



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 4, 2010

Mr. Richard Velazquez
Special Counsel to the President
Freedom of Information Officer
George Dunne, Cook County Admin. Bldg.
69 West Washington, 35th Floor
Chicago, Illinois 60602

RE: Pre-Authorization Request - 2010 PAC 5068
Pre-Authorization Request - 2010 PAC 6143

Dear Mr. Velazquez:

We have received and reviewed your January 5, 2010, letter providing notice to the Public Access Counselor and to the Chicago Sun-Times (Sun-Times Notice)¹ of Cook County's (County) intent to deny the disclosure of the Cook County Office of the Medical Examiner's (Medical Examiner) records related to the deaths of Christopher G. Kelly (Kelly) and Michael W. Scott (Scott) as records exempt from disclosure under section 7(1)(c) of the Freedom of Information Act (FOIA) (5 ILCS 140/7(1)(c) (West 2008), as amended by Public Act 96-542, effective January 1, 2010).² We have also received and reviewed your March 5, 2010, letter providing notice to the Public Access Counselor and to the Chicago Tribune (Tribune Notice) of the County's intent to deny the Tribune's request for similar information, also on the basis that the records are exempt from disclosure under section 7(1)(c) of FOIA.

¹We have also received and reviewed your January 8, 2010, supplement to the Sun-Times Notice. The January 5, 2010, notice and the January 8, 2010, supplement will be referred to collectively as the Sun-Times Notice.

²Section 7 of FOIA has been amended by a number of other public acts. The other public acts do not amend section 7(1)(c). See Public Acts 96-261, effective January 1, 2010; 96-328, effective August 11, 2009; 96-558, effective January 1, 2010; 96-863, effective March 1, 2010.

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The Medical Examiner's files relating to the deaths of Kelly and Scott generally contain documents and reports, as well as photographs of the bodies postmortem. The files relating to Kelly's death also contain photographs of physical evidence. As discussed below, after

considering the balancing test required under the unwarranted invasion of personal privacy exemption, we conclude that the Medical Examiner's documents and reports relating to the deaths of Kelly and Scott and the photographs of physical evidence in the Medical Examiner's files relating to Kelly's death are not exempt from disclosure under section 7(1)(c). We conclude that the photographs of the bodies of Kelly and Scott postmortem are exempt from disclosure under section 7(1)(c).

BACKGROUND

Chicago Sun-Times

On January 4, 2010, Chris Fusco, Staff Reporter, Chicago Sun-Times, e-mailed a FOIA request to the County seeking to inspect "all reports/documents/records/photographs regarding two cases the Cook County Medical Examiner is believed to have closed." Specifically, Mr. Fusco seeks access to "records [related to] the suicide of Christopher G. Kelly, deceased on Sept. 12, 2009" and "the suicide of Michael W. Scott, deceased on Nov. 16, 2009."³ The County asserted in its Sun-Times Notice that it intended to deny the inspection of the requested records based on familial requests for privacy.

Chicago Tribune

On February 1, 2010, Anne M. Sweeney, Reporter, Chicago Tribune, e-mailed a FOIA request to the County seeking copies of "any documents produced by the Special Counsel regarding any and all reports and documentation of the Michael Scott death investigation examination and autopsy[.]" and "copies of any intent to deny Freedom of Information requests

³In his January 4, 2010, e-mail, Mr. Fusco also withdrew an identical FOIA request dated November 25, 2009, in order to re-file it under FOIA as amended by Public Act 96-542, effective January 1, 2010.

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from any other news outlet."⁴ Ms. Sweeney sent a separate e-mail to the County, also on February 1, 2010, regarding the status of the Kelly autopsy. On February 3, 2010, the County provided Mr. Brendan J. Healey, Tribune Senior Counsel, with an electronic copy of the County's Sun-Times Notice, which sets out the County's intent to deny media access to the Medical Examiner's records related to the deaths of Kelly and Scott.

On February 17, 2010, Mr. Healey contacted you regarding the status of the Tribune's correspondence to the County dated February 10, 2010. You indicated that the County had not received any additional correspondence from the Tribune. Later that day, Ms. Sweeney sent an e-mail to you attaching copies of two FOIA request letters dated February 10, 2010. The first letter "seeks the autopsy/examination report related to the examination of Michael Scott, including but not limited to the First Call Sheet, Intake Sheet, Release Documents, Investigator's Report, Toxicology Report, Autopsy Report, Histology Report, letters or communications from the family, police or insurance companies, and photographs." The second letter requests the same information related to the death of Kelly.

