

FOIA Guide for Law Enforcement

Introduction

This guide is intended to assist law enforcement agencies in responding to Freedom of Information Act (FOIA) requests by outlining issues common to law enforcement and by providing references to statutes and determinations issued by the Attorney General's Public Access Counselor on those subjects. Please note that these are general guidelines only, and each request for review is evaluated on its own facts. You are strongly encouraged to discuss the application of a particular guideline with your unit of local government's legal counsel.

Under FOIA, "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2010).

Section 7 of FOIA provides that if a public record contains information that is exempt from disclosure, but also contains information that is not exempt from disclosure, the public body may elect to redact the exempt information. The remaining information must be made available for inspection and copying. 5 ILCS 140/7(1)(West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385 effective August 15, 2011.

SECTION 7 EXEMPTIONS

EXEMPTION 7(1)(a)

Information Prohibited from Disclosure by Federal or State Law, Rules or Regulations

Exemption 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).

Juvenile Court Act of 1987 (JCA) (705 ILCS 405/1) (West 2010)

- The Juvenile Court Act mandates that reports in which a minor was arrested, charged or investigated *must* be withheld in full. See 2010 PAC 8941 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 8941, issued October 22, 2010, at 2) and 2010 PAC 9077 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 9077, issued February 9, 2011, at 2).

- Reports in which minors are the victims of sex crimes or are incidentally mentioned are not exempt in full, but the names of the minors may be redacted. Under the Juvenile Court Act, a public body is *required* to withhold information identifying an alleged minor victim of a sex crime. 705 ILCS 405/5-905(2) (West 2010); See 2010 PAC 8955 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 8955, issued November 17, 2010, at 2-3).

Illinois Supreme Court Rule 415

- Illinois Supreme Court Rule 415 regulates discovery in criminal cases. Rule 415(c) provides that any materials furnished to an attorney pursuant to these rules "shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide."
- Rule 415(c) does not preclude a defendant in a criminal proceeding from obtaining materials through FOIA that would ordinarily be subject to discovery. The documents, however, would be subject to any applicable FOIA exemptions, including the redaction of information under section 7(1)(c) and section 7(1)(d)(iv). See 2010 PAC 9540 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 9540, issued October 26, 2010, at 3).
- Rule 415(c) *would* apply to a FOIA request to the Public Defender's Office where an individual, who was or is presently represented by the Public Defender, was seeking records relating to his own case. See 2010 PAC 11715 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 11715, issued January 21, 2011, at 2).

Illinois Supreme Court Rule of Professional Conduct 3.6

- The disclosure of documents pursuant to a FOIA request does not constitute an "extrajudicial statement" under rule 3.6. Prosecutors cannot withhold a document that is responsive to a FOIA request by arguing that Rule 3.6 precludes disclosure and, as a result, the exemption in section 7(1)(a) of FOIA applies. See 2010 PAC 7553 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 7553, issued July 12, 2010, at 3).
- The comments to Rule 3.6 provide important guidance in approaching these issues. These comments provide:

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 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. 233 Ill. 2d R. Prof. Conduct 3.6, Comment 1.

The Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/11-212(f) (West 2010))

- Section 11-212(f) of the Vehicle Code states "[a]ny law enforcement officer identification information or driver identification information that is compiled by any law enforcement agency or the Illinois Department of Transportation pursuant to this Act for the purposes of * * * [compiling the traffic stop statistical study] of this Section shall be confidential and exempt from public inspection and copying, as provided under Section 7 of the Freedom of Information Act, and the information shall not be transmitted to anyone except as needed to comply with this Section. *This Section shall not exempt those materials that, prior to the effective date of this amendatory Act of the 93rd General Assembly, were available under the Freedom of Information Act.*" 625 ILCS 5/11-212(f) (West 2010) (emphasis added).
- Section 11-212(f) of the Vehicle Code permits the disclosure of identifying information that would otherwise be subject to disclosure under FOIA. Accordingly, FOIA supersedes the confidentiality requirements of section 5/11-212(f) for law enforcement records. See 2011 PAC 13661 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 13661, issued June 6, 2011, at 3).

The Illinois Code of Criminal Procedure of 1963

- Records under court seal that were obtained through court ordered overhears specifically, audiotapes, transcripts of the audiotapes, and records that reflect the contents of the overhears, are prohibited from disclosure pursuant to section 108A-7 of the Code. (725 ILCS 5/108A-2, 7 (West 2010)) See 2011 PAC 18365 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 13661, issued May 16, 2012, at 5).
- Section 112-6(b) of the Code (725 ILCS 5/112-6(b) (West 2010)) provides that grand jury matters "other than the deliberations and vote of any grand juror shall not be disclosed by the State's Attorney[.]" See 2011 PAC 13173 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 13173, issued April 6, 2011).

