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Lisa Madigan
ATTORNEY GENERAL

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PROCESSED
By: **Analyzed by**
David Porreca
Analyzed by
Stan Zegel
Reviewed by
Stan Zegel
Abstract APPROVED
for Publication



Ms. Karen Alice Kloppe
Illinois Department on Aging
421 East Capitol Avenue, No.100
Springfield, Illinois 62701

Ms. Marjory M. Fletcher
Division Assistant
Du Page Community Development Commission
Du Page Center
421 North County Farm Road
Wheaton, Illinois 60187

RE: FOIA Request for Review – 2011 PAC 16528

Dear  Ms. Kloppe, and Ms. Fletcher:

Pursuant to section 9.5(a) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(a) (West 2011 Supp.)), the Public Access Bureau has received a Request for Review from Mr. Donald Weiss.

BACKGROUND

On August 26, 2011,  submitted a Request for Review to this office claiming that DuPage County Senior Services (County) had refused to allow him to file a FOIA request for records. On September 14, 2011,  provided this office with a copy of a FOIA request that he had submitted to the County on September 8, 2011, seeking "the records pertaining to any and all FINANCIAL ASSISTANCE given to Shirley Ann St. Vincent."¹

¹FOIA request submitted by  to DuPage County Senior Services (September 8, 2011).

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(Emphasis in original.) ██████████ alleged that, as of September 14, 2011, he had not received a response to his request.

The Public Access Bureau forwarded a copy of the Request for Review to the County and requested an explanation of its actions concerning ██████████ August 26, 2011, attempt to file a FOIA request and any response it may have provided to his September 8, 2011, FOIA request.

The County responded on September 30, 2011, asserting that on August 26, 2011, ██████████ requested information during a telephone conversation with a case supervisor but did not reference FOIA or submit a written request for records. With respect to the September 8, 2011, FOIA request, the County provided this office with a copy of its denial letter dated September 13, 2011.² The County also informed us that ██████████ had submitted an identical FOIA request to the Illinois Department on Aging (IDA), and provided this office with a copy of IDA's denial letter.³ Both public bodies denied ██████████ FOIA requests, asserting that the requested records were not public records pursuant to section 2(c) of FOIA (5 ILCS 140/2(c) (West 2011 Supp.) or, alternatively, that the records were exempt from disclosure pursuant to sections 7(1)(a) and 7(1)(b) of FOIA (5 ILCS 140/7(1)(a), (b) (West 2011 Supp.)).

On October 21, 2011, ██████████ informed the Public Access Bureau that he wished to proceed with a Request for Review of both denials. On December 19, 2011, this office requested a detailed factual explanation of the denials. IDA responded for both public bodies on January 12, 2012, again asserting that the responsive records were not "public records" subject to FOIA; alternatively, IDA reiterated that the records are exempt from disclosure under sections 7(1)(a) and 7(1)(b) of FOIA. IDA provided to this office for confidential review copies of four documents that it determined to be responsive to ██████████ FOIA request. We forwarded IDA's response letter to ██████████ on January 13, 2012. On June 8, 2012, ██████████ confirmed that he wished to receive only records detailing payments to either Ms. St. Vincent or her attorney.⁴ Therefore, this review will focus on the issue of whether the two documents that are responsive to ██████████ request are exempt from disclosure.

²Letter from Mary A. Keating, Director, DuPage County Department of Community Services, to Sarah Kaplan, Assistant Attorney General, Public Access Bureau (September 30, 2011).

³According to IDA the County is simply a contractor for IDA in administering programs for the elderly. Therefore, "[e]ven though this information is stored with Du Page, all of the program records are the property of Aging, and it is Aging – not Du Page – that controls who may have access to these confidential records." Letter from Karen Kloppe, Freedom of Information Officer, Illinois Department on Aging, to Rebecca Riddick, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (January 12, 2012).

⁴Phone conversation between ██████████ and Rebecca Riddick, Assistant Attorney General, Public Access Bureau (June 8, 2012).

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DETERMINATION

"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 2010). Additionally, "[w]hen a request is made to inspect or copy a public record that contains information that is exempt from disclosure under [section 7], 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." 5 ILCS 140/7(1) (West 2011 Supp.).

Public Records

IDA and the County assert that the records in question are not "public records" that have to be disclosed under FOIA. Section 2(c) of FOIA defines public records as:

[A]ll 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 pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.