In a February 25, 2010, e-mail to Ms. Sweeney and Mr. Healey, you stated, on behalf of the County, your intent "to provide the Attorney General/Public Access Counselor with a Notice of Intent to Deny Pursuant to Section 7(1)(c) Privacy Exemption" letter regarding the Kelly and Scott FOIA requests. By letter dated March 5, 2010, we received that correspondence from the County. A review of your March 5, 2010, letter indicates that the County views the two Tribune FOIA requests as "identical in scope to the FOIA request of the Sun-Times."

⁴Ms. Sweeney contacted the Office of the President on February 1, 2010, by telephone to inquire about the status of a pre-2010 FOIA request submitted to the Medical Examiner's office for records regarding Scott and about the status of the Chicago Sun-Times' request for similar information. You informed her that the pre-2010 FOIA request had been denied and explained the status of the pending Sun-Times request. Ms. Sweeney stated that she would submit a new request to be considered under FOIA as amended by Public Act 96-542, effective January 1, 2010. You advised Ms. Sweeney to submit the Tribune's request as one which sought documents which may be produced to the Sun-Times pursuant to its request.

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ANALYSIS

You have provided us with a description of the records generally found in the Medical Examiner's files.⁵ Further, as part of the FOIA review process, the County has identified and

⁵In your letter to this office (*see* Letter from Richard Velazquez, Special Counsel to the President, Freedom of Information Officer, Board of Commissioners of Cook County, to Cara Smith, Public Access Counselor, Office of the Attorney General (January 8, 2010)) regarding the FOIA request received January 4, 2010, from Chicago Sun-Times Reporter Chris Fusco for Medical Examiner Autopsy Reports dated January 8, 2010, you provide the following description of the documents, reports, and other records generally found in the Medical Examiner's files:

- **First Call Sheet** - a document generated when the occurrence of a death is first called into the Cook County Medical Examiner's Office
- **Intake Sheet** - a document setting forth basic information regarding a departed, such as: weight, height, personal effects of the departed, clothing, and information regarding where the departed was found
- **Release Documents** - documents which consist of toe tags and other custody type documents such as: forms executed by funeral directors up [*sic*] receipt of custody of the departed
- **Investigator's Report** - a document which contains medical history known to the Cook County Medical Examiner's Office, and other information available, by third-party sources such as policy [*sic*] and family, at the time of the Cook County Medical Examiner's investigation
- **Toxicology Report**
- **Autopsy Report**
- **Histology Report** - a document containing results of tissue examination via microscope
- **Letters** or communications from the family
- **Letters** or communications from police
- **Letters** or communications from insurance companies
- **Photographs**

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provided to this office 24 documents⁶ and 23 photographs from the Medical Examiner's records relating to Kelly's death investigation. The County has also identified and provided 22 documents⁷ and 17 photographs relating to Scott's death investigation.

Under section 1.2 of FOIA (added by Public Act 96-542, effective January 1, 2010, to be codified at 5 ILCS 140/1.2), "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." Section 1.2 of FOIA further requires that "[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."⁸ With regard to the Sun-Times and Tribune FOIA requests, you have provided notice of your intent to deny disclosure of the requested information pursuant to section 7(1)(c) of FOIA, which provides:

(1) When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying. Subject to this requirement, *the following shall be exempt from inspection and copying:*

* * *

(c) *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*

⁶The documents include: the first call sheet; a personal effects inventory; the deceased remains transportation report; the medical examiner's case checklist; authorization for release and removal; the medical examiner case report; the report of the postmortem examination; results of toxicologic analyses; and police reports.

⁷The documents include: the first call sheet; the deceased remains transportation report; the medical examiner's case checklist; a personal effects inventory; an identification certification; authorization for release; the medical examiner case report; the report of the postmortem examination; results of toxicologic analyses; police reports; and a letter from the attorney for the Scott family.

⁸In this regard, I would note that in the Tribune Notice the County incorrectly states that subsection 7(1)(c) requires that the Tribune overcome a two-part burden. Section 1.2 of FOIA, however, makes clear that it is the public body asserting that a record is exempt from disclosure, in this case the County, and not the requester, that has the burden of proving by clear and convincing evidence that the records are exempt.

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in writing by the individual subjects of the information.
"Unwarranted invasion of personal privacy" means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. (Emphasis added.)

