OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

August 14, 2017

PUBLIC ACCESS OPINION 17-011
(Requests for Review 2017 PAC 47695 & 2017 PAC 47696)

FREEDOM OF INFORMATION ACT:
Disclosure of 9-1-1 Call Recordings

Mr. Steve Miller
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Dear Mr. Miller, Ms. Zobel, and Mr. Mock:

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 2016)). For the reasons discussed below, this office concludes that the Will County Sheriff's Office (Sheriff's Office) violated the requirements of FOIA by improperly denying Mr. Steve Miller's FOIA requests for 9-1-1 call recordings relating to the death of a child.

BACKGROUND

As described in a publicly available report of the Illinois Department of Children and Family Services, seventeen-month old Semaj Crosby was reported missing from her family home on April 25, 2017. After a search by law enforcement and volunteers, Semaj Crosby was discovered deceased in her family home on April 27, 2017.[1]

On April 27, 2017, Mr. Miller, on behalf of WBBM Newsradio, submitted a FOIA request to the Sheriff's Office seeking "the audio from a 911 call made on Easter Sunday, April 16, from the home of Semaj Crosby, in the 300 block of Louis Road."[2] On the same day, Mr. Miller submitted a second FOIA request to the Sheriff's Office seeking "the audio from a 911 call made on the afternoon/evening of April 25, from the home of Semaj Crosby, in the 300 block of Louis Road, when Semaj was reported as missing."[3]

On May 2, 2017, the Sheriff's Office denied both requests in their entireties.[4] The Sheriff's Office asserted that 9-1-1 call recordings contain "'biometric identifiers[,]'" which are included in the definition of "private information" found in section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2016)) and are therefore exempt from disclosure under section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2016)). In addition, the Sheriff's Office denied access to the recording of the April 25, 2017, 9-1-1 call under section 7(1)(d)(vii) of FOIA (5 ILCS 140/7(1)(d)(vii) (West 2016)), asserting that disclosure of the requested information "at this time could impede this active investigation" of the death of Semaj Crosby.[5]

Mr. Miller filed two Requests for Review with this office on May 2, 2017, contesting each of these denials. In the Requests for Review, Mr. Miller asserted that "[b]esides the reasons they stated for denying my request, I was told by the FOIA officer, 'We have never

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[1]Department of Children and Family Services, Offices of Quality Enhancement and Clinical Practice, Joint Special Review (May 24, 2017).

[2]E-mail from Steve Miller, Reporter, WBBM NewsRadio 780 AM and 105.9 FM, to Shannon Zobel (April 27, 2017, 12:39 p.m.).

[3]E-mail from Steve Miller, Reporter, WBBM NewsRadio 780 AM and 105.9 FM, to Shannon Zobel (April 27, 2017, 1:12 p.m.).

[4]Letters from S. Zobel, FOIA Officer, Will County Sheriff's Office, to Steve Miller, WBBM Newsradio (May 2, 2017).

[5]Letter from S. Zobel, FOIA Officer, Will County Sheriff's Office, to Steve Miller, WBBM Newsradio (May 2, 2017).

released audio from a 911 call.' If that is Will County's default position, I consider that problematic."[6]

On May 10, 2017, this office sent copies of the Requests for Review to the Sheriff's Office and asked it to provide copies of the requested recordings for our confidential review together with a detailed explanation of the factual and legal bases for the applicability of the asserted exemptions.[7] In a letter dated May 19, 2017, and received by this office on May 30, 2017, the Will County State's Attorney's Office (State's Attorney's Office) provided a written response to this office on behalf of the Sheriff's Office, as well as copies of the responsive 9-1-1 call recordings.[8] The written response referred to one of the pending Requests for Review (2017 PAC 47696), but not the other (2017 PAC 47695). On June 2, 2017, an Assistant Attorney General in the Public Access Bureau confirmed that the May 19, 2017, written response and its reasoning applied to both pending Requests for Review concerning Mr. Miller's requests for 9-1-1 call recordings.[9]

On June 2, 2017, this office forwarded a copy of the Sheriff's Office's written response to Mr. Miller.[10] On June 9, 2017, Mr. Miller submitted a written reply.[11]

On June 28, 2017, this office properly extended the time within which to issue a

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[6]E-mails from Steve Miller to Public Access [Bureau, Office of the Attorney General] (May 2, 2017).

[7]Letters from Neil P. Olson, Deputy Public Access Counselor, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Shannon Zobel, FOIA Officer, Will County Sheriff's Office (May 10, 2017).

