

FOIA Guide for Law Enforcement

This guide is intended to assist law enforcement agencies in responding to Freedom of Information Act (FOIA) requests by outlining common law enforcement issues and providing references to relevant statutes, court cases, and determinations issued by the Attorney General's Public Access Counselor (PAC).

Please note that these are general guidelines only. Each Request for Review filed with the PAC is evaluated on its own facts. In addition, many scenarios have not been addressed by a reviewing court or the PAC to date. These guidelines are also not an exhaustive discussion of all the exemptions available under FOIA. Additional information is provided in the PAC's electronic training curriculum, which FOIA officers are required to complete each year but which is open to everyone. You are strongly encouraged to discuss how FOIA applies to the facts of any specific situation with your legal counsel.

This guide will begin with general information related to gathering records and responding to requests, including discussions of commonly requested law enforcement records, new legislation, and court decisions. Explanations and examples concerning specific exemptions follow, as well as information concerning the PAC Request for Review process.

General Guidelines

Presumption of Openness

Under FOIA, "[a]ll records in the custody or possession of a public body are presumed to be open to inspection 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." (Emphasis added.) 5 ILCS 140/1.2 (West 2016). Perhaps the most common error the PAC encounters in reviewing FOIA denials is the failure of public bodies to explain why and how the asserted exemptions apply to the records that they withhold.

Section 7(1) of FOIA (5 ILCS 140/7(1) (West 2016)) provides that if a public record contains information that is exempt from disclosure, but also contains information that is not exempt from disclosure, the public body may elect to redact the exempt information, but must make the remaining information available for inspection and copying. In other words, unless a record is exempt from disclosure in its entirety, a public body is allowed to redact only the portion of the record that is exempt and must disclose the rest of the record.

Section 2.15 of FOIA - Arrest Reports

Under section 2.15(a) of FOIA (5 ILCS 140/2.15(a) (West 2016)), criminal justice agencies must make arrest reports public no later than 72 hours after each arrest. The information required to be released is:

- Information that identifies the individual arrested, including name, age, address, and photograph, when and if available;

- Information detailing any charges relating to the arrest;
- The time and location of the arrest;
- The name of the investigating or arresting law enforcement agency;
- If the individual is incarcerated, the amount of any bail or bond; and
- 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.

This information must be released within 72 hours **regardless of whether it is requested pursuant to FOIA**, except that the time and location of the arrest, the name of the investigating or arresting law enforcement agency, the amount of any bail or bond, and the time and date that the individual was received into, discharged from, or transferred from the arresting agency's custody "may be withheld if it is determined that disclosure would: (i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement agency; (ii) endanger the life or physical safety of law enforcement or correctional personnel or any other person; or (iii) compromise the security of any correctional facility." 5 ILCS 140/2.15(c) (West 2016).

"The requirements of section 2.15(a) of FOIA demonstrate that the General Assembly has recognized a strong public interest in the disclosure of information concerning arrests that outweighs an arrestee's right to privacy." Ill. Att'y Gen. Pub. Acc. Op. No. 12-006, issued March 16, 2012, at 6.

Under section 2.15(b) of FOIA (5 ILCS 140/2.15(b) (West 2016)), a public body must disclose criminal history records that it maintains if the records are: (i) court records that are public; (ii) records that are otherwise available under State or local law; or (iii) records in which the requesting party is the individual identified, unless disclosure would endanger the life or physical safety of law enforcement personnel or any other person.

9-1-1 Calls

9-1-1 emergency call recordings and transcripts are public records that should be released, subject to any redactions permitted under section 7 of FOIA, including sections 7(1)(b), 7(1)(c), and 7(1)(d)(iv) (5 ILCS 140/7(1)(b), (1)(c), (1)(d)(iv) (West 2016)), which are discussed below.

Dashboard Camera Video Recordings

Dashboard camera video recordings are public records that should be released, subject to any redactions permitted under section 7 of FOIA. Body camera video footage is subject to separate procedures as discussed below.

Section 3(g) of FOIA - Unduly Burdensome Requests

Section 3(g) of FOIA (5 ILCS 140/3(g) (West 2016)) provides that "[r]equests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information."

Section 3(g) has specific procedural requirements that must be followed in order to properly deny a request as unduly burdensome:

- Opportunity to Narrow: A public body must extend to the requester an opportunity to confer with it in an attempt to reduce the request to manageable proportions. *See Heinrich v. White*, 2012 IL App (2d) 110564, ¶21, 975 N.E.2d 726, 732-33 (2012) (a public body waives the ability to deny a request under section 3(g) when it fails to comply with the threshold requirement of offering the opportunity to narrow the request to manageable proportions).
- Timely Response Required: A public body that fails to respond or extend the time for response within 5 business days after receipt of the request, as required by section 3(d) of FOIA, may not treat the request as unduly burdensome under section 3(g).

Case example of request that was not unduly burdensome: In *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 3d 1 (1st Dist. 2010), the Illinois Appellate Court analyzed whether a request for information concerning a study on eyewitness identification procedures imposed an undue burden on the Chicago Police Department (CPD). Counsel for CPD estimated that redacting the responsive records would take approximately 150 hours, equating to 20 personnel days. *National Ass'n*, 399 Ill. App. 3d at 14. The court found that there was a vital public interest in examining eyewitness identification procedures. *National Ass'n*, 399 Ill. App. 3d at 15. Moreover, the court found that the request was "specifically target[ed]" and that "the information requested [was] essential to a meaningful review of" the study on eyewitness identification procedures, in contrast to requests which would necessitate extensive review of extraneous materials. *See National Ass'n*, 399 Ill. App. 3d at 17 ("A request that is overly broad and requires the public body to locate, review, redact and arrange for inspection of a vast quantity of material that is largely unnecessary to the appellants' purpose constitutes an undue burden."). The court concluded that the burden of identifying and redacting the responsive records did not outweigh the vital public interest in disclosure of the records. *National Ass'n*, 399 Ill. App. 3d at 17.

Case example of unduly burdensome request: In *Shehadeh v. Madigan*, 2013 IL App (4th) 120742, 996 N.E.2d 1243 (2013), the Illinois Appellate Court also analyzed whether a FOIA request posed an undue burden. The requester sought any and all records that could be used for guidance on complying with FOIA and the Attorney General's Office responded that the request was unduly burdensome as written because its search identified 9,200 hits. *Shehadeh*, 2013 IL App (4th) 120742, ¶5, 996 N.E.2d at 1245. The Attorney General's Office invited the requester to narrow his request to more manageable proportions, but he declined. *Shehadeh*,

2013 IL App (4th) 120742, ¶¶5-6, 996 N.E.2d at 1245. Upon review, the court found the request to be "patently broad on its face, as it sought *any* publication or record that would or could be used by *any* public body to comply with Illinois's FOIA provisions." (Emphasis in original.) *Shehadeh*, 2013 IL App (4th) 120742, ¶28, 996 N.E.2d at 1248. Additionally, the court found that the requester failed to identify a public interest that outweighed the burden of compliance on the Attorney General's Office. *Shehadeh*, 2013 IL App (4th) 120742, ¶35, 996 N.E.2d at 1249. Thus, the court concluded that the Attorney General's Office did not violate FOIA by denying the request as unduly burdensome. *Shehadeh*, 2013 IL App (4th) 120742, ¶35, 996 N.E.2d at 1249.