There are, as yet, no reported judicial decisions construing the language of section 7(1)(c) of FOIA as amended by Public Act 96-542. Therefore, it is necessary for this office to construe the provisions of the statute as a matter of first impression.

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Illinois Department of Healthcare & Family Services v. Warner*, 227 Ill. 2d 223, 229 (2008). Legislative intent is best evidenced by the language used in the statute; if statutory language is clear and unambiguous, it must be given effect as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). If, however, a statute is ambiguous, it is appropriate to examine the statute's history, the reason for the enactments, the circumstances of its adoption, and the end to be achieved. *In re Marriage of Logston*, 103 Ill. 2d 266, 279 (1984).

FOIA requires that public bodies make a public record available for inspection, unless the record, or information in the record, falls within one of the Act's exemptions. 5 ILCS 140/3(a) (West 2008), as amended by Public Act 96-542, effective January 1, 2010. The plain and unambiguous language of section 7(1)(c) authorizes a public body to withhold personal information contained within public records if the disclosure would constitute a "clearly unwarranted invasion of personal privacy[.]" As used in section 7(1)(c), the phrase "unwarranted invasion of personal privacy" is defined to allow withholding of information that is: (1) "highly personal or objectionable to a reasonable person"; and (2) "in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." The term "subject" is not defined in section 7(1)(c) or otherwise in FOIA. In construing "the subject's right to privacy[.]" therefore, we must review the history of the subsection and the problems that the legislature sought to remedy with the amendment.

An exemption for records the release of which "would constitute a clearly unwarranted invasion of personal privacy" was originally codified in subsection 7(1)(b) of FOIA. *See* Public

Acts 83-1013, effective July 1, 1984; 86-1028, effective February 5, 1990.⁹ Under the original enactment, the statute contained a general exemption, coupled with a series of specific statutory exemptions relating to enumerated categories of records. The categorical exemptions were construed to be *per se* exemptions. See *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 408-09 (1997). The Illinois Supreme Court stated, however, that "[w]here a public body asserts an exemption for information that is not specifically included on the [enumerated] list and therefore not exempt *per se*, the court must evaluate the particular information on a case-by-case basis." *Lieber*, 176 Ill. 2d at 409. Because the statute did not provide a standard by which to determine whether an unwarranted invasion of personal privacy had occurred and because the Illinois FOIA is patterned after the Federal Freedom of Information Act (Federal FOIA) (5 U.S.C.A. §552 (West 2007 & West Supp. 2009)), the Illinois courts looked to Federal case law for guidance. *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 202 (2004); *Cooper v. Department of the Lottery*, 266 Ill. App. 3d 1007 (1994), *appeal denied*, 159 Ill. 2d 565 (1995). Under Federal law, resolution of the disclosure issue required the balancing of the public's interest in disclosure against the individual's interest in privacy. See *Margolis v. Director of the Department of Revenue*, 180 Ill. App. 3d 1084 (1989), *appeal denied*, 126 Ill. 2d 560 (1989); *Gibson v. Illinois State Board of Education*, 289 Ill. App. 3d 12, 20-21 (1997).

Public Act 96-542 amended FOIA to improve transparency in government and increase access to public records. Remarks of Sen. Raoul, May 28, 2009, Senate Debate on Senate Bill No. 189, at 41. With regard to the language of new section 7(1)(c), Public Act 96-542 was intended to "narrow [] and clarif[y] the personal privacy exemption" which "has been identified as the most abused" exemption in FOIA. Remarks of Rep. Madigan, May 27, 2009, House Debate on Senate Bill No. 189, at 93. Thus, the legislature eliminated the enumerated *per se* exemptions from the personal privacy exemption and amended the general exemption to provide a standard for determining whether a clearly unwarranted invasion of personal privacy may

⁹As originally enacted (*see* Public Act 83-1013), subsection 7(b) provided, in pertinent part:

The following shall be exempt from inspection and copying:

* * *

(b) Information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless such disclosure is consented to in writing by the individual subjects of such information. *See* Ill. Rev. Stat. 1985, ch. 116, par. 207.

Public Act 86-1028 amended section 7 of FOIA to include subsection "(1)."

occur. Under the current language, only when the information is found to be highly personal or objectionable to a reasonable person, does the public body need to balance the "subject's right to privacy" against any legitimate public interest in obtaining the information.

