



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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October 15, 2014

Via electronic mail

Mr. Jake Griffin

Senior Writer

Daily Herald

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Ms. Therese Wilde

Village Clerk / FOIA Officer

Village of Carpentersville

1200 L.W. Besinger Drive

Carpentersville, Illinois 60110

RE: FOIA Request for Review – 2014 PAC 31046

Dear Mr. Griffin and Ms. Wilde:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f)(West 2012)). For the reasons that follow, the Public Access Bureau concludes that the Village of Carpentersville (Village) improperly denied, in part, Mr. Jake Griffin's August 25, 2014, FOIA request.

On that date, Mr. Griffin, on behalf of the *Daily Herald*, submitted a FOIA request to the Village seeking copies of records pertaining to the arrest of Mr. Joshua Paul. On August 28, 2014, the Village denied Mr. Griffin's request in its entirety citing sections 7(1)(b), 7(1)(c), 7(1)(d)(iii), 7(1)(d)(vi), and 7(1)(d)(vii) of FOIA (5 ILCS 140/7(1)(b), (1)(c), (1)(d)(iii), (1)(d)(vi), (1)(d)(vii) (West 2013 Supp.), as amended by Public Act 98-965, effective July 3, 2014), as its basis. In his Request for Review, Mr. Griffin disputes the Village's denial of his FOIA request.

On September 5, 2014, this office forwarded a copy of the Request for Review to the Village and asked it to provide a detailed factual basis for the asserted exemptions. On

Mr. Jake Griffin
Ms. Therese Wilde
October 15, 2014
Page 2

September 19, 2014, the Village responded that the records in question relate to the August 17, 2014, arrest of Mr. Paul by Village police officers; Mr. Paul later died after being transported to a hospital. The Village indicated that the Kane County State's Attorney's Office and the Illinois State Police (ISP) are investigating the arrest, and that ISP has directed the Village not to release any records until the investigation concludes. The response further stated:

Until the State Police investigation is complete, public release of the Requested Records is likely to impede the investigation and deprive the subjects of the investigation of fair and impartial proceedings. [Section 7(1)(d)(iii) of FOIA], by itself, authorizes the Village in its sound discretion to withhold the Requested Records. * * *

Recent events that involved injuries to persons in police custody, and the general public's response to those events, have established that personal safety can be and has been put at risk by premature or otherwise poor handling of sensitive information. The matter at hand could become serious matter of public safety, and the Village and the law enforcement agencies charged with the investigation of the matter have exercised their discretion reasonably – and entirely within the scope of [section 7(1)(d)(vi) of FOIA] – to impose a temporary delay in the release of the sensitive Requested Records until the State Police investigation is concluded.¹

In addition, the Village asserted that section 7(1)(b) "applies to the private information of the persons involved in the underlying arrest[,]" and that the Village properly exercised its discretion under Section 7(1)(c) to protect the privacy of Mr. Paul's family, [whose] right clearly outweighs any legitimate interest in the public in obtaining the information at this time."²

DETERMINATION

All public records in the possession or custody of a public body are "presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2012); *see also Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2012).

¹Letter from Therese Wilde, Freedom of Information Officer, Village of Carpentersville, to Dushyanth Reddivari, Esq., Assistant Attorney General, Public Access Bureau (September 19, 2014).

²Letter from Therese Wilde, Freedom of Information Officer, Village of Carpentersville, to Dushyanth Reddivari, Esq., Assistant Attorney General, Public Access Bureau (September 19, 2014).

Mr. Jake Griffin
Ms. Therese Wilde
October 15, 2014
Page 3

Section 7(1)(c)

Section 7(1)(c) exempts from inspection and copying "[p]ersonal information contained in 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." 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 interest in obtaining the information."

