



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

August 23, 2010

Ms. Heather Kruse
City of Des Plaines
City Attorney's Office
1420 Miner Street
Des Plaines, IL 60016

RE: FOIA Preauthorization Requests 2010 PAC 9091, 9164

Dear Ms. Kruse:

The Office of the Public Access Counselor has received and reviewed the written notice from the City of Des Plaines of its intention to deny, in part, requests made by Dynamic Safety LLC and Wiedner & McAuliffe, Ltd. pursuant to the Freedom of Information Act for photographs and other records relating to a tragic crash between a Union Pacific train and a vehicle on August 4, 2010 that which resulted in the death of [REDACTED]. The City intends to disclose most of the requested records, including some photographs, but seeks to withhold 18 photographs pursuant to Section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c)), on the basis that disclosure of these photographs would constitute a clearly unwarranted invasion of personal privacy. For purposes of FOIA, an "[u]nwarranted invasion of personal privacy means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs the legitimate public interest in obtaining the information." 5 ILCS 140/7(1)(c).

In these circumstances, the privacy interests at stake are those of the family members of [REDACTED]. Although Illinois reviewing courts have not yet addressed the issue of whether a decedent's family members have a personal privacy interest in documents relating to the decedent's death that may be considered in determining whether disclosure of such information would constitute a clearly unwarranted invasion of personal privacy under Section 7(1)(c) of FOIA, cases decided under the Federal FOIA and freedom of information laws from other states do recognize that family members have a privacy interest in records relating to a close relative's death, including death-scene images. See *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004) (a decedent's surviving family members have a personal privacy interest under Federal FOIA in death-scene images of close relatives); *Katz v. National Archives & Records Administration*, 862 F. Supp. 476 (D.D.C. 1994) *aff'd* 68 F.3d 1438 (D.C. Cir. 1995) (recognizing Kennedy family's privacy interests under the Federal FOIA in autopsy photographs

of President Kennedy); *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (recognizing the privacy interest of a murder victim's mother in crime scene photographs).

The language of section 7(1)(c) and the legislative debates regarding Public Act 96-542, which amended FOIA effective January 1, 2010, contain no indication that the General Assembly intended to reject the established case law recognizing the privacy interests of surviving close relatives of a decedent. Accordingly, those interests should be considered in determining whether the release of the photographs in question constitutes a clearly unwarranted invasion of personal privacy.

Under Section 7(1)(c), the privacy interests of surviving family members must be balanced against the legitimate public interest in obtaining the information. 5 ILCS 140/7(1)(c). We have examined the 18 photographs that the City intends to withhold. These photographs include morbid images of [REDACTED] after the crash. We have determined that the privacy interests of surviving family members of [REDACTED] outweigh the public interest in obtaining disclosure of these photographs. Therefore, the City's request to assert the exemption under Section 7(1)(c) with respect to the 18 photographs in question is approved and further inquiry into this matter is not warranted.

If you have any questions, please feel free to contact me at 312-814-2770. This correspondence will serve to close the matter.

Sincerely,

Cara Smith
Public Access Counselor

By:

[REDACTED]
John Schmidt
Assistant Attorney General

cc: Kirstin A. Serdar
Dynamic Safety, LLC
1400 Ensall Rd.
Lake Zurich, IL 60047

Timothy McMahan
Wiedner & McAuliffe, Ltd.
1 N. Franklin St.
19th Floor
Chicago, IL 60606