Along with the fact that the term "subject" is not defined in FOIA, the Illinois courts have not addressed the issue of whether the personal privacy interests of surviving family members in the documents related to their relative's death may be considered in conducting the balancing test required under the clearly unwarranted invasion of personal privacy exemption in FOIA. Thus, it is again necessary to review Federal law for guidance in construing FOIA. Under Federal FOIA, the courts have long recognized that a decedent's surviving family members possess their own separate personal privacy interest in "their close relative's death-scene images" and similar type records. *See National Archives & Records Administration v. Favish*, 541 U.S. 157, 124 S. Ct. 1570 (2004), *rehearing denied*, 541 U.S. 1057, 124 S. Ct. 2198 (2004) (a decedent's surviving family members have a personal privacy interest under Federal FOIA in "their close relative's death-scene images"); *see also Katz v. National Archives & Records Administration*, 862 F. Supp. 476, 485-86 (D.D.C. 1994), *aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir. 1995) ("allowing access to the autopsy photographs [of President Kennedy] would constitute a clearly unwarranted invasion of the Kennedy family's privacy" under Federal FOIA); *New York Times Co. v. National Aeronautics & Space Administration*, 782 F. Supp. 628, 630 (D.D.C. 1991) (sustaining a privacy claim under Federal FOIA by the families of the deceased astronauts and recognizing the families' privacy interests in "all voice and data communications" recorded aboard the space shuttle Challenger before it disintegrated).¹⁰

Nothing in the language of section 7(1)(c) or the debates concerning Public Act 96-542 indicates that the General Assembly intended to reject the Federal case law recognizing personal privacy interests of surviving family members. Had the General Assembly intended to deny familial personal privacy interests under FOIA, it could have done so by express statutory provision. It did not. Consequently, in the context of autopsies and records related to a death, as used in section 7(1)(c), the term "subject" may be construed as including the privacy interests of those persons whose interests have been recognized by statute or case law, not merely that of a

¹⁰A number of state courts have also recognized the privacy interests of surviving family members when construing state freedom of information laws. *See, e.g., Reid v. Pierce County*, 136 Wash. 2d 195, 212, 961 P.2d 333, 342 (1998) (immediate relatives have a privacy interest in the autopsy records of the decedent); *McCambridge v. City of Little Rock*, 298 Ark. 219, 231-32, 766 S.W.2d 909, 915 (1989) (recognizing privacy interest of the murder victim's mother in crime scene photographs); *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930) (*per curiam*) (recognizing parents' rights of privacy in photographs of their deceased child's body).

decedent.¹¹ Accordingly, information related to a death may be withheld if it is: (1) "highly personal or objectionable to a reasonable person"; and (2) the surviving family's "right to privacy outweighs any legitimate public interest in obtaining the information."

Photographs

Applying the foregoing standard to the FOIA requests under review, the County's application of the section 7(1)(c) exemption with regard to the Medical Examiner's photographs related to the death of Kelly is approved in part and denied in part. The Medical Examiner's files contain 14 photographs of items of physical evidence related to Kelly's death.¹² The remaining 9 photographs are graphic autopsy photographs that depict Kelly's body postmortem.

With regard to the physical evidence photographs contained in the Medical Examiner's files, the County has failed to meet its burden of demonstrating by clear and convincing evidence that the photographs are highly personal or that disclosure of these photographs would be objectionable to a reasonable person. The County has referred to no statute or decisional law to support its determination that the disclosure of these photographs would constitute a clearly unwarranted invasion of personal privacy. Because the County has not sustained its burden of proving by clear and convincing evidence that the disclosure of the physical evidence photographs in the Medical Examiner's files would result in the disclosure of information that is highly personal or objectionable to a reasonable person, the County's request to approve denial of disclosure of these photographs in the Medical Examiner's files under section 7(1)(c) of FOIA is denied.

¹¹The Tribune has directed our attention to *Trent v. Office of Coroner of Peoria County*, 349 Ill. App. 3d 276 (2004), *appeal denied*, 212 Ill. 2d 556 (2004), a case in which the Illinois Appellate Court reviewed whether the medical records of a decedent minor were exempt from disclosure under subsection 7(1)(b) of FOIA, despite a written authorization for release of the records from the deceased child's mother who pled guilty to the child's death. The *Trent* court concluded that, for purposes of consenting to the disclosure of documents otherwise exempt from disclosure under the personal privacy provision, the "individual subject of the information" language referred to the decedent and that the plain language of the Act made no provision for a written consent to be submitted by a third party in the event of the subject's death. The *Trent* court did not address, however, the personal privacy interests of surviving family members in documents or images related to their relative's death. Therefore, *Trent* is of limited application in the current circumstances.

