PUBLIC ACCESS OPINION 12-006  
(Request for Review 2011 PAC 18379)  

FREEDOM OF INFORMATION ACT:  
Disclosure of Records Pertaining to  
Arrests and Police Reports  

Mr. Bill Dwyer, Staff Writer  
Sun-Times Media/Pioneer Press  
1010 Lake Street, Suite 104  
Oak Park, Illinois 60301  

Ms. Darlene Pugh  
Freedom of Information Officer  
Hillside Police Department  
425 Hillside Avenue  
Hillside, Illinois 60162-1215  

Dear Mr. Dwyer and Ms. Pugh:  

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of  
Information Act (FOIA) (5 ILCS 120/9.5(f) (West 2010), as amended by Public Act 97-579,  
effective August 26, 2011). For the reasons discussed below, we conclude that the Village of  
Hillside (Village) violated section 3 of FOIA (5 ILCS 140/3 (West 2010)) by withholding police  
reports concerning an incident in which a public official was arrested.  

BACKGROUND  

On January 18, 2012, Mr. Bill Dwyer, a reporter for the Sun-Times Media/  
Pioneer Press submitted a FOIA request to the Village seeking "all police incident reports related  
to Emanuel 'Chris' Welch between November 1, 2001, and March 30, 2002[,] "records of"[a]ll  
911 calls received between November 1, 2001 and March 30, 2002 related to reported batteries
of [a] woman," and "any records of police and/or fire paramedic assistance to a battered woman" for the same time period.¹

On January 23, 2012, the Village's Police Department (Department) denied the FOIA request in its entirety pursuant to section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011),² which exempts personal information if disclosure would constitute an unwarranted invasion of personal privacy. However, the Department did not provide a detailed factual basis or any explanation for its assertion of section 7(1)(c), as required by section 9(a) of FOIA (5 ILCS 140/9(a) (West 2010)). On February 2, 2012, Mr. Dwyer requested that the Public Access Counselor review the Department's denial of his FOIA request.

On February 6, 2012, the Public Access Bureau forwarded to the Department a copy of the Request for Review and requested that the Department provide copies of the records that were withheld, together with a detailed explanation of the basis for its assertion that those records are exempt under section 7(1)(c). In its letter, the Public Access Bureau also requested that the Department "clarify whether any individual was arrested or charged in connection with the incident or incidents documented in the records."³

On February 14, 2012, the Department responded to the Public Access Bureau by providing un-redacted copies of a police incident report and supplemental reports, together with a written explanation of its assertion of section 7(1)(c). The Department's response letter indicated that "[t]here are no 911 tapes available for this incident and there was no Fire Paramedic[ ] assist involved in this incident. This is the only incident involving the individual mentioned" in the FOIA request for the relevant time frame.⁴ The Department's FOIA officer also stated that "[t]he fact that this individual is a political figure has no bearing in my decision for denying this request. The decision was made strictly on the basis of the release of personal information that need not be released to the public[.]." According to the Department, its investigation of the underlying incident was "closed in 2002 with no arrests and no complaints

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³Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Darlene Pugh, Freedom of Information Officer, Hillside Police Department (February 6, 2012).

⁴Letter from Darlene Pugh, Hillside Police FOIA Officer, Village of Hillside, to Steve Silverman, Assistant Attorney General, Public Access Bureau (February 14, 2012).
signed." In a separate response letter clearly identified by the Department as "Attorney General Copy, Not to Release[,]" the Department provided additional information to explain its basis for asserting the section 7(1)(c) exemption. We have considered that additional information, but are prohibited from describing it in this binding opinion pursuant to section 9.5(c) of FOIA (5 ILCS 120/9.5(c) (West 2010), as amended by Public Act 97-579, effective August 26, 2011) ("To the extent that records or documents produced by a public body contain information that is claimed to be exempt from disclosure under Section 7 of this Act, the Public Access Counselor shall not further disclose that information").

On February 28, 2012, a managing editor for the Sun-Times Media/Pioneer Press replied to the Department's response to the allegations in the Request for Review by emphasizing that Mr. Welch is a longtime public figure who was a member of the School Board at the time of the incident and currently serves as Board president, and that he is also a candidate for election to the General Assembly:

Mr. Welch has placed himself in the public eye. We believe that Welch's expectation of privacy is superseded by his status as [a] public official and public figure – both at the time of the incident and today – and that the public's right to know should take precedence. Moreover, our request bears on the performance of public duties by officers of the Hillside Police Department and particularly on important public concerns over whether favoritism influenced their response to this incident.

The reply also indicated that the newspaper welcomes "the redaction of any name(s) or information that identifies the victim(s). We are only interested in the report as it relates to Mr. Welch."
ANALYSIS

All public records in the possession or custody of a public body are presumed to be open to inspection and copying. 5 ILCS 140/1.2 (West 2010). Section 3 of FOIA provides, in pertinent part:

(a) Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act. * * *

(b) Subject to the fee provisions of Section 6 of this Act, each public body shall promptly provide, to any person who submits a request, a copy of any public record required to be disclosed by subsection (a) of this Section and shall certify such copy if so requested.

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 2010).

Section 2.15 of FOIA

We have reviewed copies of the records in question, which contradict the Department's characterization of the underlying incident in one critical aspect: the narrative of the incident report plainly states that Mr. Welch was taken into custody by police officers. Consequently, it must initially be determined whether Mr. Welch's detention constituted an "arrest" that triggered the disclosure requirements of section 2.15(a) of FOIA (5 ILCS 140/2.15(a) (West 2010)), which provides:

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

Unambiguous statutory language should be interpreted in accordance with its plain meaning. *People v. Davis*, 199 Ill. 2d 130, 135 (2002). When terms used in a statute have acquired a technical meaning in the law, they will be given their technical meaning if that is the context in which they are employed. *Stockton v. Oldenburg*, 305 Ill. App. 3d 903-904 (4th Dist. 1999); *see Galowich v. Beech Aircraft Corp.*, 92 Ill. 2d 157, 165-166 (1982). The term "arrest" is such a term.

*Black's Law Dictionary* defines "arrest" as a "seizure or forcible restraint" and the "taking or keeping of a person in custody by legal authority, esp. in response to a criminal charge." *Black's Law Dictionary* 104 (7th ed. 1999). Illinois courts have distinguished an arrest from a brief, involuntary detention that does not require probable cause under the fourth amendment to the United States Constitution. *People v. Jackson*, 96 Ill. App. 3d 1057, 1059 (1st Dist. 1981) ("The elements of an arrest are: (1) the authority to arrest; (2) the assertion of that authority with the intent to arrest; and (3) the restraint of the person arrested"); *see also People v. Williams*, 303 Ill. App. 3d 33, 40 (1st Dist. 1999) ("In determining whether an arrest has occurred, the court must determine whether a reasonable person, innocent of any crime, would have believed that he was not free to leave"). In *People v. Jackson*, 348 Ill. App. 3d 719, 728-729 (1st Dist. 2004), the court stated that in deciding whether an arrest occurred, it must consider the "totality of the circumstances," including:

1. the time, place, length, mood and mode of the encounter between the defendant and the police;
2. the number of police officers present;
3. any indicia of formal arrest or restraint, such as the use of handcuffs or drawing of guns;
4. the intention of the officers;
5. the subjective belief or understanding of the defendant;
6. whether defendant was told he could refuse to accompany police;
7. whether the defendant was transported in a police car;
8. whether the defendant was told he was free to leave;
9. whether the defendant was told he was under arrest; and
10. the language used by officers.

Based on the confidential information in the police incident report provided to this office, we conclude, contrary to Ms. Pugh's statement, 8 that the police did take Mr. Welch into

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8 Letter from Darlene Pugh, Hillside Police FOIA Officer, to Steve Silverman, Assistant Attorney General, Public Access Bureau (February 14, 2012).
custody and arrest him on January 2, 2002, notwithstanding that he was released from custody the same day, no criminal charges were filed, and it appears that he never reached the point of being processed in connection with this arrest.

Section 7(1)(c) and Section 2.15 of FOIA

Section 7(1)(c) of FOIA exempts from inspection and copying "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information." The exemption defines "unwarranted invasion of personal privacy" as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information."

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. 11-001, issued February 18, 2011. Because Mr. Welch was arrested, the information referenced in subsection (i) and (ii) of section 2.15(a) of FOIA relating to his arrest is subject to disclosure. Information referenced in the remaining subsections of section 2.15(a) may be withheld only if "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 2010). The Department asserted in response to the allegations in the Request for Review that its investigation is closed, and there is no indication that disclosure of the information would endanger any individual or compromise the security of any correctional facility. Accordingly, the categories of information listed in section 2.15(a) of FOIA must also be disclosed to the requester. Because the disclosure of this information is governed by the more specific provisions of section 2.15 of FOIA, it may not be withheld pursuant to the general provisions of section 7(1)(c) of FOIA. See generally Murray v. Chicago Youth Center, 224 Ill. 2d 213, 233 (2007).

With respect to the remaining information contained in the incident reports, interpretations of similar provisions of the federal Freedom of Information Act are instructive in balancing Mr. Welch's right to privacy against the public interest in disclosure.\footnote{Although not controlling, federal precedent may be considered in construing the Illinois FOIA because both statutes promote full disclosure of public records subject only to limited exceptions. See Margolis v. Director, Illinois Dept. of Revenue, 180 Ill. App. 3d 1084, 1087 (1st Dist. 1989).} Of particular relevance are analyses of 5 U.S.C. § 552(b)(7)(c) (5 U.S.C. § 552(b)(7)(c) (2006), as amended by Pub. L. 111-83, Title V, § 564(b), effective Oct. 28, 2009), which exempts from disclosure...
"records or information compiled for law enforcement purposes, but only to the extent that" disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Under the federal FOIA, arrestees are considered "essentially public personages" with a "limited" and "qualified" right to privacy, "and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest" that are subject to disclosure. *Tennessean Newspaper, Inc. v. Levi*, 403 F.Supp. 1318, 1321 (D.C.Tenn. 1975). There also is a strong public interest in information that sheds light on the manner in which law enforcement officials perform their public duties. *See Lissner v. United States Customs Service*, 241 F.3d 1220, 1223 (9th Cir. 2001) (information that "sheds light on the propriety" of a federal law enforcement agency's handling of an incident in which two police officers were arrested and fined "raises a cognizable public interest under the federal FOIA"); *see also Hammons v. Scott*, 423 F. Supp. 625, 628 (N.D. Cal. 1976) (holding that disclosure of records of arrests that did not result in criminal charges does not violate a subject's constitutional right to privacy).

Here, the information at issue may be highly personal to Mr. Welch, but his right to privacy is significantly diminished in this instance by his status as an arrestee. There also is a strong public interest in arrests in general, as demonstrated by the General Assembly's enactment of section 2.15(a). Under these circumstances, the public interest in disclosure significantly outweighs the subject's right to privacy. Therefore, disclosure of the remaining portions of the records in question would not constitute an unwarranted invasion of personal privacy within the scope of section 7(1)(c).

By failing to disclose the records in question pursuant to Mr. Dwyer's FOIA request, the Department has violated section 3 of the Act. The Department is obligated to provide Mr. Dwyer with copies of the records, subject only to appropriate redactions for "private information" under section 7(1)(b) (5 ILCS 140/7(1)(b) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011). Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2010), as amended by Public Act 97-579, effective August 26, 2011) 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.

As previously noted, Mr. Dwyer and Ms. Clark have specifically stated that the Department is free to redact any name(s) or information that identifies the victim(s).

**FINDINGS AND CONCLUSIONS**

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

1) On January 18, 2012, Mr. Dwyer submitted a FOIA request to the Village seeking copies of police incident reports related to Emanuel 'Chris' Welch between November 1, 2001, and March 30, 2002, and records of 911 calls and police and paramedic calls related to a battered woman for the same time period.

2) On January 23, 2012, the Village's Police Department denied Mr. Dwyer's request pursuant to section 7(1)(c) of FOIA.

3) On February 2, 2012, the Public Access Counselor received Mr. Dwyer's Request for Review of the denial of his FOIA request. Mr. Dwyer's Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA. 5 ILCS 140/9.5(a) (West 2010), as amended by Public Act 97-579, effective August 26, 2011. Therefore, the Attorney General may properly issue a binding opinion with respect to the disclosure of the requested records.

4) On February 6, 2012, the Public Access Bureau determined that action was warranted and issued a letter to the Department requesting that it provide for review copies of the records in question, together with a detailed summary for the assertion of the section 7(1)(c) exemption, including a clarification as to whether any individual was arrested in connection with the underlying incident.

5) On February 14, 2012, the Department responded by providing the Public Access Counselor with a detailed summary of its reasons for the assertion of section 7(1)(c) together with copies of the records in question.

6) The Department stated in its response that no one was arrested in connection with the incident documented in the records. Based upon this office's review of the records, however, we conclude that Mr. Welch was, as a matter of law, arrested in connection with the underlying incident.
7) Because Mr. Welch was arrested, and because the Department has stated that its investigation is closed and there is no indication that disclosure of information relating to his arrest would endanger any individual or compromise the security of any correctional facility, the information referenced in section 2.15(a) of FOIA is not exempt from disclosure.

8) Further, the Department failed to demonstrate by clear and convincing evidence that any other information in the incident report is exempt from disclosure pursuant to section 7(1)(c).

Therefore, it is the opinion of the Attorney General that the Department violated FOIA by improperly denying Mr. Dwyer's, January 18, 2012, FOIA request for copies of police incident reports related to Emanuel 'Chris' Welch between November 1, 2001, and March 30, 2002. Accordingly, the Department is directed to take immediate and appropriate action to comply with this opinion by furnishing Mr. Dwyer with copies of those records, subject only to appropriate redactions under sections 7(1)(b) of FOIA. Under section 9.5(f) of FOIA, the Department must either immediately comply with this binding opinion or initiate administrative review under section 11.5 of FOIA (5 ILCS 140/9.5 (West 2010).

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 et seq. (West 2010). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Mr. Bill Dwyer as defendants. See 5 ILCS 140/11.5 (West 2010).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:
Michael J. Luke
Counsel to the Attorney General
PUBLIC ACCESS OPINION 16-006
(Request for Review 2016 PAC 41657)

FREEDOM OF INFORMATION ACT:
Disclosure of E-Mails from Public
Employees' Personal E-Mail Accounts
Pertaining to Transaction of Public Business;
Duty to Conduct Reasonable
Search for Responsive Records

Mr. Drew Shenkman
Counsel, CNN
One CNN Center
Atlanta, Georgia 30303

Ms. Charise Valente
General Counsel
Chicago Police Department
Office of Legal Affairs
3510 South Michigan, 5th Floor
Chicago, Illinois 60653

Dear Mr. Shenkman and Ms. Valente:

This is a binding opinion issued by the Attorney General pursuant to section 9.5(f)
of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons
discussed below, this office concludes that the Chicago Police Department (CPD) violated the
requirements of FOIA by failing to conduct an adequate search for all e-mails responsive to a
January 28, 2016, FOIA request submitted by Ms. Courtney Yager of Cable News Network, Inc.
(CNN).

Lisa Madigan
ATTORNEY GENERAL
August 9, 2016
BACKGROUND

On January 28, 2016, Ms. Yager, on behalf of CNN, submitted a FOIA request to CPD seeking "all emails related to Laquan McDonald from Police Department email accounts and personal email accounts where business was discussed" for 12 named CPD officers¹ for the date ranges of October 19 through October 24, 2014, and November 19 through November 29, 2015.²³ On February 5, 2016, Ms. Yager agreed to extend the deadline for responding to her request for e-mails to March 4, 2016. On April 19, 2016, CPD sent a series of e-mails with attachments totaling over 500 pages to Ms. Yager in response to her request.⁴ CPD's response did not cite any exemptions or provide any explanation of the records provided.

On April 28, 2016, Mr. Drew Shenkman, Counsel for CNN, filed a Request for Review with the Public Access Counselor and the Public Access Bureau alleging that the records that CNN had received from CPD, although voluminous, were unresponsive to CNN's FOIA request:

Upon receipt, Ms. Yager contacted the Department's FOIA officer ** and noted the lack of any responsive records to which she was told over the phone that the records provided were all of the records found in their search. Thus, we must deem our request to have been denied, in clear violation of FOIA. Indeed, it appears to us that the Department may not have even conducted an adequate search for such records, since not a single responsive email was actually produced.⁵

¹Officer Jason Van Dyke, Officer Joseph Walsh, Officer Janet Mondragon, Officer Dora Fontaine, Officer Daphne Sebastian, Officer Ricardo Viramontes, Officer Thomas Gaffney, Officer Joseph Mcelligott, Officer Leticia Velez, Officer Arturo Bacerra, Deputy Chief David McNaughton, and Detective David March.

²On October 20, 2014, Laquan McDonald was shot and killed by Chicago Police Officer Jason Van Dyke. The shooting was recorded on video by a CPD dashboard camera. A civil action was filed in Cook County Circuit Court related to the release of the video. Smith v. Chicago Police Department, Docket No. 2015 CH 11780 (Circuit Court, Cook County). On November 19, 2015, the circuit court ordered the release of the video recording on or before November 25, 2015. Memorandum Opinion and Order, Smith v. Chicago Police Department, Docket No. 2015 CH 11780, slip op. at 18 (Circuit Court, Cook County). CPD publicly released the video recording on November 24, 2015.

³E-mail from Courtney Yager, Producer, CNN, to Chicago Police Department, Attn: Freedom of Information Officer (January 28, 2016).

⁴E-mail from foia@chicagopolice.org to Courtney Yager (April 19, 2016).

⁵E-mail from Drew Shenkman, Counsel, CNN, to Public Access [Bureau] (April 28, 2016).
On May 5, 2016, the Public Access Bureau sent a copy of the Request for Review to CPD and asked it to provide a detailed description of the processing of Ms. Yager's FOIA request and the measures taken by CPD to search for responsive records, including a description of the specific recordkeeping systems that were searched, the method of that search, and the specific individuals who were consulted. On June 1, 2016, CPD submitted a written response to this office. CPD explained that it had searched the CPD e-mail system for the 12 named officers for the requested time periods and the search resulted in 47 e-mails. CPD described some of the responsive e-mails as being "News Clips" produced by CPD's Office of News Affairs that contained references to Laquan McDonald. According to CPD, 24 of the other e-mails were 12 identical copies of two CPD office-wide e-mails sent on November 24, 2015, and November 25, 2015, regarding the release of the dashboard camera video. CPD provided this office with copies of the records in both redacted and un-redacted forms.

The Public Access Bureau forwarded a copy of CPD's response to Mr. Shenkman on June 2, 2016. On June 9, 2016, Mr. Shenkman replied to CPD's response. With respect to CPD's search for records on personal e-mail accounts, Mr. Shenkman contended:

[i]t appears that the Department only searched for emails on the officers' city-issued email address, and not on any other platforms or devices, including personal email accounts. Even if the Department does not retain control over personal email or devices, it still has a duty to request copies of such communications that

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7Letter from Ryan Nelligan, Office of Legal Affairs, Department of Police, City of Chicago, to Office of the Attorney General, Neil Olson, Assistant Attorney General, (June 1, 2016).

8Letter from Ryan Nelligan, Office of Legal Affairs, Department of Police, City of Chicago, to Office of the Attorney General, Neil Olson, Assistant Attorney General (June 1, 2016).

9CPD asserted that it made some limited redactions to the records under sections 7(1)(b) and 7(1)(c) of FOIA (5 ILCS 140/7(1)(b), (1)(c) (West 2015 Supp.)). In an e-mail to the Public Access Bureau on July 28, 2016, Mr. Shenkman confirmed that he was not seeking review of those redactions. Therefore, this office does not address the redactions in this binding opinion.

10Letter from Neil P. Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Drew Shenkman, Counsel, CNN (June 2, 2016).
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relate to the officer's public service role and/or in the performance
of their government function.[11]

Mr. Shenkman also questioned the adequacy of CPD's search for responsive records:

Regardless of the email accounts and devices actually searched, it is entirely unclear to us the search terms and/or parameters the Department actually undertook in conducting its search. Obviously, the search terms used, and the review procedures utilized that would identify highly-relevant documents that might not be found using a search term, are crucial to obtaining CNN's satisfaction that the Department has engaged in a fulsome search responsive to CNN's FOIA request.[12]

On June 10, 2016, the Public Access Bureau sent CPD a letter requesting additional information about the measures taken by CPD to search for responsive records.13 The letter requested that CPD "describe the methods used to search CPD e-mail accounts, and in particular, which search terms were used[ ]" and address whether CPD "conducted a search of personal email accounts to discover emails in which CPD business was discussed."

On July 19, 2016, CPD submitted a supplemental response to this office.15 Documentation provided by CPD with that submission indicates that the CPD e-mail accounts of the 12 named police officers were searched for the term "Laquan McDonald." Two searches were conducted, one for each of the specified time frames requested. CPD also confirmed that it had not conducted a search of personal e-mail accounts for responsive records, asserting that e-mails on those accounts are not "public records."


On July 19, 2016, the Public Access Bureau forwarded a copy of CPD's supplemental response to Mr. Shenkman.\(^{16}\) On July 27, 2016, Mr. Shenkman provided CNN's reply to CPD's supplemental response and addressed the search for responsive records on personal e-mail accounts:

In refusing to request emails from City police officers concerning official police business, the City essentially contends that any correspondence sent or received by Chicago police officers is not a public record unless it resides on the city's servers. * * *

* * *

Illinois FOIA exists to protect the public's right to know what its government is up to. Giving public officials like police officers carte blanche to evade FOIA laws by using personal email for public purposes would eviscerate Illinois FOIA. Moreover, public officials would have an incentive to avoid FOIA by deliberately communicating about sensitive or controversial topics on private email. This flies in the face of the very purpose of public information laws.\(^{17}\)

Pursuant to section 9.5(f) of FOIA, on June 27, 2016, the Public Access Bureau properly extended the time in which to issue a binding opinion by 30 business days, to August 9, 2016.\(^{18}\)

**ANALYSIS**

**Communications on Public Employees' Personal E-Mail Accounts Pertaining to the Transaction of Public Business**

To analyze the adequacy of the CPD's response to CNN's FOIA request, it must first be determined whether e-mails on the personal e-mail accounts of CPD employees are

\(^{16}\)Letter from Neil P. Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Drew Shenkman, Counsel, CNN (July 19, 2016).

\(^{17}\)E-mail from Drew Shenkman, Counsel, CNN, to Neil Olson (July 27, 2016).

subject to the requirements of FOIA. Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2014))
provides that "[e]ach public body shall make available to any person for inspection or copying all
public records, except as otherwise provided in Sections 7 and 8.5 of this Act." Section 2(c) of
FOIA (5 ILCS 140/2(c) (West 2015 Supp.)) defines "[p]ublic records" as:

all records, reports, forms, writings, letters, memoranda, books,
papers, maps, photographs, microfilms, cards, tapes, recordings,
electronic data processing records, electronic communications,
recorded information and all other documentary materials
pertaining to the transaction of public business, regardless of
physical form or characteristics, having been prepared by or for,
or having been or being used by, received by, in the possession
of, or under the control of any public body. (Emphasis added.)

In City of Champaign v. Madigan, 2013 IL App (4th) 120662, ¶38, 992 N.E.2d
629, 638 (2013), the appellate court stated that "to qualify as a 'public record' under [section 2(c)
of] FOIA, a communication must (1) 'pertain[] to the transaction of public business' and have
either been (2) prepared by, (3) prepared for, (4) used by (5) received by, (6) possessed by, or (7)
controlled by a public body." The court stated that if a communication pertaining to public
business was sent to and received by members of a city council on personal electronic devices
during a city council meeting when the individual "members were functioning collectively as the
'public body,' then the communication is a 'public record' and thus subject to FOIA." City of
Champaign, 2013 IL App (4th) 120662, ¶42, 992 N.E.2d at 639-40. The court added: "To hold
otherwise would allow members of a public body, convened as the public body, to subvert the
Open Meetings Act [] and FOIA requirements simply by communicating about city business
during a city council meeting on a personal electronic device." (Internal citation omitted.) City
of Champaign, 2013 IL App (4th) 120662, ¶43, 992 N.E.2d at 640.

Citing City of Champaign, as well as Quinn v. Stone, 211 Ill. App. 3d 809, 812
(1st Dist. 1991), CPD argued in its supplemental response to this office that e-mails exchanged
by its employees on personal e-mail accounts are not CPD's "public records":

Because the communications sought, if any exist, would have been
prepared by or sent to individual officers and employees rather
than the City, they are not communications "prepared by or for" a
public body. And because the communications would not be
stored on a City server or account, they cannot be "used by," were
not "received by," and are not "in the possession of, or under the
control of," a public body. Thus, the requested communications, if
any, do not fall within the FOIA's definition of a "public record" and are not subject to production under the Act.¹⁹

When an individual public employee such as a CPD officer acts in an official capacity, he or she transacts public business as a member of a municipal police department, which clearly is a public body subject to the requirements of FOIA.²⁰ CPD's interpretation would undercut the principle that public bodies act through their employees, by excluding from the definition of "public records" communications sent or received by employees of a public body on personal devices or accounts, regardless of whether the communications pertain to the transaction of public business. Such an interpretation erroneously focuses not on the content of a communication but on the method by which it is transmitted.

CPD's supplemental response to this office also contended that e-mails exchanged through personal e-mail accounts are not subject to the requirements of FOIA because CPD does not possess or control those records. Citing Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 152 (1980) (because "possession or control is a prerequisite to FOIA disclosure duties[,]" transcripts of telephone conversations removed from the State Department were not "agency records" of the State Department subject to the requirements of federal FOIA), CPD maintained that FOIA does not provide a mechanism by which it could compel employees to grant it access to their personal e-mail accounts within the time requirements for a response.

With respect to the control of the records, the Court of Appeals for the District of Columbia Circuit recently considered a federal agency's argument that e-mails pertaining to the agency's business and policymaking "were 'beyond the reach of FOIA"' because the agency's director maintained them "in an 'account' that 'is under the control of the Woods Hole Research Center, a private organization.'" Competitive Enterprise Institute v. Office of Science and Technology Policy, No. 15-5128, 2016 WL 3606551, at *1 (D.C. Cir. July 5, 2016). The court disagreed, stating that there was no indication that the private organization had exclusive control of the e-mails or that the agency director was unable to access the e-mail account: "If the agency head controls what would otherwise be an agency record, then it is still an agency record and still

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¹⁹Letter from Ryan Nelligan, Office of Legal Affairs, Department of Police, City of Chicago, to Office of the Attorney General, Neil Olson, Assistant Attorney General (July 19, 2016), at 1.

²⁰Section 2(a) of FOIA (5 ILCS 140/2(a) (West 2015 Supp.)) defines public body as:

all * * * executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing[.]
must be searched or produced." *Competitive Enterprise Institute*, No. 15-5128, 2016 WL 3606551, at *4. The court added that the agency's position was incompatible with the purpose of federal FOIA (5 U.S.C. § 552 et seq. (2012)):

The Supreme Court has described the function of FOIA as serving "the citizens' right to be informed about what their government is up to." [Citations.] If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served. It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming that they are under her control. *Competitive Enterprise Institute*, No. 15-5128, 2016 WL 3606551, at *4.

The court distinguished the United States Supreme Court's decision in *Kissinger* on the bases that former Secretary of State Henry Kissinger held the relevant records under a claim of right and that the State Department had ceded legal control of those records to him. *Competitive Enterprise Institute*, No. 15-5128, 2016 WL 3606551, at *2-3. In rejecting the agency's argument that it lacked control of the records, the court emphasized that "an agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door[.]" (Emphasis added.) *Competitive Enterprise Institute*, No. 15-5128, 2016 WL 3606551, at *3.21

This reasoning is equally applicable to the Illinois FOIA, which is intended to ensure public access to "full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." 5 ILCS 140/1 (West 2014). Further, the General Assembly expressly contemplated that because "technology may advance at a rate that outpaces its ability to address those advances legislatively[ ] * * * this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made

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21See also *O'Neill v. City of Shoreline*, 170 Wash. 2d 138, 150, 240 P.3d 1149, 1155 (Washington 2010) (concluding that metadata from a chain of e-mails which a city's deputy mayor sent to her personal e-mail account and accessed on her home computer constituted public records under Washington's Public Records Act (PRA) (RCW 42.56.001 et seq. (2005)): "If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined.").
available upon request except when denial of access furthers the public policy underlying a specific exemption." 5 ILCS 140/1 (West 2014).

FOIA was enacted by Public Act 83-1013, effective July 1, 1984 – before e-mail and other forms of electronic communication became common. Despite these and other advances in technology, the original definition of "[p]ublic records" has remained largely unchanged. 22 Interpreting the definition of "public records" in FOIA to exclude communications pertaining to the transaction of public business which were sent from or received on personal e-mail accounts of public officials and public employees would be contrary to the General Assembly's intent of ensuring public access to full and complete information regarding the affairs of government. Such an interpretation would yield absurd results by enabling public officials to sidestep FOIA and conceal how they conduct their public duties simply by communicating via personal electronic devices. People v. Hunter, 2013 IL 114100, ¶13, 986 N.E.2d 1185, 1189 (2013) (a reviewing body "presumes that the legislature did not intend to create absurd, inconvenient, or unjust results."). The fact that FOIA does not include an express requirement that public bodies search and recover responsive records in personal e-mail accounts of its officers and employees is not material given the statute's absence of any express directives about how a public body must search relevant recordkeeping systems.

