

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS**

EDGAR COUNTY WATCHDOGS,)
)
 Plaintiff,)
)
 v.) 2022 CH 5
)
 VILLAGE OF FRANKFORT)
 POLICE DEPARTMENT,)
)
 Defendant.)

ANSWER AND AFFIRMATIVE DEFENSE

NOW COMES the Defendant, VILLAGE OF FRANKFORT (“VILLAGE”), an Illinois municipal corporation, by and through its attorneys, MAHONEY, SILVERMAN & CROSS, LLC, and for its Answer and Affirmative Defense to the Complaint filed by the Plaintiff, EDGAR COUNTY WATCHDOGS (“ECW”), states as follows:

INTRODUCTION

1. Pursuant to the fundamental philosophy of the American constitutional form of government, it is the public policy of the State of Illinois that all persons are entitled 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 the Illinois Freedom of Information Act (“FOIA”). 5 ILCS 140/1.

ANSWER: VILLAGE admits that Paragraph 1 states Section 1 of the Freedom of Information Act in part, but denies it is stated verbatim.

2. Restraints on access to information, to the extent permitted by FOIA, are limited exceptions to the principle that the people of this state have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of

government activity that affect the conduct of government and the lives of the people. 5 ILCS 140/1.

ANSWER: VILLAGE admits that Paragraph 2 states Section 1 of the Freedom of Information Act in part, but denies it is stated verbatim.

3. Under FOIA Section 1.2, “[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.

ANSWER: VILLAGE admits that Paragraph 3 states Section 1.2 of the Freedom of Information Act.

PARTIES

4. Plaintiff EDGAR COUNTY WATCHDOGS is a non-profit news media organization located in Paris, Illinois.

ANSWER: VILLAGE admits that ECW is an Illinois not-for-profit corporation as reported to the Illinois Secretary of State, but does not have sufficient information to admit or deny the remaining allegations in Paragraph 4.

5. Defendant VILLAGE OF FRANKFORT POLICE DEPARTMENT (“FRANKFORT PD”) is a public body located in Will County, Illinois.

ANSWER: The Frankfort Police Department is not a suable entity in that it has no independent legal existence from the Village of Frankfort. See *West By and Through Norris v. Waymire*, 114 F. 3d 646, 646-67 (7th Cir. 1997) (“The naming of the Town’s Police Department as a defendant adds nothing; it is almost certainly not a suable entity separate from the Town.”). Further answering, VILLAGE admits that it is a public body, as defined

in Section 2 of the Freedom of Information Act, with its principal office in Will County, Illinois. 5 ILCS 140/2.

DECEMBER 1, 2021 FOIA REQUEST

6. On December 1, 2021, ECW submitted a FOIA request to FRANKFORT PD for the following records: [1] “Copy of Police Report #F1-21-0000939-001”; [2] “Copy of all other police reports, incident reports, or any other reports for the address of 20671 Holland Harbor Drive, Frankfort, IL 60423, from June 1 through June 30, 2021”; [3] “Copy of the names of all officers, and any other personnel, including medical or ambulance, who responded to that address between June 1 and June 30, 2021”; [4] “Copy of the 911 call which may have generated the need for Police Report #F1-21-0000939-001.”

ANSWER: VILLAGE admits the allegations in Paragraph 6.

7. On December 6, 2021 FRANKFORT PD denied the request in its entirety by purporting to cite Section 7(1)(c) of FOIA.

ANSWER: VILLAGE admits that it denied the FOIA request submitted by ECW on December 1, 2021 by citing Section 7(1)(c) of FOIA which states:

“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.”

5 ILCS 140/7(1)(c).

8. On December 6, 2021, ECW followed up with FRANKFORT PD and asked to provide the non-exempt materials.

ANSWER: VILLAGE admits the allegations in Paragraph 8.

9. On December 10, 2021, FRANKFORT PD stated that it is following its “guidelines on how we handle this type of report” and refused to produce any non-exempt materials.

ANSWER: VILLAGE admits that it responded to ECW on December 10, 2021 with the quoted statement in part. Further answering, VILLAGE denies it refused to produce any non-exempt materials as it is not in possession of any non-exempt records responsive to the FOIA request submitted by ECW on December 1, 2021.

