted that Scott was linked to public controversies and his death was highly publicized. Based on this, the Tribune asserts that "much remains to be learned about" his death and the public has an interest in this information. There has been no showing, however, that the disclosure of the autopsy photographs of Scott's body is likely to advance the general public interest referenced in the Tribune's FOIA request.

Federal precedent establishes that under the Federal FOIA, Mr. Kelly's and Mr. Scott's surviving family members have a protectable privacy interest against the disclosure of post-mortem photographs of the decedents. This precedent provides persuasive guidance in interpreting the similar language in Illinois' Freedom of Information Act. *Margolis*, 180 Ill.App.3d at 1087. In the absence of a clear indication of a contrary intent on the part of the Illinois General Assembly in enacting and amending the Illinois FOIA, the analysis in *Favish* will apply to these circumstances.

The *Tribune* argues, however, that the specific language of Section 7(1)(c) is narrower than that of the Federal FOIA. Specifically, the *Tribune* argues that the term "the subject's right to privacy," in Section 7(1)(c)'s definition of unwarranted invasion of personal privacy, limits the application of that section to the privacy rights of the "subjects" of the photographs, in this case the two decedents, and that because a person's privacy rights do not survive his or her death, there can be no protectable privacy interest.¹¹

The California Court of Appeals recently addressed a similar claim in *Catsouras v. California Highway Patrol*, 181 Cal. App. 4th 856 (2010), noting the unique nature of the privacy interests attaching to post-mortem photographs:

California law clearly provides that surviving family members have no right of privacy in the context of written media discussing, or pictorial media portraying,

¹¹ In making its argument that personal privacy interests do not survive death, the *Tribune* relies exclusively on tort principles, which do not limit the rights and duties established by FOIA.

the life of a decedent. Any cause of action for invasion of privacy in that context belongs to the decedent and expires along with him or her. (*Flynn v. Higham*, (1983) 149 Cal. App. 3d 677, 197 Cal. Rptr. 145.) The publication of death images is another matter, however. How can a decedent be injured in his or her privacy by the publication of death images, which only come into being once the decedent has passed on? The dissemination of death images can only affect the living. *As cases from other jurisdictions make plain, family members have a common law privacy right in the death images of a decedent, subject to certain limitations.* (Emphasis added.)

As the Supreme Court noted in *Favish*, with respect to the Federal personal privacy exemption upon which Illinois' Section 7(1)(c) was patterned:

We have observed that the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution. See *Reporters Committee*, 489 U.S., at 762, n. 13, 109 S.Ct. 1468 (contrasting the scope of the privacy protection under FOIA with the analogous protection under the common law and the Constitution); see also *Marzen v. Department of Health and Human Servs.*, 825 F.2d 1148, 1152 (C.A.7 1987) ("[T]he privacy interest protected under FOIA extends beyond the common law"). *It would be anomalous to hold in the instant case that the statute provides even less protection than does the common law.* (Emphasis added.)

The same is true of Section 7(1)(c) of the Illinois FOIA. Section 7(1)(c) is intended to provide protection against clearly unwarranted invasions of privacy that might otherwise occur due to government action, not to diminish privacy rights that arise from other sources, such as the common law. To accept the *Tribune's* argument would result in precisely the "anomalous result" that the Court rejected in *Favish*: the deprivation of a recognized privacy interest by a statute intended to protect those interests. Accordingly, under the specific facts of this request, we reject an interpretation of the phrase "the subject's right to privacy" that would disregard the recognized privacy interests of close family members in the post-mortem photographs of their relatives' bodies.

The *Tribune* also argues that the language "would constitute a clearly unwarranted invasion of personal privacy" in Section 7(1)(c) of the Illinois FOIA sets a more restrictive standard than the Federal FOIA's "could reasonably be expected to constitute" an invasion of privacy language. Under these facts, it is unnecessary to resolve this issue because we have concluded that disclosure of the very graphic post-mortem photographs of the bodies of Mr. Kelly and Mr. Scott would constitute an *actual* unwarranted invasion of the surviving family members' privacy, not that disclosure "could" or "might" do so.

The *Tribune* also argues that because the deaths of Mr. Kelly and Mr. Scott were "newsworthy," disclosure of records concerning their deaths "can not support an invasion of privacy." While that argument may be apropos with respect to the recovery of damages for the *tort* of "invasion of privacy," it does not control the privacy interests protected by FOIA. Indeed, FOIA extends protection to information the release of which might not be actionable in tort. For example,

Section 7(1)(b) of FOIA protects from disclosure "private information," which is defined to include a number of unique identifiers. Although the improper disclosure of "private information" might not rise to the level of an invasion of privacy under tort law, FOIA nonetheless protects against it. Likewise, an "unwarranted invasion of personal privacy," for purposes of FOIA, is not limited to circumstances that would constitute the tort of "invasion of privacy" under common law principles.

Further, the requesting parties have not asserted that access to the post-mortem photographs of the bodies of Mr. Kelly and Mr. Scott would provide any information regarding the causes of death that cannot be gleaned from the documentary records. Although the deaths of Mr. Kelly and Mr. Scott may have been newsworthy, as the *Tribune* posits, the fact that the public is interested in the circumstances regarding their deaths does not open the door to any and all information in the custody of public officials, and, in this case, it does not open the door to the disclosure of graphic photographs of their bodies. The rights of the public to access documents pertaining to events must be balanced, in this case, against the rights of the surviving family members.

Findings and Conclusions

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

- 1). The Requests for Review were timely filed and otherwise comply with Section 9.5 of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to the disclosure of the records in issue.
- 2). The County has not produced to the requesters for inspection or copying the requested documents and photographs, notwithstanding the Public Access Counselor's denial of the County's request to withhold the documents (other than the post-mortem photographs of the decedents) pursuant to Section 7(1)(c) of FOIA.
- 3). Cook County has, as a matter of law, denied the FOIA requests of the *Tribune* and the *Sun-Times* by failing to furnish the requested documents (except for the post-mortem photographs, which the Public Access Counselor determined were exempt from disclosure) within the response period.
- 4). The County has failed to sustain its burden of demonstrating that the documents and reports in the Medical Examiner's files for both Mr. Kelly and Mr. Scott, together with the photographs of physical evidence relating to the death of Mr. Kelly, are exempt from disclosure under Section 7(1)(c) of FOIA.
- 5). The County has sustained its burden of demonstrating that the release of the post-mortem photographs of the bodies of Mr. Kelly and Mr. Scott would constitute a clearly unwarranted invasion of the surviving family members' personal privacy.

In conclusion, it is the opinion of the Attorney General that the County has, in violation of the requirements of the Freedom of Information Act, improperly denied the *Tribune's* and the *Sun-Times'* requests for access to and/or copies of documents (other than post-mortem photographs of the decedents) relating to the deaths of Christopher Kelly and Michael W. Scott. Accordingly, the County is directed to take immediate and appropriate action to comply with this opinion by furnishing to Mr. Fusco and Ms. Sweeney the documents, reports and photographs in the Medical Examiner's files relating to both Mr. Kelly and Mr. Scott (other than the post-mortem photographs of the decedents). The County may redact any "private information" contained in these records pursuant to Section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b)).

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/Art.III.

Sincerely,

LISA MADIGAN
ATTORNEY GENERAL

By:


Michael J. Luke
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