CPD also argued that the search of personal e-mail accounts would subject employees to unreasonable and unnecessary invasions of personal privacy. Section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2015 Supp.)) exempts information from disclosure when disclosure would be an "unwarranted invasion of personal privacy." This provision, however, expressly provides that the "disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy." 5 ILCS 140/7(1)(c) (West 2015 Supp.). Any e-mails exchanged by CPD employees concerning the shooting death of Mr. McDonald presumably pertain to those employees' public duties and therefore accessing them would not constitute an unwarranted invasion of personal privacy under the plain language of section 7(1)(c) of FOIA. Furthermore, communications concerning personal matters that are unrelated to the transaction of public business are not subject to the requirements of FOIA. 5 ILCS 140/2(c) (West 2015 Supp.) (limiting the definition of "public records" to "all records, * * * pertaining to the transaction of public business[.]""); City of Champaign, 2013 IL App (4th) 120662, ¶31, 992 N.E.2d at 637 ("to qualify as a public record a communication must first pertain to 'business or community interests as opposed to private

22"Public records" was defined to include "all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared, or having been or being used, received, possessed or under the control of any public body." Public Act 83-1013, effective July 1, 1984, codified at Ill. Rev. Stat. 1984, ch. 116, par. 202(c).
affairs.' Indeed, FOIA is not concerned with an individual's private affairs."). The fact that a personal e-mail account is used to send or receive public records does not transform all communications sent or received on that account, in particular those with no connection to the transaction of public business, into public records that must be disclosed in accordance with FOIA. CPD has not asserted that any employee objected to providing responsive e-mails or that it conducted a search calculated to balance the employees' personal privacy with the public body's obligations under FOIA, such as asking the employees whether they maintained responsive e-mails.

Accordingly, communications pertaining to the transaction of public business that were sent or received on the CPD employees' personal e-mail accounts are "public records" under the definition of that term in section 2(c) of FOIA.

**Search for Responsive Records**

FOIA requires a public body to conduct a "reasonable search tailored to the nature of a particular request." *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). A public body is not required to "search every record system[,]" but it "cannot limit its search to only one record system if there are others that are likely to turn up the requested information." *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). "Any doubt about the adequacy of the search should be resolved in favor of the requester" and any search terms used by a public body must be reasonably calculated to discover all responsive records. *Negley v. Federal Bureau of Investigation*, 658 F. Supp. 2d 50, 59, 60-61 (D.D.C. 2009).

As described above, CPD did not conduct a search of personal e-mail accounts for responsive records, despite the requester's specific request for any e-mails from "personal email accounts where business was discussed." This office has concluded that those e-mail accounts could contain public records as defined by section 2(c) of FOIA. Therefore, this office further concludes that CPD has failed to demonstrate that it conducted an adequate search of personal e-mail accounts for responsive records.

CPD has expressed concerns about invading its employees' personal privacy by conducting a search of their personal e-mail accounts. CPD, however, has taken no action to ascertain whether the CPD employees named in the FOIA request might possess responsive records. Although FOIA does not specifically describe the manner in which a public body is required to perform its search, an automated search of the entirety of a personal e-mail account using a search term is not necessarily required. Depending on the circumstances, ordering CPD officers to produce any responsive records may satisfy the requirement that CPD conduct a reasonable search. *See Nissen v. Pierce County*, 183 Wash. 2d 863, 886-87, 357 P.3d 45, 57
Washed 2015) ("[A]gency employees are responsible for searching their files, devices, and accounts for records responsive to a relevant [public records] request. * * * When done in good faith, this procedure allows an agency to fulfill its responsibility to search for and disclose public records without unnecessarily treading on the constitutional rights of its employees."); see also Brophy v. United States Department of Defense, No. CIV.A. 05-360 (RMC), 2006 WL 571901, at *8 (D.D.C. 2006) (absent evidence of a lack of good faith, a public employee's search of his personal e-mail account and confirmation that he did not locate responsive records satisfied the public body's obligation to conduct a reasonable search of that account). Under the requirements of FOIA, CPD may not decline to search for e-mails contained on personal accounts.

In addition, with respect to the search of the CPD e-mail accounts, CPD limited its search to any message containing the term "Laquan McDonald." This search term, however, does not account for other references to Mr. McDonald that might have been used in e-mail communications by CPD officers. At the time of the shooting in October 2014, Mr. McDonald's name may not have been widely known, but there may have been references to the incident either by the involved officer, the incident number, the incident's location, or a physical description of Mr. McDonald. In addition, both Mr. McDonald's first and last names may have been spelled differently in some e-mails. Under the circumstances, the use of a full proper name as the single search term was not reasonably calculated to discover all relevant records. Therefore, this office also concludes that CPD has failed to demonstrate that it conducted an adequate search of CPD e-mail accounts.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the available information, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On January 28, 2016, Ms. Courtney Yager, on behalf of CNN, submitted a FOIA request to CPD seeking "all emails related to Laquan McDonald from Police Department email accounts and personal email accounts where business was discussed" for 12 named CPD officers for the date ranges of October 19 through October 24, 2014, and November 19 through November 29, 2015.

2) On April 19, 2016, CPD furnished records to Ms. Yager that it deemed responsive to her request.

3) On April 28, 2016, Mr. Drew Shenkman, Counsel for CNN, filed a Request for Review with the Public Access Counselor and the Public Access Bureau alleging that CPD had not conducted an adequate search for responsive records. Mr. Shenkman's Request for
Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2014)).

4) On May 5, 2016, the Public Access Bureau forwarded a copy of the Request for Review to CPD and asked it to provide a detailed description of the handling of Ms. Yager’s request and the measures taken by CPD to search for responsive records, including a description of the specific recordkeeping systems that were searched, the method of that search, and the specific individuals who were consulted.

5) On June 1, 2016, CPD responded that it had searched the CPD e-mail accounts for the 12 named officers during the two specified time periods.

6) On June 10, 2016, the Public Access Bureau sent CPD a letter requesting additional information about the measures taken by CPD to search for responsive records. The letter requested that CPD "describe the methods used to search CPD e-mail accounts, and in particular, which search terms were used" and address whether CPD "conducted a search of personal email accounts to discover emails in which CPD business was discussed."

7) On July 19, 2016, CPD submitted a supplemental response to this office. CPD stated that it had not conducted a search of personal e-mail accounts for responsive records because e-mails on those accounts are not "public records" as defined in section 2(c) of FOIA. It also described its search of CPD e-mail accounts as using the term "Laquan McDonald" and provided records documenting that search.

8) On June 27, 2016, the Public Access Bureau properly extended the time in which to issue a binding opinion by 30 business days, to August 9, 2016, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

9) The e-mails pertaining to the transaction of public business on the personal e-mail accounts of public employees, such as the CPD officers, are "public records" as defined in section 2(c) of FOIA.

10) CPD has not demonstrated that it conducted a reasonably adequate search for all responsive records because it did not seek to obtain responsive records from the personal e-mail accounts of the named CPD officers.

11) Further, CPD has not demonstrated that it conducted a reasonably adequate search for all responsive records because it limited its search of CPD e-mail accounts to a single proper name.
Therefore, it is the opinion of the Attorney General that CPD's response to Ms. Yager's Freedom of Information Act request violated the requirements of the Act. Accordingly, CPD is directed to take immediate and appropriate action to comply with this opinion by conducting a search of the personal e-mail accounts of the 12 named CPD officers. As described above, CPD may initially conduct this search by asking the 12 CPD officers whether they maintain any records responsive to the request, and, if so, by requiring the officers to provide copies of the records to CPD's FOIA Officer. CPD is also directed to expand the scope of its search of CPD e-mail accounts to include other search terms, such as alternate name spellings, the name of the involved officers, the incident number, the location of the incident, and a physical description of Mr. McDonald. Thereafter, CPD is directed to furnish Ms. Yager with any additional responsive records, subject to appropriate redactions under section 7 of FOIA (5 ILCS 140/7 (West 2015 Supp.)).

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 et seq. (West 2014). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Courtney Yager as defendants. See 5 ILCS 140/11.5 (West 2014).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:

Michael J. Luke
Counsel to the Attorney General
OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 13, 2016

Via electronic mail
Mr. Johnathan Hettinger
News Reporter
The News-Gazette
15 East Main Street
Champaign, Illinois 61820
jhettinger@news-gazette.com

Via electronic mail
Ms. Laura J. Hall
Assistant City Attorney
City of Champaign
102 North Neil Street
Champaign, Illinois 61820
Laura.hall@ci.champaign.il.us

RE: FOIA Request for Review – 2016 PAC 41092

Dear Mr. Hettinger and Ms. Hall:

This determination is issued pursuant to section 9.5(f) of the Freedom of
Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons discussed below, the
Public Access Bureau concludes that communications pertaining to the transaction of public
business that were sent or received on the personal cellphone and personal e-mail account of the
chief of police of the City of Champaign (City), as well as portions of his personal cellphone bill
that document communications related to his public duties, are public records subject to the
requirements of FOIA. This office further concludes that, with the exception of those records,
the City conducted a reasonable search for records responsive to Mr. Johnathan Hettinger's
March 14, 2016, FOIA request.

On that date, Hettinger, on behalf of The News-Gazette, submitted a FOIA request
to the City's Police Department (Department) seeking copies of records of two traffic stops. The
request further stated:
Mr. Johnathan Hettinger  
Ms. Laura Hall  
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I would also like all phone records of Police Chief Anthony Cobb on April 19, 2014, including his personal phone because it was allegedly used to conduct official business and therefore should be considered a public record.

I would also like all communication to or from Police Chief Anthony Cobb containing the words "Bryant" or "Harvey" in 2014.

I would also like all communication to or from Police Chief Anthony Cobb containing the words "martel" or "miller" in September 2015.¹

On March 24, 2016, the City responded on behalf of the Department by providing records concerning the traffic stops and by stating that it did not possess any records responsive to the remaining portions of the request. Mr. Hettinger's Request for Review disputes that response, asserting that "governmental phone records" were improperly withheld and that any "private phone records of Police Chief Anthony Cobb ** * should be a public record because the private phone was used to conduct business on behalf of the public."²

On April 4, 2016, this office sent a copy of the Request for Review to the City and requested a detailed written explanation of the measures taken by the City to search for Chief Cobb's phone records from April 19, 2014, communications to or from Chief Cobb containing the words "Bryant," or "Harvey" in 2014, and communications to or from Chief Cobb containing the words "martel" or "miller" in September 2015. Among other things, we asked the City to include in its response a description of any efforts the City made to determine whether or not Chief Cobb or any other City employees or officials maintain responsive communications on personal cellphones that are not in the City's physical custody and to address whether the City construes communications pertaining to the transaction of public business which were transmitted on personal cellphones as "public records" subject to the requirements of FOIA. On April 13, 2016, the City provided a written response that addressed Chief Cobb's personal cellphone bill, City-issued cellphone bill, office landline phone, and e-mails. On April 14, 2016, this office requested additional information concerning records generated on cellphones that pertain to the transaction of public business. On April 27, 2016, the City issued a supplemental response. Mr. Hettinger did not reply to either response.

¹E-mail from Johnathan Hettinger, News Reporter, The News-Gazette, to foiopolicy@champaign.il.us

Determination

Phones Bills and Communications on Personal Cellphones and Personal E-mail Accounts

To analyze the adequacy of the City's response to the FOIA request, this office must first determine whether communications sent or received on Chief Cobb's personal cellphone and the phone bill for his personal cellphone are subject to the requirements of FOIA. Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2014)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." FOIA defines "[p]ublic records" as:

- all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body. 5 ILCS 140/2(c) (West 2015 Supp.).

The City's response to this office stated that Chief Cobb's personal cellphone bill is not subject to the requirements of FOIA because it was not prepared by and for, used by, received by, in the possession of, or under the control of the City. For similar reasons, the City's supplemental response to this office stated that unless e-mails or text messages pertaining to the transaction of public business were sent or received on a personal cellphone via a City e-mail account, those communications also are not public records: "The scale does not tip in favor of disclosure because the record 'was allegedly used to conduct public business.'"3

However, a federal appeals court and courts in other states – including those with statutes defining "public records" in a manner similar to the definition of that term in Illinois FOIA – have concluded that, based on those definitions as well as public policy concerns, public officials cannot skirt the requirements of FOIA by conducting public business on personal e-mail accounts and personal electronic devices. Most recently, the District of Columbia Court of Appeals considered a federal agency's argument that e-mails pertaining to the agency's business and policymaking "were 'beyond the reach of FOIA'" because the agency's director maintained them "in an 'account' that 'is under the control of the Woods Hole Research

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3Letter from Laura J. Hall, Assistant City Attorney, City of Champaign, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau (April 27, 2016), at 3.
Mr. Johnathan Hettinger
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Center, a private organization." Competitive Enterprise Institute v. Office of Science & Technology Policy, No. 15-5128, 2016 WL 3606551, at *1 (D.C. Cir. July 5, 2016). The court disagreed, stating that there was no indication that the private organization had exclusive control of the e-mails or that the agency director was unable to access the e-mail account: "If the agency head controls what would otherwise be an agency record, then it is still an agency record and still must be searched or produced." Competitive Enterprise Institute, No. 15-5128, 2016 WL 3606551, at *4. The court added that the agency's position was incompatible with the purpose of federal FOIA (5 U.S.C. § 552 et seq. (2012)):

The Supreme Court has described the function of FOIA as serving "the citizens' right to be informed about what their government is up to." If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served. It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming that they are under her control.


In a concurring opinion, Judge Srinivasan further stated that "when a current official holds agency records, we ordinarily would expect the agency to control the documents for purposes of responding to a FOIA request." Competitive Enterprise Institute, No. 15-5128, 2016 WL 3606551, at *5.

Similarly, in O'Neill v. City of Shoreline, 170 Wash. 2d 138, 240 P.3d 1149 (Washington 2010), the Washington Supreme Court considered whether metadata from a chain of e-mails which a city's deputy mayor sent to her personal e-mail account and accessed on her home computer constituted public records under Washington's Public Records Act (PRA) (RCW 42.56.001 et seq. (2005)). The initial e-mail was sent from a private citizen to another private citizen, and then forwarded to several individuals, including the deputy mayor, who in turn forwarded it to her personal e-mail account and to other city officials. Shoreline, 170 Wash. 2d at 142-43, 240 P.3d at 1151. The city provided metadata from several e-mails, but not from the e-mail forwarded to the deputy mayor's personal e-mail account because she claimed to have inadvertently deleted it. O'Neill, 170 Wash. 2d at 143, 240 P.3d at 1151-52. Much like the Illinois FOIA, the Washington Public Records Act (PRA) defined "public record"4 as: "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by

4Former RCW 42.56.010 (2005) (codified as former RCW 42.17.020(41) (2005)).
any state or local agency regardless of physical form or characteristics." *O'Neill*, 170 Wash. 2d at 146-47, 240 P.3d at 1153. The court held that the e-mail in question was clearly a public record and that metadata of such an e-mail is also a "public record" because it may relate "to the conduct of government and is important for the public to know. * * * Our broad PRA exists to ensure that the public maintains control over their government, and we will not deny our citizenry access to a whole class of possibly important government information." *O'Neill*, 170 Wash. 2d at 147, 240 P.3d at 1154. The court directed the city to search the hard drive of the deputy mayor's home computer:

If it is possible for the City to retrieve this information, the PRA requires that it be found and released to the [requesters].

* * * We note that this inspection is appropriate only because [the deputy mayor] used her personal computer for city business. If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined. (Emphasis added.) *O'Neill*, 170 Wash. 2d at 150, 240 P.3d at 1155.

Similarly, Pennsylvania appellate courts have held that e-mails exchanged by public officials on personal e-mail accounts and personal computers are public records subject to that state's Right to Know Law (RTKL) (65 P.S. § 67.101 et seq. (West 2014)). Section 102 of RTKL (65 P.S. § 67.102 (West 2014)) defines a "[p]ublic record" as a "record * * * of a Commonwealth or local agency[ ]" that is not protected by a privilege or exempt under RTKL or any other federal or state law or regulation or judicial order or decree. "Record" is defined as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document. 65 P.S. §67.102 (West 2014).

Taken together, these provisions are roughly equivalent to the definition of "public record" in section 2(c) of FOIA, except that RTKL excludes information that is exempt from disclosure.

In *Mollick v. Township of Worcester*, 32 A.3d 859 (Pa. Commw. 2011), a Pennsylvania appellate court employed the above definitions in analyzing whether e-mails related to public business which were exchanged between township supervisors on personal computers and personal e-mail accounts were "public records" under the RTKL. The trial court
ruled that they were not because e-mails "contained on the Supervisors' personal computers and personal email accounts are neither of the Township nor are they to be construed to be in possession of the Township." *Mollick*, 32 A.3d at 864. In reversing that decision, the appellate court emphasized that because the township was governed by a board of supervisors pursuant to statute, their e-mails to each other concerning Township business are Township records irrespective of their physical location:

[R]egardless of whether the Supervisors herein utilized personal computers or personal email accounts, if two or more of the Township Supervisors exchanged emails that document a transaction or activity of the Township and that were created, received, or retained in connection with a transaction, business, or activity of the Township, the Supervisors may have been acting as the Township, and those emails could be "records" "of the Township. As such, any emails that meet the definition of "record" under the RTKL, even if they are stored on the Supervisors' personal computers [citation] or in their personal email accounts, would be records of the Township. *Mollick*, 32 A.3d at 864.

*See also Barkeyville Borough v. Stearns*, 35 A.3d 91, 96-97 (Pa. Commw. Ct. 2012) (e-mails exchanged through personal e-mails accounts in which members of a city council discussed public business with each other constituted public records in the "constructive possession" of the city under RTKL: "If this Court allowed Council members to discuss public business through personal email accounts to evade the RTKL, the law would serve no function and would result in all public officials conducting public business via personal email."); *but see In re: Silberstein*, 11 A.3d 629, 633 (Pa. Commw. Ct. 2011) (e-mails exchanged by a township commissioner and citizens – rather than other members of the public body – via the commissioner's personal e-mail account and personal computer are not "public records" under the RTKL because the "commissioner is not a governmental entity. He is an individual public official with no authority to act alone on behalf of the Township.").

In addition, an Arkansas appellate court considered whether public employees' personal e-mails were subject to the Arkansas FOIA (Ark. Code Ann. §25-19-101 et seq. (West 2002)) in the context of a former public employee's appeal of the denial of unemployment benefits. *Bradford v. Director, Employment Security Department*, 83 Ark. App. 332, 128 S.W.3d 20 (Ark. Ct. App. 2003). There, the appellant asserted that he was entitled to unemployment benefits partly because he resigned from his job with the Governor's Office after being pressured to commit illegal acts. *Bradford*, 83 Ark. App. at 338-40, 128 S.W.3d at 23-24. Among other things, the appellant alleged that he was "asked by the governor's staff to violate Arkansas's Freedom of Information Act by communicating with the governor at his private email
address rather than his official one[.]" Bradford, 83 Ark. App. at 344, 128 S.W.3d at 27. The court ruled that doing so did not violate the law because e-mails sent from public officials' personal e-mail accounts were not excluded from the requirements of the Act.5

The creation of a record of communications about the public's business is no less subject to the public's access because it was transmitted over a private communications medium than it is when generated as a result of having been transmitted over a publicly controlled medium. Emails transmitted between Bradford and the governor that involved the public's business are subject to public access under the Freedom of Information Act, whether transmitted to private email addresses through private internet providers or whether sent to official government email addresses over means under the control of the State's Division of Information Services. Bradford, 83 Ark. App. at 345, 128 S.W.3d at 27-28.

The Public Access Bureau finds the reasoning in these cases to be persuasive and consistent with the purpose of Illinois FOIA. See Wisnasky-Bettorf v. Pierce, 2012 IL 111253, ¶16, 965 N.E.2d 1103, 1106 (2012) (the primary goal is to ascertain and give effect to the intent of the General Assembly,) FOIA is intended to ensure public access to "full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." 5 ILCS 140/1 (West 2014). Further, the General Assembly expressly contemplated that because "technology may advance at a rate that outpaces its ability to address those advances legislatively[ ] *** this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made available upon request except when denial of access furthers the public policy underlying a specific exemption." 5 ILCS 140/1 (West 2014).

FOIA was enacted by Public Act 83-1013, effective July 1, 1984 – before e-mail and text messages became common modes of communication. Despite these and other advances

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5Arkansas FOIA defines "[p]ublic records" as:

- writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency or improvement district that is wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.
in technology, the original definition of "[p]ublic records" has remained largely unchanged. 

Interpreting the definition of "public records" in FOIA to exclude communications pertaining to the transaction of public business which were sent from or received on personal cellphones and personal e-mail accounts of public employees and public officials would be contrary to the General Assembly's intent of ensuring public access to full and complete information regarding the affairs of government. Such an interpretation would yield absurd results by enabling public officials to sidestep FOIA and conceal how they conduct their public duties. People v. Hunter, 2013 IL 114100, ¶ 13, 986 N.E.2d 1185, 1189 (2013) (a reviewing body "presumes that the legislature did not intend to create absurd, inconvenient, or unjust results."). FOIA cannot reasonably be construed to give public bodies the option of operating in secrecy by communicating through personal cellphones and personal e-mail accounts. Ill. Att'y Gen. PAC Req. Rev. Ltr. 40576, issued May 27, 2016.

Accordingly, the Public Access Bureau concludes that communications pertaining to the transaction of public business that were sent or received on Chief Cobb's personal cellphone or personal e-mail account, and portions of his personal cellphone bill documenting those communications, if any, are "public records" under the definition of that term in section 2(c) of FOIA. Because Mr. Hettinger's Request for Review appeared to assert that all records of Chief Cobb's personal cellphone are public records because that phone was allegedly used to conduct public business, this office notes that the plain language of section 2(c) of FOIA limits the definition of "public records" to records pertaining to the transaction of public business. Cellphone communications and portions of bills concerning personal matters that are unrelated to public business are not subject to the requirements of FOIA and therefore are not responsive to the request. The fact that a device is used to send or receive public records does not transform all communications sent or received on the device, including those with no connection to public business, into public records.

Section 7(1)(c) of FOIA

The City's response to this office also emphasized that Chief Cobb has a privacy interest in records of his personal phone and that Mr. Hettinger should be required to provide an explanation of his efforts to obtain this information from alternatives sources and "why the public interest in this personal phone bill outweighs Anthony Cobb's privacy rights." This

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6"Public records" was defined to include "all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared, or having been or being used, received, possessed or under the control of any public body." Ill. Rev. Stat. 1984, ch. 116, par. 202(c).

7Letter from Laura J. Hall, Assistant City Attorney, City of Champaign, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau (April 13, 2016), at 3.
office construes that as an assertion of section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2015 Supp.)), which exempts from disclosure:

Personal 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. "Unwarranted 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 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.)

Because any communications concerning Chief Cobb's transaction of public business or phone bills documenting such communications directly relate to Chief Cobb's public duties, disclosure of records concerning those communications would not constitute an unwarranted invasion of privacy under the plain language of section 7(1)(c) of FOIA. Accordingly, the City has not sustained its burden of demonstrating that any such records are exempt from disclosure pursuant to section 7(1)(c) of FOIA. As discussed above, communications and portions of bills related to personal matters that are unconnected to the transaction of public business are not public records subject to the requirements of FOIA.

Search for Responsive Records

FOIA requires a public body to conduct a "reasonable search tailored to the nature of a particular request." Campbell v. U. S. Dep't of Justice, 164 F.3d 20, 28 (D.C. Cir. 1998). A public body is not required to "search every record system[,]" but it "cannot limit its search to only one record system if there are others that are likely to turn up the requested information." Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (1990). A public body's search must be "reasonably calculated to uncover all relevant documents." Weisberg v. Department of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). However, a "requester is entitled only to records that an agency has in fact chosen to create and retain." Yeager v. Drug Enforcement Admin., 678 F.2d 315, 321 (D.C. Cir.1982); see also Miller v. United States Dep't of State, 779 F.2d 1378, 1385 (8th Cir.1985) ("The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it.").

With respect to Chief Cobb's City-issued cellphone records from April 19, 2014, the City's response to this office stated that (1) it asked Chief Cobb for records of calls but he does not maintain phone bills from that period; (2) the bills that the City receives for phone
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Service do not contain details about specific calls; and (3) the City's cellphone provider only maintains records for one year. The City's supplemental response also stated that the call log on the City-issued cellphone only retains records of calls within the past month or so, and that Chief Cobb reported that he does not maintain any records of communications generated on the City-issued cellphone that are responsive to Mr. Hettinger's request. In addition, the City stated that its Information Technology Department unsuccessfully searched Chief Cobb's landline for the relevant period, and that the City searched the paper or electronic files where responsive records could have been saved — including keyword searches for e-mails with the specific names that Mr. Hettinger identified in his request — but did not locate any responsive records. The City's response also stated that it typically only retains e-mails for one year.

The measures taken by the City to locate records other than those related to Chief Cobb's personal cellphone appear to have been reasonably calculated to locate responsive records. *Reyes v. United States Environmental Protection Agency*, 991 F. Supp. 2d 20, 28 (D.D.C., 2014) (federal agency conducted reasonable search for communications concerning a peer review by identifying 31 employees who could potentially have responsive records and asking them to search all electronic and paper files related to the peer review process). The City, however, apparently made no effort to locate responsive communications that may have been exchanged on Chief Cobb's personal cellphone, or to obtain portions of his personal cellphone bill documenting such phone calls, because it incorrectly determined that such records are not subject to the requirements of FOIA. Because the City did not conduct a reasonable search for those records, this office requests that the City ask Chief Cobb to search for and to provide any records of responsive communications involving his personal cellphone. If any responsive records are located, the City must provide those records to Mr. Hettinger subject only to permissible redactions under section 7 of FOIA (5 ILCS 140/7 (West 2015 Supp.)).

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have questions, please contact me at (312) 814-6756. This letter serves to close this matter.

Very truly yours,

STEVE SILVERMAN  
Assistant Bureau Chief  
Public Access Bureau

41092 f3a search proper/improper mun
August 9, 2016

PUBLIC ACCESS OPINION 16-006
(Request for Review 2016 PAC 41657)

FREEDOM OF INFORMATION ACT:
Disclosure of E-Mails from Public
Employees' Personal E-Mail Accounts
Pertaining to Transaction of Public Business;
Duty to Conduct Reasonable
Search for Responsive Records

Mr. Drew Shenkman
Counsel, CNN
One CNN Center
Atlanta, Georgia 30303

Ms. Charise Valente
General Counsel
Chicago Police Department
Office of Legal Affairs
3510 South Michigan, 5th Floor
Chicago, Illinois 60653

Dear Mr. Shenkman and Ms. Valente:

This is a binding opinion issued by the Attorney General pursuant to section 9.5(f)
of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons
discussed below, this office concludes that the Chicago Police Department (CPD) violated the
requirements of FOIA by failing to conduct an adequate search for all e-mails responsive to a
January 28, 2016, FOIA request submitted by Ms. Courtney Yager of Cable News Network, Inc.
(CNN).
BACKGROUND

On January 28, 2016, Ms. Yager, on behalf of CNN, submitted a FOIA request to CPD seeking "all emails related to Laquan McDonald from Police Department email accounts and personal email accounts where business was discussed" for 12 named CPD officers for the date ranges of October 19 through October 24, 2014, and November 19 through November 29, 2015. On February 5, 2016, Ms. Yager agreed to extend the deadline for responding to her request for e-mails to March 4, 2016. On April 19, 2016, CPD sent a series of e-mails with attachments totaling over 500 pages to Ms. Yager in response to her request. CPD's response did not cite any exemptions or provide any explanation of the records provided.

On April 28, 2016, Mr. Drew Shenkman, Counsel for CNN, filed a Request for Review with the Public Access Counselor and the Public Access Bureau alleging that the records that CNN had received from CPD, although voluminous, were unresponsive to CNN's FOIA request:

Upon receipt, Ms. Yager contacted the Department's FOIA officer and noted the lack of any responsive records to which she was told over the phone that the records provided were all of the records found in their search. Thus, we must deem our request to have been denied, in clear violation of FOIA. Indeed, it appears to us that the Department may not have even conducted an adequate search for such records, since not a single responsive email was actually produced.

1Officer Jason Van Dyke, Officer Joseph Walsh, Officer Janet Mondragon, Officer Dora Fontaine, Officer Daphne Sebastian, Officer Ricardo Viramontes, Officer Thomas Gaffney, Officer Joseph McNeilligott, Officer Leticia Velez, Officer Arturo Bacerra, Deputy Chief David McNaughton, and Detective David March.

2On October 20, 2014, Laquan McDonald was shot and killed by Chicago Police Officer Jason Van Dyke. The shooting was recorded on video by a CPD dashboard camera. A civil action was filed in Cook County Circuit Court related to the release of the video. Smith v. Chicago Police Department, Docket No. 2015 CH 11780 (Circuit Court, Cook County). On November 19, 2015, the circuit court ordered the release of the video recording on or before November 25, 2015. Memorandum Opinion and Order, Smith v. Chicago Police Department, Docket No. 2015 CH 11780, slip op. at 18 (Circuit Court, Cook County). CPD publicly released the video recording on November 24, 2015.

3E-mail from Courtney Yager, Producer, CNN, to Chicago Police Department, Attn: Freedom of Information Officer (January 28, 2016).

4E-mail from foia@chicagopolice.org to Courtney Yager (April 19, 2016).

5E-mail from Drew Shenkman, Counsel, CNN, to Public Access [Bureau] (April 28, 2016).
On May 5, 2016, the Public Access Bureau sent a copy of the Request for Review to CPD and asked it to provide a detailed description of the processing of Ms. Yager's FOIA request and the measures taken by CPD to search for responsive records, including a description of the specific recordkeeping systems that were searched, the method of that search, and the specific individuals who were consulted. On June 1, 2016, CPD submitted a written response to this office. CPD explained that it had searched the CPD e-mail system for the 12 named officers for the requested time periods and the search resulted in 47 e-mails. CPD described some of the responsive e-mails as being "News Clips" produced by CPD's Office of News Affairs that contained references to Laquan McDonald. According to CPD, 24 of the other e-mails were 12 identical copies of two CPD office-wide e-mails sent on November 24, 2015, and November 25, 2015, regarding the release of the dashboard camera video. CPD provided this office with copies of the records in both redacted and un-redacted forms.