- Any "visual or audio recording, made of the interior of a school bus while the school bus is being used in the transportation of students to and from school and school-sponsored activities" is clearly subject to the restrictions imposed by section 14-3(m) of the Criminal Code of 1961. 720 ILCS 5/14-3(m) *et seq.* (West 2010).
- Such recordings "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 or around the school bus." Thus, any video and audio footage for the bus or buses are exempt under this provision of the Criminal Code. See 2011 PAC 10782 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 10782, issued April 8, 2011).

The Federal Health Insurance Portability and Accountability Act of 1996 (HIPAA)

- While a general request for information that contains protected health information would be exempt under HIPAA, a request that is made pursuant to FOIA would instead be governed by FOIA. See *Abbott v. Texas Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648, 653 (Tex. Ct. App. 2006).

EXEMPTION 7(1)(b)

Private Information

Exemption 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) allows a public body to withhold "private information[.]"

- Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2010), 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. 5 ILCS 140/2(c-5) (West 2010).
- Section 7(1)(b) of FOIA provides that public bodies may redact "private information," unless "disclosure is required by another provision of this Act, a State or federal law or a court order."

- Signatures are unique identifiers and, therefore, an exempt form of private information. See 2010 PAC 9838 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 9838, issued December 10, 2010, at 2).
- Section 2(c-5) does not list a home zip code as a unique identifier. We have determined, however, that a public body may withhold a person's home zip code under section 7(1)(b) if the name of that person has already been released to the requester. A simple cross-reference of the town and zip code with other commonly available resources such as the phone book, property assessments, or the Internet could ultimately lead to the disclosure of the home address of an individual. See 2010 PAC 8615 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 8615, issued November 19, 2010, at 2) and 2010 PAC 9808 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 9808, issued February 10, 2011, at 2).
- Addresses contained in an emergency run sheet are not exempt under section 7(1)(b) of FOIA. In that instance, section 7(1)(b) would be applicable only if there was a possibility that disclosure of the address would lead to the identity of the individual that received the medical treatment. In this context, there existed no real possibility that disclosure of the mere address would be attributable to the individual since the names of the patients are not contained in the run sheets. See 2011 PAC 13678 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 13678, issued March 5, 2012, at 7).

EXEMPTION 7(1)(c)
Invasion of Personal Privacy

Exemption 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), allows a public body to withhold "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information." The exemption defines "unwarranted invasion of 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 a date of birth would constitute a clearly unwarranted invasion of personal privacy under 7(1)(c).
- The disclosure of an individual's age, however, is not considered an invasion of personal privacy. See 2010 PAC 9225 (Ill. Att'y Gen. PAC Pre-Auth. al dl9225, issued August 26, 2010, at 2).
- Release of the *requester's* date of birth to the requester is not considered an unwarranted invasion of personal privacy.