IDA states that "[i]ndividual client records regarding confidential program services are not public records. * * * Most people would not, and do not, expect that their records could be treated as public records. The contents of these records summarize sensitive information that has been elicited in personal interviews with clients and other interested parties in order to determine the need for program services."⁵

We have reviewed the records at issue, which document a form of government-funded assistance provided to Ms. St. Vincent under the National Family Caregiver Support Program set forth in section 371 of the Older Americans Act (codified at 42 U.S.C. § 3030s-1(a) (West 2006)). The rendering of financial assistance by the County and IDA is public business and any records documenting that assistance pertain to the transaction of public business. Although portions of records pertaining to the transaction of public business which contain

⁵Letter from Karen Alice Kloppe, Freedom of Information Officer, Illinois Department on Aging, to Rebecca Riddick, Assistant Attorney General, Public Access Bureau (January 12, 2012).

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sensitive information may be exempt under section 7 of FOIA (5 ILCS 140/7 (West 2011 Supp.)), such records are nonetheless public records. Because the records at issue pertain to the transaction of public business by IDA and the County, we conclude that these documents are public records under the plain language of section 2(c) of FOIA.

Further, FOIA provides that "[a]ll records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public" (5 ILCS 140/2.5 (West 2010)). The language of 2.5 of FOIA is derived from and implements article VIII, section 1(c) of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VIII, § 1(c)), which provides: "Reports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law." The amount of financial assistance provided to Ms. St. Vincent relates to the use of public funds and is, therefore, a public record pursuant to section 2.5 of FOIA.

Section 7(1)(a)

Section 7(1)(a) of FOIA permits public bodies to withhold "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." IDA based its assertion of section 7(1)(a) on the federal Older Americans Act (42 U.S.C. § 3001 *et seq.*) (West 2006)), the Elder Abuse and Neglect Act (320 ILCS 20/1 *et seq.* (West 2010)), and related implementing rules and regulations. IDA's response to this office listed various provisions but provided only conclusory assertions that fell short of demonstrating how any specific provision prohibited disclosure of the records at issue. Although the cited statutes and implementing rules and regulations do require the confidentiality of records identifying older individuals who receive services and reports, referrals and other records concerning abuse, neglect, and financial exploitation of older individuals, none of those provisions specifically prohibits disclosure of records of financial assistance to Ms. St. Vincent. IDA's response to this office stated that the records at issue are maintained in the case management files of an older individual related to [REDACTED] – not Ms. Vincent. According to IDA, that individual, rather than Ms. Vincent, is protected by the above provisions.

Older Americans Act

First, IDA asserts that numerous provisions in the Older Americans Act prohibit disclosure of the responsive records. However, most of these provisions relate to records that have been gathered in the course of receiving a report or making a referral of suspected elder abuse, neglect, or exploitation.⁶ The remaining cited provision, section 314(3) (codified at 42

⁶Section 307(a)(12)(c) (codified at 42 U.S.C. § 3027(a)(12)(c) (West 2006)) (a State plan that provides services for to prevent the abuse of older individuals must provide for the confidentiality of "all

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USC § 3030c-1 (West 2006)), provides that the Assistant Secretary of the Administration on Aging in the U.S. Department of Health and Human Services must require entities that provide "in-home" health care services to older individuals to maintain the confidentiality of records relating to those individuals. Additionally, IDA asserts that the implementing regulations relating to State agency policies (45 CFR § 1321.11) (West 2011)) and the confidentiality and disclosure of information (45 CFR § 1321.51) (West 2011)) prohibit it from releasing the responsive records. Section 1321.11 requires that IDA develop policies to operate programs under the Older Americans Act. Section 1321.51(a) states:

A State agency shall have procedures to protect the confidentiality of information about older persons collected in the conduct of its responsibilities. The procedures shall ensure that no information about an older person, or obtained from an older person by a service provider or the State or area agencies, is disclosed by the provider or agency *in a form that identifies the person* without the informed consent of the person or of his or her legal representative, unless the disclosure is required by court order, or for program monitoring by authorized Federal, State, or local monitoring agencies. (Emphasis added.)

IDA has not asserted that Ms. St. Vincent is an "older person" protected by the confidentiality provisions of the Older Americans Act. IDA can redact the information that would identify the older person who is protected by these provisions while disclosing the amount of financial assistance provided to Ms. St. Vincent. The above provisions do not require that the records be withheld in their entirety, only that the records not be released in a form which identifies the older person. Accordingly, we conclude that IDA has not demonstrated that the Older Americans Act or federal regulations implementing that statute prohibit disclosure of the amount of financial assistance provided to Ms. St. Vincent.