The Public Access Bureau forwarded a copy of CPD's response to Mr. Shenkman on June 2, 2016. On June 9, 2016, Mr. Shenkman replied to CPD's response. With respect to CPD's search for records on personal e-mail accounts, Mr. Shenkman contended:

"It appears that the Department only searched for emails on the officers' city-issued email address, and not on any other platforms or devices, including personal email accounts. Even if the Department does not retain control over personal email or devices, it still has a duty to request copies of such communications that"

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7Letter from Ryan Nelligan, Office of Legal Affairs, Department of Police, City of Chicago, to Office of the Attorney General, Neil Olson, Assistant Attorney General, (June 1, 2016).

8Letter from Ryan Nelligan, Office of Legal Affairs, Department of Police, City of Chicago, to Office of the Attorney General, Neil Olson, Assistant Attorney General (June 1, 2016).

9CPD asserted that it made some limited redactions to the records under sections 7(1)(b) and 7(1)(c) of FOIA (5 ILCS 140/7(1)(b), (1)(c) (West 2015 Supp.)). In an e-mail to the Public Access Bureau on July 28, 2016, Mr. Shenkman confirmed that he was not seeking review of those redactions. Therefore, this office does not address the redactions in this binding opinion.

10Letter from Neil P. Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Drew Shenkman, Counsel, CNN (June 2, 2016).
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relate to the officer’s public service role and/or in the performance of their government function.\[11\]

Mr. Shenkman also questioned the adequacy of CPD’s search for responsive records:

Regardless of the email accounts and devices actually searched, it is entirely unclear to us the search terms and/or parameters the Department actually undertook in conducting its search. Obviously, the search terms used, and the review procedures utilized that would identify highly-relevant documents that might not be found using a search term, are crucial to obtaining CNN’s satisfaction that the Department has engaged in a fulsome search responsive to CNN’s FOIA request.\[12\]

On June 10, 2016, the Public Access Bureau sent CPD a letter requesting additional information about the measures taken by CPD to search for responsive records.\[13\] The letter requested that CPD "describe the methods used to search CPD e-mail accounts, and in particular, which search terms were used[ ]" and address whether CPD "conducted a search of personal email accounts to discover emails in which CPD business was discussed."\[14\]

On July 19, 2016, CPD submitted a supplemental response to this office.\[15\] Documentation provided by CPD with that submission indicates that the CPD e-mail accounts of the 12 named police officers were searched for the term “Laquan McDonald.” Two searches were conducted, one for each of the specified time frames requested. CPD also confirmed that it had not conducted a search of personal e-mail accounts for responsive records, asserting that e-mails on those accounts are not "public records."

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\[11\] Letter from Drew E. Shenkman, Counsel, CNN, to Neil Olson, Assistant Attorney General, Public Access Bureau (June 9, 2016).

\[12\] Letter from Drew E. Shenkman, Counsel, CNN, to Neil Olson, Assistant Attorney General, Public Access Bureau (June 9, 2016).


\[14\] Letter from Neil P. Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Ryan Nelligan, Chicago Police Department, Office of Legal Affairs (June 10, 2016), at 1.

\[15\] Letter from Ryan Nelligan, Office of Legal Affairs, Department of Police, City of Chicago, to Office of the Attorney General, Neil Olson, Assistant Attorney General (July 19, 2016).
On July 19, 2016, the Public Access Bureau forwarded a copy of CPD’s supplemental response to Mr. Shenkman. On July 27, 2016, Mr. Shenkman provided CNN’s reply to CPD’s supplemental response and addressed the search for responsive records on personal e-mail accounts:

In refusing to request emails from City police officers concerning official police business, the City essentially contends that any correspondence sent or received by Chicago police officers is not a public record unless it resides on the city’s servers. * * *

* * *

Illinois FOIA exists to protect the public’s right to know what its government is up to. Giving public officials like police officers carte blanche to evade FOIA laws by using personal email for public purposes would eviscerate Illinois FOIA. Moreover, public officials would have an incentive to avoid FOIA by deliberately communicating about sensitive or controversial topics on private email. This flies in the face of the very purpose of public information laws.  

Pursuant to section 9.5(f) of FOIA, on June 27, 2016, the Public Access Bureau properly extended the time in which to issue a binding opinion by 30 business days, to August 9, 2016. 

ANALYSIS

Communications on Public Employees’ Personal E-Mail Accounts Pertaining to the Transaction of Public Business

To analyze the adequacy of the CPD’s response to CNN’s FOIA request, it must first be determined whether e-mails on the personal e-mail accounts of CPD employees are
subject to the requirements of FOIA. Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2014)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." Section 2(c) of FOIA (5 ILCS 140/2(c) (West 2015 Supp.)) defines "[p]ublic records" as:

- *all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.* (Emphasis added.)

In *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶38, 992 N.E.2d 629, 638 (2013), the appellate court stated that "to qualify as a 'public record' under [section 2(c) of] FOIA, a communication must (1) 'pertain[] to the transaction of public business' and have either been (2) prepared by, (3) prepared for, (4) used by (5) received by, (6) possessed by, or (7) controlled by a public body." The court stated that if a communication pertaining to public business was sent to and received by members of a city council on personal electronic devices during a city council meeting when the individual "members were functioning collectively as the 'public body,' then the communication is a 'public record' and thus subject to FOIA." *City of Champaign, 2013 IL App (4th) 120662, ¶42, 992 N.E.2d at 639-40.* The court added: "To hold otherwise would allow members of a public body, convened as the public body, to subvert the Open Meetings Act [] and FOIA requirements simply by communicating about city business during a city council meeting on a personal electronic device." (Internal citation omitted.) *City of Champaign, 2013 IL App (4th) 120662, ¶43, 992 N.E.2d at 640.*

Citing *City of Champaign*, as well as *Quinn v. Stone*, 211 Ill. App. 3d 809, 812 (1st Dist. 1991), CPD argued in its supplemental response to this office that e-mails exchanged by its employees on personal e-mail accounts are not CPD's "public records":

Because the communications sought, if any exist, would have been prepared by or sent to individual officers and employees rather than the City, they are not communications "prepared by or for" a public body. And because the communications would not be stored on a City server or account, they cannot be "used by," were not "received by," and are not "in the possession of, or under the control of," a public body. Thus, the requested communications, if
any, do not fall within the FOIA's definition of a "public record" and are not subject to production under the Act.\footnote{Letter from Ryan Nelligan, Office of Legal Affairs, Department of Police, City of Chicago, to Office of the Attorney General, Neil Olson, Assistant Attorney General (July 19, 2016), at 1.}

When an individual public employee such as a CPD officer acts in an official capacity, he or she transacts public business as a member of a municipal police department, which clearly is a public body subject to the requirements of FOIA.\footnote{Section 2(a) of FOIA (5 ILCS 140/2(a) (West 2015 Supp.)) defines public body as: all * * * executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing[.]} CPD's interpretation would undercut the principle that public bodies act through their employees, by excluding from the definition of "public records" communications sent or received by employees of a public body on personal devices or accounts, regardless of whether the communications pertain to the transaction of public business. Such an interpretation erroneously focuses not on the content of a communication but on the method by which it is transmitted.

CPD's supplemental response to this office also contended that e-mails exchanged through personal e-mail accounts are not subject to the requirements of FOIA because CPD does not possess or control those records. Citing Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 152 (1980) (because "possession or control is a prerequisite to FOIA disclosure duties[,]" transcripts of telephone conversations removed from the State Department were not "agency records" of the State Department subject to the requirements of federal FOIA), CPD maintained that FOIA does not provide a mechanism by which it could compel employees to grant it access to their personal e-mail accounts within the time requirements for a response.

With respect to the control of the records, the Court of Appeals for the District of Columbia Circuit recently considered a federal agency's argument that e-mails pertaining to the agency's business and policymaking "were 'beyond the reach of FOIA'" because the agency's director maintained them "in an 'account' that 'is under the control of the Woods Hole Research Center, a private organization.'" \textit{Competitive Enterprise Institute v. Office of Science and Technology Policy}, No. 15-5128, 2016 WL 3606551, at *1 (D.C. Cir. July 5, 2016). The court disagreed, stating that there was no indication that the private organization had exclusive control of the e-mails or that the agency director was unable to access the e-mail account: "If the agency head controls what would otherwise be an agency record, then it is still an agency record and still
must be searched or produced." Competitive Enterprise Institute, No. 15-5128, 2016 WL 3606551, at *4. The court added that the agency's position was incompatible with the purpose of federal FOIA (5 U.S.C. § 552 et seq. (2012)):

The Supreme Court has described the function of FOIA as serving "the citizens' right to be informed about what their government is up to." [Citations.] If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served. It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming that they are under her control. Competitive Enterprise Institute, No. 15-5128, 2016 WL 3606551, at *4.

The court distinguished the United States Supreme Court's decision in Kissinger on the bases that former Secretary of State Henry Kissinger held the relevant records under a claim of right and that the State Department had ceded legal control of those records to him. Competitive Enterprise Institute, No. 15-5128, 2016 WL 3606551, at *2-3. In rejecting the agency's argument that it lacked control of the records, the court emphasized that "an agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door[.]" (Emphasis added.) Competitive Enterprise Institute, No. 15-5128, 2016 WL 3606551, at *3.21

This reasoning is equally applicable to the Illinois FOIA, which is intended to ensure public access to "full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." 5 ILCS 140/1 (West 2014). Further, the General Assembly expressly contemplated that because "technology may advance at a rate that outpaces its ability to address those advances legislatively[ ]" this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made

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21See also O'Neill v. City of Shoreline, 170 Wash. 2d 138, 150, 240 P.3d 1149, 1155 (Washington 2010) (concluding that metadata from a chain of e-mails which a city's deputy mayor sent to her personal e-mail account and accessed on her home computer constituted public records under Washington's Public Records Act (PRA) (RCW 42.56.001 et seq. (2005)): "If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined.").
available upon request except when denial of access furthers the public policy underlying a specific exemption." 5 ILCS 140/1 (West 2014).

FOIA was enacted by Public Act 83-1013, effective July 1, 1984 – before e-mail and other forms of electronic communication became common. Despite these and other advances in technology, the original definition of "public records" has remained largely unchanged. 22 Interpreting the definition of "public records" in FOIA to exclude communications pertaining to the transaction of public business which were sent from or received on personal e-mail accounts of public officials and public employees would be contrary to the General Assembly's intent of ensuring public access to full and complete information regarding the affairs of government. Such an interpretation would yield absurd results by enabling public officials to sidestep FOIA and conceal how they conduct their public duties simply by communicating via personal electronic devices. People v. Hunter, 2013 IL 114100, ¶13, 986 N.E.2d 1185, 1189 (2013) (a reviewing body "presumes that the legislature did not intend to create absurd, inconvenient, or unjust results."). The fact that FOIA does not include an express requirement that public bodies search and recover responsive records in personal e-mail accounts of its officers and employees is not material given the statute's absence of any express directives about how a public body must search relevant recordkeeping systems.

CPD also argued that the search of personal e-mail accounts would subject employees to unreasonable and unnecessary invasions of personal privacy. Section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2015 Supp.)) exempts information from disclosure when disclosure would be an "unwarranted invasion of personal privacy." This provision, however, expressly provides that the "disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy." 5 ILCS 140/7(1)(c) (West 2015 Supp.). Any e-mails exchanged by CPD employees concerning the shooting death of Mr. McDonald presumably pertain to those employees' public duties and therefore accessing them would not constitute an unwarranted invasion of personal privacy under the plain language of section 7(1)(c) of FOIA. Furthermore, communications concerning personal matters that are unrelated to the transaction of public business are not subject to the requirements of FOIA. 5 ILCS 140/2(c) (West 2015 Supp.) (limiting the definition of "public records" to "all records, * * * pertaining to the transaction of public business[.]") ; City of Champaign, 2013 IL App (4th) 120662, ¶31, 992 N.E.2d at 637 ("to qualify as a public record a communication must first pertain to 'business or community interests as opposed to private

22 "Public records" was defined to include "all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared, or having been or being used, received, possessed or under the control of any public body." Public Act 83-1013, effective July 1, 1984, codified at Ill. Rev. Stat. 1984, ch. 116, par. 202(c).
affairs.' Indeed, FOIA is not concerned with an individual's private affairs."). The fact that a personal e-mail account is used to send or receive public records does not transform all communications sent or received on that account, in particular those with no connection to the transaction of public business, into public records that must be disclosed in accordance with FOIA. CPD has not asserted that any employee objected to providing responsive e-mails or that it conducted a search calculated to balance the employees' personal privacy with the public body's obligations under FOIA, such as asking the employees whether they maintained responsive e-mails.

Accordingly, communications pertaining to the transaction of public business that were sent or received on the CPD employees' personal e-mail accounts are "public records" under the definition of that term in section 2(c) of FOIA.

Search for Responsive Records

FOIA requires a public body to conduct a "reasonable search tailored to the nature of a particular request." Campbell v. United States Dep't of Justice, 164 F.3d 20, 28 (D.C. Cir. 1998). A public body is not required to "search every record system[,]" but it "cannot limit its search to only one record system if there are others that are likely to turn up the requested information." Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). "Any doubt about the adequacy of the search should be resolved in favor of the requester" and any search terms used by a public body must be reasonably calculated to discover all responsive records. Negley v. Federal Bureau of Investigation, 658 F. Supp. 2d 50, 59, 60-61 (D.D.C. 2009).

As described above, CPD did not conduct a search of personal e-mail accounts for responsive records, despite the requester's specific request for any e-mails from "personal email accounts where business was discussed." This office has concluded that those e-mail accounts could contain public records as defined by section 2(c) of FOIA. Therefore, this office further concludes that CPD has failed to demonstrate that it conducted an adequate search of personal e-mail accounts for responsive records.

CPD has expressed concerns about invading its employees' personal privacy by conducting a search of their personal e-mail accounts. CPD, however, has taken no action to ascertain whether the CPD employees named in the FOIA request might possess responsive records. Although FOIA does not specifically describe the manner in which a public body is required to perform its search, an automated search of the entirety of a personal e-mail account using a search term is not necessarily required. Depending on the circumstances, ordering CPD officers to produce any responsive records may satisfy the requirement that CPD conduct a reasonable search. See Nissen v. Pierce County, 183 Wash. 2d 863, 886-87, 357 P.3d 45, 57
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(Wash. 2015) ("[A]gency employees are responsible for searching their files, devices, and accounts for records responsive to a relevant [public records] request. ** When done in good faith, this procedure allows an agency to fulfill its responsibility to search for and disclose public records without unnecessarily treading on the constitutional rights of its employees."); see also Brophy v. United States Department of Defense, No. CIV.A. 05-360 (RMC), 2006 WL 571901, at *8 (D.D.C. 2006) (absent evidence of a lack of good faith, a public employee's search of his personal e-mail account and confirmation that he did not locate responsive records satisfied the public body's obligation to conduct a reasonable search of that account). Under the requirements of FOIA, CPD may not decline to search for e-mails contained on personal accounts.

In addition, with respect to the search of the CPD e-mail accounts, CPD limited its search to any message containing the term "Laquan McDonald." This search term, however, does not account for other references to Mr. McDonald that might have been used in e-mail communications by CPD officers. At the time of the shooting in October 2014, Mr. McDonald's name may not have been widely known, but there may have been references to the incident either by the involved officer, the incident number, the incident's location, or a physical description of Mr. McDonald. In addition, both Mr. McDonald's first and last names may have been spelled differently in some e-mails. Under the circumstances, the use of a full proper name as the single search term was not reasonably calculated to discover all relevant records. Therefore, this office also concludes that CPD has failed to demonstrate that it conducted an adequate search of CPD e-mail accounts.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the available information, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On January 28, 2016, Ms. Courtney Yager, on behalf of CNN, submitted a FOIA request to CPD seeking "all emails related to Laquan McDonald from Police Department email accounts and personal email accounts where business was discussed" for 12 named CPD officers for the date ranges of October 19 through October 24, 2014, and November 19 through November 29, 2015.

2) On April 19, 2016, CPD furnished records to Ms. Yager that it deemed responsive to her request.

3) On April 28, 2016, Mr. Drew Shenkman, Counsel for CNN, filed a Request for Review with the Public Access Counselor and the Public Access Bureau alleging that CPD had not conducted an adequate search for responsive records. Mr. Shenkman's Request for
Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2014)).

4) On May 5, 2016, the Public Access Bureau forwarded a copy of the Request for Review to CPD and asked it to provide a detailed description of the handling of Ms. Yager's request and the measures taken by CPD to search for responsive records, including a description of the specific recordkeeping systems that were searched, the method of that search, and the specific individuals who were consulted.

5) On June 1, 2016, CPD responded that it had searched the CPD e-mail accounts for the 12 named officers during the two specified time periods.

6) On June 10, 2016, the Public Access Bureau sent CPD a letter requesting additional information about the measures taken by CPD to search for responsive records. The letter requested that CPD "describe the methods used to search CPD e-mail accounts, and in particular, which search terms were used" and address whether CPD "conducted a search of personal email accounts to discover emails in which CPD business was discussed."

7) On July 19, 2016, CPD submitted a supplemental response to this office. CPD stated that it had not conducted a search of personal e-mail accounts for responsive records because e-mails on those accounts are not "public records" as defined in section 2(c) of FOIA. It also described its search of CPD e-mail accounts as using the term "Laquan McDonald" and provided records documenting that search.

8) On June 27, 2016, the Public Access Bureau properly extended the time in which to issue a binding opinion by 30 business days, to August 9, 2016, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

9) The e-mails pertaining to the transaction of public business on the personal e-mail accounts of public employees, such as the CPD officers, are "public records" as defined in section 2(c) of FOIA.

10) CPD has not demonstrated that it conducted a reasonably adequate search for all responsive records because it did not seek to obtain responsive records from the personal e-mail accounts of the named CPD officers.

11) Further, CPD has not demonstrated that it conducted a reasonably adequate search for all responsive records because it limited its search of CPD e-mail accounts to a single proper name.
Therefore, it is the opinion of the Attorney General that CPD's response to Ms. Yager's Freedom of Information Act request violated the requirements of the Act. Accordingly, CPD is directed to take immediate and appropriate action to comply with this opinion by conducting a search of the personal e-mail accounts of the 12 named CPD officers. As described above, CPD may initially conduct this search by asking the 12 CPD officers whether they maintain any records responsive to the request, and, if so, by requiring the officers to provide copies of the records to CPD's FOIA Officer. CPD is also directed to expand the scope of its search of CPD e-mail accounts to include other search terms, such as alternate name spellings, the name of the involved officers, the incident number, the location of the incident, and a physical description of Mr. McDonald. Thereafter, CPD is directed to furnish Ms. Yager with any additional responsive records, subject to appropriate redactions under section 7 of FOIA (5 ILCS 140/7 (West 2015 Supp.)).

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 et seq. (West 2014). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Courtney Yager as defendants. See 5 ILCS 140/11.5 (West 2014).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:

Michael J. Luke
Counsel to the Attorney General
Via electronic mail

Mr. Paul Prezioso
FOIA Officer
Illinois Gaming Board
106 North LaSalle, Suite 300
Chicago, Illinois 60601
Paul.Prezioso@igb.illinois.gov

RE: FOIA Request for Review – 2015 PAC 37779

Dear [Redacted] and Mr. Prezioso:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons set forth below, the Public Access Bureau concludes that the Illinois Gaming Board (Board) improperly denied [Redacted] August 18, 2015, FOIA request in its entirety.

On that date [Redacted] submitted a FOIA request to the Board seeking a copy of the "completed investigative background employment packet and notes for [Redacted] criteria not met by candidate [Redacted] for not being selected for 1 of 3 Gaming Special Agent Trainee vacancies applied for". [Redacted] also specified that he was seeking the "[rationale] behind why an offer of employment was not offered to [Redacted]". On August 27, 2015, the Board denied the request in its entirety under sections

1E-mail from [Redacted] to Paul Prezioso, FOIA Officer, Illinois Gaming Board (August 18, 2015).
Mr. Paul Prezioso  
April 14, 2016  
Page 2

7(1)(a), 7(1)(b), 7(1)(c), 7(1)(d)(v), and 7(1)(f) of FOIA (5 ILCS 140/7(1)(a), (1)(b), (1)(c), (1)(d)(v), and (1)(f) (West 2014), as amended by Public Act 99-298, effective August 6, 2015).

On October 13, 2015, our office forwarded a copy of the Request for Review to the Board and requested a detailed explanation of the legal and factual bases for the asserted exemptions as well as copies of the responsive records for our confidential review. On October 22, 2015, the Board submitted a written response to our office together with the responsive records for our review.

On October 28, 2015, our office forwarded a copy of the Board's response letter to Mr. Paul Prezioso. On November 5, 2015, Mr. Prezioso replied to the Board's response letter. He contended that he was unfairly denied rightful employment, and the purposes of his request were to ensure information came from credible sources, that mitigating information was included, and to "verify if proper hiring procedures were followed." Mr. Prezioso also asserted that privacy considerations were not relevant because he was requesting the records relating to his application, and, to the extent the Board wished to conceal the identity of those people who had negative things to say about him, it could redact those individuals' names and identifying characteristics.

**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 2014); 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 2014). The exemptions from disclosure are to be narrowly construed. Lieber v. Board of Trustees of Southern Illinois Univ., 176 Ill. 2d 401, 408 (1997). Under section 7(1) of FOIA (5 ILCS 140/7(1) (West 2014), as amended by Public Act 99-298, effective August 6, 2015):

> [w]hen a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying. (Emphasis added.)

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Section 7(1)(a) of FOIA

Section 7(1)(a) of FOIA exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." 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 Gov't Ass'n v. Blagojevich, 386 Ill. App. 3d 808, 814 (4th Dist. 2008).

The Board asserted that the investigatory evidentiary privilege recognized at Illinois common law allows it to withhold the records responsive to the... request. However, the plain language of section 7(1)(a) of FOIA does not encompass common law, but rather that information specifically prohibited from being disclosed by federal or State statutes or rules. In addition, the case law cited by the Board, Castro v. Brown's Chicken & Pasta, Inc., 314 Ill. App. 3d 542 (1st Dist. 2000) and In re: Marriage of Daniels, 240 Ill. App. 3d 314 (1st Dist. 1992) is inapposite. In both cases, the Appellate Court held that an evidentiary privilege in discovery relating to ongoing investigations could be construed as analogous to the existing exemptions in FOIA, not that the evidentiary privilege may be cited to withhold records under FOIA. See Castro, 314 Ill. App. 3d at 555; Marriage of Daniels, 240 Ill. App. 3d 325-26 & n.1

Indeed, FOIA recognizes seven exemptions to disclosure related to investigations contained in section 7(1)(d) of FOIA (5 ILCS 140/7(1)(d) (West 2014), as amended by Public Act 99-298, effective August 6, 2015), and the Board has also asserted one of those exemptions here. Accordingly, the Board has not demonstrated that these background investigation records are exempt in their entireties on the basis of section 7(1)(a) of FOIA.

Thirty-eight pages of the responsive records provided for our confidential review, however, appear to be print-outs from the Law Enforcement Agencies Data System (LEADS). Section 1240.80(d) of title 20 of the Administrative Code (20 Ill. Adm. Code §1240.80(d) (2016), 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."; 3 see also Better Gov't Ass'n v. Zaruba, 2014 IL App (2d) 140071, ¶27 (2014) ("The regulations make it clear that the public is not entitled to view or possess data that is transmitted through, received through, or stored in LEADS."). Accordingly, the Board may withhold any LEADS information under section 7(1)(a) of FOIA.

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3That provision implements section 7 of the Illinois Criminal Identification Act (20 ILCS 2630/7 (West 2014)).
Section 7(1)(c) of FOIA

Section 7(1)(c) of FOIA exempts from disclosure "[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."

In its response to this office, the Board cited to our prior determinations that application materials and résumés of unsuccessful applicants to public positions are exempt under section 7(1)(c). However, because a subject of information may consent to the disclosure of that information, the rationale of those determinations does not apply when the requester is the subject of the information at issue. Although the Board has also asserted that the investigatory file contains other personal information exempt under section 7(1)(c), it has not described with any particularity what that information is. Accordingly, we conclude that the Board has not met its burden of demonstrating that the records are exempt from disclosure in their entireties pursuant to section 7(1)(c) of FOIA.\(^4\)

Section 7(1)(d) of FOIA

Section 7(1)(d)(v) of FOIA exempts from disclosure records that are "created in the course of administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes," which "disclose unique or specialized investigative techniques other than those generally used and known * * * and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request[.]"

The Board asserted that it is a "law enforcement body with police powers" and that it conducted "a background investigation of [redacted] which included interviewing witnesses and former employers, obtaining employment and education files, running a criminal history check, reviewing court and police records, obtaining a credit history, and receiving drug test information."\(^5\) The Board also stated that "the background investigation conducted on [redacted] is substantially similar to the background investigation the Board conducts on its

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\(^4\)The Board also cited to section 7(1)(b) of FOIA as a basis to withhold "private information," but has not explained how in particular 7(1)(b) would serve as a basis to withhold the records in their entireties. As explained at the conclusion of this letter, we conclude that the Board may redact discrete portions of the responsive records under section 7(1)(b).

\(^5\)Letter from Paul C. Prezioso, FOIA Officer, to Neil Olson, Assistant Attorney General, Public Access Bureau (October 22, 2015), at 2.
licensees and applicants. The Board has an interest in maintaining the secrecy of the methods by which it conducts background investigations.\(^6\)

The Board has not explained how its techniques are "unique or specialized investigative techniques other than those generally used and known" as required by section 7(1)(d)(v), and its assertion that its methods require "secrecy" is conclusory. The Board has generally described its background investigation techniques in its response to this office, such as interviewing references, reviewing employment and education files, performing criminal background checks, obtaining a credit history, and conducting a drug test. None of these aspects of the background investigation appear be "unique" or "specialized." Accordingly, we conclude that the Board has not demonstrated that the investigatory records are exempt in their entireties under section 7(1)(d)(v).

The Board has also argued that "if [redacted] were to find out the sources of [derogatory] information it would run contrary to the public policy of safeguarding the privacy of persons interviewed during investigations."\(^7\) Section 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)(d)(iv) (West 2014), as amended by Public Act 99-298, effective August 6, 2015) exempts from disclosure information that 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[.]") Witness statements may be withheld in their entireties under section 7(1)(d)(iv) if disclosure "would necessarily result in the disclosure of the identity of the source" of the 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). We have reviewed the responsive records provided for our confidential review, and have determined that the identities of individuals who provided information to Board could be discerned from more detailed witness statements and other information even if the names of the individuals were redacted; the type of information at issue is generally contained in the "Additional Comments" section of reference reports and other portions of those reports that identify the prior relationship between [redacted] and the reference. However, the answers to the general "yes" or "no" questions asked of all references would not unavoidably disclose the identity of those individuals. Accordingly, although we have concluded that the Board has not met its burden of demonstrating that any of the records are exempt from disclosure under section

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\(^6\)Letter from Paul C. Prezioso, FOIA Officer, to Neil Olson, Assistant Attorney General, Public Access Bureau (October 22, 2015), at 2.

\(^7\)Letter from Paul C. Prezioso, FOIA Officer, to Neil Olson, Assistant Attorney General, Public Access Bureau (October 22, 2015), at 2.
7(1)(d)(v) of FOIA, the Board may redact portions of records containing detailed information that would unavoidably disclose the identity of witnesses under section 7(1)(d)(iv).

Section 7(1)(f) of FOIA

Section 7(1)(f) of FOIA 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 is equivalent to the deliberative process exemption in the federal FOIA (5 U.S.C. §552(b)(5) (2012)), which applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). The exemption 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. That exemption "typically does not justify the withholding of purely factual material." *Enviro Tech Intern., Inc. v. United States Environmental Protection Agency*, 371 F.3d 370, 374 (7th Cir. 2004). "[T]he critical question is whether 'disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.' *Chemical Weapons Working Group v. U.S. E.P.A.*, 185 F.R.D. 1, 3 (D.D.C. 1999) (quoting *Dudman Communications v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

The records provided to our office for review contain memoranda in which Board employees express their opinions about qualifications for employment and make hiring recommendations. These predecisional and deliberative materials fall within the scope of section 7(1)(f), and we have no evidence that the records or any part thereof were publicly cited or identified by the head of the public body. Accordingly, we conclude that the Board did not improperly withhold these opinion memoranda under section 7(1)(f) of FOIA. However, records that contain purely factual material, even if contained within an investigative report authored by a Board employee, are not exempt from disclosure under section 7(1)(f) of FOIA.

In accordance with the conclusions expressed in this letter, this office requests that the Board disclose copies of certain responsive records to the extent that such records contain purely factual information about his background, the reports of his interviews with Board employees, and application materials he submitted to the Board. As described above, the Board may withhold LEADS information, information identifying witnesses, and predecisional memoranda and any other records containing the opinions and recommendations of Board
employees. In addition, the Board may properly redact "unique identifiers" that constitute "private information" under section 7(1)(b) of FOIA.\(^8\)

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This correspondence serves to close the matter. If you have questions, you may contact me at (217) 782-9078 or nolson@atg.state.il.us.

