



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 18, 2011

Terrence Collins
Office of Legal Affairs
Chicago Police Department
3510 S. Michigan Ave.
Chicago, IL 60653

PUBLIC ACCESS OPINION No. 11-001
(Request for Review 2010 PAC 10242)

FREEDOM OF INFORMATION ACT:
Section 2.15 of FOIA Requires Disclosure of Arrest Reports.

Dear Mr. Collins:

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

Background

On September 22, 2010, Mr. Flynard Miller submitted a FOIA request to the Chicago Police Department seeking a copy of the arrest records of four named individuals and the gunshot residue test report for one of those named individuals. On September 24, 2010, the Department denied this request and stated:

The requested records are criminal history records that do not meet any of the three criteria for disclosure as outlined in 5 ILCS 140/2.15(b). The three criteria for disclosure are as follows:

- (i) court records that are public;
- (ii) records that are otherwise available; or
- (iii) records in which the requesting party is the individual identified, except as provided under Section 7(1)(d)(vi).

The Department denied the request for the gunshot residue test report, stating that the Department does not possess any records responsive to this request and that this report would likely be in the possession of the Illinois State Police Crime Lab.

In a letter dated October 5, 2010, Mr. Miller requested that the Public Access Counselor review the Department's denial of his FOIA request. This letter did not include a copy of his original FOIA request or the Department's response to that request. FOIA requires that Requests for Review include a copy of the original request and any responses from the public body (5 ILCS 140/9.5(a)), and therefore we informed Mr. Miller that we could not analyze his Request for Review until we received a copy of his original request and the Department's response. On November 22, 2010, we received these copies from Mr. Miller. Because we received his complete Request for Review within 60 days of the Department's denial of his FOIA request, Mr. Miller's Request for Review was timely filed.

On December 13, 2010, we determined that further inquiry was warranted and forwarded the Request for Review to the Department. *See* 5 ILCS 140/9.5(c). This correspondence noted that Section 2.15(b) of FOIA does not contain an exemption to FOIA's disclosure requirement. Rather, it provides only for disclosure of certain categories of criminal history records. We also asked the Department for a detailed explanation of its basis for withholding these records.

In its response, dated January 11, 2011, the Department argued that arrest reports are "criminal history records," and that "under 5 ILCS 140/2.15(b)(iii), criminal history records will only be disclosed to an individual if the requesting party is the individual identified in the record." Thus, the Department denied the request because Mr. Miller is not the individual identified in the reports that he requested. The Department stated that "an individual identified in an arrest report may later be acquitted of the crime and should be afforded the right to privacy. The public's interest in such an instance does not outweigh that of the individual."

The Department also argues that the arrest reports are exempt from disclosure under Section 7(1)(a) of FOIA, which exempts "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The Department argues that the Criminal Identification Act (20 ILCS 2630/0.01 to 2630/14) and the Illinois Uniform Conviction Information Act (20 ILCS 2635/1) prohibit disclosure of these records. Finally, the Department asserts that these records are exempt under Section 7(1)(c) of FOIA, which exempts "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information." 5 ILCS 140/7(1)(c).

Analysis

FOIA provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of [the] Act." 5 ILCS 140/3(a). Section 7 of FOIA contains exemptions to the Act's general disclosure requirement, but these exemptions are to be narrowly construed. 5 ILCS 140/1. The Act states that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or

copying” and that “[a]ny 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. The Department has not met this burden.

Arrest Records are Not Exempt Under Section 7(1)(a) of FOIA.

We first address the Department’s argument that the Criminal Identification Act and the Illinois Uniform Conviction Information Act specifically prohibit the Department from disclosing these arrest reports. The Criminal Identification Act provides: “No file or record of the Department hereby created shall be made public, except as provided in the ‘Illinois Uniform Conviction Information Act’ or other Illinois law. . . and no information of any character relating to its records shall be given or furnished by said Department to any person, bureau or institution other than as provided in this Act or other State law. . . .” 20 ILCS 2630/7. For the purposes of the Criminal Identification Act, “Department” refers to the Department of State Police. 20 ILCS 2630/1. Based on its plain language, Section 7 of the Criminal Identification Act applies to the Department of State Police, not the Chicago Police Department. Even if this provision did apply to the Department, it does not prohibit disclosure of information when other Illinois law provides for disclosure. The Freedom of Information Act is “other Illinois law” that provides for disclosure of arrest reports.

Section 2.15(a) of FOIA provides:

Arrest reports. The following chronologically maintained arrest and criminal history information maintained by State or local criminal justice agencies shall be furnished as soon as practical, but in no event later than 72 hours after the arrest, notwithstanding the time limits otherwise provided for in Section 3 of this Act: (i) information that identifies the individual, including the name, age, address, and photograph, when and if available; (ii) information detailing any charges relating to the arrest; (iii) the time and location of the arrest; (iv) the name of the investigating or arresting law enforcement agency; (v) if the individual is incarcerated, the amount of any bail or bond; and (vi) if the individual is incarcerated, the time and date that the individual was received into, discharged from, or transferred from the arresting agency’s custody. 5 ILCS 140/2.15(a).

Because this section of FOIA requires disclosure of specific arrest and criminal history information, Section 7 of the Criminal Identification Act does not prohibit disclosure of this information. While Section 13(c) of the Criminal Identification Act provides that sealed or impounded records are exempt from disclosure under FOIA (20 ILCS 2630/13(c)), the Department has not asserted that these records are sealed or impounded. Nothing else in the Criminal Identification Act prohibits local law enforcement agencies from disclosing records.