- Victims' names and any identifying information may frequently be withheld under 7(1)(c).
- Graphic photographs and descriptions of alleged offenses, such as sex crimes, may frequently be withheld under 7(1)(c). See 2010 PAC 7791 (Ill. Att'y Gen. PAC Pre-Auth. al7791, issued June 29, 2010, at 2) and 2010 PAC 9091 and 9164 (Ill. Att'y Gen. PAC Pre-Auth. al9091, 9164 issued August 23, 2010, at 2).
- Graphic photographs of the deceased's body during an autopsy may be withheld under section 7(1)(c). See 2010 PAC 8890 and 9217 (Ill. Att'y Gen. Pub. Acc. Op. No. 10-003, issued October 22, 2010, at 11).
- The names of individuals who appear in police line-ups may be redacted. See 2010 PAC 8440 (Ill. Att'y Gen. PAC Pre-Auth. al dl8440, issued July 20, 2010, at 2).
- Police line-ups in which police officers appear, however, are not exempt under section 7(1)(c), as they relate to the public duties of those officers. 2011 PAC 13215 (Ill. Att'y Gen. PAC Pre-Auth al dl, 13215 issued August 12, 2011).
- When the victim of a crime is deceased, the personal privacy interest of the victim in the disclosure of his or her identity ceases to exist. See 2010 PAC 6137 (Ill. Att'y Gen. PAC Pre-Auth. dl6137, issued August 24, 2010, at 2). This would also apply to incident reports where the victim's death is caused by other circumstances such as a drug overdose. See 2011 PAC 12456 (Ill. Att'y Gen. PAC Pre-Auth. al dl12456, issued June 15, 2011, at 2).
- The right to privacy of a victim's family does not exempt a report from disclosure in its entirety. 2011 PAC 12456 (Ill. Att'y Gen. PAC Pre-Auth. al dl12456, issued June 15, 2011, at 2).
- In some circumstances, the Public Access Bureau has approved the redaction of third-party names from police reports under 7(1)(c). These redactions include, for example, the names of suspects who were never arrested and persons who incidentally appear in the reports, such as relatives or property owners. See 2011 PAC 12140 (Ill. Att'y Gen. PAC Pre-Auth. al12140, issued February 17, 2011, at 2).
- If an arrestee becomes a confidential source and that information is contained in the police report, the law enforcement agency should withhold the name of that source under 7(1)(c). This prevents the public body from asserting section 7(1)(d)(iv) as the basis for its exemption and inadvertently revealing that the arrestee has become a confidential source.
- Disclosure of the names of people issued a ticket, citation, or notice to appear is not an invasion of privacy. See 2010 PAC 7299 (Ill. Att'y Gen. PAC Pre-Auth. dl7299, issued December 7, 2010, at 2) and 2010 PAC 9468 (Ill. Att'y Gen. PAC Pre-Auth. dl9468, issued May 11, 2011, at 2). This information would normally be available for public inspection in the circuit clerk's office pursuant to section 16(6) of the Clerks of Courts Act. See 705 ILCS 105/16(6) (West 2010).

- In certain limited circumstances, an entire police report may be withheld if the report's narrative contains highly personal information about an individual (in the case of a domestic disturbance, for example), no arrests were made, and the matter is closed at the time of the request. See 2010 PAC 9687 (Ill. Att'y Gen. PAC Pre-Auth. al9687, issued October 18, 2010, at 2).
- When someone is arrested, the police must disclose the arrestee's identifying information. See 5 ILCS 140/2.15 (5 ILCS 140/2.15 (West 2010)). This information is not exempt under section 7(1)(c). 2010 PAC 10242 (Ill. Att'y Gen. Pub. Acc. Op. No. 11-001, issued February 18, 2011, at 5).
- When a victim or suspect in a police report is the FOIA requester, the disclosure of the report to that person is not considered an invasion of personal privacy under section 7(1)(c). This is also applicable to requests made by the estate of the victim. See 2010 PAC 9067 (Ill. Att'y Gen. PAC Pre-Auth. al dl9067, issued August 31, 2010, at 2).
- Identifying information and specific medical information contained in an emergency services report may be redacted, but the remainder of the report must be disclosed. See 2010 PAC 7709 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 7709, issued July 23, 2010, at 2) and 2011 PAC 14377 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 14377, issued June 23, 2011, at 2).

7(1)(d) EXEMPTIONS

Exemptions That Apply Specifically to Law Enforcement or Administrative Enforcement Proceedings

EXEMPTION 7(1)(d)(i)

Pending Law Enforcement Proceedings

Exemption 7(1)(d)(i) of FOIA (5 ILCS 140/7(1)(d)(i) (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) allows a public body to withhold records that would interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by the law enforcement or correctional agency that received the FOIA request.

- Under section 1.2 of FOIA (5 ILCS 140/1.2 (West 2010)), "[a]ll records in the custody of a public body are presumed to be open to inspection and copying" and "[a]ny public body that asserts that a record is exempt from disclosure has the burden of proving by **clear and convincing evidence** that it is exempt." (Emphasis added).
- As a result, when a public body asserts that records are exempt under section 7(1)(d)(i), the public body has the burden to prove by clear and convincing evidence that the disclosure of the records would in fact interfere with a pending or actually and

reasonably contemplated law enforcement proceeding. The fact that an investigation has been commenced is, by itself, not enough to satisfy the burden to withhold information under this exemption. 2010 PAC 6939 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 6939, issued March 24, 2011, at 2) and 2011 PAC 13661 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 13661, issued June 6, 2011, at 2).