Costs and Fees under FOIA

FOIA specifies the fees that a public body may charge for paper copies:

Except when a fee is otherwise fixed by statute, each public body may charge fees reasonably calculated to reimburse its actual cost for reproducing and certifying public records and for the use, by any person, of the equipment of the public body to copy records. No fees shall be charged for the first 50 pages of black and white, letter or legal sized copies requested by the requester. The fee for black and white, letter or legal sized copies shall not exceed 15 cents per page. 5 ILCS 140/6(b) (West 2016).

When the responsive records exceed 50 pages and the requester cannot or will not pay for the additional pages, the first 50 pages must be released at no cost but the remaining pages may be withheld.

A public body must produce records that are maintained in an electronic format in the electronic format specified by the requester, if it is feasible to do so. For instance, if the requester specifies that information be produced in an Excel spreadsheet format, a public body must furnish the information in that format if the information may be imported into that electronic format. If production in the requested electronic format is not feasible, then the public body must disclose the records in the electronic format in which they are maintained or in paper format, at the option of the requester. A public body may not charge for electronic copies, except for the actual cost of the recording medium. 5 ILCS 140/6(a) (West 2016). FOIA does not require a public body that maintains a record only in paper format to convert the record into an electronic format in response to a request.

Traffic Accident Reports: Because fees for traffic accident reports are fixed by statute (*see* Illinois Vehicle Code, 625 ILCS 5/11-416 (West 2016)), a law enforcement agency may charge a fee of up to \$5 for a copy of an accident report, and up to \$20 in the case of an accident investigated by an accident reconstruction officer or accident reconstruction team.

Voluminous Requests: A voluminous request is defined as "a request that: (i) includes more than 5 individual requests for more than 5 different categories of records or a combination of individual requests that total requests for more than 5 different categories of

records in a period of 20 business days; or (ii) requires the compilation of more than 500 letter or legal-sized pages of public records unless a single requested record exceeds 500 pages." Section 6(a-5) of FOIA (5 ILCS 140/6(a-5) (West 2016)) provides an exception to the general rule that a public body may only charge the actual cost of the recording medium for furnishing copies of records in an electronic format, and fixes fees that are applicable to voluminous requests:

Records not in PDF:

2 or fewer megabytes:	Up to \$20
2+ to 4 megabytes:	Up to \$40
4+ megabytes:	Up to \$100

PDF Records:

80 or fewer megabytes:	Up to \$20
80+ to 160 megabytes:	Up to \$40
160+ megabytes:	Up to \$100

For additional information about voluminous requests, see sections 2(h) and 3.6 of FOIA (5 ILCS 140/2(h) (West 2016) and 5 ILCS 140/3.6 (West 2016)).

Commercial requests: Under section 6(f) of FOIA (5 ILCS 140/6(f) (West 2016)), a public body may charge for labor costs for commercial requests of up to \$10 per hour (after the first 8 hours) for the time spent searching for and retrieving a requested record *or* examining the record for necessary redactions. A public body can also charge for the actual cost of retrieval of records stored at an off-site storage site managed by a third-party storage company under contract with the public body. This section allows a public body to charge for reviewing the records for redactions, which often is the most time-consuming process of a response.

What is "Creation of a New Record"?

FOIA "is not designed to compel the compilation of data the governmental body does not ordinarily keep" and "does not compel the agency to provide answers to questions posed by the inquirer." *Kenyon v. Garrels*, 184 Ill. App. 3d 28, 32 (4th Dist. 1989). However, a public body should carefully analyze whether a FOIA request truly requires the creation of a new record or merely seeks information already maintained in the ordinary course of business. Simply compiling information that a public body maintains is not creating a new record.

Case example of creating a new record: In *Chicago Tribune Co. v. Dep't of Financial and Professional Regulation*, 2014 IL App (4th) 130427, 8 N.E.3d 11 (2014), the Illinois Appellate Court analyzed how a FOIA request for "the *number* of claims or informal complaints filed against * * * identified physicians" had to be handled. (Emphasis in original.) *Chicago Tribune Co.*, 2014 IL App (4th) 130427, ¶4, 8 N.E.3d at 13. The court noted that FOIA does not obligate public bodies to answer questions or generate new records, and that "[a] request to inspect or copy must reasonably identify a public record and not general data, information, or statistics." *Chicago Tribune Co.*, 2014 IL App (4th) 130427, ¶33, 8 N.E.3d at 19.

Because the request would have required the public body to manually review its paper files and tally the number of initial claims made against the identified physicians rather than provide existing responsive records (the public body did not possess a record reflecting the number of claims), the court held that it was a general inquiry question, to which FOIA did not require a response. *Chicago Tribune Co.*, 2014 IL App (4th) 130427, ¶36, 8 N.E.3d at 20.

Case example of not creating a new record: In *Hites v. Waubonsee Community College*, 2016 IL App (2d) 150836, 56 N.E.3d 1049 (2016), the Illinois Appellate Court analyzed a series of requests for information contained in databases. The court first held that the data in the databases was subject to FOIA: "the database is akin to a file cabinet, and the data that populates the database is like the files. FOIA permits a proper request for a single file, some of the files, or all of the files." *Hites*, 2016 IL App (2d) 150836, ¶71, 56 N.E.3d at 1064-65. The court further held that requests for existing data meeting specified parameters (zip codes of all persons taking GED classes at the Aurora campus in the fall of 2011) did not involve the creation of new records because they only required searching and sorting the information that was already compiled in the databases. *Hites*, 2016 IL App (2d) 150836, ¶¶77-81, 56 N.E.3d at 1066-67.

In summary, FOIA does not require public bodies to create entirely new records consisting of information that is not in its possession or custody, but a public body may be required to compile and re-organize information that it already maintains in the ordinary course of business. See *Hamer v. Lentz*, 132 Ill. 2d 49, 54-57 (1989) (public body required to create a computer program if necessary to disclose requested information because the information was non-exempt and maintained in the ordinary course of business; compiling/reorganizing existing information does not equal creation of a new record).

E-mails and Other Communications Exchanged on Private Accounts, Personal Cellphones, and Other Devices

In a binding opinion (Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, issued August 9, 2016), the Attorney General concluded that e-mails pertaining to the transaction of public business are public records even when sent to or from private e-mail accounts. Likewise, text messages and other communications pertaining to the transaction of public business that are generated from or accessed on a public employee's personal cellphone are public records, as are portions of bills for personal cellphones that document the occurrence of such communications. Ill. Att'y Gen. PAC Req. Rev. Ltr. 41092, issued July 13, 2016, at 8. Conversely, "[c]ellphone communications and portions of bills *concerning personal matters that are unrelated to public business* are not subject to the requirements of FOIA." (Emphasis added.) Ill. Att'y Gen. PAC Req. Rev. Ltr. 41092, at 8.

When a request seeks e-mails or other messages from public employees' private accounts or personal electronic devices, the public body may be able to fulfill its obligations under FOIA by asking the applicable personnel to search their e-mail accounts or devices in good faith and then provide the public body's FOIA officer with any e-mails or other messages that they locate. See Ill. Att'y Gen. Pub. Acc. Op. No. 16-006, at 10-11.