We could find nothing in the Illinois Uniform Conviction Information Act (the Act) that prohibits the Department from disclosing arrest records, and the Department has not identified any specific section of the Act that it claims applies here. Rather, Section 23(C) of the Act provides that “[n]othing in this Act shall be construed as restricting or prohibiting. . . the

dissemination of local criminal history record information maintained by criminal justice agencies on behalf of units of local government to members of the general public requesting such information.” 20 ILCS 2635/23(C). Thus, the Act makes clear that it does not prohibit the Department from providing arrest records to members of the general public. Because neither the Criminal Identification Act nor the Illinois Uniform Conviction Act specifically prohibit the Department from disclosing arrest records, and the Department has not identified any other statute or rule that prohibits disclosure of arrest records, the Department has failed to establish that these arrest records are exempt from disclosure under Section 7(1)(a) of FOIA.

Section 2.15 of FOIA requires disclosure of arrest records.

The Department further asserts that Section 2.15(b) allows the Department to withhold the arrest records that Mr. Miller requested. Section 2.15(b) states:

- (b) Criminal history records. The following documents maintained by a public body pertaining to criminal history record information are public records subject to inspection and copying by the public pursuant to this Act: (i) court records that are public; (ii) records that are otherwise available under State or local law; and (iii) records in which the requesting party is the individual identified, except as provided under Section 7(1)(d)(vi). 5 ILCS 140/2.15(b).

The Department asserts that criminal history records, including arrest reports, may *only* be released if they fit into one of the categories in subsections (i), (ii) and (iii) of this section. Section 2.15(b), however, does not contain the word “only” or any other language limiting the release of criminal history records. Instead, the plain language of this section mandates disclosure of records in specific circumstances. Nothing in this section allows public bodies to withhold information. When the language of a statute is clear and unambiguous, it must be applied as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). Based on its plain language, Section 2.15(b) does not allow the Department to withhold the requested arrest records.

Arrest records are not exempt under Section 7(1)(c) of FOIA.

Finally, the Department asserts that all of the requested arrest records are exempt under Section 7(1)(c) of FOIA, which exempts from inspection and copying “[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information.” 5 ILCS 140/7(1)(c). The exemption defines “unwarranted invasion of personal privacy” as the “disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject’s right to privacy outweighs any legitimate public interest in obtaining the information.” *Id.*

The fact of an arrest and the circumstances surrounding an arrest may be highly personal to the individuals involved. Section 2.15(a) of FOIA, however, requires State and local criminal justice agencies to disclose certain arrest and criminal history information notwithstanding such concerns. This Section of FOIA clearly reflects the legislature’s recognition of a public interest

in disclosure of information regarding arrests. This strong public interest outweighs the individuals' right to privacy in this information. Because the Department has not met its burden to establish that the privacy interests of these arrested individuals outweigh the public interest in disclosure, the types of information listed in Section 2.15(a) of FOIA are not exempt from disclosure under Section 7(1)(c) of FOIA and must be released.

The Department's Denial of Mr. Miller's Request for a Gunshot Residue Test Report was Permissible.

In response to Mr. Miller's request for a gunshot residue test report, the Department stated that it does not possess such a report. FOIA does not require public bodies to create or maintain records that they would not otherwise create or maintain. *See* 5 ILCS 140/1. As a result, the Department's denial of the request for the gunshot residue test report was clearly permissible.

Findings and Conclusions

- 1) Mr. Miller's Request for Review was timely filed and otherwise complies with Section 9.5(a) of FOIA (5 ILCS 140/9.5(a)). This Office received Mr. Miller's complete Request for Review on November 22, 2010, and properly extended the deadline in which to issue a binding opinion by 21 business days until February 23, 2011. Therefore, the Attorney General may properly issue a binding opinion with respect to the disclosure of the requested arrest records.
- 2) Neither the Criminal Identification Act nor the Illinois Uniform Conviction Information Act specifically prohibits the Department from releasing the requested arrest records. Therefore, the Department has failed to prove by clear and convincing evidence that the arrest records are exempt from disclosure under Section 7(1)(a) of FOIA.
- 3) Section 2.15(a) of FOIA requires State and local criminal justice agencies to release certain types of information related to arrests. Section 2.15(b) does not allow public bodies to withhold arrest records.
- 4) Arrest records are not exempt from disclosure under Section 7(1)(c) of FOIA.

In conclusion, it is the opinion of the Attorney General that the Department has violated FOIA by improperly denying Mr. Miller's request for arrest records. Accordingly, the Department must provide to Mr. Miller copies of the requested arrest records without redacting the information that Section 2.15(a) of FOIA requires be released. The Department may redact other private information in those records that is exempt under Section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b)). Under Section 9.5(f) of FOIA, the Department must either immediately comply with this binding opinion or initiate administrative review under Section 11.5 of FOIA.

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 4/3-101 *et seq.* An aggrieved party may obtain judicial review of the decision by filing a complaint for

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administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of the decision naming the Attorney General of Illinois and Mr. Flynard Miller as defendants. *See* 5 ILCS 140/11.5.

Sincerely,

LISA MADIGAN
ATTORNEY GENERAL

By:

A handwritten signature in black ink, appearing to read "Michael J. Luke", written in a cursive style.

Michael J. Luke
Senior Assistant Attorney General
Chief, Public Access and Opinions Division

cc: Flynard Miller R25894
P.O. Box 112
Joliet, IL 60434