10. FRANKFORT PD did not provide any clarity about what guidelines it relied on to deny the request.

ANSWER: VILLAGE denies that it did not provide any clarity as Section 7(1)(c) was cited in the denial.

11. Further, FRANKFORT PD’s “guideline” is not a statutory basis to deny ECW’s FOIA request.

ANSWER: VILLAGE admits that it cited Section 7(1)(c) in denying the FOIA request.

12. Section 7(1)(c) exempts:

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.

5 ILCS 140/7(1)(c).

ANSWER: VILLAGE admits that Paragraph 12 states Section 7(1)(c) of the Freedom of

Information Act.

13. In violation of Section 9(a) of FOIA, FRANKFORT PD has not provided a “detailed factual basis” for the application of Section 7(1)(c).

ANSWER: VILLAGE denies the allegations in Paragraph 13.

14. Instead, FRANKFORT PD relied on what they purported to be Section 7(1)(c) of FOIA and an unidentified “guideline” to deny the request in its entirety.

ANSWER: VILLAGE denies the allegations in Paragraph 14. Further answering, VILLAGE admits that Section 7(1)(c) provides for the exemption of a single record in possession of the VILLAGE responsive to the FOIA request submitted by ECW on December 1, 2021.

15. FRANKFORT PD has not proved that the records responsive to the request are exempt.

ANSWER: VILLAGE denies the allegations in Paragraph 15.

16. As of the date of this filing, FRANKFORT PD has produced no responsive records and has not complied with FOIA.

ANSWER: VILLAGE denies that it has not complied with FOIA. Further answering, VILLAGE states it is not in possession of non-exempt records responsive to the FOIA request submitted by ECW on December 1, 2021.

COUNT I – FAILURE TO PRODUCE RECORDS

17. The above paragraphs are incorporated by reference.

ANSWER: VILLAGE incorporates the answers to the above paragraphs by reference.

18. FRANKFORT PD is a public body under FOIA.

ANSWER: The Frankfort Police Department is not a suable entity in that it has no

independent legal existence from the Village of Frankfort. See *West By and Through Norris v. Waymire*, 114 F. 3d 646, 646-67 (7th Cir. 1997) (“The naming of the Town’s Police Department as a defendant adds nothing; it is almost certainly not a suable entity separate from the Town.”). Further answering, VILLAGE admits that it is a public body, as defined in Section 2 of the Freedom of Information Act. 5 ILCS 140/2.

19. The records sought in the FOIA request are non-exempt public records.

ANSWER: VILLAGE denies the allegations in Paragraph 19.

20. FRANKFORT PD has violated FOIA by failing to produce the records responsive to the request.

ANSWER: VILLAGE denies the allegations in Paragraph 20.

COUNT II – FAILURE TO PERFORM AN ADEQUATE SEARCH

21. The above paragraphs are incorporated by reference.

ANSWER: VILLAGE incorporates the answers to the above paragraphs by reference.

22. FRANKFORT PD is a public body under FOIA.

ANSWER: The Frankfort Police Department is not a suable entity in that it has no independent legal existence from the Village of Frankfort. See *West By and Through Norris v. Waymire*, 114 F. 3d 646, 646-67 (7th Cir. 1997) (“The naming of the Town’s Police Department as a defendant adds nothing; it is almost certainly not a suable entity separate from the Town.”). Further answering, VILLAGE admits that it is a public body, as defined in Section 2 of the Freedom of Information Act. 5 ILCS 140/2.

23. FRANKFORT PD bears the burden of proving beyond material doubt that is performed an adequate search for responsive records.

ANSWER: VILLAGE denies the allegations in Paragraph 23 as it does not accurately state

the burden of proof.

24. FRANKFORT PD has failed to come forward with sufficient evidence to carry this burden.

ANSWER: VILLAGE denies the allegations in Paragraph 24.

25. FRANKFORT PD has violated FOIA by failing to adequately search for records responsive to the request.

ANSWER: VILLAGE denies the allegations in Paragraph 25.

COUNT III – WILLFUL AND INTENTIONAL VIOLATION OF FOIA

26. The above paragraphs are incorporated by reference.

ANSWER: VILLAGE incorporates the answers to the above paragraphs by reference.