Very truly yours,

[Signature]

NEIL P. OLSON
Assistant Attorney General
Public Access Bureau

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\(^8\)FOIA 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. 5 ILCS 140/2(c-5) (West 2014).
October 28, 2014

Via electronic mail
Ms. Christy Gutowski
Chicago Tribune
cmgutowski@chicagotribune.com

RE: FOIA Request for Review – 2014 PAC 31313

Dear Ms. Gutowski:

This determination letter is issued pursuant to section 9.5(c) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(c) (West 2012)). For the reasons that follow, the Public Access Bureau concludes that no further action on this matter is warranted.

On August 22, 2014, you submitted a FOIA request to the City of Urbana (City) seeking records pertaining to the investigation of the death of an infant. On August 28, 2014, the City denied that request pursuant to sections 7(1)(a), 7(1)(c), and 7(1)(d)(iii) of FOIA (5 ILCS 140/7(1)(a), (1)(c), (1)(d)(iii) (West 2013 Supp.), as amended by Public Act 98-695, effective July 3, 2014), as well as section 7.5(l) of FOIA (5 ILCS 140/7.5(l) (West 2013 Supp.), as amended by Public Act 98-756, effective July 16, 2014). On September 17, 2014, the Public Access Bureau received your Request for Review contesting that denial.

On September 19, 2014, an Assistant Attorney General in the Public Access Bureau contacted the City by telephone to clarify the basis for the City's denial. On September 22, 2014, the Assistant City Attorney responded that the responsive records were provided to a child death review team and that the proper citation for the confidentiality of materials provided to a child death review team is section 30(b) of the Child Death Review Team Act (20 ILCS 515/30(b) (West 2012)) (in conjunction with section 7(1)(a) of FOIA), rather than section 7.5(l) of FOIA.

Section 7(1)(a) of FOIA permits 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." Section 30(b) of the Child Death Review Team Act
provides: "Records and information provided to a child death review team and the Executive Council, and records maintained by a team or the Executive Council, are confidential and not subject to the Freedom of Information Act [citation], as provided in that Act." (Emphasis added.)

Because the City has confirmed that the responsive records were provided to a child death review team, and because section 30(b) of the Child Death Review Team Act specifically prohibits the City from disclosing such records, we conclude that the City properly denied your FOIA request pursuant to section 7(1)(a) of FOIA. Therefore, the Public Access Bureau has determined that no further action on this matter is warranted. If you have any questions, you may contact me at the Chicago address on the first page of this letter. This letter serves to close this matter.

Very truly yours,

JOSH JONES
Assistant Attorney General
Public Access Bureau

31313 f no fi war mun

cc: Ms. Michelle E. Brooks
    Assistant City Attorney
    City of Urbana
    400 South Vine Street
    Urbana, Illinois 61801
Via electronic mail
Ms. Elisabeth A. Abraham
Assistant General Counsel
Office of the Cook County Sheriff
50 W. Washington, Room 704
Chicago, Illinois 60604
Liz.Abraham@cookcountyil.gov

Mr. Kim Janssen
Staff Reporter
Chicago Sun-Times
350 N. Orleans Street
Chicago, Illinois 60654
kjanssen@suntimes.com

RE: FOIA Request for Review - 2012 PAC 18365

Dear Ms. Abraham and Mr. Janssen:

The Public Access Counselor has received a Request for Review submitted by Mr. Kim Janssen, Staff Reporter, Chicago Sun-Times, pursuant to section 9.5(a) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(a) (West 2010), as amended by Public Act 97-579, effective August 26, 2011). This office has considered the Request for Review as well as the responsive correspondence and records submitted to this office by the Office of the Cook County Sheriff (Sheriff's Office).

BACKGROUND

On December 22, 2011, Mr. Janssen submitted a FOIA request to the Sheriff's Office seeking "copies of all reports, documents, video and audio recordings relating to the investigation of convicted panderer Kimberly Miniea[.]"1 The Sheriff's Office responded to Mr.

1E-mail from Kim Janssen, Staff Reporter, Chicago Sun-Times, to CCSO FOIA officer (December 22, 2011).
Janssen’s request on January 10, 2012, furnishing him with a copy of the Cook County Sheriff’s Police Department Motor Vehicle Incident Report, after redacting private information from the report pursuant to section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011)). The Sheriff’s Office denied disclosure of the remaining responsive records, which include audiotapes and investigatory records, pursuant to section 7(1)(c) and 7(1)(d)(v) of FOIA (5 ILCS 140/7(1)(c), (d)(v) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011)).

Section 7(1)(c) of FOIA exempts from inspection and copying:

Personal 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.

"Unwarranted 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 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.

Section 7(1)(d)(v) exempts from inspection and copying information that 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[.]"

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2Letter from Ms. Elizabeth A. Abraham, Assistant General Counsel, Office of the Cook County Sheriff, to Matthew C. Rogina, Assistant Attorney General, Public Access Bureau (January 10, 2012).
Mr. Janssen submitted his Request for Review of the Sheriff's Office's partial denial to the Public Access Bureau on January 31, 2012.\textsuperscript{3} On February 6, 2012, this office forwarded a copy of the Request for Review to the Sheriff's Office and asked for an explanation of the applicability of the asserted exemptions.\textsuperscript{4} The Sheriff's Office responded on February 16, 2012, asserting that the information contained in the withheld records was obtained pursuant to court ordered eavesdropping (commonly referred to as "overhears") and is exempt from disclosure under section 7(1)(a) of FOIA. Section 7(1)(a) 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 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011). The Sheriff's Office asserted that section 108A-2 and section 108A-7 of the Illinois Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/108A-2, 7) (West 2010)) prohibit disclosure of the records.\textsuperscript{5} The Sheriff's Office's letter, states, in pertinent part:

[T]hese reports contain specific accounts and records which were obtained through court-approved Confidential Overhears. These Orders were obtained in accordance with 725 ILCS 5/108A-1 et seq. 725 ILCS 5/108A-2 specifically addresses the authorized disclosure or use of the information obtained through these Orders, and therefore the [Sheriff's Office] is not allowed to disclose these documents pursuant to the Illinois Code of Criminal Procedure.

Section 108A-2(a) limits the disclosure of information that is obtained through court-approved overhears to "[a]ny law enforcement officer who, by any means authorized in this Article, has obtained knowledge of the contents of any conversation overheard or recorded by use of an eavesdropping device or evidence derived therefrom[.]" 725 ILCS 5/108A-2(a) (West 2010). Section 108A-2(b) provides that "[a]ny investigative or law enforcement officer

\textsuperscript{3}E-mail from Kim Janssen, Staff Reporter, \textit{Chicago Sun-Times}, to Paccess@atg.state.il.us (January 31, 2012).

\textsuperscript{4}Letter from Matthew C. Rogina, Assistant Attorney General, Public Access Bureau, to Elizabeth A. Abraham, Assistant General Counsel, Office of the Cook County Sheriff (February 6, 2012).

\textsuperscript{5}Letter from to Elizabeth A. Abraham, Assistant General Counsel, Office of the Cook County Sheriff to Matthew C. Rogina, Assistant Attorney General, Public Access Bureau (February 16, 2012).
who, by any means authorized in this Article, has obtained knowledge of the contents of any conversation overheard or recorded use of an eavesdropping device or evidence derived therefrom, may use the contents to the extent such use is appropriate to the proper performance of his official duties." 725 ILCS 5/108A-2(b) (West 2010). Finally, section 108A-7 provides:

[R]ecordings shall be sealed under the instructions of the judge and custody shall be where he orders. Such recordings shall not be destroyed except upon order of the judge hearing the application and in any event shall be kept for 10 years if not destroyed upon his order. 725 ILCS 5/108A-7 (West 2010).

This office forwarded a copy of the Sheriff’s Office’s response to Mr. Janssen on February 16, 2012.6 To date, Mr. Janssen has not responded. On April 3, 2012, the Sheriff’s Office responded and supplied us with the investigatory records and audio recordings that are responsive to Mr. Janssen’s request.

DETERMINATION

The issue for our review is whether records generated pursuant to a court ordered overheard are exempt from disclosure pursuant to section 7(1)(a) of FOIA because sections 108A-2 and 108A-7 of the Code of Criminal Procedure prohibit the disclosure of such records generally.

The Illinois Appellate Court has addressed the issue of the public’s right to access records that are generated pursuant to an overheard. In In re Consensual Overhear, 323 IllApp.3d 236 (2nd Dist. 2001), the Northwest Herald (Herald) submitted a FOIA request seeking an application for an overheard, the order authorizing the overheard, documents indicating that the subject was notified by the judge, and other related documents that were under seal. Consensual Overhear, 323 IllApp.3d at 236. The Illinois Appellate Court concluded that the Herald did not have standing to access the court records and that the statutes governing confidential overhears limit access to the documents to individuals who are related to the case, such as the prosecuting attorneys, law enforcement officers, investigative officers, parties to the overhears, and their attorneys. Consensual Overhear, 323 IllApp.3d at 241. The Court concluded that the language

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6Letter from Mr. Matthew C. Rogina, Assistant Attorney General, Public Access Bureau, to Kim Janssen, Staff Reporter, Chicago Sun-Times (February 16, 2011).
in the Code of Criminal Procedure restricting access to records that are generated pursuant to an overheard reflects the legislature's intention to keep those records confidential:

Reading sections 108A-7 and 108A-8 together, we conclude that only a party to the application or the recorded conversation or his attorney may file a motion to inspect the applications, orders, recorded conversation, or evidence derived therefrom and the judge may grant the application to disclose upon a showing of good cause. Nowhere in the provisions does the legislature contemplate access by a nonparty to the overheard. If the legislature intended to give the press or the public access to this information, it specifically would have stated so.

* * *

The proceeding in which the government seeks the court's permission to implement an eavesdropping device is not the type of proceeding that historically has been open to the public. In fact, the very nature of the proceedings in the present matter guards against disclosure of the type petitioner seeks. We find no constitutional or common-law presumption of a right of access to the documents here. (Emphasis added.) Consensual Overhear, 323 Ill. App.3d at 240-242.

This office concludes that the requested records presently under court seal, consisting of the audiotapes, transcripts of the audiotapes, and records that reflect the contents of the overheard, are prohibited from disclosure pursuant to section 108A-7. However, there is no similar prohibition on records that were generated independently of the overheard but are not under court seal, such as the arrest report or other investigatory records. These types of records, which do not detail the contents of the overheard, are outside the scope of article 108 of the Criminal Code.

In addition, we find no support for the Sheriff's Office's assertion that the records generated independently of the overheard are exempt in their entirety under section 7(1)(c) or section 7(1)(d)(v). Although victim and witness information may be redacted under section
7(1)(c), nothing in those records reveals any unique or specialized techniques that would exempt the records pursuant to section 7(1)(d)(v).

Accordingly, we conclude that pursuant to section 7(1) (a) of FOIA, the Sheriff's Office may properly withhold records presently under court seal pursuant to sections 108A-2 and 108A-7 of the Code of Criminal Procedure. The Sheriff's Office, however, is directed to disclose to Mr. Janssen any records that were generated independently of the overheard, subject only to permissible redactions, if any.  

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This correspondence shall serve to close this matter. If you have any questions, you may contact me at (312) 814-5383.

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7The Sheriff's Office may redact "private information under section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011)). The Sheriff's office may also redact "personal information" under section 7(1)(c) (5 ILCS 140/7(1)(c) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011)), which exempts from inspection and copying "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. "Unwarranted 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 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."

Finally, the Sheriff's Office may also redact information under section 7(1)(d)(iv) (5 ILCS 140/7(1)(d)(iv) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452, effective August 19, 2011)) which exempts from inspection and copying information that would "[u]navoidably 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[.]"
Ms. Elisabeth A. Abraham
Mr. Kim Janssen
May 16, 2012
Page 7

Very truly yours,

[Signature]

MATTHEW C. ROGINA
Assistant Attorney General
Public Access Bureau

18365 RFR f pb ex proper county
Re: FOIA Request for Review – 2016 PAC 42138

Dear [Name]

This determination letter is issued pursuant to section 9.5(c) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(c) (West 2014)). For the reasons that follow, the Public Access Bureau concludes that no further action on this matter is warranted.

On April 22, 2016, you submitted a FOIA request to the Office of the Cook County State's Attorney (State's Attorney's Office) seeking the grand juror deliberations and grand juror votes from your case. On May 4, 2016, the State's Attorney's Office responded that it has no records of the grand jury deliberations or votes from your case, but, regardless, section 112-6 of the Code of Criminal Procedure (725 ILCS 5/112-6 (West 2014)) prohibits the State's Attorney's Office from disclosing such information. On June 8, 2016, you submitted the above-captioned Request for Review contesting the State's Attorney's Office's response.

Even if the State's Attorney's Office possesses records responsive to your request, section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2014), as amended by Public Acts 99-298, effective August 6, 2015; 99-346, effective January 1, 2016) 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[.]" Section 112-6(b) of the Code of Criminal Procedure (725 ILCS 5/112-6(b) (West 2014)) requires secrecy of grand jury proceedings; it states 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 2014)) 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 unless a court order or a law directs otherwise. There is no indication that a court order or a law directs the State's Attorney's Office to provide you with the deliberations and votes of the grand jurors in your case pursuant to FOIA. Accordingly, even if the State's Attorney's Office possesses responsive records, those records are exempt from disclosure pursuant to section 7(1)(a) of FOIA. Therefore, no further action on this matter is warranted.

If you have any questions, you may contact me at the Chicago address on the first page of this letter. This letter serves to close this matter.

Very truly yours,

JOSH JONES
Supervising Attorney
Public Access Bureau

42138 f no fi war sao
cc: Via electronic mail
Mr. Paul Castiglione
Executive Assistant State's Attorney for Policy
Office of the Cook County State's Attorney
69 West Washington Street, Suite 3200
Chicago, Illinois 60602
Paul.castiglione@cookcountyil.gov
Dear Lawrence Correctional Center,

10930 Lawrence Road
Sumner, Illinois 62466

Re: FOIA Request for Review – 2016 PAC 40944

This determination letter is issued pursuant to section 9.5(c) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(c) (West 2014)). For the reasons that follow, the Public Access Bureau concludes that no further action on this matter is warranted.

On January 11, 2016, you submitted a FOIA request to the Office of the Cook County State’s Attorney (State’s Attorney’s Office) seeking grand jury transcripts and minutes from your criminal case. On January 21, 2016, the State’s Attorney’s Office denied your request in its entirety pursuant to section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2014), as amended by Public Acts 99-298, effective August 6, 2015; 99-346, effective January 1, 2016). On March 21, 2016, you submitted the above-captioned Request for Review contesting the State’s Attorney’s Office’s denial.

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[.]
The State’s Attorney's Office withheld the grand jury transcripts and minutes you requested pursuant to section 7(1)(a) of FOIA based on section 112-6 of the Code of Criminal Procedure (725 ILCS 5/112-6 (West 2014)), which provides, in pertinent part:

(b) 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). * * *
(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. (Emphasis added.) 725 ILCS 5/112-6(b), (c)(1), (c)(3) (West 2014).

Under these provisions, "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). The same confidentiality applies to grand jury minutes, which document matters occurring before grand juries. Because section 112-6 of the Criminal Code provides for the confidentiality of matters occurring before grand juries and because none of the confidentiality exceptions appear to apply to you, the State's Attorney's Office is specifically prohibited from disclosing the grand jury transcripts and minutes you are seeking. Accordingly, we conclude that those records are exempt from disclosure pursuant to section 7(1)(a) of FOIA, and that no further action on this matter is warranted.

If you have any questions, you may contact me at the Chicago address on the first page of this letter. This letter serves to close this matter.

Very truly yours,

JOSH JONES
Supervising Attorney
Public Access Bureau
March 29, 2016
Page 3

40944 f no fi war sao

cc: Via electronic mail
Mr. Paul Castiglione
Executive Assistant State's Attorney for Policy
Office of the Cook County State's Attorney
69 West Washington Street, Suite 3200
Chicago, Illinois 60602
Paul.castiglione@cookcountyil.gov
February 5, 2016

Via electronic mail
Mr. Brendan J. Healey
Mandell Menkes LLC
One North Franklin, Suite 3600
Chicago, Illinois 60606
bhealey@mandellmenkes.com

RE: FOIA Request for Review – 2016 PAC 39947

Dear Mr. Healey:

This determination is issued pursuant to section 9.5(c) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(c) (West 2014)). For the reasons that follow, we have determined that no further action is warranted as to this matter.

On December 2, 2015, Ms. Jenna Morton, on behalf of WQAD, submitted a FOIA request to the Monmouth-Roseville Community Unit School District #238 (District) seeking "surveillance video for bus #8 on August 21st 2015." On December 4, 2015, the District responded that the video was a "student record" as defined under the Illinois School Student Records Act (ISSRA) (105 ILCS 10/1 et seq. (West 2014)) because it contained information from which numerous students could be individually identified. Therefore, the District denied the request under section 7.5(r) of FOIA (5 ILCS 140/7.5(r) (West 2014)), which exempts "[i]nformation prohibited from being disclosed by the [ISSRA]." In this Request for Review, you contend that the Illinois Administrative Code excludes school bus recordings from the definition of "School Student Record."2

Although the parties cite to the ISSRA, another provision of Illinois law specifically governs the making and disclosure of school bus recordings. Section 14-3(m) of the Criminal Code of 2012 (720 ILCS 5/14-3(m) (West 2014)), as one exemption from criminal

1E-mail from Jenna Morton to Edward Fletcher (December 2, 2015).

eavesdropping prohibitions, allows electronic videotape recording of the interior of a school bus while it is being used in the transportation of students to and from school and school sponsored activities; it further provides:

Recordings made pursuant to this subsection (m) shall be confidential records and may only be used by school officials (or their designees) and law enforcement personnel for investigations, school disciplinary actions and hearings, proceedings under the Juvenile Court Act of 1987, and criminal prosecutions, related to incidents occurring in and around the school bus.[.] (Emphasis added.)

The Public Access Bureau has previously determined that because this provision bars disclosure of a video taken from the interior of a school bus transporting students for school-related activities, except for one of the specified official purposes, such a video is exempt from disclosure under section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2014), as amended by Public Act 99-298, effective August 6, 2015).³ See Ill. Att'y Gen. PAC Req. Rev. Ltr. 18521, issued June 14, 2012, at 4; Ill. Att'y Gen. PAC Req. Rev. Ltr. 10782, issued April 8, 2011, at 3. Ms. Morton is not one of the officials to whom disclosure is permitted for authorized purposes. Accordingly, we have determined that no further action is warranted as to this matter.

This letter will close this file. If you have any questions, please contact me at (217) 782-9078 or nolson@atg.state.il.us.

Very truly yours,

NEIL P. OLSON
Assistant Attorney General
Public Access Bureau

³Section 7(1)(a) of FOIA permits a public body to withhold "[i]nformation specifically prohibited from disclosure by federal or State law[.]"
cc: Via electronic mail
Mr. Edward D. Fletcher
Superintendent
Monmouth-Roseville Community
Unit School District #238
105 North E Street
Monmouth, Illinois 61462
efletcher@mr238.org
Via electronic mail

RE: FOIA Request for Review – 2016 PAC 43338

Dear [Redacted],

This determination letter is issued pursuant to section 9.5(c) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(c) (West 2014)). For the reasons set forth below, the Public Access Bureau concludes that no further action is warranted.

On July 7, 2016, you submitted a FOIA request to the Chicago Police Department (CPD) seeking copies of the electronic recordings of the interrogation of Mr. Michael Ward by CPD detectives in connection with CPD's investigation of the death of a named individual. On July 19, 2016, CPD denied your request in its entirety pursuant to section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2015 Supp.). In its denial letter, CPD referenced section 103-2.1(g) of the Code of Criminal Procedure (725 ILCS 5/103-2.1(g) (West 2014)) as its basis for asserting the section 7(1)(a) exemption. On August 4, 2016, you submitted this Request for Review contesting CPD's denial.

Section 7(1)(a) of FOIA exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." One such State law is the Code of Criminal Procedure (725 ILCS 5/100-1 et. seq. (West 2014)), which, among other things, governs how a law enforcement agency handles statements made during a custodial interrogation, including electronic recordings. Section 103-2.1(g) of the Code of Criminal Procedure provides:
Any electronic recording of any statement made by an accused during a custodial interrogation that is compiled by any law enforcement agency **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. (Emphasis added.)

You appear to contend in your Request for Review that CPD waived its ability to deny the recordings in question under section 7(1)(a) because those recordings were disclosed to the Chicago Tribune. As support for this assertion, you provided a link to the Chicago Tribune's website¹ which contained an article regarding the underlying incident and a portion of a video recording of the interrogation of Mr. Ward by CPD detectives. However, this article also makes clear that the recording of the interrogation in question is a Cook County court record and that it was made public by Mr. Ward's attorneys — not CPD.² It is axiomatic that CPD does not waive its reliance on the section 7(1)(a) exemption when the electronic recordings you seek were disclosed to the public by someone other than CPD.

Because section 2.1(g) of the Code of Criminal Procedure specifically prohibits CPD from disclosing copies of the electronic recordings you are seeking and because the portion of those electronic recordings that is currently available for the public to view was not disclosed by CPD, we have determined that CPD did not improperly deny your FOIA request pursuant to section 7(1)(a) of FOIA. Accordingly, we have determined that no further action is warranted on this matter.


If you have any questions, you may contact me by mail at the Chicago address listed on the first page of this letter. This letter serves to close this matter.

Very truly yours,

SHANNON BARNABY
Assistant Attorney General
Public Access Bureau

43338 f no fi war pd

cc:  Via electronic mail
Ms. Charise Valente
General Counsel
Chicago Police Department
3510 South Michigan Avenue
Chicago, Illinois 60653
pacola@chicagopolice.org
August 12, 2016

Via electronic mail
Mr. Robert T. Hrodey
Hrodey Associates
P.O. Box 366
Woodstock, Illinois 60098
inquiry@hrodey.com

Via electronic mail
Ms. Jennifer J. Gibson
Zukowski, Rogers, Flood, & McArdle
50 Virginia Street
Crystal Lake, Illinois 60014
jgibson@zrfmlaw.com

RE: FOIA Request for Review – 2015 PAC 34767

Dear Mr. Hrodey and Ms. Gibson:

This determination letter is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons that follow, the Public Access Bureau concludes that the City of Woodstock (City) improperly redacted certain portions of the records responsive to Mr. Robert T. Hrodey's February 27, 2015, FOIA request.

On that date, Mr. Hrodey submitted a FOIA request to the City seeking certain records related to a traffic accident that occurred on Wednesday, February 25, 2015, involving a named individual. On March 9, 2015, the City provided responsive records with portions redacted pursuant to sections 7(1)(a) and 7(1)(b) of FOIA (5 ILCS 140/7(1)(a), (1)(b) (West 2014)). With respect to section 7(1)(a), the response asserted that the federal Driver's Privacy Protection Act (DPPA) (18 U.S.C. § 2721 et. seq. (West 2014)) specifically prohibits disclosure of certain information redacted from the records. On April 15, 2015, Mr. Hrodey submitted this Request for Review contesting the redactions.
On April 20, 2015, this office forwarded a copy of the Request for Review to the City and asked it to provide a detailed explanation of the legal and factual basis for the asserted exemptions, together with unredacted copies of the records for our confidential review. On May 13, 2015, the City provided this office with the records and its written response. On May 18, 2015, this office forwarded the City's response to Mr. Hrodey, who replied by reiterating that the DPPA does not prohibit disclosure of the redacted information.

**DETERMINATION**

"All records in the custody or possession of a public body are presumed to be open to inspection and copying." 5 ILCS 140/1.2 (West 2014); see also Southern Illinoisan v. Illinois Dept. of Public Health, 218 Ill. 2d 390, 415 (2006). Any 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 2014). The exemptions from disclosure are to be narrowly construed. Lieber v. Board of Trustees of Southern Illinois University, 176 Ill. 2d 401, 407 (1997).

**Section 7(1)(a) of FOIA/ Federal Driver's Privacy Protection Act**

Section 7(1)(a) of FOIA exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The City cited the DPPA as the federal law that prohibited the disclosure of the information redacted from the responsive records. The DPPA generally prohibits officers, employees, and contractors of a state department of motor vehicles (DMV) from disclosing or otherwise making available "personal information" for any use not permitted under the limited exceptions set forth in the Act. See 18 U.S.C. § 2721(a)(1) (West 2014); Maracich v. Spears, 133 S. Ct. 2191, 2198 ("Disclosure of personal information [contained in the records of state DMVs] is prohibited [by the DPPA] unless for a purpose permitted by an exception listed in 1 of 14 statutory subsections."). In addition, section 2722(a) of DPPA (18 U.S.C. § 2722(a) (West 2014)) states that "[i]t shall be unlawful for any person knowingly to obtain or disclose personal information[ ]from a motor vehicle record[.]" See also Dahlstrom v. Sun-Times Media, 777 F.3d 937, 941-42 (7th Cir. 2015) (concluding that a newspaper violated the DPPA by knowingly obtaining a police officer's personal information from motor vehicle records from the Illinois Secretary of State, which it proceeded to publish). Section 2725(3) of DPPA (18 U.S.C. § 2725(3) (West 2014)) defines "personal information" as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." (Emphasis added).
We have reviewed the records in question, which consist of an Illinois Traffic Crash Report, an incident report, and a police department case report, all of which concern the investigation of a fatal traffic accident. The City redacted names, dates of birth, addresses, drivers' license numbers, license plate information, Vehicle Identification Numbers (VINS), vehicle make, model, and year, and the vehicle owner's name and address from the records. The City's response to this office asserts that the redacted information falls squarely within the DPPA's definition of "personal information" and that because the information was obtained, or verified, from motor vehicle records, the City is prohibited from disclosing it:

As a matter of routine, police officers obtain the names, dates of birth, addresses, and driver's license numbers of those involved in traffic accidents or traffic incidents by asking for the physical driver's license or state ID issued by the Secretary of State. If an individual does not have a driver's license or state ID, the police officer will ask the individual for his or her name and date of birth. In any event, whether the officer is provided with a driver's license or state ID or is simply told a name and date of birth, the police officer for his safety inputs the relevant information into the LEADS [Law Enforcement Agencies Data System] program, which uses Secretary of State motor vehicle date [sic] * * * when investigating a traffic accident or incident, a police officer will input into LEADS the information off of the vehicle license plates involved. The LEADS program then provides the police officer with the vehicle VIN, make, model, year, and vehicle owner name and address. We believe that all the foregoing information falls squarely within the definition of "personal information" as defined by the DPPA, and that because it was obtained through motor vehicle records, i.e., driver's license, state ID, a vehicle license plate, and/or LEADS, that its disclosure is prohibited.\(^3\)

The DPPA's legislative history reveals that it was enacted to address two specific public policy objectives. The primary objective was "to protect the personal privacy and safety of all American licensed drivers" by preventing motor vehicle data from being obtained and used for committing crimes. 103 Cong. Rec. H.2522 (daily ed. Apr. 20, 1994). The secondary objective was to prevent states from selling personal information to businesses engaged in direct marketing and solicitation without the driver's consent. See Maracich, 133 S. Ct. at 2198 ("The

\(^3\)Letter from Jennifer J. Gibson to Sarah Pratt, Public Access Counselor, Office of the Attorney General (May 1, 2015), at 1-2.
second concern related to the State's common practice of selling personal information to businesses engaged in direct marketing and solicitation."); Dahlstrom, 777 F.3d at 944.

The plain language of the definition of "personal information" in DPPA, however, expressly carves out an exception for information in law enforcement records relating to vehicular accidents, driving violations, and driver status. See 103 Con. Rec. H.2522 (daily ed. Apr. 20 1994) (statement of Rep. Moran) ("It is very important to note that the amendment in no way affects access to accident information about the car or driver."); available at 1994 WL 140035; see also Mattivi v. Russell, 2002 WL 31949898, *4 (D. Colo. Aug. 2, 2002) (concluding the statute's 'plain language * * * makes clear that Congress did not intend 'information on vehicular accidents' to be included within the Act's prohibition of disclosures of 'personal information.'"); Fla. Op. Atty. Gen. No. 2010-10, issued April 13, 2010 ("Once personal information contained in a motor vehicle record is received from the department and used in creation of new records, however, it is no longer protected by DPPA [or the Florida implementing statute]."); Wis. Op. Atty. Gen. No 1-02-08, issued April 29, 2008 ("We believe it is reasonable to interpret this exclusion [for information concerning vehicular accidents, driving violations, and driver's status] from the 'personal information' definition to mean that information such as a driver's name, address, and telephone number are not encompassed in the personal information protected by the DPPA when that information is incorporated into a document such as an accident report."); Ky. Att'y Gen. No. 02-ORD-197, issued January 29, 2002 (stating that the DPPA "is inapplicable to law enforcement agencies, and the accident reports they generate, notwithstanding the fact that some of the information that appears in an accident report is extracted from motor vehicle records.").

In addition, the disclosure of "personal information" obtained from motor vehicle records for use in connection with law enforcement purposes is a "permissible use" under the DPPA. Section 2721(b) of the Act (18 U.S.C. §2721(b) (West 2014) identifies certain uses for which "personal information" is permitted to be disclosed. One of the permitted disclosures of personal information is "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. §2721(b)(1) (West 2014). (Emphasis added). In addition, section 2721(c) of DPPA\(^5\) (18 U.S.C. §2721(c) (West 2014)) permits law enforcement agencies to redisclose the information that it obtained from motor vehicle records for purposes related to law enforcement functions.