¹²The photographs depict objects such as: an evidence bag; a pill organizer, with pills visible; and open boxes of over the counter medications.

Turning to the autopsy photographs, the courts have determined that autopsy photographs are records that are highly personal, the release of which would be objectionable to reasonable persons. *See Katz*, 862 F. Supp. at 485-86. Further, you have indicated that the Kelly family has requested privacy.

The Kelly family has a cognizable, personal privacy interest in the release of the Medical Examiner's photographs. In determining whether these records are subject to disclosure, this privacy interest must be weighed against "any legitimate public interest in obtaining the information." In seeking access to all of the information in the Medical Examiner's files, the Tribune asserted that because Kelly was involved in public controversies and his death was highly publicized, the public has an interest in information regarding his death. While Kelly was a public figure, there has been no showing that the disclosure of photographs of his body during the autopsy is likely to advance the public interests referenced in the Tribune's FOIA request. *See generally Favish*, 541 U.S. at 172-73, 124 S. Ct. at 1580-81. In this regard, at least one Illinois court has noted in construing the personal privacy exemption that FOIA is intended to "guarantee 'that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.'" (Emphasis in original.) *Trent v. Office of Coroner of Peoria County*, 349 Ill. App. 3d 276, 281 (2004), *appeal denied*, 212 Ill. 2d 556 (2004), citing *Lakin Law Firm v. Federal Trade Comm'n*, 352 F.3d 1122, 1123 (7th Cir. 2003). On balance, the privacy interests of the Kelly family in the graphic photographs of Kelly's body postmortem outweigh the very generalized public interest in obtaining access to these photographs. Accordingly, the County's request to deny the disclosure of the autopsy photographs of Kelly's body is approved.

Similarly, the County's use of the section 7(1)(c) exemption with regard to the Medical Examiner's photographs of Scott's body is approved. Based on our review of the Medical Examiner's files, each of the 17 photographs that depict Scott's body postmortem. As noted above, the courts have determined that autopsy photographs are records that are highly personal and their release would be objectionable to reasonable persons. Further, you have indicated that the Scott family has requested privacy. In fact, on behalf of the Scott family, their attorney submitted a letter to the County "requesting that any and all records compiled by your office or in your possession relating to or in any way connected with the death of Michael W. Scott be withheld from public dissemination." *See* Letter from Enrico J. Mirabelli, Nadler, Pritikin & Mirabelli, LLC, to Dr. Mitra B. Kalelkar, Office of Cook County Medical Examiner (December 17, 2009). The Scott family has a personal privacy interest in the release of the Medical Examiner's autopsy photographs, and this interest must be weighed against "any legitimate public interest in obtaining the information."

Like Kelly, Scott was also a public figure. In seeking access to the Medical Examiner's records, the Tribune noted that Scott was linked to public controversies and his death was highly publicized. Based on this, the Tribune asserts that "much remains to be learned about" his death and the public has an interest in this information. There has been no showing, however, that the disclosure of the autopsy photographs of Scott's body is likely to advance the general public interest referenced in the Tribune's FOIA request. *See generally Favish*, 541 U.S. at 172-73, 124 S. Ct. at 1580-81. On balance, the privacy interests of the Scott family in the graphic photographs of Scott's body postmortem outweigh the generalized public interest in obtaining access to these photographs. Accordingly, the County's request to deny the disclosure of the autopsy photographs related to Scott's death is approved.

Documents and Reports

With respect to the documents and reports of the Medical Examiner, the County's use of the section 7(1)(c) exemption is denied. The County has failed to meet its burden of proving by clear and convincing evidence that the disclosure of the Medical Examiner's documents and reports would result in the provision 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.

In support of the County's Notices, you have directed us to *Favish* and *Trent*. In *Trent*, under the then current language of subsection 7(1)(b) of FOIA,¹³ the court recognized that "[a]n

¹³Subsection 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2002)) provided:

(1) The following shall be exempt from inspection and copying:

* * *

(b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. * * * Information exempted under this subsection (b) shall include but is not limited to:

(i) files and personal information maintained with respect to * * * patients * * * or other individuals receiving * * * medical * * * care or services directly or indirectly from * * * public bodies[.]