27. FRANKFORT PD is a public body under FOIA.

ANSWER: The Frankfort Police Department is not a suable entity in that it has no independent legal existence from the Village of Frankfort. See *West By and Through Norris v. Waymire*, 114 F. 3d 646, 646-67 (7th Cir. 1997) (“The naming of the Town’s Police Department as a defendant adds nothing; it is almost certainly not a suable entity separate from the Town.”). Further answering, VILLAGE admits that it is a public body, as defined in Section 2 of the Freedom of Information Act. 5 ILCS 140/2.

28. The records sought in the FOIA request are non-exempt public records.

ANSWER: VILLAGE denies the allegations in Paragraph 28.

29. FRANKFORT PD has willfully and intentionally or otherwise in bad faith violated FOIA.

ANSWER: VILLAGE denies the allegations in Paragraph 29.

WHEREFORE, VILLAGE OF FRANKFORT, an Illinois municipal corporation,

requests that this Court deny the relief requested in the Complaint and grant such further relief as is deemed fair and just.

AFFIRMATIVE DEFENSE

Determination of Attorney General that Single Exempted Record Was Properly Withheld

30. In response to the FOIA request submitted by ECW on December 1, 2021, the VILLAGE withheld a single exempted record – Report #F1-21-0000939-001 (“Report”).

31. Section 9 of the Freedom of Information Act provides the Public Access Counselor established in the Office of Illinois Attorney General with authority to review denials of requests.

32. After review, the Public Access Counselor, among other available relief, is able to issue a determination letter on the appropriateness of the denial in relation to the obligation of a public body under FOIA.

33. Addressing the denial of a request for the same Report, submitted by another requester, the Public Access Counselor found that the Report was appropriately withheld under Section 7(1)(c) as the Report consisted of highly personal information and that the privacy interest of those involved outweigh the public interest in disclosure under these circumstances. Ill. Att’y Gen. APC Req. Rev. Ltr. 68847, issued February 16, 2022 at 3-4. Attached hereto and incorporated herein as Exhibit A is the Public Access Bureau determination letter issued February 16, 2022.

34. The Public Access Bureau found that disclosure of *any portion* of the Report could constitute an unwarranted invasion of privacy. See *Coleman v. F.B.I.*, 13 F. Supp. 2d 75, 80 (D.D.C. 1998). See *Exhibit A*.

35. Since on or about March 8, 2022, ECW has been on notice of the determination of

the Public Access Bureau.

36. The VILLAGE properly withheld the exempted record as determined by the Attorney General.

WHEREFORE, the VILLAGE OF FRANKFORT, an Illinois municipal corporation, requests that this Court adopt the determination of the Public Access Bureau of the Illinois Attorney General and find that the single exempted record was properly withheld, find in favor of the VILLAGE and grant such other relief as is deemed fair and just.

Respectfully submitted,

VILLAGE OF FRANKFORT,
an Illinois municipal corporation

By: /s/ Hannah R. Lamore
One of Its Attorneys

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OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

February 16, 2022

Via electronic mail

Via electronic mail

Ms. Cindy Reilly
Freedom of Information Officer
Village of Frankfort Police Department
20602 Lincoln Way Lane
Frankfort, Illinois 60423
creilly@frankfortil.org

RE: FOIA Request for Review – 2021 PAC 68847

Dear _____ and Ms. Reilly:

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 2018)). For the reasons that follow, the Public Access Bureau concludes that the Village of Frankfort Police Department (Department) did not improperly deny _____ November 24, 2021, FOIA request.

On that date, _____ submitted a FOIA request to the Department seeking copies of various records concerning _____ and a residential address during the month of June 2021. On December 1, 2021, the Department denied the request in its entirety pursuant to section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558, effective August 20, 2021). On December 6, 2021, _____ submitted a Request for Review contesting the denial. Noting that section 7(1)(c) contains an exception for information that bears on the public duties of public employees and officials, she stated:

Exhibit A

I believe the denial to be unwarranted,

[1]

On December 7, 2021, this office sent a copy of the Request for Review to the Department and asked it to provide unredacted copies of the responsive records for this office's confidential review, and a detailed written explanation of the legal and factual bases for its denial under section 7(1)(c). In particular, this office asked the Department to address the argument that the subject's status as a public official makes the exemption inapplicable. On December 10, 2021, the Department furnished this office with those materials. On December 20, 2021, submitted a reply.