- The public body must produce specific evidence that disclosure of information contained in a document, such as a police report, would interfere with an actual or reasonably contemplated law enforcement proceeding. Examples of such information would be witnesses who have yet to be interviewed or suspects that have yet to be arrested.
- A criminal conviction that is being challenged through a post-conviction action does not constitute an ongoing criminal proceeding for the purposes of this exemption. Illinois courts have consistently held that post-conviction appeals are civil proceedings. See *Illinois v. Wilson*, 37 Ill. 2d 617, 620 (Ill. 1967); see also *People v. Andretich*, 244 Ill. App. 3d 558, 559 (Ill. App. 3d Dist. 1993); *Illinois v. Dominguez*, 366 Ill. App. 3d 468, 472 (Ill. App. 2d Dist. 2006).
- If a prosecution has commenced, a police department is strongly encouraged to contact the State's Attorney's Office to assess whether disclosure of the requested records could interfere with the prosecution. If a police department intends to assert an exemption under 7(1)(d) in a case where a prosecution is underway, obtaining detailed information from the State's Attorney's Office will likely help the police department meet its burden.
- In *Day v. City of Chicago*, 388 Ill. App. 3d 70, 72 (1st Dist. 2009), the plaintiff, who was convicted of murder in 1994, submitted a FOIA request in 2007 to the City of Chicago Police Department seeking all documents relating to his arrest and the investigation. The City denied the police report in its entirety pursuant to section 7(1)(c)(1) of FOIA, as it was written at the time, claiming that the investigation was "ongoing." The First District Appellate Court held that the City's three affidavits were "entirely conclusory and inadequate to sustain the City's burden to show the requested documents and the redacted portions of the General Case and Arrest Reports were exempt because disclosure would 'obstruct an ongoing investigation.'" *Day*, 388 Ill. App. 3d at 75. According to the Court, affidavits will not suffice "if the public body's claims are conclusory, merely recite statutory standards, or are too vague or sweeping." *Day*, 388 Ill. App. 3d at 74 (quoting *Illinois Educ. Ass'n. v. Illinois State Bd. of Educ.*, 204 Ill. 2d 456, 469 (2003)).
- The release of substantive information provided by individuals, even if identifying information were redacted, could have serious consequences for witness cooperation such as swaying testimony and discouraging other yet-to-be identified individuals from supplying information. The release of such information could taint prospective jurors if the information were released independent of any admissibility hearing. The latter, being subject to the rules of criminal procedure, would likely not have the same impact

on public dissemination as would the release of information in response to a FOIA request. 2011 PAC 17636 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 17636, issued April 3, 2012, at 5).

- Other pieces of evidence, such as lab test results, financial records, and other pertinent records could possibly taint a prospective jury. 2011 PAC 17636 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 17636, issued April 3, 2012, at 2).
- A public body cannot obtain a prohibitive order to bar the release of a law enforcement record specifically in response to a FOIA request. *Carbondale Convention Ctr., Inc. v. City of Carbondale*, 245 Ill. App. 3d 474, 479 (5th Dist. 1993).

EXEMPTION 7(1)(d)(ii)

Interference with Active Administrative Enforcement Proceedings

Exemption 7(1)(d)(ii) (5 ILCS 140/7(1)(d)(ii) (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) allows a public body to withhold records when disclosure would interfere with active administrative enforcement proceedings conducted by the public body that received the FOIA request.

- The public body has the burden to prove by clear and convincing evidence that the disclosure of the records in question would in fact interfere with active administrative enforcement proceedings.
- This office has found this exemption to be applicable in matters involving active, internal investigations of alleged police misconduct and matters involving an administrative agency's active investigation regarding whether an applicant is qualified to hold a license. See 2010 PAC 8033 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 8033, issued September 10, 2010, at 2) and 2011 PAC 11795 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 11795, issued March 7, 2011, at 2-3).
- The Department must provide a persuasive explanation as to how disclosure of records would interfere with a pending investigation. The mere existence of an investigation does not exempt the records from disclosure. See 2011 PAC 12042 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 12042, issued June 6, 2011, at 2).

EXEMPTION 7(1)(d)(iii)

Deprivation of a Fair Trial

Exemption 7(1)(d)(iii) (5 ILCS 140/7(1)(d)(iii) (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), allows a public body to withhold records when disclosure would create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing.