\(^5\)See section 2721(c) of DPPA, states "[a]n authorized recipient of personal information * * * may resell or redisclose the information only for a use permitted under subsection (b) [2721(b) of DPPA]."
The DPPA's legislative history makes clear that the law is intended to provide law enforcement officers wide breadth to carry out their duties. See Parus v. Kroeplin, 402 F. Supp. 2d 999, 1005-06 (W.D. Wisc. Dec. 6, 2005) ("Although the Act was intended to 'prevent stalkers, harassers, would-be criminals and other unauthorized individuals from obtaining and using personal information from motor vehicle records,' it was not intended to impede the ability of law enforcement officers to carry out their duties."). Congressional hearing transcripts illustrate that lawmakers specifically discussed the latitude that law enforcement agencies should be given to perform their duties. Senator Harkin stated, "with respect to law enforcement agencies, [section 2721(b)(1)] should be interpreted so as not to in any way restrict or hinder law enforcement and crime prevention strategies,' even when those strategies might include releasing personal information to the general public." Parus, 402 F. Supp. 2d at 1006 (quoting 139 Cong. Rec. S15962 (daily ed. Nov. 17, 1993) (statement of Sen. Harkin) (discussing legislative history in determining that police dispatcher engaged in a law enforcement function, and therefore, did not violate the DPPA by relaying personal information obtained from motor vehicle records to the Department of Natural Resources' warden because the police dispatcher had no reason to believe that the warden sought the information for personal reasons).

As the City points out, its police department uses information that it obtains from motor vehicle records for law enforcement functions such as ensuring police officers' safety, confirming a driver's information, documenting contact with an individual, ensuring that there are no outstanding warrants, and creating law enforcement records including investigatory reports, accident reports, and police reports. These uses of "personal information" clearly involve the police department carrying out its essential functions. Compare Senne v. Village of Palatine, 6 F. Supp. 3d 786, 792 (N.D. Illinois, Nov. 27, 2013) (finding village's use of "personal information" printed on tickets constituted a "permissible use" under DPPA) with Schierits v. City of Brookfield, 868 F. Supp. 2d 818, 820-21 (E.D. Wis. June 20, 2012) (holding police officer violated DPPA when he obtained an address from DMV records and provided the address to the individual's ex-girlfriend for purposes of the ex-girlfriend using the address in a custody dispute); Deicher v. City of Evansville, 2007 WL 5323757 (W.D. Wis. April 12, 2007) (finding police officer violated DPPA when he accessed DMV records to obtain the new address of a civilian's former wife) overruled on other grounds by Deicher v. City of Evansville, 545 F.3d 537 (7th Cir. 2007).

The City contends that the Seventh Circuit Court of Appeals' decision in Dahlstrom v. Sun-Times Media restricts "personal information' from being disclosed via police and accident reports tendered in response to a FOIA request "because the defendant in that case violated DPPA by obtaining and publishing certain records that contained personal information
which it received from a FOIA request sent to the City of Chicago. This, however, is an imprecise reading of Dahlstrom. In Dahlstrom, the court makes clear that the Sun-Times obtained only the names and photographs of police officers from the City of Chicago in response to its FOIA request; the remaining personal information at issue in this case was obtained directly from the Illinois Secretary of State. Dahlstrom, 777 F.3d at 941 ("The Officers contend — and Sun-Times has not disputed — that Sun-Times knowingly obtained this additional identifying information from motor vehicle records maintained by the Secretary of State. * * * The Officers do not challenge Sun-Times's publication of their photographs or names, as they concede that Sun-Times lawfully obtained that information pursuant to its FOIA request."). In fact, the Dahlstrom Court makes clear that if the type of information contained in motor vehicle records is obtained from a source other than a state DMV, including pursuant to a FOIA request to a police department, the DPPA does not prohibit disclosure. Dahlstrom, 777 F.3d at 949-50 ("The DPPA proscribes only the publication of personal information that has been obtained from motor vehicle records. The origin of the information is thus crucial to the illegality of its publication — the statute is agnostic to the dissemination of the very same information acquired from a lawful source. * * * much of which [personal information] can be gathered * * * from other lawful sources (including, of course, a state FOIA request)"). Therefore, this office concludes that the DPPA does not require the redaction of "personal information," as defined by the DPPA, from law enforcement records provided in response to a FOIA request.

The City also appears to contend that the VIN, make, model, year, and vehicle owner name and address must be redacted if the information derives from or is confirmed through LEADS. Section 1240.80(d) of title 20 of the Administrative Code (20 Ill. Adm. Code § 1240.80(d) (2014), old Part repealed and new Part adopted 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." That provision implements the Criminal Identification Act (20 ILCS 2630/0.01 et seq. (West 2014)). This office has consistently determined that only information specifically generated from the LEADS database, such as the LEADS identification number or information showing the agencies that accessed the database and the time and date of queries, is prohibited from disclosure by the above provisions; basic information identifying a driver or his or her vehicle, such as vehicle registration information, that is obtained from the LEADS database and incorporated into an investigative report is not exempt from disclosure under section 7(1)(a) of FOIA. See, e.g., Ill. Att'y Gen. PAC Req. Rev. Ltr. 13417, issued May 18, 2011; Ill. Att'y Gen. PAC Req. Rev. Ltr. 12402, issued March 22, 2011; Ill. Att'y Gen. PAC Req. Rev. Ltr. 12865, issued June 2, 2011.

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Mr. Robert T. Hrodey  
Ms. Jennifer J. Gibson  
August 12, 2016  
Page 7

As discussed above, because the redacted information in these law enforcement records pertain to a vehicular accident, the redacted information is not "personal information" protected by the DPPA, and therefore, is not prohibited from being disclosed. Similarly, State law restrictions on the disclosure of LEADS data do not prohibit disclosure of basic information identifying a driver or his or her vehicle which is incorporated into a police report. Accordingly, we conclude that the City has not sustained its burden of demonstrating that this information is exempt from disclosure under section 7(1)(a) of FOIA.

Section 7(1)(b) of FOIA

The City may, however, redact driver's license numbers, personal license plate numbers, home addresses, personal telephone numbers, and medical records from the reports pursuant to 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2015 Supp.)). Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2015 Supp.)) defines this information as forms of "private information," which is exempt from disclosure under section 7(1)(b) of FOIA. Likewise, the City may redact signatures from the reports pursuant to 7(1)(b) of FOIA, which this office has previously determined are unique identifiers, and therefore, are an exempt form of private information. Ill. Att'y Gen. PAC Req. Rev. Ltr. 98387, issued December 10, 2010. In addition, the City may redact dates of birth from the reports under section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2015 Supp.)), which exempts from disclosure "[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 personal privacy" as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." This office has consistently concluded that birth dates are a highly personal form of information, and that the subject's right to privacy outweighs any legitimate public interest in disclosure. See, e.g., Ill. Att'y Gen. PAC Req. Rev. Ltr. 13417, issued May 18, 2011, at 3.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me by mail at the Chicago address listed on the first page of this letter, by e-mail at sbarnaby@atg.state.il.us, or by phone at (312) 814-5383.
Very truly yours,

SHANNON BARNABY
Assistant Attorney General
Public Access Bureau

34767 f 71a improper 71b proper mun
July 6, 2016

Via electronic mail
Mr. Jonah Newman
The Chicago Reporter
111 West Jackson Street, Suite 820
Chicago, Illinois 60604
jnewman@chicagoreporter.com

Via electronic mail
Ms. Charise Valente
General Counsel
Chicago Police Department
3510 South Michigan Avenue
Chicago, Illinois 60653
pacola@chicagopolice.org

RE: FOIA Request for Review – 2016 PAC 41455

Dear Mr. Newman and Ms. Valente:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons discussed below, the Public Access Bureau concludes that the Chicago Police Department improperly withheld information responsive to Mr. Jonah Newman's FOIA request.

In a letter dated April 4, 2016, Mr. Newman, on behalf of The Chicago Reporter, submitted a FOIA request to CPD seeking a spreadsheet of certain categories of information from "the 'Arrest Processing Report' section" of arrest reports he received in response to a previous FOIA request. On April 19, 2016, CPD provided responsive records consisting of lists of information pulled from some of the requested categories, but withheld all information under the categories "visual check of arrestee," "arrestee questionnaire," and "questionnaire remarks,"

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Mr. Jonah Newman  
Ms. Charise Valente  
July 6, 2016  
Page 2

citing section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2015 Supp.)).\textsuperscript{2} Section 7(1)(a) exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." CPD's response asserted that federal regulations (45 CFR Part 160, Part 162, Part 164) implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Pub. L. No. 104-191, 110 Stat. 1936 (1996)) prohibit CPD from releasing this information. Mr. Newman's Request for Review disputed the withholding of that information.

On April 25, 2016, this office sent a copy of the Request for Review to CPD and asked it to provide a representative sample of the records that were withheld for this office's confidential review, together with a detailed explanation for the assertion that HIPAA specifically prohibits CPD from disclosing the requested information. Having received no response, on May 27, 2016, this office again requested those materials. On June 9, 2016, CPD responded that although that the reasoning for not providing certain fields in the response to Mr. Newman's FOIA request "appears to be erroneous[,]" the response was still proper because the "visual check of arrestee," "arrestee questionnaire," and "questionnaire remarks" are contained in "freeform, variable length text fields that are not suitable for spreadsheet production. ** * * * This information is available in each individual arrest report, but unable to be captured in spreadsheet form."\textsuperscript{3} On June 10, 2016, Mr. Newman replied that all three fields appear to be the same as or similar to other fields that CPD had provided in the spreadsheet he received. He added that even if the information could not be provided in spreadsheet format, CPD is "obligated under the statute to provide them to me in some format. Therefore, CPD's response to your inquiry letter, even if taken as credible on its face, is not a valid reason to continue to withhold these records."\textsuperscript{4}

**DETERMINATION**

"All 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." 5 ILCS 140/1.2 (West 2014). FOIA requires that "each public body shall make available to any person for inspection and copying all public records, except as otherwise provided in Section 7 of this Act." 5 ILCS 140/3(a) (West 2014).

\footnotesize{\textsuperscript{2}Letter from P.O. Zuniga, #10919, Freedom of Information Officer, Chicago Police Department, Office of Legal Affairs, to Jonah Newman, Chicago Reporter (April 19, 2016).  

\textsuperscript{3}Letter from Ryan Nelligan, Office of Legal Affairs, Department of Police, City of Chicago, to Office of the Attorney General, Steve Silverman, Assistant Bureau Chief (June 9, 2016).  

\textsuperscript{4}Letter from Jonah Newman, Data and Investigative Reporter, The Chicago Reporter, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau, Office of the Attorney General (June 10, 2016).}
Mr. Jonah Newman  
Ms. Charise Valente  
July 6, 2016  
Page 3

As an initial matter, CPD's response to this office appears to acknowledge that its response to Mr. Newman's request improperly cited federal regulations implementing HIPAA as its basis for withholding the categories of information about arrestees that are at issue. We agree. HIPAA's privacy rule specifically prohibits a "covered entity" from releasing individually identifiable health information unless disclosure is permitted by HIPAA. 45 C.F.R. § 164.502(a). A "covered entity" is a health care provider, a healthcare clearinghouse, or a health plan. 45 C.F.R. § 160.10. In People v. Bauer, 402 Ill. App. 3d 1149, 1158 (5th Dist. 2010), the Illinois Appellate Court concluded that law enforcement agencies are not covered entities under HIPAA and therefore are not subject to HIPAA's privacy rule. Likewise, the Public Access Bureau has consistently determined that because police departments are not covered entities, HIPAA does not specifically prohibit police departments from disclosing records. Accord Ill. Att'y Gen. PAC Req. Rev. Ltr. 19519, issued October 12, 2012, at 3. Therefore, HIPAA does not provide a valid basis to withhold any of the information Mr. Newman sought in his FOIA request.

With respect to CPD's assertion that it is not required to provide the information at issue because it is "not suitable for spreadsheet production[,]" section 6(a) of FOIA (5 ILCS 140/6(a) (West 2014)) provides:

When a person requests a copy of a record maintained in an electronic format, the public body shall furnish it in the electronic format specified by the requester, if feasible. If it is not feasible to furnish the public records in the specified electronic format, then the public body shall furnish it in the format in which it is maintained by the public body, or in paper format at the option of the requester. (Emphasis added.)

It is undisputed that CPD maintains the requested information in electronic format. Therefore, if it is not feasible for CPD to provide the records in the spreadsheet format that Mr. Newman requested, section 6(a) of FOIA expressly requires CPD to give him the option of receiving the information in either the electronic format in which it is maintained or in paper format. CPD's response to Mr. Newman's FOIA request did not make those options available to him or assert that providing paper or electronic copies of the records would be unduly burdensome pursuant to section 3(g) of FOIA (5 ILCS 140/3(g) (West 2014)). Accordingly, CPD's response to the request violated FOIA. To remedy that violation, this office requests that CPD disclose the requested "visual check of arrestee," "arrestee questionnaire," and "questionnaire remarks" to Mr. Newman in his choice of either the electronic format in which the information is maintained or in paper format.
The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (312) 814-6756. This letter serves to close this file.

Very truly yours,

STEVE SILVERMAN
Assistant Bureau Chief
Public Access Bureau
OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

January 27, 2014

Mr. Gregory Pratt
Chicago Tribune
18450 Crossing Drive, Suite A
Tinley Park, Illinois 60487

Mr. Thomas M. Melody
Klein, Thorpe and Jenkins, Ltd.
20 North Wacker Drive, Suite 1660
Chicago, Illinois 60606

RE: FOIA Request for Review - 2013 PAC 25627

Dear Mr. Pratt and Mr. Melody:

This determination letter 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 Tinley Park (Village) improperly denied Mr. Gregory Pratt’s June 26, 2013, FOIA request.

BACKGROUND

On that date, Mr. Pratt, on behalf of the Chicago Tribune, submitted a FOIA request to the Village seeking "any and all police reports, incident reports and narratives involving Eric Noonan[.]"¹ On July 3, 2013, the Village denied the request citing section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c)) (West 2012)) and an unspecified “federal law."² Mr. Pratt submitted a complete Request for Review to this office on August 14, 2013. On August 15, 2013, this office forwarded a copy of the Request for Review to the Village and asked it to provide unredacted copies of the withheld records and a detailed explanation of the factual and legal basis for the asserted exemptions. On August 26, 2013, counsel for the Village supplied copies of the requested records and a letter in support of the Village’s denial under section

¹E-mail from Gregory Pratt, Chicago Tribune, to Laura Godette (June 26, 2013).

²Letter from Laura Godette, Deputy Clerk, Freedom of Information Officer, Village of Tinley Park, to Gregory Pratt, Chicago Tribune (July 3, 2013).
7(1)(c). In the letter, counsel also asserted that the responsive records were exempt from disclosure under sections 7(1)(a), 7(1)(b), and 7(1)(n) of FOIA (5 ILCS 140/7(1)(a), (1)(b), (1)(n) (West 2012)). A copy of the Village's response was provided to Mr. Pratt; on September 9, 2013, Mr. Pratt replied to the Village's response.

DETERMINATION

All public records in the possession or custody of a public body are presumed to be open to inspection and copying (5 ILCS 140/1.2 (West 2012)), and exemptions to disclosure are to be narrowly construed. Lieber v. Board of Trustees of Southern Illinois Univ., 176 Ill. 2d 401, 408 (1997); see also 5 ILCS 140/1 (West 2012). 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. 5 ILCS 140/1.2 (West 2012).

Section 7(1)(c) of FOIA

Section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2012)) exempts from disclosure:

[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. 'Unwarranted 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 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 Village withheld three police incident reports and one incident dispatch detail report under section 7(1)(c). The Village's response to this office notes that two of the incident reports concern domestic incidents. The third report involves a juvenile matter. 3

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3Letter from Thomas M. Melody, Klein, Thorpe and Jenkins, Ltd., to Rob Olmstead, Assistant Attorney General, Public Access Bureau (August 26, 2013).
2011 Incident Report

One of the incident reports details the December 4, 2011, arrest of Mr. Noonan and an accompanying charge of domestic battery against him. Section 2.15(a) of FOIA (5 ILCS 140/2.15(a) (West 2012)) generally requires disclosure of the following arrest information:

(i) information that identifies the individual, including the name, age, address, and photograph, when and if available; (ii) information detailing any charges relating to the arrest; (iii) the time and location of the arrest; (iv) the name of the investigating or arresting law enforcement agency; (v) if the individual is incarcerated, the amount of any bail or bond; and (vi) if the individual is incarcerated, the time and date that the individual was received into, discharged from, or transferred from the arresting agency's custody.

The requirements of section 2.15(a) of FOIA demonstrate that the General Assembly recognizes 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. 11-001, issued February 18, 2011. Because Mr. Noonan was arrested for a criminal offense, the information referenced in subsection (i) and (ii) of section 2.15(a) of FOIA relating to his arrest must be disclosed. Information referenced in the remaining subsections of section 2.15(a) may be withheld, but only if its "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 2012). The Village has not asserted that disclosure of the report would result in such consequences. Accordingly, the categories of information listed in section 2.15(a) of FOIA must be disclosed to Mr. Pratt.

Further, the Village has not demonstrated that disclosure of any other information contained in the incident report would constitute an unwarranted invasion of Mr. Noonan's privacy as contemplated in section 7(1)(c) of FOIA. This office has previously determined that "arrestees are considered 'essentially public personages' with a 'limited' and 'qualified' right to privacy, 'and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest' that are subject to disclosure." Ill. Att'y Gen. Pub. Acc. Op. No. 12-006, issued March 16, 2012, at 7 (citing Tennessean Newspaper, Inc. v. Levi, 403 F. Supp. 1318, 1321 (D.C. Tenn. 1975)).
Mr. Gregory Pratt  
Mr. Thomas Melody  
January 27, 2014  
Page 4

There is also a strong public interest in information that sheds light on the manner in which public officials perform their duties. See Ill. Att'y Gen. Pub. Acc. Op. No. 12-006, issued March 16, 2012. Thus, section 7(1)(c) expressly provides that "the disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy."

Mr. Noonan was employed by the Tinley Park fire department. Mr. Pratt contends that the report contains information that relates to the public duties of Mr. Noonan, in that the events described in the incident report occurred at a Village fire station and led to Mr. Noonan's termination for violating the Village's employment policies on harassment and workplace violence. The Village's response concedes that the incident was work-related, noting that the report was part of a disciplinary investigation against Mr. Noonan. This office's review of the report confirms that the 2011 incident occurred at a Tinley Park fire station, involved at least one on-duty firefighter, and that information contained in the report does bear upon Mr. Noonan's public duties. Therefore, disclosure of the report would not constitute an unwarranted invasion of Mr. Noonan's personal privacy under the plain language of section 7(1)(c) of FOIA.

To the extent that the victim's right to privacy may be at issue in the release of the December 11, 2011, report, the Village may withhold information that would "unavoidably disclose the identity of ** * persons who file complaints with ** * law enforcement under section 7(1)(d)(iv) of FOIA. Therefore, the Village may redact information from the report that identifies the victim and his or her relationship to the arrestee. Moreover, on October 2, 2013, a representative of this office spoke with Mr. Pratt, who confirmed that he does not object to the redaction of the alleged victim's name.

Under section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b), the Village may also partially redact the report to protect private information, which is defined as "unique identifiers, including a person's social security number, driver's license number ** * home or personal telephone numbers" and "includes home address and personal license plates, except as otherwise provided by law." 5 ILCS 140/2(c-5) (West 2012) (Emphasis added.) Because section 2.15 otherwise provides that an arrestee's home address must be released, the Village may not redact that information.

2010 Incident Report

The 2010 incident report pertains to an unrelated investigation of allegations of domestic battery, theft and criminal damage to property in which Mr. Noonan was the complainant. The incident occurred on private property and did not relate to the public duties of public employees. This office has previously determined that domestic disturbances are highly personal by their nature. See Ill. Att'y Gen. PAC Pre-Auth. al16019, issued August 23, 2011; see
also Ill. Att'y Gen. PAC Pre-Auth. al15532, issued August 3, 2011. However, as discussed above, the Village is required under section 2.15(a) of FOIA to disclose information relating to the person arrested as a result of the complaint, including the name, age, address, charges, time and location of arrest, name of investigating agency, any bail or bond information and incarceration information, unless excepted under section 2.15(c). See Ill. Att'y Gen. PAC Pre-Auth. al15488, issued August 2, 2011, at 2 (approving withholding of domestic disturbance report under section 7(1)(c) but noting that arrests require certain disclosures).

The 2008 Incident Report

The 2008 report details an incident concerning a juvenile. This office has reviewed the report, in which no crime was alleged and no arrests were made. The information contained in the report is highly personal, and the General Assembly has determined that the privacy rights of juveniles are to be scrupulously protected, except in very limited circumstances. See, i.e., 705 ILCS 405/1-7(C) (West 2012). The privacy rights of the juvenile, as well as Mr. Noonan, who was not engaged in the performance of his official duties at the time, outweigh any legitimate public interest in disclosure of the report. Thus, the Village properly withheld this report pursuant to section 7(1)(c) of FOIA. See Ill. Att'y Gen. PAC Pre-Auth. al15194, issued July 8, 2011 (approving withholding of highly personal police reports not involving the requester or the arrests of any parties).

The Incident Dispatch Detail Report

Likewise, the incident dispatch detail report documents no alleged crime, no arrest, and no suspect. Information in this report is highly personal, and Mr. Noonan's right to privacy outweighs any legitimate public interest in disclosure. Accordingly, we conclude that this report is exempt from disclosure pursuant to section 7(1)(c) of FOIA.

Section 7(1)(a) of FOIA

The Village's response to this office also asserts the records fall within the scope of section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2012)), which exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." However, neither the Village's denial letter to Mr. Pratt nor its response to this office identified any federal or state law, rule or regulation that specifically prohibits disclosure of the records in question. The Village's response to this office does, however, refer to "limited medical information in the reports"4 in support of its 7(1)(a)

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4Letter from Thomas M. Melody, Klein, Thorpe and Jenkins, Ltd., to Rob Olmstead, Assistant Attorney General, Public Access Bureau (August 26, 2013).
exemption. Presumably, the Village is referring to the Health Information Portability and Accountability Act (HIPAA) (42 U.S.C. §§ 1320d through 1320d-0 (2012)). HIPAA, however, prohibits the release of medical information only by "covered entities" such as health plans, health care clearinghouses, and qualified health care providers. *Coy v. Washington County Hospital District, 372 Ill. App. 3d 1077, 1081 (5th Dist., 2007) (citing 45 C.F.R. §§ 160.102(a), 160.103 (2002)); see also People v. Bauer, 402 Ill. App. 3d 1149, 1158 (5th Dist. 2010) (holding that "law enforcement agencies * * * are not covered entities under HIPAA.")*; Ill. Att'y Gen. PAC Req. Rev. Ltr. 19519, issued October 12, 2012, at 3; Ill. Att'y Gen. PAC Req. Rev. Ltr. 11601, issued May 11, 2011. Thus, this office concludes that the Village has not sustained its burden of demonstrating that the records are exempt from disclosure pursuant to section 7(1)(a) of FOIA.

Section 7(1)(n) of FOIA

Lastly, the Village contends in its response to this office that the incident reports are exempt under section 7(1)(n) of FOIA (5 ILCS 140/7(1)(n) (West 2012)) because they "were part of internal disciplinary investigations." Section 7(1)(n) exempts from disclosure "records relating to a public body's adjudication of employee grievances or disciplinary cases." This office has previously determined that police incident reports "exist independently of any internal investigation and do not become adjudicatory simply because they are relied upon by the public body during the course of its [disciplinary] investigation." Ill. Att'y Gen. Pub. Acc. Op. No. 13-011, issued June 11, 2013, at 8. Because the police incident reports were generated independently and prior to any adjudication that may have occurred, we conclude that those reports are not exempt from disclosure under section 7(1)(n).

CONCLUSION

The Village must release the 2011 incident report, subject only to appropriate redactions under section 7(1)(b) of FOIA and the redaction of the victim's name any other information identifying the victim pursuant to section 7(1)(d)(iv). The Village must also release the arrestee information in the 2010 incident report as required by section 2.15 of FOIA.

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9Letter from Thomas M. Melody, Klein, Thorpe and Jenkins, Ltd., to Rob Olmstead, Assistant Attorney General, Public Access Bureau (August 26, 2013).
The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (312) 814-6756. This letter shall serve to close this matter.

Very truly yours,

STEVE SILVERMAN
Assistant Bureau Chief
Public Access Bureau

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OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 29, 2015

Sergeant Craig Gelande
City of Silvis Police Department
1040 First Avenue
Silvis, Illinois 61282

RE: FOIA Request for Review – 2015 PAC 35548

Dear [Name] and Sergeant Gelande:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons that follow, the Public Access Bureau concludes that the City of Silvis Police Department (Department) did not withhold non-exempt information responsive to [Redacted] May 23, 2015, FOIA request.

On that date, [Name] submitted a FOIA request to the Department seeking copies of all police, fire, and ambulance calls and/or reports for a specific address from March 2007 through May 23, 2015. On May 27, 2015, the Department provided [Redacted] with responsive records but redacted certain information, asserting that it was highly personal. On June 1, 2015, the Public Access Bureau received the above-captioned Request for Review contesting the extent of the Department's redactions and its withholding of entire records.

On June 11, 2015, the Public Access Bureau sent a copy of the Request for Review to the Department and asked it to provide unredacted copies of the responsive records for our confidential review, together with a detailed explanation of its legal and factual bases for withholding responsive information. On June 21, 2015, this office received those records and the Department's written response asserting that its denial was proper. The Department specifically cited sections 7(1)(b) and 7(1)(c) of FOIA (5 ILCS 140/7(1)(b), (1)(c) (West 2014)). [Name] did not submit a reply.
DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2014); see also Southern Illinoisan v. Illinois Department 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 2014). "When a request for public records is denied on the grounds that the records are exempt under Section 7 of [FOIA], the notice of denial shall specify the exemption claimed to authorize the denial and the specific reasons for the denial, including a detailed factual basis and a citation to supporting legal authority." (Emphasis added.) 5 ILCS 140/9(b) (West 2014).

As a preliminary matter, we note that the Department's May 27, 2015, response to the request did not provide a detailed factual basis or supporting legal authority for withholding responsive information, and only alluded to one of the applicable exemptions rather than specifying both of them. We remind the Department to ensure that it complies with section 9(b) of FOIA when it denies any portion of a FOIA request in the future.

Section 7(1)(c) of FOIA

Section 7(1)(c) of FOIA exempts from disclosure "[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." Section 7(1)(c) 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 outweights 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."

A public body's contention that the release of information would constitute an unwarranted invasion of personal privacy is evaluated on a case-by-case basis. Chicago Journeymen Plumbers' Local Union 130, U.A. v. Department of Public Health, 327 Ill. App. 3d 192, 196 (1st Dist. 2001). The phrase "clearly unwarranted invasion of personal privacy" evinces a strict standard to claim the exemption, and the burden is on the government agency having charge of the record to prove that standard has been met. Schessler v. Department of Conservation, 256 Ill. App. 3d 198, 202 (4th Dist. 1994).

Based on our review, the information the Department redacted and withheld pursuant to section 7(1)(c) is exempt from disclosure under that provision. The Department primarily redacted highly personal medical information, the disclosure of which would constitute
a clearly unwarranted invasion of personal privacy. The public interest is low in the medical information that was redacted, whereas a profound invasion of personal privacy would occur if that information were to be disclosed. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 20579, issued April 9, 2013, at 3 ("The Public Access Bureau has previously determined that * * * information pertaining to specific medical conditions or treatments would be an unwarranted invasion of personal privacy.").

Additionally, the Department redacted dates of birth. The Public Access Bureau has consistently determined that the disclosure of dates of birth would constitute a clearly unwarranted invasion of personal privacy. See, e.g., Ill. Att'y Gen. PAC Req. Rev. Ltr. 27345, issued May 19, 2014, at 3.

The Department also redacted information that would identify witnesses who provided information to law enforcement personnel, which this office has consistently found to be permissible pursuant to section 7(1)(c) in order to avoid an unwarranted invasion of personal privacy, if not pursuant to section 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)(d)(iv) (West 2014)) as information identifying an individual who provided information to a law enforcement agency. See, e.g., Ill. Att'y Gen. PAC Req. Rev. Ltr. 37979, issued October 28, 2015.

Further, the Department redacted information provided to law enforcement personnel by alleged victims of criminal offenses, the disclosure of which would be highly objectionable to a reasonable person. The release of that information would create a potential for further harm to the alleged victims, outweighing any public interest in that information.

Finally, the records that the Department withheld in full all involve domestic incidents in which no individuals were arrested. When no arrests result from an incident involving private individuals (as opposed to public officials) who are not charged with any crime, this office has determined that the subjects' privacy rights outweigh any legitimate public interest in that information. See, e.g., Ill. Att'y Gen. PAC Req. Rev. Ltr. 23355, issued May 16, 2013, at 3 (collecting cases).

Section 7(1)(b) of FOIA

Lastly, section 7(1)(b) of FOIA 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 2014)) 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.

To the extent that the Department withheld information that is not exempt from disclosure pursuant to section 7(1)(c), it is exempt from disclosure pursuant to section 7(1)(b) because it constitutes "private information" pursuant to the above definition of that term.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. Please contact me at the Chicago address on the first page of this letter if you have any questions. This letter serves to close this matter.

Very truly yours,

JOSH JONES
Supervising Attorney
Public Access Bureau

35548 f 71b proper 71c proper pd
OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 18, 2015

Menard Correctional Center
P.O. Box 1000
Menard, Illinois 62259

Detective Sergeant J. Sims, #102
Criminal Investigations Division
Matteson Police Department
20500 South Cicero Avenue
Matteson, Illinois 60443

RE: FOIA Request for Review – 2015 PAC 36261

Dear [Redacted] and Detective Sergeant Sims:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons that follow, the Public Access Bureau concludes that the Matteson Police Department (Department) improperly denied [Redacted] FOIA request in its entirety.