Importantly, the exemptions in sections 7 and 7.5 of FOIA (5 ILCS 140/7, 7.5 (West 2016)) are equally applicable to communications pertaining to public business that are

sent to or from a public employee's or official's private e-mail account or personal electronic device. In other words, a public body is not required to disclose such records in their entirety because they were exchanged on private accounts or personal electronic devices. As with records exchanged on a public body's e-mail accounts and electronic devices, information that is exempt from disclosure under FOIA may be properly redacted or withheld.

Section 7 Exemptions

In general, the use of exemptions to withhold or redact information is permissive rather than mandatory under FOIA. *See Roehrborn v. Lambert*, 277 Ill. App. 3d 181, 186 (1st Dist. 1995) ("The purpose of the Act is to ensure disclosure of information, not to protect information from disclosure. * * * The exemptions cannot be read to prohibit dissemination of such information, but rather are simply cases where disclosure is not required."). "[T]he exceptions to disclosure set forth in the FOIA are to be read narrowly so as not to defeat the FOIA's intended purpose." *Southern Illinoisan v. Illinois Dep't of Public Health*, 218 Ill. 2d 390, 416 (2006).

Section 7(1)(a) Exemption (Information Specifically Prohibited from Disclosure by Federal or State Laws, Rules, or Regulations)

Section 7(1)(a) of FOIA allows a public body to withhold "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." 5 ILCS 140/7(1)(a) (West 2016). Section 7(1)(a) is the exemption to cite when a law or rule outside of FOIA prohibits the disclosure of a record.

Clear Prohibition on Disclosure in Statute or Rules Required: The General Assembly "has authorized exemptions to the FOIA's expansive disclosure policy when a given disclosure is not just prohibited 'by federal or State law or rules and regulations adopted under federal or State law' but *specifically* so prohibited." (Emphasis in original.) *Better Government Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 814 (4th Dist. 2008); *see also Better Government Ass'n v. Zaruba*, 2014 IL App (2d) 140071, ¶21, 21 N.E.3d 516, 522 (2014) (records exempt "where the plain language contained in a State or federal statute reveals that public access to the records was not intended." (quoting *Kibort v. Westrom*, 371 Ill. App. 3d 247, 256 (2d Dist. 2007))).

Prohibition on Disclosure Must be Found in Statute or Rules, not Common Law: *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 37779, issued April 14, 2016, at 3 (rejecting assertion of common law investigatory privilege under section 7(1)(a)).

Child Death Review Team Act (20 ILCS 515/1 et seq. (West 2016))

Section 30(b) of the Child Death Review Team Act (20 ILCS 515/30(b) (West 2016)) exempts from disclosure records and information provided to a child death review team. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 31313, issued October 28, 2014, at 2.

Criminal Code of 2012 and Code of Criminal Procedure of 1963
(720 ILCS 5/1-1 et seq. (West 2016) & 725 ILCS 5/100-1 et seq. (West 2016))

Records under court seal: Records under court seal that were obtained through court ordered overhears—specifically, audiotapes, transcripts from the audiotapes, and records that reflect the contents of the overhears—are prohibited from disclosure under section 108A-7 of the Code of Criminal Procedure of 1963 (725 ILCS 5/108A-7 (West 2016)). See Ill. Att'y Gen. PAC Req. Rev. Ltr. 18365, issued May 16, 2012, at 5.

Grand jury matters: Section 112-6(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/112-6(b) (West 2016)) requires secrecy of grand jury proceedings. The Code provides that grand jury matters "other than the deliberations and vote of any grand juror shall not be disclosed by the State's Attorney, except as otherwise provided for in subsection (c)." Correspondingly, subsection (c) (725 ILCS 5/112-6(c) (West 2016)) provides, in pertinent part:

(c)(1) Disclosure otherwise prohibited by this Section of matters occurring before the Grand Jury, other than its deliberations and the vote of any grand juror, may be made to:

- a. a State's Attorney for use in the performance of such State's Attorney's duty; and
- b. such government personnel as are deemed necessary by the State's Attorney in the performance of such State's Attorney's duty to enforce State criminal law.

* * *

(3) Disclosure otherwise prohibited by this Section of matters occurring before the Grand Jury may also be made when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice or when a law so directs.

The provisions of section 112-6 mean that the deliberations and votes of grand jurors are specifically prohibited from disclosure to *anyone* unless a court order or a law directs otherwise. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 42138, issued June 15, 2016 (finding grand jury deliberations and votes exempt from disclosure). In addition, "as a matter of law, [FOIA] is not the proper vehicle for obtaining grand jury transcripts." *Taliani v. Herrmann*, 2011 IL App (3d) 090138, ¶16, 956 N.E.2d 550, 554 (2011); see Ill. Att'y Gen. PAC Req. Rev. Ltr. 40944, issued March 29, 2016, at 2 (finding grand jury transcripts and minutes exempt from disclosure).

School bus audio-visual recordings: Any "visual or audio recording, made of the interior of a school bus while the school bus is being used in the transportation of students to and

from school and school-sponsored activities" is subject to section 14-3(m) of the Criminal Code of 2012 (720 ILCS 5/14-3(m) (West 2016)), which provides that such recordings "shall be confidential records and may only be used by school officials * * * and law enforcement personnel" for specified purposes. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 39947, issued February 5, 2016, at 2.

Custodial interrogations: Section 103-2.1(g) of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-2.1(g) (West 2016)) provides that the electronic recordings of custodial interrogations required to be made to order to admit those statements into evidence in prosecutions of certain serious crimes are confidential and exempt from disclosure. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 43338, issued August 10, 2016, at 2.

Driver's Privacy Protection Act (DPPA)
(18 U.S.C. § 2721 et seq. (2016))

The DPPA does not prohibit a law enforcement agency from disclosing personal information obtained from motor vehicle records which would otherwise be protected by the DPPA when the personal information is incorporated into law enforcement agency records related to an accident investigation or used for carrying out other law enforcement functions. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 34767, issued August 19, 2016, at 2-7.

Health Insurance Portability and Accountability Act of 1996 (HIPAA)
(Pub. L. No. 104-191, 110 Stat. 1936)

HIPAA does not cover law enforcement agencies: The HIPAA privacy rule prohibits the release of medical information by "covered entities," such as health plans, health care clearinghouses, and qualified health care providers, *not* law enforcement agencies. *See People v. Bauer*, 402 Ill. App. 3d 1149, 1158 (5th Dist. 2010) ("law enforcement agencies * * * are not covered entities under HIPAA."); Ill. Att'y Gen. PAC Req. Rev. Ltr. 41455, issued July 6, 2016, at 3; Ill. Att'y Gen. PAC Req. Rev. Ltr. 25627, issued January 27, 2014, at 6. Therefore, law enforcement agencies may not generally use HIPAA as a basis to withhold records under section 7(1)(a). Medical records, however, are defined as "private information" in section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2016)) and thus exempted from disclosure by section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2016)). In addition, **specific** health information about an individual in records like police reports such as a diagnosis or treatment plan, may be exempt from disclosure under other exemptions such as section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2016)). *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 35548, issued October 29, 2015, at 2-3. Very general medical information, such as "leg injury" or "neck pain," however, is not exempt.