- The public body has the burden to prove by clear and convincing evidence that the disclosure of the records in question would create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing.
- To meet its burden under section 1.2 of FOIA, the public body must provide specific evidence that disclosure of certain information contained in a police report could create a substantial likelihood that a person will be deprived of a fair trial or impartial hearing. General statements or hypothetical statements are not sufficient to meet this burden.
- A post-conviction appeal would not fall within the scope of section 7(1)(d)(iii). See *Illinois v. Wilson*, 37 Ill. 2d 617, 620 (Ill. 1967); see also *People v. Andretich*, 244 Ill. App. 3d 558, 560 (Ill. App. 3d Dist. 1993); *Illinois v. Dominguez*, 366 Ill. App. 3d 468, 472-73 (Ill. App. 2d Dist. 2006).
- In 2010 PAC 9216 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 9216, issued October 4, 2010), we concluded that a police department met its burden of demonstrating that disclosure of police reports would create a likelihood that the defendant would be deprived of a fair trial. In its response to our further inquiry letter, the police department explained that the possibility of additional charges still existed and additional complainants had yet to be identified. The Department also explained that past similar events involving the defendant had earned him notoriety in the community and could affect jury selection. See 2010 PAC 9216 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 9216, issued October 4, 2010, at 2).
- There is a distinction between exhibits that are introduced during an open court proceeding for the purposes of determining their admissibility at trial and the disclosure of those same exhibits to the general public in response to a FOIA request. The latter would have a far greater impact on jeopardizing the defendant's right to a fair trial, as the exhibits alone are more likely to arouse public passion than if they were introduced within the context of the arguments proffered by the prosecution and defendant in a hearing. 2011 PAC 17760 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 17636, issued April 2, 2012, at 4).

EXEMPTION 7(1)(d)(iv)
Protection of Confidential Sources

Exemption 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), allows a public body to withhold records when disclosure would unavoidably reveal 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. This exemption does not apply to the identities of witnesses to traffic accidents, traffic accident reports, and rescue reports. Witness information in traffic accident 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."

- A law enforcement officer is not a witness pursuant to section 7(1)(d)(iv).
- The name of a law enforcement officer who provides information pursuant to an administrative investigation can be redacted pursuant to section 7(1)(d)(iv). See 2010 PAC 5752 and 5753 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 5752, 5753, issued April 20, 2011, at 4).

EXEMPTION 7(1)(d)(v)
Protection of Special Investigative Techniques

Exemption 7(1)(d)(v) (5 ILCS 140/7(1)(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), provides that a public body may withhold information if releasing it would disclose unique or specialized investigative techniques, other than those generally used and known or disclose internal documents of correctional agencies related to detection, observation, or investigation of incidents of crime or misconduct, and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request.

- The public body has the burden to prove by clear and convincing evidence that the disclosure of the records in question would in fact reveal unique or specialized investigative techniques.
- The administering of a polygraph test does not fall within this exemption. In 2010 PAC 7909 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 7909, issued July 21, 2010), the Public Access Bureau concluded that even assuming that the polygraph could be considered a novel investigative tool despite its decades of use, the polygraph reports at issue simply described the examiner's conclusions as to whether the test subject answered certain questions truthfully. The reports did not provide any information on how the polygraph

test was administered or how the process works. See 2010 PAC 7909 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 7909, issued July 21, 2010, at 3).

- In 2010 PAC 6587 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 6587, issued August 30, 2010), this office concluded that disclosure of information concerning a law enforcement agency's search for a cell phone or its use of a citywide camera system to track a vehicle would not reveal unique or specialized investigative techniques, the disclosure of which would result in demonstrable harm. We found that a Google search returned dozens of articles detailing the technique that the officers used to locate the cell phone – a technique that is not unique to law enforcement. Moreover, a Google search also returned dozens of articles in which city officials discussed the implementation of the citywide camera surveillance system and how police and emergency dispatchers could use the system to read license plate numbers and track incidents of crime. See 2010 PAC 6587 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 6587, issued August 30, 2010, at 7).

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

Exemption 7(1)(d)(vi) (5 ILCS 140/7(1)(d)(vi) (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), provides that a public body may withhold information if disclosure would endanger the life or physical safety of law enforcement personnel or any other person.

- The public body has the burden to prove by clear and convincing evidence that the disclosure of the records in question would in fact endanger the life or physical safety of law enforcement personnel or any other person.
- Hypothetical, speculative scenarios do not satisfy the clear and convincing burden under section 1.2. Instead, the public body must provide specific information about how disclosure of information in response *to the FOIA request at issue* would endanger the life or physical safety of a law enforcement officer or any other person. See 2010 PAC 10313 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 10313, issued March 1, 2011, at 7-8).

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

Exemption 7(1)(d)(vii) (5 ILCS 140/7(1)(d)(vii) (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), provides that a public body may withhold information if disclosure would obstruct an ongoing criminal investigation by the agency that is the recipient of the request.