At common law, a person's right of privacy does not ordinarily survive beyond his or her death. *See Trent v. Office of Coroner of Peoria County*, 349 Ill. App. 3d 276, 282 (3rd Dist. 2004), Holdridge, P.J., *specially concurring*. However, a number of federal and State courts, as well as the Attorney General (*see* Ill. Att'y Gen. Pub. Acc. Op. No. 10-003, issued October 22, 2010), have concluded that close family members of a decedent possess a separate and distinct right of privacy in the disclosure of sensitive information concerning the decedent. For example, the United States Supreme Court has held that family members have a protectable privacy interest in the disclosure of "graphic details surrounding their relative's death" under a provision of the federal Freedom of Information Act (*see* 5 U.S.C. § 552 (b)(7)(C) (West 2012)) which contains language similar to that of section 7(1)(c) of the Illinois FOIA.³ *National Archives and Records Administration v. Favish*, 541 U.S. 157, 171, 124 S. Ct. 1570, 1580 (2004). Similarly, in *Katz v. National Archives & Records Administration*, 862 F.Supp. 476, 485-486 (D.D.C., 1992), the court held that the privacy rights of family members justified withholding President Kennedy's autopsy records under Exemption 6 of the federal FOIA (5 U.S.C. § 552 (b)(6) (1988)), which also contains language similar to that of section 7(1)(c) of the Illinois FOIA.⁴

The resolution of a personal privacy exemption claim requires the balancing of the public's interest in disclosure of specific information against the individual's (or in this case, his family's) interest in privacy. *See Gibson v. Illinois State Board of Education*, 289 Ill. App. 3d 12, 20-21 (1st Dist. 1997). Therefore, to determine whether section 7(1)(c) of FOIA exempts from disclosure the names of persons whose deaths were related to a particular cause, the interests of the public in accessing that information must be balanced against the family members' interests in limiting public dissemination of the information. This determination is

³Exemption 7(C) of the Federal FOIA applies to "records or information compiled for law enforcement purposes, *but only to the extent that the production of such law enforcement records or information * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy*[" (Emphasis added).

⁴Exemption 6 of the federal FOIA exempts from disclosure "personnel and medical files and similar files *the disclosure of which would constitute a clearly unwarranted invasion of personal privacy*[" (Emphasis added).

Mr. Jake Griffin
Ms. Therese Wilde
October 15, 2014
Page 4

made considering and weighing four factors: "(1) the [requestor's] interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information." *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 1, 13 (1st Dist. 2010). The General Assembly's use of the language "*clearly unwarranted invasion of personal privacy*" evinces a "stricter standard to claim exemption" which the government agency possessing the records bears the burden of sustaining. (Emphasis in original.) *Schessler v. Department of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994).

With respect to the first two factors, Mr. Griffin seeks copies of the arrest records in order to report information to the public regarding the death of an individual following his arrest. Furthermore, Mr. Griffin's interest in disclosure of the records to disseminate information to public is aligned with the public's interest in obtaining information regarding the manner in which law enforcement officials perform their public duties; specifically, in monitoring the use of force by police officers. There is a strong public interest in information that sheds light on the manner in which law enforcement officials perform their public duties. Ill. Att'y Gen. Pub. Acc. Op. No. 12-006, issued March 16, 2012, at 7; *see also Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997) (ordering disclosure of documents pertaining to allegations of police misconduct in part because "[p]erformance of police duties and investigations of their performance is a matter of great public importance").

The third factor to be considered is the degree of invasion of personal privacy of the decedents' relatives if the arrest records are disclosed. The Village has not articulated how disclosing the arrest report to the media could result in an unwarranted invasion of the personal privacy rights of the decedent's family members. Further, the FOIA request seeks only arrest report information which, based on this office's review, does not contain any graphic details or images of the decedent. With respect to the final factor, the Village's police department arrested Mr. Paul and compiled records concerning his arrest. Therefore, there are no other obvious means by which Mr. Griffin can obtain the information contained in the arrest records.

Based on our analysis of the four factors set out in *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, this office concludes that there is a significant public interest in the disclosure of the arrest records which clearly outweighs the privacy interests of family members. The requested information relates to the manner in which law enforcement officials performed their public duties, specifically, in monitoring the use of force by police officers. Moreover, the Village has not provided any evidence to support its assertion that the disclosure of the arrest records would result in an unwarranted invasion of surviving family members' right to privacy. We note that the records in question do not include autopsy reports, post-mortem photos of the decedent, or other graphic images or details. Accordingly, the Village has not sustained its burden of demonstrating that the records are exempt from disclosure pursuant to section 7(1)(c) of FOIA.