Illinois Supreme Court Rule 415

Illinois Supreme Court Rule 415 (Ill. S. Ct. R. 415 (eff. Oct. 1, 1971)) regulates discovery in criminal cases. As described in the Supreme Court Rules, discovery is the formal pre-trial process in which the parties to litigation are required to exchange certain information. Rule 415(c) provides that any materials furnished *to an attorney* pursuant to these rules "shall

remain in his exclusive custody and be used only for the purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide."

The PAC has determined that the plain language of Rule 415(c) prohibits the disclosure only of those materials furnished to an attorney from the opposing party in the criminal discovery process. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 36261, issued December 18, 2015, at 3-5. Therefore, Rule 415(c) is generally not a basis to withhold records, such as police reports, that are generated by a law enforcement agency and remain in the agency's possession.

Illinois Supreme Court Rule of Professional Conduct 3.6

Section 3.6(a) of the Illinois Rules of Professional Conduct of 2010 (Ill. R. Prof. Conduct 3.6(a) (effective January 1, 2010)) provides:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of an adjudicative proceeding in the matter.

Additionally, section 3.6(d) of the Illinois Rules of Professional Conduct of 2010 (Ill. R. Prof. Conduct 3.6(d) (effective January 1, 2010)) provides: "No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a)."

The PAC has determined that the disclosure of records under FOIA does not constitute an impermissible "extrajudicial statement" under Rule 3.6. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 41019, issued June 14, 2016.

LEADS Information (20 Ill. Adm. Code §1240.80(d) (2017))

Section 1240.80(d) of title 20 of the Administrative Code (20 Ill. Adm. Code §1240.80(d) (2017), last amended at 23 Ill. Reg. 7521, effective June 18, 1999) provides that "LEADS data shall not be disseminated to any individual or organization that is not legally authorized to have access to the information." *See also Better Government Ass'n v. Zaruba*, 2014 IL App (2d) 140071, ¶27, 21 N.E.3d 516, 525 (2014) ("[T]he public is not entitled to view or possess data that is transmitted through, received through, or stored in LEADS."). Accordingly, law enforcement agencies may withhold information under section 7(1)(a) if it is specifically generated from the LEADS database.

However, general information, such as vehicle registration information, that is obtained from the LEADS database and incorporated into an investigative report is not exempt from disclosure under FOIA. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 34767, issued August 12, 2016, at 6.

Rights of Crime Victims and Witnesses Act
(725 ILCS 120/1 et seq. (West 2016))

Rights of Crimes Victims and Witnesses Act does not specifically prohibit disclosure of records under FOIA: See Ill. Att'y Gen. Pub. Acc. Op. No. 16-009, issued November 7, 2016, at 21-22. However, other provisions of FOIA may provide a basis for redacting information identifying victims and witnesses. See 5 ILCS 140/7(1)(c), (1)(d)(iv) (West 2016).

Section 7(1)(b) Exemption
(Private Information)

Section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2016)) allows a public body to withhold "[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 2016)) defines "private information" as:

unique 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.

Therefore, under section 7(1)(b), a public body *may* withhold (redact) the following information:

- Social security numbers: expressly exempt.
- Driver's license numbers: expressly exempt.
- Biometric identifiers: The PAC has determined that biometric identifiers (as defined by section 10 of the Biometric Information Privacy Act (740 ILCS 14/10 (West 2016)), including "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry[,]") are exempt from disclosure under section 7(1)(b). The Public Access Bureau has also consistently determined that DNA is a biometric identifier. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 40554, issued March 18, 2016, at 2. However, photographs are not biometric identifiers. See Ill. Att'y Gen. Pub. Acc. Op. No. 14-008, issued August 19, 2014, at 3-6.
- Personal financial information: Note that this exemption for "*personal* financial information" (emphasis added) does not include the *public body's* financial information.
- Passwords or other access codes: expressly exempt.

- Medical records: expressly exempt. The term "medical records" is undefined in FOIA, but the PAC has interpreted it as applying to records relating to a particular patient, documenting medical history, care and treatment, test results, diagnoses, and medications. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 39535, issued May 11, 2016, at 3 (laboratory drug test results exempt under section 7(1)(b)).
- Home or personal telephone numbers: Note that this exemption does not include telephone numbers for devices paid for by the public body or business telephone numbers.
- Personal e-mail addresses: Note that this exemption does not include business e-mail addresses.
- Home addresses: except as otherwise provided by law or when compiled without possibility of attribution to any person. Note that this exemption does not include business street addresses.
- Zip codes: The PAC has concluded that a public body may withhold a zip code when coupled with identifying information, such as the individual's name. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 23275, issued March 1, 2013, at 2.
- Personal license plates: except as otherwise provided by law or when compiled without possibility of attribution to any person. Note that this exemption does not include commercial license plates.
- Signatures: The PAC has consistently concluded that a person's signature is a unique identifier, and may be redacted. *See, e.g.*, Ill. Att'y Gen. Pub. Acc. Op. No. 14-015, issued November 25, 2014, at 11.

Under section 7(1)(b), a public body *may not* withhold (redact) the following information:

- Business telephone numbers: *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 22902, issued June 27, 2016, at 3.
- Business e-mail addresses: *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 23125, issued March 26, 2014, at 2.
- Business street addresses: *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 23125, issued March 26, 2014, at 2.
- Federal Employer Identification Numbers (FEINs): *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 30238, issued April 15, 2015, at 7.
- Commercial license plates: *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 36246, issued September 3, 2015, at 2.
- Badge numbers: *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 28860, issued March 30, 2015, at 4.
- Vehicle Identification Numbers (VINs): *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 30238, issued April 15, 2015, at 7.
- Firearm serial numbers: *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 28651, issued June 29, 2015, at 5.

Section 7(1)(c) Exemption (Personal Information)

Section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2016)) allows a public body to withhold "[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." The exemption defines "unwarranted invasion of 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. *The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.*" (Emphasis added.)

The Attorney General or the PAC has determined that disclosure of the following information is a clearly unwarranted invasion of personal privacy, and therefore that a public body *may* withhold (redact) this information under section 7(1)(c):

- Date of Birth: The PAC has consistently determined that the disclosure of a date of birth would constitute a clearly unwarranted invasion of personal privacy under section 7(1)(c). *See, e.g.,* Ill. Att'y Gen. Pub. Acc. Op. No. 16-009, issued November 7, 2016, at 12.
- Race: *See, e.g.,* Ill. Att'y Gen. PAC Req. Rev. Ltr. 32361, issued September 1, 2015, at 3.
- Graphic photographs and descriptions of offenses: *See, e.g.,* Ill. Att'y Gen. PAC Req. Rev. Ltr. 23394, issued March 5, 2014, at 5. Note that when the requester is the victim or the person who otherwise has the greatest privacy interest in the record (such as the spouse of a decedent), the disclosure of that record to the requester is not considered an invasion of personal privacy under section 7(1)(c).
- Graphic autopsy photographs of decedent: *See* Ill. Att'y Gen. Pub. Acc. Op. No. 10-003, issued October 22, 2010, at 11; *but see* Ill. Att'y Gen. Pub. Acc. Op. No. 16-002, issued February 10, 2016, at 6 (such photographs are not exempt from disclosure to the executor of the decedent's estate or to the individual who otherwise has the greatest privacy interest in those materials, i.e. the decedent's spouse).
- Victims' names and their identifying information: *See, e.g.,* Ill. Att'y Gen. PAC Req. Rev. Ltr. 37628, issued April 25, 2016, at 3. Note that when the requester is the victim at issue, the disclosure of that information to the requester is not considered an invasion of personal privacy under section 7(1)(c).
- Names of individuals whose photos were used in police line-ups in connection with crimes for which they were not arrested or charged: *See, e.g.,* Ill. Att'y Gen. PAC Req. Rev. Ltr. 12784, issued April 23, 2012, at 2.
- Other third-party names: For instance, the names of suspects who were never arrested and of persons referenced incidentally in reports, such as relatives or neighbors. *See, e.g.,* Ill. Att'y Gen. PAC Req. Rev. Ltr. 31526, issued November 26, 2014, at 6.
- Specific medical information: Identifying information and specific emergency medical services information may be redacted, but the remainder of the report generally must be

disclosed. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 37687, issued January 29, 2016, at 3-4 (sheriff's office permissibly redacted description of specific injury to a deputy and his specific medical treatment, but improperly redacted general information pertaining to the situation, such as the administrative steps involved).