In an undated letter received by the Department on June 27, 2015, [Redacted] submitted a FOIA request to the Department seeking all records concerning his criminal prosecution in Cook County Circuit Court Case No. 06-CR-27754.\(^1\) On June 29, 2015, the Department denied the request citing Illinois Supreme Court Rule 415(c); the Department’s response asserted that this Rule “mandates that discovery materials are to remain in the exclusive custody of a criminal defendant’s attorney, and should not be given to the criminal defendant or be in his or her possession.”\(^2\) In a letter dated July 7, 2015, [Redacted] filed a Request for Review disputing the denial of his request, which stated: “I am without representation in my

\(^1\)Letter from [Redacted] to Matteson Police Department (undated).

\(^2\)Letter from Detective Sergeant J. Sims #102, Criminal Investigations Division, Matteson Police Department, to [Redacted] (June 29, 2015), at 1.
case, * * * in which I now will proceed pro[se]." His submission included a copy of a letter from the Office of the State Appellate Defender stating that the Illinois Supreme Court had denied petition for leave to appeal an appellate court decision affirming his criminal convictions. See People v. 2014 IL App (1st) 103436, 16 N.E.2d 129 (2014).

On July 20, 2015, the Public Access Bureau sent a copy of the Request for Review to the Department and asked it to provide a representative sample of the responsive records together with a detailed explanation for the assertion that Illinois Supreme Court Rule 415(c) prohibits the Department from providing copies of the requested records to The Department furnished those materials on July 24, 2015, stating in its written response:

I initially denied [redacted] request under Illinois Supreme Court Rule 415(c), which mandates that discovery materials are to remain in the exclusive custody of a criminal defendant's attorney, and should not be given to the criminal defendant or be in his or her possession.

Without a clear understanding of when a defendant is no longer a defendant, I believe rule 415(c) still applies and [redacted] the requestor and defendant in this matter, is not entitled to the requested records, nor can he legally be in possession of such records. Furthermore, [redacted] indicates in his PAC [Public Access Counselor] Review request that he "will proceed pro[se]," leading me to believe he is seeking an appeal(s), which again would prevent him from possessing such records as he would still be the defendant in such criminal proceedings. If he does indeed file an appeal, I believe that he must seek such records through discovery through the court system, and not directly through the police department utilizing the Freedom of Information Act.

(Emphasis in original.)

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5Letter from Detective Sergeant J. Sims #102, Criminal Investigations Division, Matteson Police Department, to Steve Silverman, Assistant [Bureau Chief], Public Access Bureau (July 24, 2015), at 1-2.
On July 31, 2015, the Public Access Bureau sent a copy of the Department's response to [redacted]; he did not reply.

**ANALYSIS**

"All 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." 5 ILCS 140/1.2 (West 2014). Section 5(a) of FOIA (5 ILCS 140/5(a) (West 2014)) provides: "Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

The Department's responses to [redacted] FOIA request and to this office assert that Rule 415(c) prevents the Department from disclosing the requested records to [redacted]. We construe that response as an assertion of section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2014)), which permits 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." (Emphasis added.) 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).

Thus, the records are exempt from disclosure only if Rule 415(c) can be construed as specifically prohibiting the Department from disclosing the records at issue in this matter.

The basic rules of statutory construction apply to the construction of Illinois Supreme Court rules. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 332 (2002) ("It is well settled that the construction of [Supreme Court] rules is comparable to this court's construction of statutes."); *see also* Ill. S. Ct. R. 2 (effective July 1, 1971) ("These rules are to be construed in accordance with the appropriate provisions of the Statute on Statutes (5 ILCS 70/0.01 et seq.), and in accordance with the standards stated in section 1-106 of the Code of Civil Procedure (735 ILCS 5/1-106.")."

In construing a statute, the primary goal "is to ascertain and give effect to the intent of the General Assembly." *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). The best indicator of legislative intent is the language of the statute, "which must be given its plain and ordinary meaning." *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 2012 IL 111286, ¶23, 962 N.E.2d 956, 964 (2012).

Rule 415(c) provides that "[a]ny 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." (Emphasis added.) The committee comments on the Rule (Ill. S. Ct. R. 415(c), Committee Comments (adopted October 1, 1971)) explain its purpose:

If the materials to be provided were to become, in effect, matters of public availability once they had been turned over to counsel for the limited purposes which pretrial disclosures are designed to serve, the administration of criminal justice would likely be prejudiced. Accordingly, this paragraph establishes a mandatory requirement in every case that the material which an attorney receives shall remain in his exclusive custody. While he will undoubtedly have to show it to, or at least discuss it with others, he is not permitted to furnish them with copies or let them take it from his office. It should be noted that this paragraph also applies to the State. (Emphasis added.)

The representative sample of records that the Department provided for this office's confidential review includes police reports generated by the Department, laboratory analyses and other records related to forensic testing, court records reflecting criminal charges and the underlying facts of the offenses, property inventories, an arrest report and fingerprint card, cell check reports, the defendant's mug shot, and an autopsy report and related medical examiner records. The Department has neither asserted nor demonstrated that any of the records in question were furnished to an attorney for the Department pursuant to the rules of discovery. Although a public body's attorney may properly assert section 7(1)(a) of FOIA based on Rule 415(c) to withhold records that he or she received in discovery, the exemption is not available to the Department under these circumstances. The plain language of the Rule only requires an attorney to maintain exclusive custody of records "furnished" to him or her in discovery. Nothing in the Rule restricts a public body such as a police department from disclosing records that it generated or obtained outside of the discovery process.

With respect to the Department's assertion that... may file an appeal and therefore must obtain the records he seeks through discovery for that appeal, the article that Rule 415(c) falls under is entitled "Rules on Criminal Proceedings in the Trial Court." Ill. S. Ct. R. Art. IV. Illinois Supreme Court Rule 1 provides, in pertinent part: "The rules on proceedings in the trial court, together with the Civil Practice Law and the Code of Criminal Procedure, shall govern all proceedings in the trial court[.] * * * The rules on appeals shall govern all appeals." Because Rule 415(c) only governs trial court proceedings, it does not apply to appeals. Nor does the Rule specifically prohibit a defendant from using discovery alternatives, such as FOIA, to obtain records. Ill. Att'y Gen. Pub. Acc. Op. No. 13-017, issued November 12, 2013, at 7 ("Illinois Supreme Court rules governing discovery do not restrict parties to litigation from
Detective Sergeant J. Sims  
December 18, 2015  
Page 5

accessing records through FOIA."; *Hoover v. U.S. Department of the Interior*, 611 F. 2d 1132, 1137 (5th Cir. 1980) (a litigant's potential access to records through discovery in pending litigation did not preclude him from seeking the same records under FOIA because the pending litigation was "not related to the rights of general public access under the FOIA to agency documents."). Accordingly, we conclude that the Department has not sustained its burden of demonstrating that the records requested by [REDACTED] are exempt from disclosure pursuant to section 7(1)(a) of FOIA.

In accordance with the conclusions expressed in this determination, we request that the Department furnish [REDACTED] with copies of the requested records subject to permissible redactions pursuant to section 7 of FOIA (5 ILCS 140/7 (West 2014)). In particular, the Department may properly redact pursuant to section 7(1)(d)(iv) (5 ILCS 140/7(1)(d)(iv) (West 2014)) information that 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[.]" If any information is redacted or withheld, the Department should issue a supplemental response to [REDACTED] that includes a "detailed factual basis for the application of any exemption claimed," and that otherwise complies with the requirements of section 9(a) of FOIA (5 ILCS 140/9(a) (West 2014)).

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (312) 814-6756 or the Chicago address listed on the bottom of the first page of this letter. This letter serves to close this file.

Very truly yours,

[REDACTED]

STEVE SILVERMAN  
Assistant Bureau Chief  
Public Access Bureau

36261 f 71a improper pd
Via electronic mail

Via electronic mail
Ms. Patricia Lord
Senior Assistant City Attorney
City of Naperville
400 South Eagle Street
P.O. Box 3020
Naperville, Illinois 60566
lordp@naperville.il.us

RE: FOIA Request for Review – 2016 PAC 41019

Dear [REDACTED] and Ms. Lord:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons stated below, the Public Access Bureau concludes that the City of Naperville Police Department (Department) did not improperly redact information from police reports responsive to the [REDACTED] on February 16, 2016, FOIA request, with the exception of certain information provided by Department employees.

On that date, [REDACTED] submitted a FOIA request to the Department for police reports relating to a particular case. On February 23, 2016, the Department denied the request in its entirety under 7(1)(d)(i) of FOIA (5 ILCS 140/7(1)(d)(i) (West 2014), as amended by Public Acts 99-298, effective August 6, 2015; 99-346, effective January 1, 2016).

On April 6, 2016, this office sent a copy of the Request for Review to the Department and asked it to provide a detailed explanation of the factual and legal bases for the
On April 18, 2016, the Department submitted a written response. The Department stated that it had reassessed its position of withholding the records in their entireties, and furnished a redacted version of the records to [Redacted]. The records are police reports concerning an alleged battery committed against [Redacted] which is the subject of a pending criminal case. The Department asserted that it properly redacted portions of the records under sections 7(1)(a), 7(1)(b), 7(1)(c), 7(1)(d)(i), 7(1)(d)(ii), and 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)a, (1)b, 7(1)c, (1)d(i), (1)d(1ii), (1)d(iv) (West 2014), as amended by Public Acts 99-298, effective August 6, 2015; 99-346, effective January 1, 2016). The response included a letter from the DuPage County State's Attorney's Office (State's Attorney's Office), which also asserted that disclosure of the requested records is prohibited by the discovery provisions in Illinois Supreme Court Rule 415(c), as well as by Rule 3.6 of the Illinois Rules of Professional Conduct of 2010 (Ill. R. Prof. Conduct 3.6 (effective January 1, 2010)) and Rule 3.8 of the Illinois Rules of Professional Conduct of 2010 (Ill. R. Prof. Conduct 3.8 (effective January 1, 2016)).

On April 25, 2016, this office forwarded a copy of the Department's response to [Redacted] he did not reply.

**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). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois Univ.,* 176 Ill. 2d 401, 408 (1997). Bare conclusions without a detailed rationale do not satisfy a public body's burden of explaining how exemptions are applicable. *See Rockford Police Benevolent and Protective Ass'n, Unit No. 6 v. Morrissey, et al.*, 398 Ill. App. 3d 145, 151 (2nd Dist. 2010) (citing *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 464 (2003)).

**Sections 7(1)(d)(i) and 7(1)(d)(iii) of FOIA**

Sections 7(1)(d)(i) and 7(1)(d)(iii) of FOIA exempt from disclosure:

(d) Records in the possession of any public body created in the course of administrative enforcement proceedings, and any law
enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would:

(i) 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;

* * *

(iii) create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing[.]

"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 (2d Dist. 1989). 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. Day v. City of Chicago, 388 Ill. App. 3d 70, 74-77 (1st Dist. 2009).

The Department's and the State's Attorney's Office's claims that disclosure of the complete records would interfere with or obstruct an ongoing prosecution is unsupported by any specific facts. A public body must demonstrate how disclosure of records would interfere with or obstruct a criminal prosecution or investigation in order to properly withhold records pursuant to section 7(1)(d)(i) of FOIA. The Public Access Bureau has consistently concluded that the mere commencement of an investigation or prosecution does not constitute clear and convincing evidence that any records are exempt from disclosure. See, e.g., Ill. Att'y Gen. PAC Req. Rev. Ltr. 33927, issued May 6, 2015; Ill. Att'y Gen. PAC Req. Rev. Ltr. 30811, issued November 21, 2014; Ill. Att'y Gen. PAC Req. Rev. Ltr. 26563, issued November 21, 2013.

The Department also cited section 7(1)(d)(iii), which permits a public body to withhold records if disclosure would "create a substantial likelihood a person will be deprived of a fair trial[.]") However, that assertion is also conclusory and unsupported by specific facts. The Department and State's Attorney's Office have not demonstrated how disclosure of any information in the police reports would create a "substantial likelihood" that the criminal defendant will be deprived of a fair trial. Accordingly, this office concludes that the Department has not sustained its burden of showing by clear and convincing evidence that the records are exempt from disclosure under sections 7(1)(d)(i) and 7(1)(d)(iii) of FOIA.
Section 7(1)(d)(iv) of FOIA

Section 7(1)(d)(iv) of FOIA exempts from disclosure information that 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[.]" Witness statements may be withheld in their entireties under section 7(1)(d)(iv) if disclosure "would necessarily result in the disclosure of the identity of the source" of the 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). This office has reviewed the un-redacted responsive records provided by the Department, and determined that the identities of individuals who provided information to police could be discerned from the content of the records even if the names of the individuals were redacted. Accordingly, while this office concludes that the Department has not met its burden of demonstrating that portions of the records are exempt from disclosure under sections 7(1)(d)(i) and 7(1)(d)(iii), the Department properly withheld witness statements in their entireties or redact portions of records containing information attributed to witnesses under section 7(1)(d)(iv).

The Department also withheld statements or observations by Department employees. The information provided by Department employees who are merely performing their assigned duties does not require the protection afforded 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[n] * * * investigation pursuant to their duties as public servants would yield [an] absurd result, and statutes should be construed to avoid absurdity."). Accordingly, this office concludes that while the Department properly withheld the information provided by civilian witnesses under section 7(1)(d)(iv), information provided by Department employees must be disclosed.

Section 7(1)(a) of FOIA

Section 7(1)(a) of FOIA exempts from inspection and copying "[i]information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." Because FOIA does not have an exemption containing or referencing either Illinois Supreme Court Rule 415(c) or Rules 3.6 and 3.8 of the Illinois Rules of Professional Conduct, this office construes the Department and the State's Attorney's Office's collective reliance on those rules as asserting section 7(1)(a) of FOIA. See, e.g., Better Government Ass'n v. Blagojevich, 386 Ill. App. 3d 808, 815-16 (4th Dist. 2008) (under section 7(1)(a), "an exemption restricting the expansive nature of the FOIA's disclosure provisions must be explicitly stated - that is, such a proposed disclosure must be specifically prohibited").
Illinois Supreme Court Rule 415(c)

Illinois Supreme Court's rules "have the force of law, and the presumption must be that they will be obeyed and enforced as written." *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995). The Illinois Supreme Court has explained:

When interpreting supreme court rules, our court is guided by the same principles applicable to the construction of statutes. [Citations.] With rules, as with statutes, our goal is to ascertain and give effect to the drafters' intention. [Citation.] The most reliable indicator of intent is the language used, which must be given its plain and ordinary meaning. *People v. Marker*, 233 Ill.2d 158, 164–65 (2009).

Illinois Supreme Court Rule 415(c) provides that "*only materials furnished to an attorney pursuant to these rules shall remain in his exclusive custody* and be used only for the purpose of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide." (Emphasis added.) The committee comments on the Rule (Ill. S. Ct. R. 415(c), Committee Comments (adopted October 1, 1971)) explain its purpose:

If the materials to be provided were to become, in effect, matters of public availability once they had been turned over to counsel for the limited purposes which *pretrial disclosures* are designed to serve, the administration of criminal justice would likely be prejudiced. Accordingly, this paragraph establishes a mandatory requirement in every case that *the material which an attorney receives shall remain in his exclusive custody*. While he will undoubtedly have to show it to, or at least discuss it with others, he is not permitted to furnish them with copies or let them take it from his office. It should be noted that this paragraph also applies to the State. (Emphasis added.)

The State's Attorney's Office has contended that the police reports have been tendered in discovery and that under Rule 415(c), "counsel for the State and the Defendant are prohibited from releasing the documents requested." However, the FOIA request was submitted to the Department, not the State's Attorney's Office or defense counsel. Further, the *Department* has not asserted that any of the requested records were received by an attorney for the Department in

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1Letter from Robert B. Berlin, State's Attorney, DuPage County, to Neil P. Olson, Assistant Attorney General (April 12, 2016), at 3.
discovery. Rather, the Department generated the materials while investigating the alleged battery. The Department’s interpretation of Supreme Court Rule 415(c) as prohibiting police departments from providing records generated by police departments in response to FOIA requests is contrary to the plain language of the rule and unsupported by any legal authority. Because the Department has not demonstrated that any of the requested materials were received by an attorney for the Department in discovery, this office concludes that the Department has not shown by clear and convincing evidence that the requested records are exempt under section 7(1)(a) of FOIA.

**Rules of Professional Conduct**

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)." Notably, Rule 3.6 also acknowledges a legitimate public interest in disclosure of law enforcement records:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. **On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate**
interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy. (Emphasis added.) Ill. R. Prof. Conduct 3.6, Committee Comment 1 (adopted July 1, 2009).

Section 3.8 of the Illinois Rules of Professional Conduct of 2010 states:

The duty of a public prosecutor is to seek justice, not merely to convict. The prosecutor in a criminal case shall:

* * *

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that pose a serious and imminent threat of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Rules 3.6 and 3.8 of the Illinois Rules of Professional Conduct of 2010 prohibit prosecutors and law enforcement personnel from making statements outside of court that could threaten the fairness of a pending adjudication. Although the State's Attorney's Office argues that the difference between a public release of records and a public statement "is a distinction without a difference," this office is unaware of any authority which concludes that providing a FOIA requester with records constitutes an extrajudicial statement. Indeed, "FOIA is consistent with the Rules of Professional Conduct because Section 7(1)(d)(iii) of FOIA exempts records if their disclosure would 'create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing.'" Ill. Att'y Gen. PAC Req. Rev. Ltr. 10319, issued January 18, 2011, at 3. As described above, the Department has not made that required showing under section 7(1)(d)(iii). Thus, these rules do not prohibit the Department from providing a FOIA requester with records concerning a criminal case. Because the Rules of Professional Conduct cited do not specifically prohibit the Department from providing the requester with the responsive records,

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the Department failed to sustain its burden of demonstrating by clear and convincing evidence that the rules exempt the responsive records from disclosure pursuant to section 7(1)(a) of FOIA.

**LEADS Information**

The Department asserted that it redacted certain information obtained through the Law Enforcement Agencies Data System (LEADS). Section 1240.80(d) of title 20 of the Administrative Code (20 Ill. Adm. Code §1240.80(d) (2016), 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 Gov't Ass'n v. Zaruba, 2014 IL App (2d) 140071, ¶27 (2014) ("The regulations make it clear that the public is not entitled to view or possess data that is transmitted through, received through, or stored in LEADS."). Accordingly, the Department properly redacted LEADS information under section 7(1)(a) of FOIA.

**Section 7(1)(b) of FOIA**

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 2014), as amended by Public Acts 99-78, effective July 20, 2015), 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.

The Department redacted a driver's license number, a personal telephone number, a home address, and a personal license plate number from the responsive records. As set forth in section 2(c-5), driver's license numbers, personal telephone numbers, home addresses, and personal license plate numbers are "private information" that may be properly redacted under section 7(1)(b) of FOIA. Accordingly, the Department properly redacted this information.

7That provision implements section 7 of the Illinois Criminal Identification Act (20 ILCS 2630/7 (West 2014)).
Section 7(1)(c) of FOIA

Section 7(1)(c) of FOIA exempts from disclosure "[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 personal privacy" as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information."

The Public Access Bureau has consistently determined that an individual's date of birth is highly personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy. See, e.g., Ill. Att'y Gen. PAC Req. Rev. Ltr. 20376, issued August 31, 2012. Therefore, the Department's redaction of dates of birth was permissible under section 7(1)(c) of FOIA.

The Department's primary basis for asserting 7(1)(c) appears to be to protect the identities of witnesses providing information to the Department. As described above, this office has determined that such information may be withheld under section 7(1)(d)(iv). Accordingly, this office does not address the applicability of section 7(1)(c) other than to dates of birth.

In accordance with the conclusions of this letter, this office requests that the Department furnish additional records with additional un-redacted information, namely the information provided by Department employees that is not exempt from disclosure under section 7(1)(d)(iv). The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this file. If you have any questions, please contact me at nolson@atg.state.il.us or (217) 782-9078.

Very truly yours,

NEIL P. OLSON
Assistant Attorney General
Public Access Bureau

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OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS  

Lisa Madigan  
ATTORNEY GENERAL  

August 12, 2016  

Via electronic mail  
Mr. Robert T. Hrodey  
Hrodey Associates  
P.O. Box 366  
Woodstock, Illinois 60098  
inquiry@hrodey.com  

Via electronic mail  
Ms. Jennifer J. Gibson  
Zukowski, Rogers, Flood, & McArdle  
50 Virginia Street  
Crystal Lake, Illinois 60014  
jgibson@zrfmlaw.com  

RE: FOIA Request for Review — 2015 PAC 34767  

Dear Mr. Hrodey and Ms. Gibson:  

This determination letter is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons that follow, the Public Access Bureau concludes that the City of Woodstock (City) improperly redacted certain portions of the records responsive to Mr. Robert T. Hrodey's February 27, 2015, FOIA request.  

On that date, Mr. Hrodey submitted a FOIA request to the City seeking certain records related to a traffic accident that occurred on Wednesday, February 25, 2015, involving a named individual. On March 9, 2015, the City provided responsive records with portions redacted pursuant to sections 7(1)(a) and 7(1)(b) of FOIA (5 ILCS 140/7(1)(a), (1)(b) (West 2014)). With respect to section 7(1)(a), the response asserted that the federal Driver's Privacy Protection Act (DPPA) (18 U.S.C. § 2721 et. seq. (West 2014)) specifically prohibits disclosure of certain information redacted from the records. On April 15, 2015, Mr. Hrodey submitted this Request for Review contesting the redactions.
On April 20, 2015, this office forwarded a copy of the Request for Review to the City and asked it to provide a detailed explanation of the legal and factual basis for the asserted exemptions, together with unredacted copies of the records for our confidential review. On May 13, 2015, the City provided this office with the records and its written response. On May 18, 2015, this office forwarded the City's response to Mr. Hrodey, who replied by reiterating that the DPPA does not prohibit disclosure of the redacted information.

DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection and copying." 5 ILCS 140/1.2 (West 2014); see also Southern Illinoisan v. Illinois Dept. of Public Health, 218 Ill. 2d 390, 415 (2006). Any 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 2014). The exemptions from disclosure are to be narrowly construed. Lieber v. Board of Trustees of Southern Illinois University, 176 Ill. 2d 401, 407 (1997).

Section 7(1)(a) of FOIA/ Federal Driver's Privacy Protection Act

Section 7(1)(a) of FOIA exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The City cited the DPPA as the federal law that prohibited the disclosure of the information redacted from the responsive records. The DPPA generally prohibits officers, employees, and contractors of a state department of motor vehicles (DMV) from disclosing or otherwise making available "personal information" for any use not permitted under the limited exceptions set forth in the Act. See 18 U.S.C. § 2721(a)(1) (West 2014); Maracich v. Spears, 133 S. Ct. 2191, 2198 ("Disclosure of personal information [contained in the records of state DMVs] is prohibited [by the DPPA] unless for a purpose permitted by an exception listed in 1 of 14 statutory subsections."). In addition, section 2722(a) of DPPA (18 U.S.C. §2722(a) (West 2014)) states that "[i]t shall be unlawful for any person knowingly to obtain or disclose personal information[ ]from a motor vehicle record[.]" See also Dahlstrom v. Sun-Times Media, 777 F.3d 937, 941-42 (7th Cir. 2015) (concluding that a newspaper violated the DPPA by knowingly obtaining a police officer's personal information from motor vehicle records from the Illinois Secretary of State, which it proceeded to publish). Section 2725(3) of DPPA (18 U.S.C. § 2725(3) (West 2014)) defines "personal information" as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." (Emphasis added).
We have reviewed the records in question, which consist of an Illinois Traffic Crash Report, an incident report, and a police department case report, all of which concern the investigation of a fatal traffic accident. The City redacted names, dates of birth, addresses, drivers' license numbers, license plate information, Vehicle Identification Numbers (VINs), vehicle make, model, and year, and the vehicle owner's name and address from the records. The City's response to this office asserts that the redacted information falls squarely within the DPPA's definition of "personal information" and that because the information was obtained, or verified, from motor vehicle records, the City is prohibited from disclosing it:

As a matter of routine, police officers obtain the names, dates of birth, addresses, and driver's license numbers of those involved in traffic accidents or traffic incidents by asking for the physical driver's license or state ID issued by the Secretary of State. If an individual does not have a driver's license or state ID, the police officer will ask the individual for his or her name and date of birth. In any event, whether the officer is provided with a driver's license or state ID or is simply told a name and date of birth, the police officer for his safety inputs the relevant information into the LEADS [Law Enforcement Agencies Data System] program, which uses Secretary of State motor vehicle data [sic] * * * when investigating a traffic accident or incident, a police officer will input into LEADS the information off of the vehicle license plates involved. The LEADS program then provides the police officer with the vehicle VIN, make, model, year, and vehicle owner name and address. We believe that all the foregoing information falls squarely within the definition of "personal information"as defined by the DPPA, and that because it was obtained through motor vehicle records, i.e., driver's license, state ID, a vehicle license plate, and/or LEADS, that its disclosure is prohibited.3

The DPPA's legislative history reveals that it was enacted to address two specific public policy objectives. The primary objective was "to protect the personal privacy and safety of all American licensed drivers" by preventing motor vehicle data from being obtained and used for committing crimes. 103 Cong. Rec. H.2522 (daily ed. Apr. 20, 1994). The secondary objective was to prevent states from selling personal information to businesses engaged in direct marketing and solicitation without the driver's consent. See Maracich, 133 S. Ct. at 2198 ("The

second concern related to the State's common practice of selling personal information to businesses engaged in direct marketing and solicitation."); *Dahlstrom*, 777 F.3d at 944.

The plain language of the definition of "personal information" in DPPA, however, expressly carves out an exception for information in law enforcement records relating to vehicular accidents, driving violations, and driver status. See 103 Con. Rec. H.2522 (daily ed. Apr. 20 1994) (statement of Rep. Moran) ("It is very important to note that the amendment in no way affects access to accident information about the car or driver."). *available at* 1994 WL 140035; *see also* *Mattivi v. Russell*, 2002 WL 31949898, *4* (D. Colo. Aug. 2, 2002) (concluding the statute's 'plain language * * * makes clear that Congress did not intend 'information on vehicular accidents' to be included within the Act's prohibition of disclosures of 'personal information.'"); *Fla. Op. Atty. Gen. No. 2010-10*, issued April 13, 2010 ("Once personal information contained in a motor vehicle record is received from the department and used in creation of new records, however, it is no longer protected by DPPA [or the Florida implementing statute]."); *Wis. Op. Atty. Gen. No 1-02-08*, issued April 29, 2008 ("We believe it is reasonable to interpret this exclusion [for information concerning vehicular accidents, driving violations, and driver's status] from the 'personal information' definition to mean that information such as a driver's name, address, and telephone number are not encompassed in the personal information protected by the DPPA when that information is incorporated into a document such as an accident report."); *Ky. Atty Gen. No. 02-ORD-197*, issued January 29, 2002 (stating that the DPPA "is inapplicable to law enforcement agencies, and the accident reports they generate, notwithstanding the fact that some of the information that appears in an accident report is extracted from motor vehicle records.").

In addition, the disclosure of "personal information" obtained from motor vehicle records for use in connection with law enforcement purposes is a "permissible use" under the DPPA. Section 2721(b) of the Act (18 U.S.C. §2721(b) (West 2014) identifies certain uses for which "personal information" is permitted to be disclosed. One of the permitted disclosures of personal information is "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. §2721(b)(1) (West 2014). (Emphasis added). In addition, section 2721(c) of DPPA§ (18 U.S.C. §2721(c) (West 2014)) permits law enforcement agencies to redisclose the information that it obtained from motor vehicle records for purposes related to law enforcement functions.

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5*See section 2721(c) of DPPA, states "[a]n authorized recipient of personal information * * * may resell or redisclose the information only for a use permitted under subsection (b) [2721(b) of DPPA]."
The DPPA's legislative history makes clear that the law is intended to provide law enforcement officers wide breadth to carry out their duties. See Parus v. Kroeplin, 402 F. Supp. 2d 999, 1005-06 (W.D. Wisc. Dec. 6, 2005) ("Although the Act was intended to 'prevent stalkers, harassers, would-be criminals and other unauthorized individuals from obtaining and using personal information from motor vehicle records,' it was not intended to impede the ability of law enforcement officers to carry out their duties."). Congressional hearing transcripts illustrate that lawmakers specifically discussed the latitude that law enforcement agencies should be given to perform their duties. Senator Harkin stated, "with respect to law enforcement agencies, [section 2721(b)(1)] should be interpreted so as not to in any way restrict or hinder law enforcement and crime prevention strategies," even when those strategies might include releasing personal information to the general public." Parus, 402 F. Supp. 2d at 1006 (quoting 139 Cong. Rec. S15962 (daily ed. Nov. 17, 1993) (statement of Sen. Harkin) (discussing legislative history in determining that police dispatcher engaged in a law enforcement function, and therefore, did not violate the DPPA by relaying personal information obtained from motor vehicle records to the Department of Natural Resources' warden because the police dispatcher had no reason to believe that the warden sought the information for personal reasons).

As the City points out, its police department uses information that it obtains from motor vehicle records for law enforcement functions such as ensuring police officers' safety, confirming a driver's information, documenting contact with an individual, ensuring that there are no outstanding warrants, and creating law enforcement records including investigatory reports, accident reports, and police reports. These uses of "personal information" clearly involve the police department carrying out its essential functions. Compare Senne v. Village of Palatine, 6 F. Supp. 3d 786, 792 (N.D. Illinois, Nov. 27, 2013) (finding village's use of "personal information" printed on tickets constituted a "permissible use" under DPPA) with Schierts v. City of Brookfield, 868 F. Supp. 2d 818, 820-21 (E.D. Wis. June 20, 2012) (holding police officer violated DPPA when he obtained an address from DMV records and provided the address to the individual's ex-girlfriend for purposes of the ex-girlfriend using the address in a custody dispute); Deicher v. City of Evansville, 2007 WL 5323757 (W.D. Wis. April 12, 2007) (finding police officer violated DPPA when he accessed DMV records to obtain the new address of a civilian's former wife) overruled on other grounds by Deicher v. City of Evansville, 545 F.3d 537 (7th Cir. 2007).