Mr. Jake Griffin
Ms. Therese Wilde
October 15, 2014
Page 5

Section 7(1)(d)(iii)

The Village also denied the request under section 7(1)(d)(iii), which exempts from inspection and copying records in the possession of any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure of the records would "create a *substantial likelihood* that a person will be deprived of a fair trial or an impartial hearing." (Emphasis added). In *Day v. City of Chicago*, 388 Ill. App. 3d 70, 76 (1st. Dist. 2009), the Illinois Appellate Court held that the mere existence of an ongoing investigation did not demonstrate that records were exempt from disclosure under a prior version of section 7(1)(d)(iii):⁵ "Simply saying there is an 'ongoing criminal investigation because the case has not been cleared,' with little additional explanation, is not 'objective indicia' sufficient to show the ongoing investigation exemption applies." *Day v. City of Chicago*, 388 Ill. App. 3d at 76, quoting *Illinois Education Association v. Illinois State Board of Education*, 204 Ill.2d 456, 470 (2003). The Village has not provided any explanation or information from which this office could conclude that disclosure of the records to Mr. Griffin would impede a fair trial or impartial hearing, or whose right to a fair trial or impartial hearing they are protecting, since the subject of the arrest is now deceased. Accordingly, we conclude that the Village has not met its burden of proving by clear and convincing evidence that the requested records are exempt under section 7(1)(d)(iii) of FOIA.

Section 7(1)(d)(vi)

Section 7(1)(d)(vi) exempts from inspection and copying information that would "endanger the life or physical safety of law enforcement personnel or any other person." Unquestionably, there is a strong public interest in protecting the safety of law enforcement officers. The Village's response to this office alluded to violent protests in other parts of the country following incidents in which individuals were injured by police officers. However, the Village has failed to demonstrate that any of the officers involved in Mr. Paul's arrest have received threats, or that they or any other individuals are likely to be endangered by disclosure of records concerning Mr. Paul's arrest. Accordingly, this office concludes that section 7(1)(d)(vi) of FOIA does not exempt the Village from disclosing the police records pertaining to an arrest in which the subject subsequently died.

Section 7(1)(d)(vii)

Finally, the Village denied the request under section 7(1)(d)(vii), which exempts from inspection and copying records in the possession of any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure of the records would "obstruct an ongoing criminal investigation by the agency that is the recipient of the request."

⁵ ILCS 140/7(1)(c)(viii) (West 2006).

Mr. Jake Griffin
Ms. Therese Wilde
October 15, 2014
Page 6

(Emphasis added). Although the Village claims that it was instructed by ISP to withhold the records requested, it has not provided any explanation or information from which this office could conclude that disclosure of the records to Mr. Griffin would obstruct an ongoing criminal investigation by the Village. "The classification of information as 'law enforcement' or 'investigatory' does not necessarily foreclose access unless it can be shown, in a particular case, that disclosure would interfere with law enforcement and would, therefore, not be in the public interest." *Baudin v. City of Crystal Lake*, 192 Ill. App. 3d 530, 536 (2nd Dist. 1989). Accordingly, we conclude that the Village has not met its burden of proving by clear and convincing evidence that the requested records are exempt under section 7(1)(d)(vii) of FOIA.

Section 7(1)(b)

Section 7(1)(b) exempts from disclosure "[p]rivate information, unless disclosure is required by another provision of this Act, a State or federal law or a court order." Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2012)) defines "private information" as:

[U]nique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.

The Village may properly redact private information from the requested records under section 7(1)(b).

Accordingly, we request that the Village provide Mr. Griffin with copies of the arrest records in question, subject only to permissible redactions for "private information" under section 7(1)(b) of FOIA.

The Public Access Counselor has determined that resolution of this matter does

Mr. Jake Griffin
Ms. Therese Wilde
October 15, 2014
Page 7

not require the issuance of a binding opinion. If you have questions, you may contact me at (312) 814-5201 or the Chicago address listed below. This correspondence shall serve to close the matter.

Very truly yours,



DUSHYANTH REDDIVARI
Assistant Attorney General
Public Access Bureau

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