- The public body has the burden to prove by clear and convincing evidence that the disclosure of the records in question would in fact obstruct an ongoing criminal investigation by the agency that is the recipient of the request.

EXEMPTION 7(1)(e)

Correctional Institutions and Detention Facilities

Exemption 7(1)(e) (5 ILCS 140/7(1)(e) (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), allows a public body to withhold "records that relate to or affect the security of correctional institutions and detention facilities."

- Certain records in the Illinois Department of Corrections' (IDOC) Asbestos Report Plan, such as the building inventory form, site plans, floor plans and diagrams of the facility, were exempt from disclosure under section 7(1)(e). See 2010 PAC 6652 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 6652, issued July 16, 2012).
- Disclosure of an Administrative Directive that relates to process and issuance of identification cards could compromise the security of a correctional facility by allowing an inmate or an outside individual to manipulate an IDOC identification card and was exempt from disclosure under section 7(1)(e). See 2012 PAC 18909 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 18909, issued March 23, 2012).
- Disclosure of an administrative directive that describes exactly how employees are supposed to dress would compromise the security of that correctional facility and was exempt from disclosure under section 7(1)(e). See 2012 PAC 19130 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 19130, issued May 2, 2012).

EXEMPTION 7(1)(f)

Pre-decisional, Deliberative Communication

Exemption 7(1)(f) (5 ILCS 140/7(1)(f) (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) allows a public body to withhold "[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."

- Federal courts have acknowledged that in certain instances, when a record contains both preliminary recommendations and factual material, the factual material in the memorandum is not covered by the deliberative process privilege and therefore, must

be disclosed. *Parmelee v. Camparone*, No. 93 C 7362, 1998 WL 704181 at *1 (N.D. Ill. October 1, 1998).

- Information based on factual and numerical data does not fall within the scope of section 7(1)(f). 2010 PAC 10334 (Ill. Att'y Gen. PAC Pre-Auth dl10334, issued December 21, 2010).
- A memorandum related to former Chicago Mayor Richard M. Daley's security protection was both factual and contained recommendations. The factual material was not "inextricably connected" to the portion of the memorandum that contained recommendations and therefore, was not exempt in its entirety from disclosure under section 7(1)(f). 2011 PAC 14360 (Ill. Att'y Gen. PAC Pre-Auth al dl, 14360 issued June 29, 2011).
- The New York Court of Appeals has held that portions of police reports setting forth factual data are not within that State's deliberative process exemption. *Matter of Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 277, 675 N.E.2d 808, 813, 653 N.Y.S.2d 54, 59 (1996). The court in that case stated that "a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations." *Matter of Gould*, 89 N.Y.2d at 277, 675 N.E.2d at 813, 653 N.Y.S.2d at 59.
- Statements in which officers express opinions may be withheld from police reports. 2011 PAC 13215 (Ill. Att'y Gen. PAC Pre-Auth al dl, 13215 issued August 12, 2011).

EXEMPTION 7(1)(n)

Adjudication of Grievances and Disciplinary Cases

Exemption 7(1)(n) of FOIA (5 ILCS 140/7(1)(n) (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) allows a public body to withhold "records relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed."

- Black's Law Dictionary defines the word "adjudication" to mean "[t]he legal process of resolving a dispute; the process of judicially deciding a case." *Black's Law Dictionary* 47 (9th ed. 2009). Black's further defines an adjudication hearing as an "[a]gency proceeding in which a person's rights and duties are decided after notice and an opportunity to be heard." *Black's Law Dictionary* 788 (9th ed. 2009).
- In order to properly apply section 7(1)(n), a public body's adjudication of a disciplinary matter or employee grievance should include, at the very least, the commencement of some type of formal hearing such as an arbitration or civil service hearing. See 2010 PAC 6731 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 6731, issued September 27, 2010, at 2).
- The records that a public body seeks to exempt under section 7(1)(n) must be related to the actual adjudication. Records that were generated independent of an adjudication,

such as a public body's own internal investigation into an allegation of misconduct, would not fall within the scope of section 7(1)(n). See 2010 PAC 5752 and 5753 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 5752, 5753, issued April 20, 2011, at 3).

- Complaints and the names of the officers contained in those complaints cannot be said to have been generated specifically for the purposes of an actual adjudication. See 2010 PAC 6906 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 6906, issued March 25, 2011, at 2).