[8]Letter from Philip A. Mock, Assistant State's Attorney, [Will County State's Attorney's Office], to Neil P. Ols[o]n, Deputy Public Access Counselor, Illinois Attorney General (May 19, 2017).

[9]Telephone conference between Neil P. Olson, Deputy Public Access Counselor, Assistant Attorney General, Public Access Bureau, Office of the Attorney General and Philip A. Mock, Assistant State's Attorney, Will County State's Attorney's Office (June 2, 2017).

[10]Letter from Neil P. Olson, Deputy Public Access Counselor, Assistant Attorney General, Public Access Bureau, to Steve Miller, WBBM Newsradio 780 AM and 105.9 FM (June 2, 2017).

[11]Letter from Steve Miller, WBBM Newsradio 780 AM – 105.9 FM, to [Neil] Olson (June 9, 2017).

binding opinion by 30 business days, to August 14, 2017, pursuant to section 9.5(f) of FOIA.[12]

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 2016). "Public records" as defined in section 2(c) of FOIA (5 ILCS 140/2(c) (West 2016)) include "recordings," therefore 9-1-1 call recordings are public records. Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2016)) further 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 contained in section 7 of FOIA (5 ILCS 140/7 (West 2016)) are to be narrowly construed. *See Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

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, in turn, 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.)

In its response to this office, the Sheriff's Office asserted:

> The Act does not provide a definition for biometric identifiers. Illinois statutes do not provide a definition of biometric identifiers for purposes of FOIA. A common and usual understanding of the term "biometric identifiers" would include the process of voice

[12]Letter from Neil P. Olson, Deputy Public Access Counselor, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Steve Miller, WBBM Newsradio 780 AM and 105.9 FM, and Philip A. Mock, Assistant State's Attorney, Will County State's Attorney's Office (June 28, 2017).

> recognition as being included in the broad category of biometric identifier. * * * The Will County Sheriff does not have the technical capacity to scramble or modify audio recordings to remove the biometric component of voice recognition from audio files to protect the sanctity of citizen and/or governmental employee's privacy of their individual voice biometric identifiers.[13]

This office has also recognized that the term "biometric identifiers" is undefined in FOIA, but determined in a binding opinion that "the phrase 'biometric identifier' is commonly understood to refer to the ***measurement and analysis*** of a unique physical or behavioral characteristic that identifies a person, such as a fingerprint or voice pattern." (Emphasis added.) Ill. Att'y Gen. Pub. Acc. Op. No. 14-008, issued August 19, 2014, at 4. That binding opinion also found that a record such as a photograph that generally identifies a person must contain measurable characteristics in order to be considered a biometric identifier. Ill. Att'y Gen. Pub. Acc. Op. No. 14-008, at 5-6.

In Binding Opinion 14-008, this office also examined the statutory definition of "biometric identifier" in Illinois' Biometric Information Privacy Act (740 ILCS 14/1 *et seq.* (West 2016)). That statute defines "biometric identifier" to include "a retina or iris scan, fingerprint, ***voiceprint***, or scan of hand or face geometry." (Emphasis added.) 740 ILCS 14/10 (West 2016). A "voiceprint" is generally defined as a "distinctive pattern of curved lines and whorls made by a machine that measures human vocal sounds for the purpose of identifying an individual speaker." Black's Law Dictionary (10th ed. 2014), *available at* Westlaw BLACKS. Therefore, a voiceprint, which is a record of mechanical measurement, is not the same as a simple recording of a voice. A Federal district court has noted that distinction in the context of interpreting the Biometric Information Privacy Act: "[I]f [an entity] simply captured and stored the *photographs* and did not measure and generate scans of face geometry, then there would be no violation of the Act. (***The same is true of someone, say a journalist, who records a person's voice without generating a voiceprint.***)" (Italics in original, bold added.) *Rivera v. Google Inc.*, No. 16 C 02714, 2017 WL 748590, at *7 (N.D. Ill. Feb. 27, 2017).

With its written response to this office, the Sheriff's Office provided a copy of a section from the website of the Federal Bureau of Investigation, which describes "voice

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[13]Letter from Philip A. Mock, Assistant State's Attorney, [Will County State's Attorney's Office], to Neil P. Ols[o]n, Deputy Public Access Counselor, Illinois Attorney General (May 19, 2017), at 1.

recognition" as "a biometric modality that uses an individual's voice for recognition purposes."[14] However, "voice recognition," like a "voiceprint," is an analytical process by which a voice is measured or matched to a speaker, not the simple recording of a voice itself. Furthermore, the Sheriff's Office's broad interpretation of the term "biometric identifiers" would exempt all voice recordings from disclosure under section 7(1)(b). Such an interpretation would be inconsistent with the definition of "public records" in FOIA, which includes "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[.]" (Emphasis added.) 5 ILCS 140/2(c) (West 2016). This office presumes that in adopting this broad definition of "public records," the General Assembly did not intend to exclude all voice recordings from public disclosure. *See 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."). It would be absurd to presume that the General Assembly intended to categorically exempt all voice recordings in their entireties, regardless of their content, given the legislature's specific inclusion of "tapes," "recordings," and "recorded information" in FOIA's definition of "public records."

