



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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February 11, 2016

Mr. Michael G. Cainkar
Law Offices of Louis F. Cainkar, Ltd
30 North LaSalle Street, Suite 3922
Chicago, Illinois 60602

Mr. Jeffrey R. Jurgens
Corporation Counsel
City of Bloomington
109 East Olive
PO Box 3157
Bloomington, Illinois 61702

RE: FOIA Request for Review – 2015 PAC 39260

Dear Mr. Cainkar and Mr. Jurgens:

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 Bloomington (City) improperly withheld records in response to Mr. Michael Cainkar's November 6, 2015, FOIA request.

On that date, Mr. Cainkar submitted a FOIA request to the City seeking the "copies of all citizen's complaints, documents relating to any internal investigation (including the results of the investigation), lawsuits, disciplinary charges, and the disciplinary records, within the last 10 years, relating to Officer Timothy Ty Carlton, Officer John Fernon, and Sergeant Donath."¹ On November 25, 2015, the City denied the request in part, and disclosed citizen complaint forms partially redacted under sections 7(1)(b) and 7(1)(c) of FOIA (5 ILCS 140/7(1)(b), (1)(c) (West 2014), as amended by Public Act 99-298, effective August 6, 2015). The City asserted that no citizen complaints existed prior to 2009, citing record retention requirements and that "records of disciplinary action" that were more than four years old were required to be deleted under section 8 of the Personnel Record Review Act (PRRA) (820 ILCS 40/8 (West 2014)). After further correspondence with Mr. Cainkar on November 30, 2015, the

¹FOIA Request from Michael G. Cainkar (November 6, 2015).

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City produced an additional Record of Disciplinary Action for Sergeant Donath. In his Request for Review, Mr. Cainkar contended that the City misapplied the PRRA and had not disclosed all records responsive to his request, in particular investigatory records relating to citizen complaints.

On January 6, 2016, we forwarded a copy of the Request for Review to the City and asked it to provide a detailed description of the handling of Mr. Cainkar's request and the measures taken by the City to search for responsive records, including a description of the specific recordkeeping systems that were searched and the specific individuals who were consulted. We asked the City to specifically address the applicability of the PRRA and whether any investigatory records exist.

On January 20, 2016, the City responded and described a search of two systems for responsive records: one relating to citizen complaints and the other relating to internal investigations. The City stated that its complaint files contain additional records other than the citizen complaint forms, but that it construed Mr. Cainkar's request to be limited to the forms. The City explained that a citizen complaint may not result in a corresponding internal investigation. The City also stated that one of the officers at issue had three internal investigations in 2009 and 2010 that resulted in discipline, but that since these investigations were more than four years old, they were withheld under section 7.5(q) of FOIA (5 ILCS 140/7.5(q) (West 2014), as amended by Public Act 99-78, effective July 20, 2015) and section 8 of the PRRA.

On January 26, 2016, we forwarded a copy of the City's response to Mr. Cainkar. He replied on February 4, 2016 that "the internal investigations or other 'documents' generated as a result of the citizens' complaints are not 'disciplinary records' per se" and the scope of his request was broader than citizen complaint forms.²

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 2014)), 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 2014). 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).

²Letter from Michael G. Cainkar to Neil P. Olson, Assistant Attorney General, Public Access Bureau (February 4, 2016).

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Section 7.5(q) of FOIA and the PRRA

Section 7.5(q) of FOIA exempts "[i]nformation prohibited from being disclosed by the Personnel Records Review Act" from disclosure. Section 8 of the PRRA provides:

An employer shall review a personnel record before releasing information to a third party and, except when the release is ordered to a party in a legal action or arbitration, delete disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than 4 years old.

Further, section 11 of the PRRA (820 ILCS 40/11 (West 2014)) states that "[t]his Act shall not be construed to diminish a right of access to records already provided by law, except that disclosure of performance evaluations under the Freedom of Information Act shall be prohibited."

The unambiguous language of sections 8 and 11 of the PRRA precludes public bodies from using it as a basis to withhold records other than those that document a *disciplinary action*. As the Public Access Bureau has previously determined, in order to be considered a record of disciplinary action under the PRRA, a record must document the imposition of discipline. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 18779, issued June 29, 2012, at 6. Accordingly, the City improperly withheld records under section 7.5(q) of FOIA that are beyond the scope of section 8 of the PRRA, such as underlying investigative records from 2009 and 2010.

We also note that the City has acknowledged that, in addition to the citizen complaint forms disclosed to Mr. Cainkar, the complaint files contain records that the City did not construe as responsive to Mr. Cainkar's request. Mr. Cainkar's request for "documents relating to any internal investigation" encompasses correspondence and other records concerning citizen complaints that resulted in internal investigations. Accordingly, if the City possesses any records related to complaints that resulted in investigations which are not accounted for in the system that maintains records of internal investigations, those records are responsive to Mr. Cainkar's request. If Mr. Cainkar is seeking correspondence related to citizen complaints that did not result in internal investigations, such records are beyond the scope of his request as written; he may wish to file another FOIA request for those records.

In accordance with the conclusions expressed in this letter, we request that the City disclose all responsive records to Mr. Cainkar, subject to appropriate redactions under

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section 7 of FOIA (5 ILCS 140/7 (West 2014), as amended by Public Act 99-298, effective August 6, 2015). In particular, the City may properly redact "unique identifiers" that constitute "private information" under section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2014), as amended by Public Act 99-298, effective August 6, 2015).³ Dates of birth may be redacted under section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2014), as amended by Public Act 99-298, effective August 6, 2015). *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 20376, issued August 31, 2012. The City may also properly redact the names and any other identifying information of witnesses who voluntarily provided information to law enforcement pursuant to 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), which exempts from disclosure information that would unavoidably disclose the identity of a person who provided information to a law enforcement agency.

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 matter. If you have any questions, please contact me at (217) 782-9078.

Very truly yours,



NEIL P. OLSON
Assistant Attorney General
Public Access Bureau

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³FOIA 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).