The City contends that the Seventh Circuit Court of Appeals' decision in Dahlstrom v. Sun-Times Media restricts "personal information' from being disclosed via police and accident reports tendered in response to a FOIA request "because the defendant in that case violated DPPA by obtaining and publishing certain records that contained personal information
which it received from a FOIA request sent to the City of Chicago.\textsuperscript{6} This, however, is an
imprecise reading of Dahlstrom. In Dahlstrom, the court makes clear that the Sun-Times
obtained only the names and photographs of police officers from the City of Chicago in response
to its FOIA request; the remaining personal information at issue in this case was obtained
directly from the Illinois Secretary of State. Dahlstrom, 777 F.3d at 941 ("The Officers contend
- and Sun-Times has not disputed - that Sun-Times knowingly obtained this additional
identifying information from motor vehicle records maintained by the Secretary of State. * * *
The Officers do not challenge Sun-Times's publication of their photographs or names, as they
concede that Sun-Times lawfully obtained that information pursuant to its FOIA request."). In
fact, the Dahlstrom Court makes clear that if the type of information contained in motor vehicle
records is obtained from a source other than a state DMV, including pursuant to a FOIA request
to a police department, the DPPA does not prohibit disclosure. Dahlstrom, 777 F.3d at 949-50
("The DPPA prescribes only the publication of personal information that has been obtained from
motor vehicle records. The origin of the information is thus crucial to the illegality of its
publication - the statute is agnostic to the dissemination of the very same information acquired
from a lawful source. * * * much of which [personal information] can be gathered * * * from
other lawful sources (including, of course, a state FOIA request)"). Therefore, this office
concludes that the DPPA does not require the redaction of "personal information," as defined by
the DPPA, from law enforcement records provided in response to a FOIA request.

The City also appears to contend that the VIN, make, model, year, and vehicle
owner name and address must be redacted if the information derives from or is confirmed
through LEADS. Section 1240.80(d) of title 20 of the Administrative Code (20 Ill. Adm. Code §
1240.80(d) (2014), old Part repealed and new Part adopted 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." That provision implements the
Criminal Identification Act (20 ILCS 2630/0.01 et seq. (West 2014)). This office has
consistently determined that only information specifically generated from the LEADS database,
such as the LEADS identification number or information showing the agencies that accessed the
database and the time and date of queries, is prohibited from disclosure by the above provisions;
basic information identifying a driver or his or her vehicle, such as vehicle registration
information, that is obtained from the LEADS database and incorporated into an investigative
report is not exempt from disclosure under section 7(1)(a) of FOIA. See, e.g., Ill. Att'y Gen.
PAC Req. Rev. Ltr. 13417, issued May 18, 2011; Ill. Att'y Gen. PAC Req. Rev. Ltr. 12402,

\textsuperscript{6}Letter from Jennifer J. Gibson to Sarah Pratt, Public Access Counselor, Office of the Attorney
General (May 1, 2015), at 1-2.
As discussed above, because the redacted information in these law enforcement records pertain to a vehicular accident, the redacted information is not "personal information" protected by the DPPA, and therefore, is not prohibited from being disclosed. Similarly, State law restrictions on the disclosure of LEADS data do not prohibit disclosure of basic information identifying a driver or his or her vehicle which is incorporated into a police report. Accordingly, we conclude that the City has not sustained its burden of demonstrating that this information is exempt from disclosure under section 7(1)(a) of FOIA.

Section 7(1)(b) of FOIA

The City may, however, redact driver's license numbers, personal license plate numbers, home addresses, personal telephone numbers, and medical records from the reports pursuant to 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2015 Supp.)). Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2015 Supp.)) defines this information as forms of "private information," which is exempt from disclosure under section 7(1)(b) of FOIA. Likewise, the City may redact signatures from the reports pursuant to 7(1)(b) of FOIA, which this office has previously determined are unique identifiers, and therefore, are an exempt form of private information. Ill. Att'y Gen. PAC Req. Rev. Ltr. 98387, issued December 10, 2010. In addition, the City may redact dates of birth from the reports under section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2015 Supp.)), which exempts from disclosure "[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 personal privacy" as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." This office has consistently concluded that birth dates are a highly personal form of information, and that the subject's right to privacy outweighs any legitimate public interest in disclosure. See, e.g., Ill. Att'y Gen. PAC Req. Rev. Ltr. 13417, issued May 18, 2011, at 3.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me by mail at the Chicago address listed on the first page of this letter, by e-mail at sbarnaby@atg.state.il.us, or by phone at (312) 814-5383.
Mr. Robert T. Hrodey  
Ms. Jennifer J. Gibson  
August 12, 2016  
Page 8  

Very truly yours,  

SHANNON BARNABY  
Assistant Attorney General  
Public Access Bureau  

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PUBLIC ACCESS OPINION 16-009
(Requests for Review 2016 PAC 43168, 43184, 43186, 43193 and 43370)

FREEDOM OF INFORMATION ACT:
Disclosure of Certain Information in a Criminal Complaint Filed by a Public Figure

Ms. Amanda Vinicky  
Statehouse Bureau Chief  
National Public Radio Illinois  
501 South Second Street  
Springfield, Illinois 62703

Mr. Chris Fusco  
Staff Reporter  
*Chicago Sun-Times*  
350 North Orleans, 10th Floor  
Chicago, Illinois 60654

Mr. John O'Connor  
Associated Press  
Statehouse Pressroom  
401 South 2nd Street, Basement 13G  
Springfield, Illinois 62706

Ms. Natasha Korecki  
Playbook writer/Political reporter  
*Politico*, LLC  
1000 Wilson Boulevard  
Arlington, Virginia 22209

Mr. Nathan Lurz  
Reporter, Downers Grove and DuPage Shaw Media  
1101 West 31st Street  
Downers Grove, Illinois 60515

Ms. Enza Petrarca  
Village Attorney  
Village of Downers Grove  
801 Burlington Avenue  
Downers Grove, Illinois 60515

Dear Ms. Vinicky, Mr. O'Connor, Mr. Fusco, Mr. Lurz, Ms. Korecki, and Ms. Petrarca:

This is a binding opinion issued by the Attorney General pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons discussed below, this office concludes that, although the Village of Downers Grove (Village) provided copies of some records and substantial additional information in a supplemental response and properly applied exemptions to portions of various records that it continues to
withhold, it violated the requirements of FOIA by improperly redacting and withholding other information related to a criminal complaint filed by a then-public official.

BACKGROUND

This binding opinion addresses five FOIA requests seeking the same or similar records, each of which the Village denied in part asserting the same bases. Because the Requests for Review present common issues, this office has consolidated these files for determination in this binding opinion.

2016 PAC 43168

On July 25, 2016, Ms. Sarah Mueller submitted a FOIA request to the Village seeking "[a] copy of all police reports filed by Ron Sandack of Downers Grove between July 1, 2016 and July 24, 2016." On July 26, 2016, the Village's Police Records/Information Manager responded by providing a copy of an incident report but redacted most of the information therein pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) of FOIA (5 ILCS 140/7(1)(b), (1)(c), (1)(d)(vii) (West 2015 Supp.)) The response also stated that "[i]nvestigative supplements have not been completed as of the date of this response and that "[e]videntiary documents are denied" pursuant to sections 7(1)(c) and 7(1)(d)(vii) of FOIA. On July 26, 2016, Ms. Mueller submitted a Request for Review, on behalf of National Public Radio (NPR) Illinois, disputing the redaction of the information in the narrative of the complaint, the type of incident, and the offense classification.

On August 3, 2016, the Public Access Bureau sent a copy of the Request for Review to the Village's Police Department and asked it to provide unredacted copies of the police report at issue for this office's confidential review together with a detailed explanation of the factual and legal bases for the applicability of the sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) exemptions to the information redacted from the complaint as well as to the redactions of the


3 E-mail from Sarah Mueller, Reporter, NPR Illinois, to Public Access (July 26, 2016). Ms. Mueller also questioned why she was required to submit photo identification in order to file a FOIA request with the Village. The Public Access Counselor's authority under FOIA is limited to reviewing denials of FOIA requests. See 5 ILCS 140/9.5(a) (West 2014). Because Ms. Mueller did not refuse to provide photo identification and because the Village did not deny her request for failing to do so, this office is unable to review that issue. However, this office notes that no provision of FOIA authorizes a public body to require a requester to provide photo identification as a prerequisite to filing a FOIA request.
type of incident and the offense classification. On August 5, 2016, the Village Attorney furnished those materials to the Public Access Bureau in a consolidated response to the Requests for Review in 2016 PAC 43184, 43186, and 43193 (Consolidated Response). On the same day, this office forwarded a copy of the non-confidential portions of the Village's Consolidated Response to Ms. Mueller; she did not reply.

On September 8, 2016, this office received from the Village a supplemental response in which it asserted that the information redacted from the incident report should remain confidential based on Mr. Sandack's rights as a crime victim under article I, sections 8.1(a)(1) and 8.1(a)(2) of the Illinois Constitution of 1970 (Supplemental Response to PAC). On September 8, 2016, this office forwarded a copy of the Supplemental Response to PAC) to Ms. Mueller; she did not reply.

2016 PAC 43184

On July 25, 2016, Mr. John O'Connor, on behalf of the Associated Press, submitted a FOIA request to the Village's Police Department seeking "a copy of any report filed by Ron Sandack or involving alleged cyber-security threats or fraudulent impersonation using social media since July 1, 2016." On July 26, 2016, the Village's Police Records/Information Manager responded by providing a copy of an incident report but redacted most of the information therein pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) of FOIA. The response also indicated that investigative supplements had not been completed, and that evidentiary documents were withheld pursuant to sections 7(1)(c) and 7(1)(d)(vii) of FOIA. On July 26,

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2016, Mr. O’Connor submitted a Request for Review asserting that the report was excessively redacted and requested that this office direct the “Downers Grove Police Department to disclose all relevant and public information under FOIA.”

On August 5, 2016, this office forwarded a copy of the non-confidential portions of the Village’s Consolidated Response to Mr. O’Connor. On August 9, 2016, Mr. O’Connor submitted a reply in which he disputed the redaction of information in several specific sections of the incident report. On September 8, 2016, this office forwarded a copy of the Supplemental Response to PAC to Mr. O’Connor. He did not reply to the Supplemental Response to PAC.

2016 PAC 43186

On July 26, 2016, Mr. Chris Fusco, on behalf of the Chicago Sun-Times, submitted a FOIA request to the Village “seeking to review and/or obtain copies of any police reports, audio and/or video recordings, and/or any other records involving incidents since Jan. 1, 2016 — including but not limited to cyberhacking — involving state Rep. Ronald Sandack, whose home and office are in Downers Grove.” On the same day, the Village’s Police Records/Information Manager responded by providing a copy of an incident report but redacted most of the information therein pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) of FOIA; the response also stated that investigative supplements had not been completed, and denied evidentiary documents under sections 7(1)(c) and 7(1)(d)(vii) of FOIA. On July 27, 2016, Mr. Fusco submitted a Request for Review in which he questioned whether the information that was redacted and withheld is exempt from disclosure under FOIA.

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15 E-mail from Chris Fusco, Staff Reporter, Investigations/Projects, Chicago Sun-Times, to FOIA Officer, Village of Downers Grove (July 26, 2016).


17 E-mail from Chris Fusco, Chicago Sun-Times, to Public Access Counselor, Illinois Attorney General (July 27, 2016).
On August 3, 2016, the Public Access Bureau sent a copy of the Request for Review to the Village's Police Department and asked it to provide unredacted copies of the records that were redacted and withheld for this office's confidential review together with a detailed explanation of the factual and legal bases for the applicability of the sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) exemptions. This office also asked the Village's Police Department to clarify in its response the reasons for withholding investigative supplements that had not been completed at the time of the response to the FOIA request.  

On August 5, 2016, this office forwarded a copy of the non-confidential portions of the Village's response to Mr. Fusco. On September 8, 2016, this office forwarded a copy of the Supplemental Response to PAC to Mr. Fusco. He did not reply to either response.

2016 PAC 43193

On July 26, 2016, Mr. Nathan Lurz, on behalf of Shaw Media, submitted a FOIA request to the Village seeking copies of "[a]ny police reports involving former IL State Rep. Ron Sandack filed in the past six months, including any legally releasable ongoing cases." On July 27, 2016, the Village’s Police Records/Information Manager responded by providing a copy of an incident report but redacted most of the information therein pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) of FOIA. The response also stated that investigative supplements had not been completed, and that evidentiary documents were withheld pursuant to sections 7(1)(c) and 7(1)(d)(vii) of FOIA. On July 27, 2016, Mr. Lurz submitted a Request for Review questioning whether the information redacted from the incident report is exempt from disclosure under FOIA.

On August 3, 2016, the Public Access Bureau sent a copy of the Request for

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20 Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Chris Fusco, Staff Reporter, Chicago Sun-Times (September 8, 2016).


23 E-mail from Nathan Lurz to Public Access (July 27, 2016).
Review to the Village's Police Department and asked it to provide an unredacted copy of the police report together with a detailed explanation of the factual and legal bases for the applicability of the sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) exemptions to the information that was redacted.²⁴

On August 5, 2016, this office forwarded a copy of the non-confidential portions of the Consolidated Response to Mr. Lurz.²⁵ On September 8, 2016, this office forwarded a copy of the Supplemental Response to PAC to Mr. Lurz.²⁶ He did not reply to either response.

2016 PAC 43370

On July 25, 2016, Ms. Natasha Korecki, on behalf of Politico Illinois, submitted a FOIA request to the Village seeking a "copy or copies of any police report filed by Ronald Sandack (state Representative) from March[ ] 1, 2016 to the present."²⁷ On July 26, 2016, the Village's Police Department responded by providing a copy of the report but redacted information pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) of FOIA. The response also stated that investigative supplements had not been completed, and that evidentiary documents were withheld pursuant to sections 7(1)(c) and 7(1)(d)(vii) of FOIA.²⁸ On August 7, 2016, Ms. Korecki submitted a Request for Review questioning whether the information that was redacted from the report is exempt from disclosure under FOIA.²⁹

On August 11, 2016, this office sent a copy of the Request for Review to the Village's Police Department and asked it to provide a detailed explanation of the factual and legal bases for the applicability of the sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) exemptions to the


²⁶Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Nathan Lurz, Reporter, Downers Grove and DuPage County, Shaw Media (September 8, 2016).

²⁷E-mail from Natasha Korecki, POLITICO Illinois Playbook writer/Political reporter, to FOIA Officer (July 25, 2016).

²⁸Letter from Tracy Adams, Police Records/Information Manager, Village of Downers Grove, to Natasha Korecki - Politico (July 26, 2016).

²⁹E-mail from Natasha Korecki, POLITICO Illinois Playbook writer/Political reporter to Appeals officer (August 7, 2016).
information that was redacted from the report. On August 12, 2016, an Assistant Village Attorney asked an Assistant Attorney General in the Public Access Bureau to send Ms. Korecki a copy of the non-confidential portions of the Village's Consolidated Response that had previously been provided to this office with regard to the other Requests for Review. On August 12, 2016, this office sent a copy of that response to Ms. Korecki. On September 8, 2016, this office forwarded a copy of the Supplemental Response to PAC to Ms. Korecki. She did not reply to either response.

**Supplemental Response to FOIA Requests**

On September 16, 2016, the Village issued a supplemental response (Supplemental Response) to each requester in which it disclosed some portions of the records that had previously been denied and furnished additional records that were generated or obtained subsequent to its initial response. The Supplemental Response, however, indicated that other portions of the records were still being redacted or withheld pursuant to sections 7(1)(b) and 7(1)(c) as well as section 7(1)(d)(v) (5 ILCS 140/7(1)(d)(v) (West 2015 Supp.)). In addition, the response stated that "some records are being denied pursuant to a court order."

This office then received correspondence from Mr. O'Connor, Mr. Fusco and Ms. Tina Sfondeles, Mr. Lurz, and Ms. Korecki indicating that they continued to seek review of the information that had been redacted and withheld in the Supplemental Response.

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33Letter from Enza Petrarca, Village Attorney, Village of Downers Grove, to "Requester" (September 16, 2016).

34E-mail from John O'Connor, AP, to [Steve] Silverman (September 16, 2016).

35E-mail from Tina Sfondeles and Chris Fusco, Chicago Sun-Times, to Public Access Counselor, Illinois Attorney General (September 19, 2016).

36E-mail from Nathan Lurz, Reporter – Downers Grove and DuPage County, Suburban Life Newspaper (September 20, 2016).

37E-mail from Natasha Korecki, POLITICO Illinois Playbook writer/Political reporter, to Mary Jo [Vail] (September 20, 2016).
Ms. Amanda Vinicky, the Springfield Bureau Chief of NPR Illinois, advised the same in a telephone conversation with the Public Access Counselor. Therefore, on September 22, 2016, this office sent a letter to the Village and asked it to provide a detailed explanation of the applicability of sections 7(1)(b), 7(1)(c), 7(1)(d)(v) and the court order to the information that continued to be redacted and withheld, adding that the Village could incorporate by reference any portions of its previous responses to this office which remained relevant. The letter also asked the Village to furnish copies of any responsive records that were not previously provided for this office's confidential review.

On September 28, 2016, the Village provided a second supplemental response (Second Supplemental Response to PAC) together with the additional records that this office had requested. The response indicated that the Village incorporated the arguments set forth in its previous responses to this office dated August 5, 2016, and September 8, 2016. On September 30, 2016, this office sent the non-confidential portions of the Village's response to Ms. Vinicky, Mr. O'Connor, Mr. Fusco, Mr. Lurz, and Ms. Korecki. None of the requesters replied to the Second Supplemental Response to PAC.

On September 23, 2016, pursuant to section 9.5(f) of FOIA, this office extended the time within which to issue a binding opinion by 30 business days in Requests for Review

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ANALYSIS

"It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with [FOIA]," 5 ILCS 140/1 (West 2014). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2014)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." 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 2014). Section 7(1) of FOIA (5 ILCS 140/7(1) (West 2015 Supp.)) further provides that "when a request is made to inspect or copy a public record that 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 information that is exempt. The public body shall make the remaining information available for inspection and copy." (Emphasis added.)

As an initial matter, the additional information disclosed in the Village's September 16, 2016, Supplemental Response to the requesters which had been redacted or withheld in the Village's initial response resolves the allegations that those portions of the records were improperly denied. See Duncan Publishing, Inc. v. City of Chicago, 304 Ill. App. 3d 778, 782 (1st Dist. 1999) ("Once an agency produces all the records related to a plaintiff's

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request, the merits of a plaintiff's claim for relief, in the form of production of information, becomes moot." Thus, our determination in this matter is limited to the information that the Village still claims is exempt from disclosure after issuing its Supplemental Response.

Section 7(1)(b) of FOIA

Section 7(1)(b) of FOIA 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 2015 Supp.)) 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. (Emphasis added.)

The Village's Second Supplemental Response to PAC stated that the Village redacted Mr. Sandack's "home address and personal telephone number, Facebook account names, numbers and URLs, Skype usernames, and account transaction numbers[ ]" pursuant to section 7(1)(b) of FOIA. In a September 7, 2016, telephone conversation with an Assistant Attorney General in the Public Access Bureau, an Assistant Village Attorney stated that Mr. Sandack's attorney confirmed for the Village that the redacted telephone number is for a cellphone that Mr. Sandack maintains for personal use.

Home addresses and personal telephone numbers constitute "private information" under the plain language of the definition of that term in section 2(c-5) of FOIA. Mr. Sandack's account identification numbers and the Uniform Resource Locators (URLs) for his Facebook page and that of another individual — which are specific website addresses — are "unique identifiers" and therefore forms of "private information" that are exempt from disclosure under section 7(1)(b). In addition, the tracking numbers for wire transfers that were redacted constitute "personal financial information," which also is defined as a form of "private information" in section 2(c-5) of FOIA. Accordingly, this office concludes that the Village has sustained its burden of demonstrating that this information is exempt from disclosure pursuant to section 7(1)(b) of FOIA.

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However, Mr. Sandack's Facebook and Skype account names are akin to or derived from his legal name. Conspicuously absent from the statutory definition of "private information" is any reference to a person's name. Although names are specific to individuals (see Lieber v. Board of Trustees of Southern Illinois University, 176 Ill. 2d 401, 411 (1997)), they are neither confidential nor unique. To the contrary, names are "basic identification," and as the Supreme Court concluded in Lieber, "[w]here the legislature intended to exempt a person's identity from disclosure, it [has done] so explicitly." Lieber, 176 Ill. 2d at 412. By excluding names from the definition of "private information," the General Assembly clearly did not intend for names to be exempt from disclosure under section 7(1)(b) of FOIA. Accordingly, this office concludes that the Village improperly redacted Mr. Sandack's Facebook and Skype account names. The Facebook and Skype account names and other identifying information of the person with whom Mr. Sandack communicated are addressed in the analysis of section 7(1)(c) below.

Section 7(1)(c) of FOIA

Section 7(1)(c) exempts from inspection and copying "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information." The exemption defines "unwarranted invasion of personal privacy" as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy." 5 ILCS 140/7(1)(c) (West 2015 Supp.). A public body's assertion that the release of information would constitute an unwarranted invasion of personal privacy is evaluated on a case-by-case basis. Chicago Journeymen Plumbers' Local Union 130 v. Dept of Public Health, 327 Ill. App. 3d 192, 196 (1st Dist. 2001). The phrase "clearly unwarranted invasion of personal privacy" evinces a strict standard to claim the exemption, and the burden is on the public body possessing the record to prove that standard has been met. Schessler v. Dept of Conservation, 256 Ill. App. 3d 198, 202 (4th Dist. 1994).

The Village's Consolidated Response indicated that portions of Mr. Sandack's statement and birth date were redacted pursuant to section 7(1)(c) of FOIA.51 The Village's Supplemental Response to PAC also indicated that, pursuant to section 7(1)(c), the Village redacted information relating to the identities of suspects and withheld in their entireties records that Mr. Sandack provided to the police when he reported the crime, including receipts for wire...
transfers and Skype messages.\textsuperscript{52}

**Birth Date**

An individual's birth date is highly personal by its very nature and the subject's right to privacy outweighs any legitimate public interest in disclosing this information. See, e.g., *Oliva v. United States*, 756 F. Supp. 105, 107 (E.D.N.Y. 1991) (holding that, under Exemption 6 of the Federal Freedom of Information Act (5 U.S.C. § 552(b)(6) (1990)), \textsuperscript{53} "dates of birth[] are a private matter, particularly when coupled with * * * other information" and that disclosure "would constitute a clearly unwarranted invasion of personal privacy."); *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336, 346-348, 54 Tex. Sup. Ct. J. 245 (2010) (state employees have a "nontrivial privacy interest" in their dates of birth under the Texas Public Information Act (see Tex. Gov't Code §§552.101, 552.102), which substantially outweighs the negligible public interest in disclosure). Accordingly, this office concludes that Mr. Sandack's birth date is exempt from disclosure pursuant to section 7(1)(c) of FOIA.

**Mr. Sandack's Statement and the Records that he Provided to Police**

At the outset, this office notes that at the time he filed the incident report on July 14, 2016, Mr. Sandack was the State Representative serving the 81st District in the Illinois House of Representatives. He resigned from office on July 24, 2016, "citing 'cyber security issues' that also prompted him to delete his social media accounts."\textsuperscript{54}

As a former elected official, Mr. Sandack remains a public figure. An individual's status as public figure diminishes his or her right to privacy. *Iowa Citizens for Community Improvement v. United States Dep't of Agriculture*, 256 F. Supp. 2d 946, 954 (S.D. Iowa 2002) (nominee's "privacy interest is not eliminated by the fact that he has been nominated by President Bush to serve as Undersecretary of Agriculture for Rural Development; however, his public-figure status lessens that interest."). Although a public figure's "official position" may be a relevant factor in analyzing whether disclosure of records would constitute an unwarranted invasion of personal privacy, "it does not determine, of its own accord, that the privacy interest is


\textsuperscript{53}Because Illinois' FOIA statute is based on the Federal FOIA statute, decisions construing similar provisions of the Federal Act, while not controlling, may provide helpful and relevant precedents in construing the State Act. See, e.g., *Margolis v. Director, Ill. Dep't of Revenue*, 180 Ill. App. 3d 1084, 1087 (1st Dist. 1989).

Federal courts have identified several factors relevant in analyzing the applicability of the personal privacy provision of the Federal FOIA to records of criminal investigations concerning public figures such as current and former public officials. In *Citizens for Responsibility and Ethics in Washington v. United States Dep't of Justice*, 978 F. Supp. 2d 1, 8-10 (D.D.C. 2013), a Federal appellate court stated that a former United States Senator had a heightened privacy interest in such records because he had resigned from office and because he had not been criminally charged following an investigation concerning allegations that he covered up an extra-marital affair. *Citizens for Responsibility and Ethics in Washington, 978 F. Supp. 2d at 10. The court, however, also stated that because the Senator had publicly acknowledged the existence of the investigation, his "privacy interest in a fact already known to the public is substantially diminished; all the more so because he was the person responsible for disclosing it." *Citizens for Responsibility and Ethics in Washington, 978 F. Supp. 2d at 10; see also Citizens for Responsibility & Ethics in Washington v. United States Dep't of Justice, 840 F. Supp. 2d 226, 233 (D.D.C. 2012) ("One can have no privacy interest in information that is already in the public domain, especially when the person asserting his privacy is himself responsible for placing that information into the public domain."). Nonetheless, the court emphasized that the Senator "retain[ed] a cognizable privacy interest in the contents of the file.

In addition to reopening old wounds, disclosure of DOJ's investigative file could result in new revelations of misconduct, even if that misconduct did not rise to the level of a criminal violation." *Citizens for Responsibility and Ethics in Washington, 978 F. Supp. 2d at 10; see also Kimberlin v. Dep't of Justice, 139 F.3d 944, 949 (D.C. Cir. 1998) (a public official who disclosed to the media that he was accused of misconduct and sanctioned "still has a privacy interest, however, in avoiding disclosure of the details of the investigation[].")*

In Illinois, the resolution of a personal privacy exemption claim requires balancing the public interest in disclosure of the specific information against the involved individuals' interests in privacy. *See Gibson v. Illinois State Board of Education, 289 Ill. App. 3d 12, 20-21 (1st Dist. 1997).* This determination is made by considering and weighing four factors: 

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

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55Exemption 7(C) of Federal FOIA (5 U.S.C. § 552(b)(7)(C) (2012)) exempts from disclosure "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.[*]"
the requested information." National Association of Criminal Defense Lawyers v. Chicago Police Dep't, 399 Ill. App. 3d 1, 13 (1st Dist. 2010).

Here, the requesters represent media outlets that seek to disseminate information from the records in question to the public. Therefore, their interest in the records and the public's interest are aligned. In his Request for Review (2016 PAC 43184), Mr. O'Connor emphasized that Mr. Sandack's "status as a public figure who voluntarily engaged in the use of social media must be taken into consideration[.]" and asserted that "there surely is information that has been improperly redacted in the name of preserving the investigation which the complainant himself has disclosed to one or more members of the news media."56 Mr. Sandack reportedly told Capitol Fax that "he had 'deactivated' three of his four online social media accounts after 'someone' had 'tried hacking[ ]' and that "somebody started creating fake accounts in his name around July 4th. In all, the person or persons wound up creating a total of ten fake Facebook accounts and two fake Twitter accounts."57 (Emphasis in original.) Following the disclosure of additional records in the Village's Supplemental Response, Mr. Sandack issued a written statement indicating that he "was the target of an international crime ring focusing on high-profile individuals luring them to engage in inappropriate online conversations with the intent of extortion," and that he "took their bait and fell for it hook, line and sinker."58 There is a significant public interest in disclosure of information that relates to allegations of a crime committed against a public figure, especially one that a public official publicly acknowledged and cited as a contributing factor in his decision to resign from public office.

As to the degree of invasion of personal privacy, the Village's Consolidated Response to this office, which it incorporated by reference in its Supplemental Response to PAC, stated: "Mr. Sandack is the victim in this case. ** ** ** Nobody, public figure or not, would want any of the information being disclosed to the public."59 This office has considered, but is precluded from discussing in this binding opinion, additional information about the applicability


of section 7(1)(c) that the Village provided confidentially. In his reply to the Village's Consolidated Response in 2016 PAC 43184, Mr. O'Connor stated that "[e]ven if statements by the victim include information that would constitute an invasion of personal privacy, I find it hard to fathom that the statement the victim gave police is one, long, highly personal narrative."

Lastly, there do not appear to be any alternative means for the requesters to obtain the records in question.

This office's review of the records confirms that Mr. Sandack is the victim rather than the target of the investigation documented therein. The portions of his statement that were disclosed in the Village's Supplemental Response reveal the general nature of the crime under investigation and details about how Mr. Sandack was targeted. The portions of his statement that remain redacted and the information he provided to police contain highly personal information. On one hand, Mr. Sandack's interest in privacy is heightened by the fact that he has resigned his public office and is no longer a public official. On the other hand, Mr. Sandack's privacy rights are diminished by his status as a public figure and his voluntary disclosure of discrete information about the alleged crime to the media.