The Attorney General or the PAC has determined that disclosure of the following information is not a clearly unwarranted invasion of personal privacy, and therefore a public body *may not* withhold (redact) the information under section 7(1)(c):

- Age: Disclosure of a person's age is not an unwarranted invasion of personal privacy. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 22982, issued July 29, 2013, at 4.
- Gender: Disclosure of a person's gender is not an unwarranted invasion of personal privacy. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 30238, issued April 15, 2015, at 7.
- Basic arrestee information: *See* 5 ILCS 140/2.15 (West 2016), discussed further above. This arrestee information is not exempt under section 7(1)(c). *See* Ill. Att'y Gen. Pub. Acc. Op. No. 12-006, issued March 16, 2012, at 6-8.
- Crash Data Retrieval system report: *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 42769, issued August 23, 2016, at 2-3.
- Graphic photos of decedent to executor of decedent's estate: Ill. Att'y Gen. Pub. Acc. Op. No. 16-002, issued February 10, 2016, at 6 (such photographs are not exempt from disclosure to the executor of the decedent's estate or to the individual who otherwise has the greatest privacy interest in those materials, i.e., the decedent's spouse).
- Personal information concerning decedent on basis of decedent's privacy interest: A person ceases to have a privacy interest after death. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 16-002, issued February 10, 2016, at 4-5. However, as described above, the executor of a decedent's estate or surviving family members may have privacy interests in personal information concerning the decedent.
- Names of police officers in police line-ups: *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 12784, issued April 23, 2012, at 2.
- Name of treating hospital or medical facility: *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 37628, issued April 25, 2016, at 4.
- Personal information concerning requester: A requester may consent to disclosure of his or her personal information under section 7(1)(c).

In general, the application of section 7(1)(c) involves a fact-specific, case-by-case inquiry. *Chicago Journeyman Plumbers' Local Union 130 v. Dep't of Public Health*, 327 Ill. App. 3d 192, 196 (1st Dist. 2001). The public interest in the disclosure of the specific information at issue must be balanced against the implicated privacy interest(s). *See Gibson v. Illinois State Board of Education*, 289 Ill. App. 3d 12, 20-21 (1st Dist. 1997). Four factors are weighed: "(1) the [requester'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 Dep't*, 399 Ill. App. 3d 1, 13 (1st Dist. 2010).

Section 7(1)(d) Exemptions (Exemptions That Apply Specifically to Law Enforcement or Administrative Enforcement Proceedings)

Law enforcement agencies commonly seek to assert one of the exemptions available under section 7(1)(d) of FOIA in order to protect the integrity of ongoing investigations and prosecutions. As with all FOIA exemptions, "[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." (Emphasis added.) 5 ILCS 140/1.2 (West 2016). As explained below, it is particularly important that a law enforcement agency provide a detailed factual basis when denying requested records under one or more of the section 7(1)(d) exemptions. Conclusory assertions to the PAC without specific factual support under section 7(1)(d) frequently result in a determination that the law enforcement agency failed to meet its burden, and thus that the records were improperly withheld. If a law enforcement agency does not wish to disclose certain facts to a requester when responding to a Request for Review, the law enforcement agency may designate as confidential parts, or even all, of its response to the PAC. (See "Request for Review" section below.)

Section 7(1)(d)(i) Exemption (Pending Law Enforcement Proceedings)

Under section 7(1)(d)(i) of FOIA (5 ILCS 140/7(1)(d)(i) (West 2016)), a law enforcement agency may withhold records to the extent disclosure would "interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency that is the recipient of the request[.]"

A public body has the burden to prove by clear and convincing evidence that the disclosure of the records would in fact interfere with a pending or actually and reasonably contemplated law enforcement proceeding. Conclusory statements that the disclosure of records would obstruct a law enforcement proceeding are insufficient to support the assertion of the pending law enforcement proceeding exemption. *See Day v. City of Chicago*, 388 Ill. App. 3d 70, 74-77 (1st Dist. 2009).

The PAC has consistently determined that the mere fact that an investigation is underway is not, by itself, enough for a public body to meet this burden. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 33927, issued May 6, 2015, at 3; Ill. Att'y Gen. PAC Req. Rev. Ltr. 30828, issued March 18, 2015, at 3. Factors that are considered in determining the applicability of section 7(1)(d)(i) include the nature of the offense, the stage of the investigation or prosecution, and the sensitivity of the investigatory records. Ill. Att'y Gen. PAC Req. Rev. Ltr. 34970, issued August 24, 2015, at 2 (public body properly withheld laboratory results and analysis related to serious crime that continued to be investigated).

This exemption applies only to law enforcement proceedings conducted by the agency that received the request. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 36612, issued November 10, 2015, at 4.

A criminal conviction that is being challenged in a post-conviction action does not constitute an ongoing criminal prosecution for purposes of FOIA. The Illinois courts have consistently held that criminal appeals are civil proceedings. *See Illinois v. Wilson*, 37 Ill. 2d 617, 620 (1967); *see also Illinois v. Dominguez*, 366 Ill. App. 3d 468, 472-73 (2d Dist. 2006).

Section 7(1)(d)(ii) Exemption (Interference with Active Administrative Enforcement Proceedings)

Under section 7(1)(d)(ii) of FOIA (5 ILCS 140/7(1)(d)(ii) (West 2016)), a law enforcement agency may withhold records to the extent disclosure would "interfere with active administrative enforcement proceedings conducted by the public body that is the recipient of the request[.]"

The general principles of section 7(1)(d)(ii) are the same as section 7(1)(d)(i):

- A public body has the burden of proving by clear and convincing evidence that the disclosure of the records would in fact interfere with active administrative proceedings. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 35850, issued November 6, 2015, at 4.
- The mere fact that an administrative proceeding has commenced is not, by itself, enough for a public body to meet this burden.
- The exemption applies only to active administrative enforcement proceedings conducted by the agency receiving the request, not another agency.

The section 7(1)(d)(ii) exemption may apply to matters such as active, internal investigations of allegations such as employee misconduct or an administrative agency's active investigation regarding whether an applicant is qualified to hold a license.