DISCUSSION

Under FOIA, "[a]ll 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 2020). A public body "has the burden of proving by clear and convincing evidence" that information it withholds is exempt from disclosure. 5 ILCS 140/1.2 (West 2020).

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." An "unwarranted invasion of personal privacy" is defined in section 7(1)(c) 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." As referenced above, the exception to the exemption is that "[t]he 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 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. Dep't of Public Health*, 327 Ill. App. 3d 192, 196 (1st Dist. 2001). Illinois courts consider the following factors in determining whether disclosure of information would constitute a clearly unwarranted invasion of personal privacy: "(1) the plaintiff's interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested

¹E-mail from

to Public Access [Bureau] (November 24, 2021).

information." *National Ass'n of Criminal Defense Lawyers v. Chicago Police Dep't*, 399 Ill. App. 3d 1, 13 (1st Dist. 2010).

In its response to this office, the Department asserted that it withheld one responsive police report, under section 7(1)(c). The Department stated that "the offense is a [redacted] which also involved [redacted]." ² The Department also stated that "[t]his report had no arrest, and no investigation due to the victim not wanting this at the time of the report."³ The Department added that "[d]ue to the word [redacted] we do not want any escalation of a situation with a report being released."⁴ In her reply, [redacted] disputed that response, arguing that "[i]f any report was made, whether an arrest or investigation were made or not, it is a public document, especially as it pertains to an elected public official."⁵

This office's review of the withheld report confirmed that it consists of highly personal information concerning a [redacted] dispute. No arrest was made, and as the Department stated, the report reflects that the person identified as the victim did not seek a police investigation. Applying the four-factor balancing test set out above, [redacted] did not indicate a personal interest other than the general public interest in information concerning possible criminal misconduct by her elected representative. While there is a strong public interest in information reflecting how public officials perform their public duties, which is upheld by the exception in section 7(1)(c), there is generally a lower public interest in matters involving public officials that do not rise to the level of an arrest or the charging of a criminal offense. *See, for instance*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 32478, issued October 4, 2016, at 3-4 (police report concerning domestic matter involving a police officer and his family on private property where no arrests were made exempt from disclosure under section 7(1)(c)).

In contrast to the diminished privacy interests of arrestees, the right to privacy "is strongest where the individuals in question 'have been investigated but never publicly charged.'" *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, 846 F. Supp. 2d 63, 71 (D.D.C. 2012) (quoting *American Civil Liberties Union v. U.S. Dep't of Justice*, 655 F.3d 1, 7 (D.C. Cir. 2011)); *see also* Ill. Att'y Gen. Pub. Acc. Op. No. 16-009, issued November 7, 2016, at 16 (disclosure of information identifying suspect of a crime who had not been arrested

²Letter from Cindy Reilly, FOIA Officer, Frankfort Police Department, to Joshua M. Jones, Deputy Bureau Chief, Office Of the Attorney General, Public Access Bureau (undated).

³Letter from Cindy Reilly, FOIA Officer, Frankfort Police Department, to Joshua M. Jones, Deputy Bureau Chief, Office Of the Attorney General, Public Access Bureau (undated).

⁴Letter from Cindy Reilly, FOIA Officer, Frankfort Police Department, to Joshua M. Jones, Deputy Bureau Chief, Office Of the Attorney General, Public Access Bureau (undated).

⁵E-mail from [redacted] to Joshua Jones (December 20, 2021).

Ms. Cindy Reilly
February 16, 2022
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or charged would constitute a clearly unwarranted invasion of personal privacy). It also appears that the identity of the alleged victim could be discerned from the content of the report even if it was significantly redacted. *See 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."). These privacy interests outweigh the public interest in disclosure under these circumstances.

Thus, while there do not appear to be alternative means for _____ to obtain a copy of the report, the Department sustained its burden of proving that the report is exempt from disclosure pursuant to section 7(1)(c).

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. Should you have questions, please contact me at joshua.jones@ilag.gov.

Very truly yours,



JOSHUA M. JONES
Deputy Bureau Chief
Public Access Bureau

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