Here, the 9-1-1 call recordings contain voices, but not any measurement or analysis of those voices that would constitute a biometric identifier, such as a "voiceprint." Accordingly, this office concludes that the Sheriff's Office has not sustained its burden of demonstrating that the recordings are exempt under section 7(1)(b) of FOIA.

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

With respect to recording of the April 25, 2017, 9-1-1 call, the Sheriff's office also asserted section 7(1)(d)(vii) (2017 PAC 47696). Section 7(1)(d)(vii) of FOIA exempts 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:
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> * * *

[14]Letter from Philip A. Mock, Assistant State's Attorney, [Will County State's Attorney's Office], to Neil P. Ols[o]n, Deputy Public Access Counselor, Illinois Attorney General (May 19, 2017) (attaching Federal Bureau of Investigation, Biometric Center of Excellence, Voice Recognition).

> (vii) obstruct an ongoing criminal investigation by the agency that is the recipient of the request.

Under this exemption, "[t]he 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." (Emphasis added.) *Baudin v. City of Crystal Lake*, 192 Ill. App. 3d 530, 536 (2d Dist. 1989). Conclusory statements asserting that the disclosure of requested records would obstruct a law enforcement investigation are insufficient to demonstrate that law enforcement records are exempt from disclosure under FOIA. *See Day v. City of Chicago*, 388 Ill. App. 3d 70, 76-77 (1st Dist. 2009) (rejecting the public body's attempt "to use the term 'ongoing criminal investigation' * * * as some sort of magic talisman, the invocation of which casts a spell of secrecy over the documents at issue.") (internal quotations omitted.); *see also* Ill. Att'y Gen. Pub. Acc. Op. 17-001, issued March 14, 2017, at 4-5 (public body failed to provide a factual basis to establish that disclosure of a field report would interfere with its investigation).

In its response to Mr. Miller's FOIA request, the Sheriff's Office cited section 7(1)(d)(vii) and stated: "***The Will County Sheriff's Office is currently investigating the death of Semaj Crosby. The release of any information at this time could impede this active investigation.***"[15] (Emphasis in original.) The Sheriff's Office's response to this office explained:

> The Will County Sheriff is currently investigating the suspicious death of Semaj Crosby as a potential criminally caused death. There has been no determination that the death was non-criminal. As in all suspicious deaths involving young children, a parent is a person of interest to interview in the criminal investigation. The caller to 911 self-identified as the mother of Semaj Crosby. In conducting further interviews with the victim's mother it is a tactical advantage for the Sheriff's Investigators to have exclusive full knowledge of that prior 911 conversation. If the 911 call was available under FOIA disclosure, the mother could tailor any subsequent statements made to investigators to match the 911 statements. If the further interview with the mother matched the 911 statements, without the ability for the mother to hear the 911 call, it could assist the Investigators in determining her veracity. If statements at a further interview do not correlate with the 911 call,

[15]Letter from S. Zobel, FOIA Officer, Will County Sheriff's Office, to Steve Miller, WBBM Newsradio (May 2, 2017).

> the investigators can explore those variances to hopefully develop new leads for the investigation.[16]

This office has reviewed the recording provided and considered the Sheriff's Office's discussion of why the recording's disclosure would obstruct the ongoing criminal investigation. The Sheriff's Office's argument focuses on its concern that Semaj Crosby's mother could tailor her future statements to those of the 9-1-1 call recordings. However, in explaining this general concern, the Sheriff's Office's has not specified particular statements on the 9-1-1 call recording that would assist Semaj Crosby's mother in such a way that that would result in obstructing the investigation. In addition, the 9-1-1 recording is a limited part of the evidence in the ongoing investigation. For these reasons, the Sheriff's Office has not provided a sufficient factual basis to support a finding that disclosure of the limited information in the 9-1-1 call would obstruct its investigation. Accordingly, this office concludes that the Sheriff's Office has not sustained its burden of demonstrating by clear and convincing evidence that the 9-1-1 call recording is exempt from disclosure under section 7(1)(d)(vii) of FOIA.