Section 7(1)(d)(iii) Exemption (Deprivation of Fair Trial or Impartial Hearing)

Under section 7(1)(d)(iii) of FOIA (5 ILCS 140/7(1)(d)(iii) (West 2016)), a law enforcement agency may withhold records to the extent disclosure would "create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing[.]"

Disclosure of withheld information must create a *substantial* likelihood that a person will be deprived of a fair trial or an impartial hearing in order for this exemption to apply. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 28652, issued July 24, 2015, at 7 (even though a death investigation technically remained open, the prosecutor had determined that there was insufficient evidence to charge anyone in connection with the death, and the mere possibility that an individual conceivably could still be arrested and prosecuted was too tenuous for section 7(1)(d)(iii) to apply). In addition, a public body must demonstrate that furnishing records to a defendant or a defendant's advocate, such as a family member, would actually jeopardize the

ability of a defendant to receive a fair trial in order for this exemption to apply. *See, e.g.*, Ill. Att'y Gen. PAC Req Rev. Ltr. 36758, issued September 30, 2015, at 4-5.

Section 7(1)(d)(iv) Exemption (Protection of Witnesses and Confidential Sources)

Under section 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)(d)(iv) (West 2016)), a law enforcement agency may withhold records to the extent disclosure would:

unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies; except that the identities of witnesses to traffic accidents, traffic accident reports, and rescue reports shall be provided by agencies of local government, except when disclosure would interfere with an active criminal investigation conducted by the agency that is the recipient of the request[.]

Under the plain language of section 7(1)(d)(iv), both the identity of a confidential informant and the confidential information furnished only by the confidential informant are exempt from disclosure. This provision also allows police departments and other law enforcement agencies to protect the anonymity of members of the public who provide them with information, such as witnesses who give statements about potential crimes. *See, e.g., Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 200-01 (1st Dist. 2004) (names and addresses of beat meeting participants properly redacted because they provided information to police department). Typically, only the limited information that would unavoidably identify such a person, such as that person's name and contact information, may be properly redacted. However, such a person's statement to law enforcement may be withheld in its entirety if disclosure of the contents "would necessarily result in the disclosure of the identity of that source" of information and, therefore, "redaction of the [records] cannot be meaningfully accomplished." *Copley Press, Inc. v. City of Springfield*, 266 Ill. App. 3d 421, 426 (4th Dist. 1994).

The PAC has previously determined that the section 7(1)(d)(iv) exemption is limited to confidential information that was not revealed in court proceedings and information that identifies witnesses who provided information to police but did not testify. Nothing in section 7(1)(d)(iv), however, either expressly or impliedly requires a law enforcement agency to ascertain whether otherwise exempt information in its possession has been disclosed in a judicial proceeding. Thus, to the extent that it does not possess records reflecting whether a specific individual testified during a judicial proceeding relating to the requested records, a law enforcement agency is not required to seek that information, and may withhold the source's identity. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 23394, issued March 5, 2014, at 4.

A law enforcement officer performing his or her public duties is *not* a witness whose identity may be protected under section 7(1)(d)(iv). *See* Ill. Att'y Gen. PAC Req. Rev.

Ltr. 26558, issued January 7, 2014, at 3 ("Construing section 7(1)(d)(iv) to apply to individuals who provide information for a law enforcement investigation pursuant to their duties as public servants would yield [an] absurd result, and statutes should be construed to avoid absurdity."). However, the identifying information of a law enforcement officer who provides information purely as a witness in an administrative investigation may be redacted under section 7(1)(d)(iv). *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 12887, issued July 19, 2011, 2011, at 2.

As set forth in the plain language of section 7(1)(d)(iv), "identities of witnesses to traffic accidents, traffic accident reports, and rescue reports *shall* be provided by agencies of local government, except when disclosure would interfere with an active criminal investigation conducted by the agency that is the recipient of the request[.]" (Emphasis added.)

Section 7(1)(d)(v) Exemption (Protection of Special Investigative Techniques)

Under section 7(1)(d)(v) of FOIA (5 ILCS 140/7(1)(d)(v) (West 2016)), a law enforcement agency may withhold records to the extent disclosure would:

disclose unique or specialized investigative techniques other than those generally used and known or disclose internal documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct, and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request[.]

The techniques must be "unique or specialized" and "other than those generally used and known." *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 34304, issued July 6, 2015, at 2 (police reports relating to a prostitution sting did not contain any unique or specialized techniques). The administering of a polygraph test generally does not fall within this exemption. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 7909, issued July 21, 2010, at 3 (no indication that disclosure of polygraph test results would cause demonstrable harm to the public body).

Section 7(1)(d)(vi) Exemption (Danger to Life or Physical Safety)

Under section 7(1)(d)(vi) of FOIA (5 ILCS 140/7(1)(d)(vi) (West 2016)), a law enforcement agency may withhold records to the extent disclosure would "endanger the life or physical safety of law enforcement personnel or any other person[.]"

Records identifying non-undercover police officers are ordinarily not exempt from disclosure under section 7(1)(d)(vi), notwithstanding threats to involved officers. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 26630, issued January 23, 2014, at 4 ("[T]he Department has failed to demonstrate that the disclosure of the requested records * * * will 'endanger the life or physical safety of law enforcement personnel' beyond the risks that are inherent in police

work."). However, information identifying undercover officers may be redacted under section 7(1)(d)(vi). *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 25181, issued August 21, 2013, at 2-3.

Section 7(1)(d)(vii) (Obstruction of Ongoing Criminal Investigation)

Under section 7(1)(d)(vii) of FOIA (5 ILCS 140/7(1)(d)(vii) (West 2016)), a law enforcement agency may withhold records to the extent disclosure would "obstruct an ongoing criminal investigation by the agency that is the recipient of the request."

The general principles of section 7(1)(d)(vii) are the same as sections 7(1)(d)(i) and 7(1)(d)(ii):

- A public body has the burden of proving by clear and convincing evidence that the disclosure of the records would in fact obstruct an ongoing criminal investigation.
- The mere fact that a criminal investigation has commenced is not, by itself, enough for a public body to meet its burden.
- The exemption applies only to ongoing criminal investigations conducted by the agency receiving the request, not investigations by other agencies.

Section 7(1)(e) Exemption (Security of Correctional Institutions and Detention Facilities)

Under section 7(1)(e) of FOIA (5 ILCS 140/7(1)(e) (West 2016)), a public body may withhold "[r]ecords that relate to or affect the security of correctional institutions and detention facilities."

The PAC has consistently determined that disclosure of a requested record must pose a security risk to a correctional or detention facility to fall within the scope of section 7(1)(e). *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 32159, issued April 17, 2015, at 3 ("Construing section 7(1)(e) in light of the purpose of FOIA and its other provisions, it better comports with FOIA to conclude that section 7(1)(e) applies to records that could jeopardize the security of a correctional institution if disclosed, rather than any records merely pertaining to security in any manner whatsoever.").

A video recording of internal sections of a correctional or detention facility may be properly withheld if the public body demonstrates that disclosure would jeopardize security, such as by exposing the surveillance system's blind spots. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 38967, issued July 20, 2016, at 2.

Section 7(1)(f) Exemption (Predecisional, Deliberative Communications)

Section 7(1)(f) of FOIA (5 ILCS 140/7(1)(f) (West 2016)) exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body."