EXEMPTION 7(1)(v)

Security Plans

Exemption 7(1)(v) (5 ILCS 140/7(1)(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) allows a public body to withhold the following security information:

[v]ulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations, the destruction of which would constitute a clear and present danger to the health or safety of the community, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public.

- The number of police officers assigned to certain districts *does not* fall within the scope of section 7(1)(v). 2010 PAC 11568 (Ill. Att'y Gen. Pub. Acc. Op. No. 11-002, issued February 25, 2011, at 4).

FURTHER GUIDELINES

Arrest Reports and Criminal History Records - Section 2.15

- Under section 2.15(a) of FOIA, police departments must make arrest reports public no later than 72 hours after the arrest. The 72-hour provision in this section provides for quicker release of these documents than the normal five-day FOIA timeline. Once the 72 hours pass, however, the arrest reports, along with the photographs of the arrestees, still must be disclosed. See 2010 PAC 6701 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 6701, issued February 8, 2011, at 2); 2010 PAC 9018 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 9018, issued May 12, 2011, at 2) and 2011 PAC 11638 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 11638, issued June 23, 2011, at 2).
- Section 2.15(b) of FOIA (5 ILCS 140/2.15(b) (West 2010)) states that public bodies must provide criminal history records if the records are: (i) court records that are public; (ii) records that are otherwise available under State or local law; or (iii) records in which

the requesting party is the individual identified, except as provided under section 7(1)(d)(vi).

- The Illinois Criminal Identification Act (20 ILCS 2630/1 *et seq.* (West 2008)) and the Illinois Uniform Conviction Information Act (20 ILCS 2635/1 *et seq.* (West 2008)) do not preclude the release of criminal history information of an arrestee that is contained in an arrest report. See 2010 PAC 10242 (Ill. Att'y Gen. Pub. Acc. Op. No. 11-001, issued February 18, 2011, at 3-4).
- Documents generated exclusively from the LEADS database, however, are most likely exempt. Law enforcement agencies must keep Law Enforcement Agencies Database System (LEADS) documents confidential from any unauthorized users. 20 Ill. Admin. Code 1240.50. Disclosing a LEADS document in response to a FOIA request could threaten the public body's access to LEADS. 20 Ill. Admin Code. 1240.110.

911 Calls

- 911 emergency call recordings and transcripts are public records and should be released subject to any redactions that may be allowed under section 7 of FOIA, including sections 7(1)(c) and (d)(iv).

Medical Examiner's Files

- In 2010 PAC 8890 and 9217 (Ill. Att'y Gen. Pub. Acc. Op. No. 10-003, issued October 22, 2010), the Public Access Counselor reviewed a FOIA request for autopsy reports and all other documents and photographs in the files of the medical examiner in the cases of two deaths. The Public Access Counselor concluded that the reports are public records and should be released, noting that the public body did not meet its burden of establishing that disclosure of the documents would constitute a clearly unwarranted invasion of personal privacy under section 7(1)(c). The Public Access Counselor noted that the public body may redact portions of the records if they would disclose "private information" under section 7(1)(b). Additionally, the Public Access Counselor concluded that graphic photographs of the body of the deceased during the autopsy may be withheld under 7(1)(c), but photographs of other evidence at the crime scene must be released.
- Section 5/4-7001 of the Counties Code (55 ILCS 5/4-7001 (West 2010)) sets forth a separate set of fees for: Autopsy report (\$50); Verdict of coroner's jury (\$5); Toxicology Report (\$25); and photo obtained by coroner (\$3).

Costs and Fees

The Freedom of Information Act specifies the fees that public bodies may charge:

- ***Except when a fee is otherwise fixed by statute***, each public body may charge fees reasonably calculated to reimburse its actual cost for reproducing and certifying public records and for the use, by any person, of the equipment of the public body to copy records. No fees shall be charged for the first 50 pages of black and white, letter or legal sized copies requested by a requester. The fee for black and white, letter or legal sized copies shall not exceed 15 cents per page. 5 ILCS 140/6(b) (West 2010).
- For voluminous reports that exceed 50 pages and for which the requester cannot or will not pay, the first 50 pages must be released at no cost and the remaining pages may be withheld.
- Pursuant to section 5/11-416 of the Illinois Vehicle Code (625 ILCS 5/11-416 (West 2010)), public bodies may charge \$5.00 for a copy of a vehicle accident report prepared by a law enforcement agency.