Public Act 96-542, among other things, amended and renumbered subsection 7(1)(b) of FOIA. It is currently section 7(1)(c) of FOIA.

individual's medical records^[14] fall squarely within this exemption for documents, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Trent*, 349 Ill. App. 3d at 279. The County has not asserted that the Medical Examiner's files include medical records. The County also has made no attempt to review the documents and reports contained in the Medical Examiner's records in the Kelly and Scott cases and explain why the disclosure of each specific document and report would constitute a clearly unwarranted invasion of personal privacy.

We, however, have reviewed each of the documents and reports contained in the Medical Examiner's records related to the Kelly and Scott cases. Our review of these documents and reports indicates that they may not properly be characterized as "medical records." Further, we have sought to determine whether each document contains information that is "highly personal or objectionable to a reasonable person[.]" and whether the presence of such information would justify withholding a particular document in its entirety. We have determined that none of the documents in the specific files under review are subject to being withheld in their entireties. For example, the Medical Examiner's records in the Kelly and Scott cases include personal effects inventories, deceased remains transportation reports, the medical examiner's case checklists, toxicology reports, the reports of the postmortem examinations, and police reports. The documents should be disclosed subject to redaction of any limited information that falls within the provisions of current section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2008), as amended by Public Act 96-542, effective January 1, 2010)¹⁵ or within the provisions of any other pertinent Illinois statutes.¹⁶ Accordingly, the County's intent to deny disclosure of the Medical Examiner's documents and reports under section 7(1)(c) of FOIA is denied.

¹⁴The "medical records" referred to in *Trent* are not described. The appellate court notes that the trial court "commented that the authorization signed by [the mother] 'might apply, if at all, to a request for these records directly from the hospitals.'" *Trent*, 349 Ill. App. 3d at 278. The concurrence indicates that "medical records" were those records the coroner obtained from the attending physicians who rendered medical treatment to the decedent. *Trent*, 349 Ill. App. 3d at 282 (Slater, J., concurring).

¹⁵Section 7 of FOIA has been amended by a number of other public acts. The other public acts do not amend section 7(1)(b). See Public Acts 96-261, effective January 1, 2010; 96-328, effective August 11, 2009; 96-558, effective January 1, 2010; 96-863, effective March 1, 2010.

¹⁶By way of example, the first call sheets provide for the home addresses and telephone numbers of the decedent's next of kin and the social security number and date of birth of the decedent. The funeral homes' release and removal forms seek the signature of the decedent's next of kin. The medical examiner case reports provide for the date of birth, social security number, home address, and telephone number of the decedent. The narrative contained in the medical examiner case report may also contain "private information" (the Kelly report contains his wife's telephone number). To the extent that the foregoing information is included on the forms, the Medical Examiner may appropriately redact this information under section 7(1)(b).

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CONCLUSION

In summary, the County has failed to analyze each of the documents and reports in the Medical Examiner's files to determine whether they are highly personal or objectionable to a reasonable person, and our review indicates that they may not properly be characterized in that way. As a result, the County has not sustained its burden of establishing that these documents may be withheld from disclosure under section 7(1)(c), and the documents should be disclosed subject to the limited redaction of any "private information," as defined by section 2(c-5) of FOIA (added by Public Act 96-542, effective January 1, 2010, to be codified at 5 ILCS 140/2(c-5)) or other information expressly exempt from disclosure under any other Illinois law. The Medical Examiner's photographs of physical evidence relating to the death of Kelly also are not exempt from disclosure under section 7(1)(c). Because the County has provided no support for its determination that these photographs are highly personal, that their release would be objectionable to a reasonable person, or that the right to privacy outweighs any legitimate public interest in obtaining the information, section 7(1)(c) does not allow withholding of these photographs. The photographs of the bodies of Kelly and Scott, however, may be withheld from disclosure under section 7(1)(c) of FOIA. The graphic photographs of their bodies postmortem are highly personal and their disclosure would be objectionable to a reasonable person. When considered in light of the well-settled Federal precedent establishing the privacy interests of surviving family members in such photographs, the privacy interests of the Kelly and Scott families outweigh the generalized public interest in access to these photographs.

Should you have questions or concerns, please feel free to contact me.

Very truly yours,



Cara Smith
Public Access Counselor

cc: Mr. Chris Fusco, Chicago Sun-Times
Ms. Anne M. Sweeney, Chicago Tribune