FINDINGS AND CONCLUSIONS

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

1) On April 27, 2017, Mr. Steve Miller, on behalf of WBBM Newsradio, submitted two FOIA requests to the Will County Sheriff's Office each seeking a recording of a 9-1-1 call made from the home of Semaj Crosby.

2) On May 2, 2017, the Sheriff's Office denied both requests citing sections 2(c-5) and 7(1)(b) of FOIA. The denial letters asserted that the requested recordings contained "biometric identifiers" and therefore were exempt "private information" as defined in section 2(c-5) of FOIA. With respect to the second request (2017 PAC 47696), the Sheriff's Office asserted that the requested recording was also exempt under section 7(1)(d)(vii) of FOIA because the Sheriff's Office was investigating the death of Semaj Crosby.

3) On May 2, 2017, Mr. Miller submitted Requests for Review contesting the two denials by the Sheriff's Office. The Requests for Review were timely filed and otherwise comply with section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2016)).

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[16]Letter from Philip A. Mock, Assistant State's Attorney, [Will County State's Attorney's Office], to Neil P. Ols[o]n, Deputy Public Access Counselor, Illinois Attorney General (May 19, 2017), at 1-2.

4) On May 10, 2017, the Public Access Bureau sent copies of Mr. Miller's Requests for Review to the Sheriff's Office and asked it to provide copies of the requested 9-1-1 call recordings for our confidential review together with a detailed explanation of the factual and legal bases of the applicability of the asserted exemptions.

5) On May 30, 2017, the Public Access Bureau received a written response from the Will County State's Attorney's Office on behalf of the Sheriff's Office together with copies of the responsive 9-1-1 call recordings.

6) On June 2, 2017, the Public Access Bureau forwarded a copy of the Sheriff's Office's written response to Mr. Miller. On June 9, 2017, Mr. Miller submitted a written reply.

7) On June 28, 2017, the Public Access Bureau properly extended the time within which to issue a binding opinion by 30 business days, to August 14, 2017, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to these matters.

8) Section 7(1)(b) of FOIA exempts "private information" from inspection and copying. Section 2(c-5) of FOIA defines "private information" to include "biometric identifiers." The term "biometric identifiers" is not defined in section 2(c-5) or elsewhere in FOIA. The term "biometric identifier," however, is commonly understood to refer to the measurement and analysis of a unique physical or behavioral characteristic that identifies a person.

9) The voice recordings at issue do not contain a measurement or analysis of a person's voice, such as a "voiceprint." Because the requested 9-1-1 call recordings do not contain biometric identifiers as that phrase is commonly used, they do not contain "private information" and therefore are not exempt from disclosure under section 7(1)(b) of FOIA.

10) Section 7(1)(d)(vii) of FOIA exempts from disclosure records in the possession of a law enforcement agency for law enforcement purposes only to the extent that their disclosure would "obstruct an ongoing criminal investigation by the agency that is the recipient of the request."

11) The existence of a criminal investigation does not, by itself, render records relating to the investigation exempt from disclosure under section 7(1)(d)(vii) of FOIA. To sustain its burden under this exemption, a public body must demonstrate how the disclosure of the records would obstruct an ongoing criminal investigation by the public body that received the FOIA request.

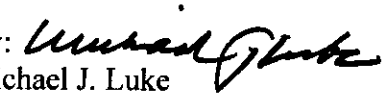
12) In asserting section 7(1)(d)(vii), the Sheriff's Office's has not provided a sufficient factual basis to show how disclosure of the information in the 9-1-1 call recording would obstruct its investigation. Because the Sheriff's Office has not provided clear and convincing evidence that the disclosure of the 9-1-1 call recording would interfere with a criminal investigation conducted by the Sheriff's Office, this office concludes that the Sheriff's Office has not sustained its burden of demonstrating that the April 25, 2017, 9-1-1 call recording is exempt from disclosure under section 7(1)(d)(vii) of FOIA.

Therefore, it is the opinion of the Attorney General that the Sheriff's Office has improperly denied Mr. Miller's Freedom of Information Act requests in violation of the requirements of the Act. Accordingly, the Sheriff's Office is directed to take immediate and appropriate action to comply with this opinion by disclosing the requested 9-1-1 call recordings to Mr. Miller.

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 2016). 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. Steve Miller as defendants. *See* 5 ILCS 140/11.5 (West 2016).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
Counsel to the Attorney General

CERTIFICATE OF SERVICE

Sarah L. Pratt, Public Access Counselor, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 17-011) upon:

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by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Springfield, Illinois on August 14, 2017.

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