Inquiry by the PAC

Section 9.5(c) of FOIA (5 ILCS 140/9.5(c) (West 2010), as amended by Public Act 97-579, effective August 26, 2011) provides:

- [U]pon receipt of a request for review, the Public Access Counselor shall determine whether further action is warranted. If the Public Access Counselor determines that the alleged violation is unfounded, he or she shall so advise the requester and the public body and no further action shall be under taken. In all other cases, the Public Access Counselor shall forward a copy of the request for review to the public body within 7 working days after receipt and shall specify the records or other documents that the public body shall furnish to facilitate the review. *Within 7 working days after receipt of the request for review, the public body shall provide copies of records requested and shall otherwise fully cooperate with the Public Access Counselor.* (Emphasis added.)
- A further inquiry letter issued by our office does not mean that a public body is in violation of FOIA. Rather, it means that the Public Access Counselor's Office needs more information to complete its review.
- When responding to a further inquiry letter, a public body may choose to provide confidential information in the response letter. In some instances, this may help the public body meet the clear and convincing standard as required under section 1.2.

Please note that under FOIA, we are required to forward a copy of any response from a public body to the requester and provide the requester with an opportunity to reply. 5 ILCS 140/9.5(d) (West 2010), as amended by Public Act 97-579, effective August 26, 2011.

- FOIA provides, however, that "[t]o 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 [the] Act, the Public Access Counselor shall not further disclose that information." 5 ILCS 140/9.5(c) (West 2010), as amended by Public Act 97-579, effective August 26, 2011.
- The Act also requires that we redact "any alleged confidential information to which the request pertains" when providing a copy of your written response to the requester. 5 ILCS 140/9.5(d) (West 2010), as amended by Public Act 97-579, effective August 26, 2011.
- To assist us in doing so, we request that to the extent your response contains allegedly confidential information, *you clearly identify that specific information for us.*
- Some public bodies have chosen to provide two letters to this office in response to a further inquiry letter, one with redactions that may be forwarded to the requester and one without redactions that cannot be forwarded to the requester. When providing copies of documents without redactions for review by the Public Access staff, some public bodies choose to stamp "Produce only to the PAC per 5 ILCS 140/9/5. Not for public dissemination" on each document.
- Failure to respond to a further inquiry letter or a failure to provide this office with a copy of police reports could result in a finding that the public body has not met its burden of establishing that the reports are exempt from disclosure. See 2010 PAC 6364 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 6364, issued March 4, 2011, at 2); 2010 PAC 10801 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 10801, issued June 3, 2011, at 2) and 2011 PAC 13848 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 13848, issued June 14, 2011, at 2).

SECTION 3(g)

Unduly Burdensome

- Section 3(g) of FOIA (5 ILCS 140/3(g) (West 2010)) provides that "[r]equests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information."
- A public body must extend to the requester an opportunity to narrow the request before issuing a full denial pursuant to section 3(g). See 2010 PAC 10801 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 10801, issued June 3, 2011, at 2).

- In 2010 PAC 9625 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 9625, issued October 20, 2010), the Public Access Counselor's Office found that a FOIA request to the Chicago Fire Department seeking run sheets for a seven-year period was unduly burdensome. The Fire Department met its burden by clearly explaining in detail that the Department would have to scan each report to determine if it was a "transport" (rather than a refusal or other non-transport call.) The Department would then have to review each transport call for medical treatment information and other private information and redact that information from each document. Finally, the Department would have to copy the requested documents. The Department explained that complying with this request would require approximately 500 hours to locate, sort, print, review, redact, and respond to the request. Based on this very specific and detailed response, we concluded that the Department met its burden to establish that the FOIA request was unduly burdensome to the daily operations of the Department. 2010 PAC 9625 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 9625, issued October 20, 2010, at 2).
- A request for all arrest photographs for a one-month period was not unduly burdensome under section 3(g) as section 2.15(a)(i) of FOIA (5 ILCS 140/2.15(a)(i) (West 2010)) mandates that a law enforcement agency produce the name of an arrestee, the nature of the charge and the photographs of the arrestee within 72 hours of the arrest. The obligation under FOIA to produce the information requested reflects the General Assembly's recognition of the significant public interest in the dissemination of these records. 2011 PAC 14369 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 14369, issued July 1, 2011, at 2).

Additional Resources

Additional information, including binding opinions and pre-authorization letters, is available on the Illinois Attorney General's website at:

www.illinoisattorneygeneral.gov

You may also contact the FOIA hotline at the Public Access Counselor's Office:

1-877-299-3642

or at

paccess@atg.state.il.us