The section 7(1)(f) exemption applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). Section 7(1)(f) is "intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." *Harwood*, 344 Ill. App. 3d at 248. Section 7(1)(f) generally does not, however, exempt from disclosure purely factual material. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 13-015, issued September 24, 2013, at 6-7 (law enforcement agency improperly withheld criminal statistical data derived from public source documents submitted by municipality). Nonetheless, Federal courts have construed the scope of the deliberative process exemption to cover factual information that is so "inextricably intertwined" with a record's deliberative material that disclosure of just the factual material would still reveal the agency's decision-making process. *Enviro Tech International, Inc. v. United States Environmental Protection Agency*, 371 F.3d 370, 375 (7th Cir. 2004).

"Only those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." *Kalven v. City of Chicago*, 2013 IL App (1st) 121846, ¶24, 7 N.E.3d 741, 748 (2013) (quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010)). Further, a public body that asserts the deliberative process exemption "has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

Section 7(1)(n) Exemption (Adjudication of Grievances and Disciplinary Cases)

Under section 7(1)(n) of FOIA (5 ILCS 140/7(1)(n) (West 2016)), a public body may withhold "[r]ecords relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed." Law enforcement agencies have cited section 7(1)(n) as a basis for withholding complaint register files (CRs) and other investigatory files about investigations of law enforcement officers, but courts have ruled that 7(1)(n) does not apply to such investigatory records.

Specifically, in *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, 7 N.E.3d 741 (2014), the court noted that an "adjudication" involves a formalized legal process that results in a final and enforceable decision. *Kalven*, 2014 IL App (1st) 121846, ¶13, 7 N.E.3d at 745. In contrast, the court found that CRs are "part of an investigatory process that is separate and

distinct from disciplinary adjudications." *Kalven*, 2014 IL App (1st) 121846, ¶14, 7 N.E.3d at 745. Therefore, the court held that CRs cannot be withheld under section 7(1)(n). *Kalven*, 2014 IL App (1st) 121846, ¶22, 7 N.E.3d at 747. The court rejected a broad reading of the statute's language to extend to records other than those generated during an adjudication: "[T]he phrase 'related to' must be read narrowly, and in the context of FOIA, CRs are not 'related to' disciplinary adjudications in a way that might exempt them from disclosure." *Kalven*, 2014 IL App (1st) 121846, ¶22, 7 N.E.3d at 747; *see also Peoria Journal Star v. City of Peoria*, 2016 IL App (3d) 140838, ¶16, 52 N.E.3d 711, 714 (2016) (police department improperly withheld report of investigation of grievance that was created before any adjudication).

Section 7(1)(v) Exemption (Security Plans)

Under section 7(1)(v) of FOIA (5 ILCS 140/7(1)(v) (West 2016)), a law enforcement agency may withhold:

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.

The number of police officers assigned to certain districts does not fall within the scope of section 7(1)(v). Ill. Att'y Gen. Pub. Acc. Op. No. 11-002, issued February 25, 2011, at 4. Similarly, the PAC has concluded that a public body did not meet its burden of demonstrating that data regarding the availability of police cars and average 9-1-1 response times was exempt under section 7(1)(v). *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 37516, issued November 20, 2015, at 3.

The PAC has also found that video footage from public surveillance cameras is not exempt under section 7(1)(v). *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 41200, issued June 6, 2016, at 3 (city failed to describe how disclosure of footage of a public street intersection from a single camera for a discrete period of time would jeopardize the overall effectiveness of this system or the safety of the public).

Section 7.5 Statutory Exemptions

Exemptions specifically referring to other statutes are consolidated in section 7.5 of FOIA (5 ILCS 140/7.5 (West 2016)), which provides that records are exempt from inspection

and copying to the extent provided for by the statutes. The exemptions that are cited most frequently by law enforcement are listed below.

Section 7.5(k) Exemption Illinois Vehicle Code

Section 7.5(k) of FOIA (5 ILCS 140/7.5(k) (West 2016)) exempts from disclosure "[l]aw enforcement officer identification information or driver identification information compiled by a law enforcement agency or the Department of Transportation under Section 11-212 of the Illinois Vehicle Code." That section of the Vehicle Code requires the Illinois Department of Transportation to produce an annual traffic stop statistical study report using data compiled by law enforcement agencies. Section 11-212(f) of the Vehicle Code (625 ILCS 5/11-212(f) (West 2016)) further provides that:

Any law enforcement officer identification information and driver or pedestrian identification information that is compiled by any law enforcement agency or the Illinois Department of Transportation pursuant to this Act *for the purposes of fulfilling the requirements of this Section* shall be confidential and exempt from public inspection and copying, as provided under Section 7 of the Freedom of Information Act, and the information shall not be transmitted to anyone except as needed to comply with this Section. *This Section shall not exempt those materials that, prior to the effective date of this amendatory Act of the 93rd General Assembly, were available under the Freedom of Information Act.* (Emphases added.)

Therefore, the identification data must have been compiled for the purposes of complying with section 11-212 of the Vehicle Code to be exempt under section 7.5(k) of FOIA. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 17237, issued September 2, 2015, at 3. Similarly, any other record that is available under FOIA is still subject to disclosure, notwithstanding that it might contain information required to be compiled by a law enforcement agency for these purposes. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 13661, issued June 6, 2011, at 3 (dashcam video recording not exempt under section 11-212(f) of the Vehicle Code).

Section 7.5(v) Exemption Firearm Owner's Identification Card Act and Firearm Concealed Carry Act

Under section 7.5(v) of FOIA (5 ILCS 140/7.5(v) (West 2016)), names and information of people who have applied for or received Firearm Owner's Identification (FOID) cards under the Firearm Owners Identification Card Act (430 ILCS 65/0.01 *et seq.* (West 2016)) or who applied for or received a concealed carry license under the Firearm Concealed Carry Act (430 ILCS 66/1 *et seq.* (West 2016)), as well as certain additional information under the Concealed Carry Act, are exempt from disclosure unless otherwise authorized by those Acts.

Law enforcement agency objections to concealed carry applications are expressly exempted from disclosure under section 20(h) of the Firearm Concealed Carry Act (430 ILCS 66/20(h) (West 2016)): See Ill. Att'y Gen. PAC Req. Rev. Ltr. 42182, issued June 10, 2016, at 2 (citing 5 ILCS 140/7.5(v) (West 2016)).

Section 7.5 (bb) Exemption Juvenile Court Act of 1987 (JCA)

The confidentiality provisions of the Juvenile Court Act of 1987 (JCA) (705 ILCS 405/1-1 *et seq.* (West 2016)) are intended to protect information pertaining to alleged criminal conduct by minors. Although section 7(1)(a) has generally been cited along with the JCA when withholding juvenile records, section 7.5(bb) of FOIA, which became effective on August 16, 2015, specifically addresses the exemption of records under the JCA. See 5 ILCS 140/7.5(bb) (West 2016) (exempting from disclosure "[i]nformation which is or was prohibited from disclosure by the Juvenile Court Act of 1987.").