Taking all of these factors into account, this office concludes that disclosure of most of the remaining redacted portions of the statement and the documentation Mr. Sandack provided to police would constitute a clearly unwarranted invasion of personal privacy. These materials contain highly personal and specific information concerning how Mr. Sandack was allegedly lured into an extortion scheme, how the extortion was carried out, and how he responded. He has not publicly disclosed this information, which is unrelated to his former public duties. There is no legitimate public interest in disclosure of these portions of the records that would outweigh Mr. Sandack's right to privacy. Accordingly, this office concludes that the Village has sustained its burden of demonstrating that this information is exempt from disclosure pursuant to section 7(1)(c) of FOIA.

However, the Village has not sustained its burden of demonstrating by clear and convincing evidence that the amounts of money that were requested and transmitted and the receipts of those transactions would constitute an unwarranted invasion of personal privacy. Although the fact that an individual paid money in response to extortion is highly personal, that

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605 ILCS 140/9.5(d) (West 2014) ("The Public Access Counselor shall forward a copy of the answer to the person submitting the request for review, with any alleged confidential information to which the request pertains redacted from the copy.").

fact has already been revealed in the records disclosed to the requesters. Further, Mr. Sandack is a public figure who publicly acknowledged that he was extorted and he cited the extortion as a reason for his resignation from public office. Under these circumstances, Mr. Sandack's right to privacy does not outweigh the legitimate public interest in disclosure of this information. Accordingly, this office concludes that the Village improperly withheld that information pursuant to section 7(1)(c) of FOIA. As discussed above, Mr. Sandack's home address and telephone number may be properly redacted from the receipts pursuant to section 7(1)(c), and, as discussed below, information identifying the recipient of the money may be properly redacted pursuant to section 7(1)(c).

Information Relating to the Identities of Suspects

When balancing the right to privacy against the public interest in disclosure, courts have "repeatedly expressed particular concern for protecting those who have been investigated, but not charged, in connection with a crime from the public embarrassment and damage to their reputations which a disclosure of the investigative interest would cause." Dunaway v. Webster, 519 F. Supp. 1059, 1078 (N.D. Cal. 1981); see also Citizens for Responsibility and Ethics in Washington v. United States Dep't of Justice, 846 F. Supp. 2d 63, 71 (D.D.C., 2012), quoting American Civil Liberties Union v. United States Dep't of Justice, 655 F.3d 1, 7 (D.C. Cir. 2011) (the right to privacy "is strongest where the individuals in question have been investigated but never publicly charged."). Fiumara v. Higgins, 572 F. Supp. 1093, 1108 (D. N.H. 1983) (the version of section 7(1)(c) in Federal FOIA "applies to withhold the identities of those third parties investigated for possible criminal activities, even though not subsequently charged or indicted."). Special circumstances – such as suspects who are candidates for public office rather than private citizens and allegations of illegal campaign contributions that are required to be publicly reported – are required to justify disclosure of information identifying unindicted targets of criminal investigations. See Common Cause v. National Archives and Records Service, 628 F.2d 179, 184 (D.C. Cir. 1980).

Although the records in question involve a public figure, Mr. Sandack was the victim rather than the target of the investigation. The records contain names (possibly aliases), Facebook and Skype account names, and other types of identifying information of suspects who appear to be private citizens. Because these individuals are suspects who have not been arrested or charged with a crime, their right to privacy outweighs any legitimate public interest in disclosure of this identifying information. Accordingly, this office concludes that the Village did not improperly redact that information pursuant to section 7(1)(c) of FOIA.

Western Union and MoneyGram E-mails and Document Response

The Village contends that the following information in e-mails and documents obtained from Western Union and MoneyGram in the course of the investigation is exempt from
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disclosure pursuant to section 7(1)(c): the name of an individual to whom money was sent; account numbers; the amount sent; and the names, addresses, and e-mail addresses of other victims. The Village also redacted information obtained from Western Union from the records that were provided to the requesters in the Supplemental Response.

As discussed above, the disclosure of names and other information identifying a suspect of a crime who has not been arrested or charged would constitute an unwarranted invasion of personal privacy. Likewise, information identifying any victims other than Mr. Sandack may be properly redacted pursuant to section 7(1)(c) of FOIA. McCorkin v. United States Dept' of Labor, 630 F.2d 242, 245 (5th Cir. 1980) ("Exemption 7(C) is intended to protect the privacy of any person mentioned in the requested files, not only the person who is the object of the investigation."); Coleman v. F.B.I., 13 F. Supp. 2d 75, 80 (D.D.C. 1998) (disclosure of FBI documents would constitute an unwarranted invasion of personal privacy because "it is evident that release of any portion would reveal the identities of innocent third parties, witnesses or victims."). Accordingly, this office concludes that those portions of the e-mails and documents obtained from Western Union and MoneyGram are exempt from disclosure pursuant to section 7(1)(c) of FOIA.

However, once de-identified, disclosure of the remaining portions of the records would not constitute an unwarranted invasion of privacy because they would not identify any suspects or other victims. See 5 ILCS 140/7(1) (West 2015 Supp.) (when a record contains both exempt and non-exempt information, "the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying."). Therefore, these records are not exempt from disclosure in their entirety pursuant to section 7(1)(c) of FOIA. The Village's assertion that the records are exempt from disclosure pursuant to section 7(1)(d)(v) is discussed below.

Lastly, the Village appears to have withheld certain records relating to search warrants and subpoenas which reflect that unspecified information was sought from or provided by Yahoo and Microsoft, which owns Skype, pursuant to section 7(1)(c). These portions of the records do not reveal the type of information that was sought. The Village has not explained how records that merely show unspecified information was sought or produced would constitute an unwarranted invasion of personal privacy. Accordingly, the Village has not sustained its burden of demonstrating that these records are exempt from disclosure pursuant to section 7(1)(c) of FOIA.

Records Relating to Search Warrants and Subpoenas

Section 7(1)(d)(v) of FOIA

Section 7(1)(d)(v) of FOIA exempts from disclosure:
Records in the possession of any public body created in the course of administrative enforcement proceedings, and any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would:

* * *

(v) 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[.]

In construing a similar provision in Federal FOIA, 62 "[c]ourts have held that information pertaining to law enforcement techniques and procedures properly is withheld * * * where disclosure reasonably could lead to circumvention of laws or regulations." Skinner v. United States Dep't of Justice, 893 F. Supp. 2d 109, 112 (D.D.C. 2012). For example, in Miller v. United States Dep't of Justice, 562 F.Supp. 2d 82 (D.D.C. 2008), a Federal District court held that forms used by the FBI to develop psychological profiles of criminals were properly withheld based on the agency's explanation of how suspects could use the information to circumvent the effective use of techniques for developing profiles; see also Piper v. United States Dep't of Justice, 294 F.Supp. 2d 16, 30 (D.D.C. 2003) (even though the use of polygraph examinations is widely known, the question and answers used in the examinations themselves were within the scope of the law enforcement investigative technique exemption because disclosure could enable a criminal to "anticipate and avoid the questioning strategy of the FBI[.]" thereby doing "violence to the polygraph examination's function - the discerning of truth."); but see American Civil Liberties Union of Southern California v. United States Citizenship and Immigration Services, 133 F. Supp. 3d 234, 243-44 (D.D.C. 2015) ("vague and conclusory" assertions with "no explanation of how the information, if released, could risk circumvention of the law, no explanation of what laws would purportedly be circumvented, and little detail regarding what law enforcement purpose is involved" are insufficient to "justify withholding records under the FOIA.").

The Village's Second Supplemental Response to PAC stated that the information redacted pursuant to section 7(1)(d)(v) reflects specialized investigative techniques that were

62 Exemption 7(E) (5 U.S.C. § 552(b)(7)(E) (2012)) applies to law enforcement records that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law[.]"
developed to assist in investigations of kidnapping cases. The Village provided additional information confidentially which asserts that disclosure of the information could harm the Village’s Police Department by revealing the nature of specific investigative techniques that are not generally known to the public. The Village also withheld certain other records relating to search warrants and subpoenas, including the e-mails and documents obtained from Western Union and MoneyGram.

Most of the records that were redacted or withheld pertaining to Facebook, Yahoo, Skype, and Microsoft concern the gathering of information through specialized investigative techniques that are not generally known. It is apparent that disclosure of this information would result in demonstrable harm to the Village’s Police Department by providing insights into specialized investigative techniques that could enable perpetrators to evade detection and circumvent investigations of crimes that involve communications over the Internet, including social media. Information redacted from the records provided in the Supplemental Response concerning a suspect’s online profile image and communications with the FBI and authorities in another country also reflects specialized investigative techniques that are not generally known. Disclosure of such information could harm the Village’s Police Department by undermining its ability to investigate crimes that originate in other countries. Accordingly, this office concludes that this information was properly redacted or withheld pursuant to section 7(1)(d)(v) of FOIA. In contrast, portions of records that merely document that records were sought from companies without revealing the type of information that was sought would not reveal any unique or specialized investigative techniques and therefore were improperly withheld.

In addition, certain information redacted from the records disclosed in the Supplemental Response and the e-mails and documents obtained from Western Union and MoneyGram, which were withheld in their entireties, appear to reflect routine investigative steps rather than specialized investigative techniques. The Village's assertion that disclosure of this information will impede the ability to investigate similar crimes is largely conclusory. It is unclear how release of this information would cause demonstrable harm to the Village’s Police Department. Accordingly, the Village has not sustained its burden of demonstrating by clear and convincing evidence that this information is exempt from disclosure pursuant to section 7(1)(d)(v) of FOIA.

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63 The Village's response appears to assert that records obtained from Facebook, Yahoo, and Skype are exempt from disclosure only pursuant to section 7(1)(c). However, because disclosure of the content of the records would unavoidably reveal the specialized techniques used by investigators, this information is exempt from disclosure pursuant to section 7(1)(d)(v). This office declines to address the applicability of section 7(1)(c) to these records.
Illinois Constitution of 1970

The Village's September 8, 2016, Supplemental Response to this office cited the following provision of the Illinois Constitution of 1970.

(a) Crime victims, as defined by law, shall have the following rights:
   (1) The right to be treated with fairness and respect for their dignity and privacy and to be free from harassment, intimidation, and abuse throughout the criminal justice process.
   (2) The right to notice and to a hearing before a court ruling on a request for access to any of the victim's records, information, or communications which are privileged or confidential by law. Ill. Const. 1970, art. I, § 8.1(a)(1), (2).

Specifically, the Village's Supplemental Response to this office asserted: "As the victim of a crime, Mr. Sandack is afforded these protections of respect for his dignity and privacy. Accordingly, the information that was redacted in the initial incident report that was provided to the Requesters should remain redacted and private."64

The Village's reliance on this provision is misplaced. Article I, section 8.1 of the Illinois Constitution of 1970 was implemented by the Rights of Crime Victims and Witnesses Act (725 ILCS 120/1 et seq. (West 2014)). That Act provides, in relevant part:

   (a) "Crime victim" or "victim" means: (1) any natural person determined by the prosecutor or the court to have suffered direct physical or psychological harm as a result of a violent crime perpetrated or attempted against that person or direct physical or psychological harm as a result of (i) a violation of Section 11-501 of the Illinois Vehicle Code or similar provision of a local ordinance or (ii) a violation of Section 9-3 of the Criminal Code of 1961 or the Criminal Code of 2012; (2) in the case of a crime victim who is under 18 years of age or an adult victim who is incompetent or incapacitated, both parents, legal guardians, foster parents, or a single adult representative; (3) in the case of an adult deceased victim, 2 representatives who may be the spouse, parent, child or sibling of the victim, or the representative of the victim's

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estate; and (4) an immediate family member of a victim under clause (1) of this paragraph (a) chosen by the victim. If the victim is 18 years of age or over, the victim may choose any person to be the victim's representative. In no event shall the defendant or any person who aided and abetted in the commission of the crime be considered a victim, a crime victim, or a representative of the victim.

* * *

(c) "Violent crime" means: (1) any felony in which force or threat of force was used against the victim; (2) any offense involving sexual exploitation, sexual conduct, or sexual penetration; (3) a violation of Section 11-20.1, 11-20.1B, 11-20.3, or 11-23.5 of the Criminal Code of 1961 or the Criminal Code of 2012; (4) domestic battery or stalking; (5) violation of an order of protection, a civil no contact order, or a stalking no contact order; (6) any misdemeanor which results in death or great bodily harm to the victim; or (7) any violation of Section 9-3 of the Criminal Code of 1961 or the Criminal Code of 2012, or Section 11-501 of the Illinois Vehicle Code, or a similar provision of a local ordinance, if the violation resulted in personal injury or death. "Violent crime" includes any action committed by a juvenile that would be a violent crime if committed by an adult. For the purposes of this paragraph, "personal injury" shall include any Type A injury as indicated on the traffic accident report completed by a law enforcement officer that requires immediate professional attention in either a doctor's office or medical facility. A type A injury shall include severely bleeding wounds, distorted extremities, and injuries that require the injured party to be carried from the scene. 725 ILCS 120/3(a), (c) (West 2015 Supp.), as amended by Public Act 99-642, effective July 28, 2016.

Neither this office's review of the incident report nor any information provided by the Village indicates that Mr. Sandack is a victim of a violent crime entitled to the rights guaranteed by Article I, Section 8.1(a) of the Illinois Constitution. There is no allegations that he suffered direct physical or psychological harm as a result of a violent crime as that term is defined in section 3(e) of the Rights of Crime Victims or Witnesses Act, or a violation of section
11-501 of the Vehicle Code (625 ILCS 5/11-501 (West 2014)) or section 9-3 of the Criminal Code of 2012 (720 ILCS 5/9-3 (West 2014)). Moreover, the protections guaranteed by article I, sections 8(a)(1) and 8(a)(2) of the Illinois Constitution of 1970 apply to the criminal justice process and court and other proceedings related to criminal charges that have been filed.

Complaints for Search Warrants and Search Warrants

Lastly, the Village withheld complaints for search warrants and search warrants for Skype and Facebook asserting that disclosure was precluded by court order. The Village's Second Supplemental Response to PAC explained:

The complaints and search warrants have similar language as follows: "Due to the ongoing nature of this investigation, it is hereby ordered that the complaint for search warrant, search warrant, proof of service for the search warrant and the search warrant inventory are to be impounded by the Circuit Court Clerk and not disclosed or released to the public in any manner until further order of the court." *** It is the position of the Village that neither the complaints nor the warrants can be released at all without a court order. [67]

The Illinois Appellate Court has held that "[t]rial courts have discretion to determine whether justice requires a protective order – and what the parameters of the order should be." Willeford v. Toys "R" Us-Delaware, Inc., 385 Ill. App. 3d 265, 273 (5th Dist. 2008). The United States Supreme Court also has recognized that a public body enjoined from releasing information by court order must obey the order when responding to FOIA requests. GTE Sylvania, Inc. v. Consumers Union of the United States, Inc., 445 U.S. 375, 100 S. Ct. 1194 (1980). In that case, the Court held that a Federal agency did not violate the Federal FOIA by withholding several consumer safety reports after manufacturing groups that were identified in the reports obtained an injunction prohibiting their disclosure: "To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the Freedom of Information Act would do

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[65] Section 11-501 of the Vehicle Code applies to "[d]riving while under the influence of alcohol, other drug or drugs, intoxicating compound or compounds or any combination thereof."

[66] Section 9-3 of the Criminal Code of 2012 applies to "[i]nvoluntary Manslaughter and Reckless Homicide."

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violence to the common understanding of the term 'improperly' and would extend the Act well beyond the intent of Congress." GTE Sylvania, Inc., 445 U.S. at 387, 100 S. Ct. at 1202.

Likewise, the Village has confirmed for this office that the judge who issued the search warrants included language in the complaints for search warrants and the warrants that specifically prohibits their disclosure. Accordingly, this office concludes that the Village did not improperly withhold those records.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the information submitted, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On July 25, 2016, Ms. Sarah Mueller, on behalf of NPR Illinois, submitted a FOIA request to the Village of Downers Grove seeking "[a] copy of all police reports filed by Ron Sandack of Downers Grove between July 1, 2016 and July 24, 2016."

2) On July 26, 2016, the Village's Police Records/Information Manager responded by providing a copy of an incident report but redacted most of the information therein pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) of FOIA. The response also stated that investigative supplements had not been completed, and that evidentiary documents were being withheld pursuant to section 7(1)(c) and 7(1)(d)(vii) of FOIA.

3) On July 26, 2016, Ms. Mueller submitted a Request for Review (2016 PAC 43168) with the Public Access Counselor and the Public Access Bureau in which she disputed the redaction of the information in the narrative of the complaint, the type of incident, and the offense classification. Ms. Mueller's Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2014)). Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

4) On July 25, 2016, Mr. John O' Connor, on behalf of the Associated Press, submitted a FOIA request to the Village's Police Department seeking "a copy of any report filed by Ron Sandack or involving alleged cyber-security threats or fraudulent impersonation using social media since July 1, 2016."

5) On July 26, 2016, the Village's Police Records/Information Manager responded by providing a copy of an incident report but redacted most of the information therein pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) of FOIA. The response also stated that investigative supplements had not been completed, and that evidentiary documents were being withheld pursuant to sections 7(1)(c) and 7(1)(d)(vii) of FOIA.
6) On July 26, 2016, Mr. O'Connor filed a Request for Review (2016 PAC 43184) with the Public Access Counselor and the Public Access Bureau in which he asserted that the report was excessively redacted and requested that this office "direct the Downers Grove Police Department to disclose all relevant and public information under FOIA." Mr. O'Connor's Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) On July 26, 2016, Mr. Chris Fusco, on behalf of the Chicago Sun-Times, submitted a FOIA request to the Village "seeking to review and/or obtain copies of any police reports, audio and/or video recordings, and/or any other records involving incidents since Jan. 1, 2016 – including but not limited to cyberhacking – involving state Rep. Ronald Sandack, whose home and office are in Downers Grove."

8) On July 26, 2016, the Village's Police Records/Information Manager responded by providing a copy of an incident report but redacted most of the information therein pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) of FOIA. The response also stated that investigative supplements had not been completed, and denied evidentiary documents under sections 7(1)(c) and 7(1)(d)(vii) of FOIA.

9) On July 27, 2016, Mr. Fusco filed a Request for Review (2016 PAC 43186) with the Public Access Counselor and the Public Access Bureau in which he questioned whether the information that was redacted and withheld is exempt from disclosure under FOIA. Mr. Fusco's Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

10) On July 26, 2016, Mr. Nathan Lurz, on behalf of Shaw Media, submitted a FOIA request to the Village of Downers Grove seeking copies of "[a]ny police reports involving former IL State Rep. Ron Sandack filed in the past six months, including any legally releasable ongoing cases."

11) On July 27, 2016, the Village's Police Records/Information Manager responded by providing a copy of an incident report but redacted most of the information therein pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) of FOIA. The response also stated that investigative supplements had not been completed, and that evidentiary documents were being withheld pursuant to sections 7(1)(c) and 7(1)(d)(vii) of FOIA.

12) On July 27, 2016, Mr. Lurz submitted a Request for Review (2016 PAC 43193) to the Public Access Counselor and the Public Access Bureau questioning whether the information redacted from the incident report is exempt from disclosure under FOIA. Mr. Lurz's
Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

13) On July 25, 2016, Ms. Natasha Korecki, on behalf of Politico Illinois, submitted a FOIA request to the Village seeking a "copy or copies of any police report filed by Ronald Sandack (state Representative) from March[  ]1, 2016 to the present."

14) On July 26, 2016, the Village’s Police Records/Information Manager responded by providing a copy of the report but redacted information pursuant to sections 7(1)(b), 7(1)(c), and 7(1)(d)(vii) of FOIA. The response also stated that investigative supplements had not been completed, and that evidentiary documents were being withheld pursuant to sections 7(1)(c) and 7(1)(d)(vii) of FOIA.

15) On August 7, 2016, Ms. Korecki submitted a Request for Review (2016 PAC 43370) to the Public Access Counselor and the Public Access Bureau questioning whether the information that was redacted from the report is exempt from disclosure under FOIA. Ms. Korecki’s Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

16) On August 3, 2016, the Public Access Bureau forwarded copies of Requests for Review 2016 PAC 43168, 2016 PAC 43184, 2016 PAC 43186, and 2016 PAC 43193 to the Village’s Police Department and asked it to provide unredacted copies of the records in question for our confidential review together with detailed explanations of the factual and legal bases for the applicability of the section 7(1)(b), 7(1)(c), and 7(1)(d)(vii) exemptions to the information that was redacted and withheld. This office also asked the Village’s Police Department to clarify the reasons for withholding the investigative supplements that had not been completed.

17) On August 5, 2016, the Village Attorney provided the materials requested to the Public Access Bureau in a consolidated response to 2016 PAC 43168, 2016 PAC 43184, 2016 PAC 43186, and 2016 PAC 43193.

18) On August 5, 2016, this office sent copies of the non-confidential portions of the Village’s responses to Ms. Mueller, Mr. O’Connor, Mr. Fusco, and Mr. Lurz.

19) On August 9, 2016, Mr. O’Connor submitted a reply to the Village’s response. Ms. Mueller, Mr. Fusco, and Mr. Lurz did not comment on the Village’s response.

20) On August 11, 2016, this office sent a copy of Ms. Korecki’s Request for Review (2016 PAC 43370) to the Village’s Police Department and asked it to provide a detailed
explanation of the factual and legal bases for the applicability of the section 7(1)(b), 7(1)(c), and 7(1)(d)(vii) exemptions to the information that was redacted from the report.

21) On August 12, 2016, an Assistant Village Attorney asked an Assistant Attorney General in the Public Access Bureau by e-mail to send Ms. Korecki a copy of the non-confidential portions of its consolidated response to this office in 2016 PAC 43168, 2016 PAC 43184, 2016 PAC 43186, and 2016 PAC 43193.

22) On August 12, 2016, this office sent a copy of that response to Ms. Korecki; she did not submit a reply.

23) On September 8, 2016, this office received from the Village a supplemental response in which it asserted that the information redacted from the incident report should remain confidential based on Mr. Sandack's rights as a crime victim under article I, sections 8.1(a)(1) and 8.1(a)(2) of the Illinois Constitution of 1970.

24) On September 8, 2016, this office forwarded copies of the Village's supplemental response to Ms. Mueller, Mr. O'Connor, Mr. Fusco, Mr. Lurz, and Ms. Korecki; none submitted replies to that response.

25) On September 16, 2016, the Village issued a supplemental response to each requester in which it provided portions of the records that had previously been denied as well as additional records that were generated or obtained subsequent to the FOIA request. The supplemental response indicated that portions of the records were still being redacted or withheld pursuant to sections 7(1)(b) and 7(1)(c) as well as section 7(1)(d)(v). The supplemental response also cited a court order as the basis for withholding other unspecified records.

26) On September 16, 2016, this office received correspondence from Mr. O'Connor indicating that he continued to seek review of the information that was redacted and withheld in the Village's supplemental response. On September 19, 2016, Mr. Fusco submitted correspondence indicating that he also continued to seek review of the redacted and withheld information; similar correspondence was received from Mr. Lurz and Ms. Korecki on September 20, 2016. In a telephone conversation with the Public Access Counselor, Ms. Vinicky also confirmed that NPR continued to seek review of the information that was redacted and withheld.

27) On September 22, 2016, this office sent a letter to the Village and asked it to provide a detailed explanation of the applicability of sections 7(1)(b), 7(1)(c), 7(1)(d)(v) and the court order to the information that continued to be redacted and withheld, adding that the Village could incorporate by reference any portions of its previous response to this office which remained relevant. The letter also asked the Village to furnish copies of any responsive records that were not previously provided for this office's confidential review.
28) On September 23, 2016, this office extended the time to issue a binding opinion in 2016 PAC 43168, 2016 PAC 43184, 2016 PAC 43186, and 2016 PAC 43193 by 30 business days, to November 7, 2016, pursuant to section 9.5 of FOIA. On the same date, this office extended the time to issue a binding opinion in 2016 PAC 43370 by 30 business days, to November 23, 2016, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue binding opinions with respect to these matters.

29) On September 28, 2016, the Village provided the additional materials that this office requested. 68

30) On September 30, 2016, this office sent the non-confidential portions of the Village's written response to Ms. Vinicky, Mr. O'Connor, Mr. Fusco, Mr. Lurz, and Ms. Korecki. They did not reply to that response.

31) With respect to the specific information redacted or withheld from the documents in question, the Attorney General makes the following findings:

(a) Mr. Sandack's home addresses and personal telephone numbers constitute "private information" under the plain language of the definition of that term in section 2(c-5) of FOIA, and therefore are exempt from disclosure pursuant to section 7(1)(b) of FOIA. The tracking numbers for wire transfers which were redacted constitute "personal financial information," which also is defined as a form of "private information" in section 2(c-5) of FOIA. In addition, Mr. Sandack's Facebook account identification numbers, the Uniform Resource Locator (URL) for his Facebook page and that of another individual – which are specific website addresses – are unique identifiers within the scope of section 7(1)(b). Mr. Sandack's Facebook account names and Skype usernames, however, are not exempt from disclosure pursuant to section 7(1)(b).

(b) Mr. Sandack's birth date is exempt from disclosure pursuant to section 7(1)(c) of FOIA.

(c) Most of the redacted portions of Mr. Sandack's statement and the documents he provided to police contain highly personal and specific information that is unrelated to Mr. Sandack's former public duties. There is no legitimate public interest in disclosure of these portions of the records that outweighs Mr. Sandack's right to privacy. Accordingly, that information is exempt from disclosure pursuant to section 7(1)(c) of FOIA. However, the Village has not demonstrated that the amounts of money that were

requested or sent in response to extortion attempts and receipts of those transactions
would constitute an unwarranted invasion of personal privacy. Therefore, that
information is not exempt from disclosure pursuant to section 7(1)(c).

(d) Disclosure of information identifying victims of crimes and those suspected
of committing a crime who have not been arrested or charged with a crime would
countain a clearly unwarranted invasion of those individuals' personal privacy.
Therefore, that information is exempt from disclosure pursuant to section 7(1)(c) of
FOIA.

(e) The Village has not demonstrated how disclosure of records reflecting that
unspecified information was sought from or provided by Yahoo and Microsoft, which
owns Skype, would constitute an unwarranted invasion of personal privacy. Therefore
that information is not exempt from disclosure pursuant to section 7(1)(c).

(f) The Village has provided clear and convincing evidence that disclosure of
most of the remaining redacted or withheld records concerning Facebook, Yahoo, and
Skype would cause harm to the Village's Police Department by revealing or providing
insights into specialized investigative techniques that perpetrators could exploit to evade
detection and circumvent investigations of crimes that involve communications over the
Internet, including social media. Information redacted from the records provided in the
supplemental response concerning a suspect's online profile image and communications
with the FBI and authorities in another country also reflects specialized investigative
techniques that are not generally known. Disclosure of such information could harm the
Village's Police Department by undermining its ability to investigate crimes that originate
in other countries. Accordingly, this office concludes that those records are exempt from
disclosure pursuant to section 7(1)(d)(v) of FOIA.

(g) The Village has not, however, sustained its burden of demonstrating that
certain portions redacted from the records provided in the Village's supplemental
response, as well as e-mails and records obtained from Western Union and Money Gram,
are exempt from disclosure pursuant to section 7(1)(d)(v) of FOIA. As discussed above,
portions of those records identifying victims of crimes and those suspected of having
committed a crime who have not been arrested or charged as well as the amounts of
money demanded from or sent by Mr. Sandack are exempt from disclosure pursuant to
section 7(1)(c) of FOIA.

(h) Because the complaints for search warrants and the search warrants issued
expressly prohibit their disclosure, the Village did not improperly withhold those records.
Therefore, it is the opinion of the Attorney General that the Village's response to
the Freedom of Information Act requests submitted by Ms. Mueller, Mr. O'Connor, Mr. Fusco,
Mr. Lurz, and Ms. Korecki violated the requirements of the Act, as specified in subparagraph (f)
of paragraph 31 above. Accordingly, the Village is directed to take immediate and appropriate
action to comply with this opinion by furnishing the requesters with the non-exempt portions of
additional records responsive to their requests. This office is providing the Village Attorney
under separate cover a copy of the pertinent portions of the incident report, e-mails, and records
obtained from Western Union, MoneyGram, Yahoo, and Microsoft. The additional portions of
records provided to the requesters in the supplemental response to the FOIA request that the
Attorney General has concluded must be disclosed are highlighted in yellow. In addition, the
Village should locate and disclose portions of the records reflecting Mr. Sandack's Facebook
account name and Skype user names. This office has also indicated information in the records
that may be properly redacted pursuant to sections 7(1)(b) and 7(1)(e), in accordance with the
analysis in this opinion.

This opinion shall be considered a final decision of an administrative agency for
the purpose of administrative review under the Administrative Review Law. 735 ILCS 5/3-101
et seq. (West 2014). The Village may obtain judicial review of the decision by filing a
complaint for administrative review in the Circuit Court of Cook County or Sangamon County
within 35 days of the date of this decision, naming the Attorney General of Illinois and Amanda
Vinicky, John O'Connor, Chris Fusco, Nathan Lurz, and Natasha Korecki as defendants. See 5
ILCS 120/7.5 (West 2014). If it chooses to pursue review, the Village should consider whether
Mr. Sandack is a necessary party under section 2-405 of the Code of Civil Procedure. 735 ILCS
5/2-405 (West 2014). A requester may also obtain judicial review of this decision by filing a
complaint for administrative review in the Circuit Court of Cook County or Sangamon County
within 35 days of the date of this decision, naming the Attorney General of Illinois, the Village
and the other requesters as defendants or co-plaintiffs. See 5 ILCS 120/7.5 (West 2014). If a
requester chooses to pursue review, the requester should also consider whether Mr. Sandack is a
necessary party under section 2-405 of the Code of Civil Procedure. 735 ILCS 5/2-405 (West
2014).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:

Michael J. Luke
Counsel to the Attorney General