Under the general provisions of the JCA, "[i]nspection and copying of law enforcement records maintained by law enforcement agencies that relate to a minor who has been investigated, arrested, or taken into custody before his or her 18th birthday" is limited to certain enumerated parties. 705 ILCS 405/1-7(A) (West 2016). Article V of the JCA contains similar confidentiality provisions related to delinquency proceedings. See 705 ILCS 405/5-905 (West 2016). (Note that Public Act 99-298, effective August 6, 2015, extended the applicability of these confidentiality provisions to records relating to a minor who was "investigated" in addition to those who were "arrested" or "taken into custody.") Further, section 1-7(E) of the JCA (705 ILCS 405/1-7(E) (West 2016) prohibits law enforcement officers from disclosing "the identity of any minor in releasing information to the general public as to the arrest, investigation or disposition of any case involving a minor."

JCA generally does not apply to criminal conduct by adults: The fact that a minor is involved as a victim does not permit a record to be withheld in full under the JCA. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 26360, issued March 20, 2015, at 4 ("By their plain language, [JCA] provisions do not apply to records concerning crimes committed by adults against minors."). *But see* 705 ILCS 405/5-905(2) (West 2016) (requiring a public body to withhold information identifying an alleged minor victim of a sex crime).

JCA's confidentiality provisions do not apply to minors charged as adults: The JCA does not apply to minors charged with the crimes specified in section 5-130 of the JCA (705 ILCS 405/5-130 (West 2016)), namely first degree murder, aggravated criminal sexual assault, and aggravated battery with a firearm. Ill. Att'y Gen. PAC Req. Rev. Ltr. 34853, issued June 29, 2015, at 2 (JCA does not apply to minor charged with first degree murder at age of 16 (citing 705 ILCS 405/5-130(1)(a) (West 2016))). The confidentiality provisions of the JCA also do not apply when a minor is charged as an adult and a matter is transferred from the juvenile court system to criminal court under 705 ILCS 405/5-805 (West 2016).

JCA does not prohibit disclosure of information about adults: If a record such as a police report contains information about both adults and minors investigated or charged with

crimes, the information relating to the adults may not be withheld under the JCA. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 31178, issued March 19, 2015, at 4 (portions of police report regarding arrest of two minors could be redacted but portions of report concerning adult arrestee not exempt from disclosure).

Section 7.5(cc) Exemption Law Enforcement Officer-Worn Body Camera Act

With the increased use of officer-worn body cameras, the General Assembly enacted the Law Enforcement Officer-Worn Body Camera Act (50 ILCS 706/10-20(b) (West 2016)), which became effective on January 1, 2016. Section 7.5(cc) was added to FOIA (5 ILCS 140/7.5(cc) (West 2016)), and exempts from inspection and copying "[r]ecords made under the Law Enforcement Officer-Worn Body Camera Act, **except to the extent authorized under that Act.**" (Emphasis added.) This Act is intended to provide standard protocols and procedures to ensure that officer-worn body cameras are used in furtherance of the goals of helping collect evidence, improving transparency and accountability, and strengthening public trust, while still protecting individual privacy. The Act limits the types of footage that are subject to disclosure under FOIA and institutes procedures to protect the identities of third parties:

- If video footage is "flagged" due to filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm, then it is subject to disclosure under FOIA.
- If the subject of an encounter is a victim or a witness and has a reasonable expectation of privacy (arrestees have no such expectation), written consent is required for disclosure.
- Video footage is required to be disclosed to a subject of an encounter or the subject's legal representative upon request. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 41069, 41070, issued July 20, 2016, at 4.
- Only recordings or portions of recordings responsive to a request may be made available for inspection or reproduction.
- The identity of any person who is not the officer, the subject of the encounter, or otherwise directly involved in the encounter *shall* be redacted.
- The exemptions in section 7 of FOIA still may be asserted for body-worn camera footage.

Because the Act specifically requires law enforcement agencies to redact certain portions of body-worn camera footage before releasing it, a public body's assertion that it lacks the technological capability to make redactions is not a valid basis for denying a request for these videos. Law enforcement agencies must be able to perform the required redactions to body-camera footage or obtain assistance from an outside source. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 41069, 41070, issued July 20, 2016, at 5.

Requests for Review by the Public Access Counselor

Any person whose request to inspect or copy a public record has been denied may file a Request for Review with the PAC within 60 days after the public body's final denial of a FOIA request. 5 ILCS 140/9.5(a) (West 2016).

Section 9.5(c) of FOIA (5 ILCS 140/9.5(c) (West 2016)) provides:

Upon receipt of a request for review, the Public Access Counselor shall determine whether further action is warranted. If the Public Access Counselor determines that the alleged violation is unfounded, he or she shall so advise the requester and the public body and no further action shall be undertaken. In all other cases, the Public Access Counselor shall forward a copy of the request for review to the public body within 7 business days after receipt and shall specify the records or other documents that the public body shall furnish to facilitate the review. *Within 7 business days after receipt of the request for review, the public body shall provide copies of records requested and shall otherwise fully cooperate with the Public Access Counselor.* (Emphasis added.)

After an initial review, if the complaint is unfounded on its face (for example, if the Request for Review does not allege the denial of a FOIA request, or complains about redactions that are clearly allowed) the PAC will send a letter to both parties stating that it will not take any action. In most cases, the PAC will send a "further inquiry" letter together with a copy of the Request for Review to the public body and ask for the information needed to make a determination, including copies of responsive records and further explanation by the public body of its basis for withholding records.

Further Inquiry Letters: A "further inquiry" letter issued by the PAC does not necessarily mean a public body is in violation of FOIA or will be found in violation of FOIA. Rather, it means that the PAC needs more information to complete its review: most importantly, the PAC will probably need to review the records in question. As set forth in section 9.5(c) of FOIA, a public body is required to provide the PAC with copies of the records it asks to review. **The PAC does not disclose the records it receives from a public body for its confidential review, even if it determines that the records are not exempt from disclosure.** In those instances, the PAC asks the public body to disclose the records to the requester.

Remember that under FOIA a public body has the burden of proving by clear and convincing evidence that a public record is exempt from disclosure. Therefore, **a public body's failure to respond to the PAC or to provide the PAC with records may result in a finding that the public body has not met its burden to withhold the records.**

The Public Body's Response: The PAC is required to forward a copy of the public body's response to the requester and provide the requester with an opportunity to reply. A

public body may choose to designate all or part of its response to the PAC as confidential. 5 ILCS 140/9.5(d) (West 2016). In some instances, this may help the public body meet FOIA's clear and convincing standard without disclosing to the requester information that the public body wishes to keep confidential. A public body should clearly identify what information in its response letter is confidential, ideally by providing two letters to the PAC: one with redactions suitable for forwarding to the requester, and the other for the PAC's confidential review only.

A public body should also be as specific as possible about the reasons why it believes that particular exemptions apply to specific records or portions of records. In many cases, especially those involving voluminous records, it will be helpful to mark and number the pages for reference.

Resolution by Mediation or Informal Means: The PAC was intended as an alternative to litigation in court. If, after receiving correspondence from the PAC, a public body believes a Request for Review may be resolved informally by furnishing some or all of the records at issue, it should contact the assigned Assistant Attorney General to discuss the matter. PAC Assistant Attorneys General also frequently contact requesters and public bodies to discuss means of informally resolving Requests for Review.

Additional Resources

More information, including all of the PAC binding opinions and other training materials, is available on the Illinois Attorney General's website:

<http://foia.ilattorneygeneral.net/>

You may also contact the PAC on its hotline during business hours, Monday through Friday.

1-877-299-3642