Illinois Elder Abuse and Neglect Act

information gathered in the course of receiving reports and making referrals"); section 705(a)(6)(C) (codified at 42 U.S.C. § 3058(d) (West 2006)) (in order to be eligible for funding for Vulnerable Elder Rights Protection Activities (VERPA), "[a]ll information gathered in the course of receiving reports and making referrals shall remain confidential" subject to certain exceptions); and sections 721(b)(8), 721 (b)(9)(D), 721(e)(2), and 721(e)(3) (codified at 42 U.S.C. § 3058i(b)(8), (b)(9)(d), (e)(2), (e)(3) (West 2006)) (State agencies that receive funding under VERPA must provide training to comply with State and federal confidentiality requirements, promote a system that preserves the confidentiality of older individuals, require information gathered during reports and referrals to remain confidential subject to certain exceptions, and make reasonable efforts to resolve conflicts with other public agencies over confidentiality requirements by entering into memoranda of understanding).

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IDA also asserted that sections 4(c)⁷ and 8⁸ of the Elder Abuse and Neglect Act (320 ILCS 20/4(c) and 8 (West 2010)) specifically prohibit disclosure of the responsive records. Both sections protect the confidentiality of persons who make reports of elder abuse, neglect, financial exploitation, and self-neglect and the reports concerning such claims. However, the records in question are not reports of elder abuse, neglect, financial exploitation, or self-neglect, and do not identify any individual who made such a report. Instead, the responsive records were generated after IDA closed a report that was deemed unfounded. Accordingly, IDA has not demonstrated that sections 4(c) and 8 of the Elder Abuse and Neglect Act specifically prohibit disclosure of the requested records.

Illinois Administrative Code

IDA also asserts that three Illinois Administrative Code provisions specifically prohibit disclosure of the records at issue: 2 Ill. Adm. Code 725.50 (2011); 89 Ill. Adm. Code 220.100 (2011); 89 Ill. Adm. Code 270.275 (2011)).

Section 725.50 of Title 2 of the Administrative Code states:

- a) Information concerning individuals receiving services through programs administered by the Department and/or by the area agency is protected under Federal confidentiality rules (45 CFR 1321.19 and 45 CFR 205.50) and may be released only under specified conditions.
- b) Where information is furnished by or to other agencies covered by State confidentiality laws, the requirements of State law shall be applied to such acquired information.

The federal confidentiality rules set forth in 45 C.F.R. § 205.50 apply to individuals who receive assistance pursuant to a State Plan for financial assistance under title IV-A of the federal Social Security Act (42 U.S.C. §§ 601 to 619) (West 2006)) while 45 CFR § 1321.19 (2011) governs the process for amending a "State plan" in accordance with the Older Americans Act. The records at issue concern financial assistance that Ms. St. Vincent received under the caregiver assistance program in section 371 of the Older Americans Act. IDA,

⁷"The identity of a person making a report of alleged or suspected abuse, neglect, financial exploitation, or self-neglect under this Act may be disclosed by the Department or other agency provided for in this Act only with such person's written consent or by court order." 320 ILCS 20/4(c) (West 2010).

⁸"All records concerning reports of elder abuse, neglect, financial exploitation, or self-neglect and all records generated as a result of such reports shall be confidential and shall not be disclosed except as specifically authorized by this Act or other applicable law." 320 ILCS 20/8 (West 2010).

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however, has not asserted that Ms. St. Vincent is an "older person" under the Older Americans Act or identified any confidentiality provision in that statute which specifically prohibits disclosure of records that document her receipt of financial assistance under the caregiver assistance program. Accordingly, IDA has not demonstrated that section 725.50 of Title 2 of the Administrative Code specifically prohibits disclosure of records documenting financial assistance provided to Ms. St. Vincent.

Next, section 220.100(a) of Title 89 of the Administrative Code states:

No information concerning an older person or obtained from an older person by the Department, area agency on aging, or a provider of services under this rule shall be disclosed by the Department, area agency on aging or provider of services in any form that will *identify the particular older person* without the informed consent of the older person or his or her legal representative unless the disclosure is required by court order, 45 CFR 74.24 (1984) or for other program monitoring by authorized Federal or State monitoring agencies. (Emphasis added.)

Again, this provision only limits disclosure of information that identifies older persons. Because section 220.100 of Title 89 of the Administrative Code does not specifically prohibit disclosure of financial assistance provided to Ms. St. Vincent, IDA has not sustained its burden of demonstrating that this information is exempt from disclosure under section 7(1)(a) based on that provision.

Finally, IDA claims that the responsive records are exempt from disclosure pursuant to section 270.275 of Title 89 of the Administrative Code. This provision requires that IDA maintain confidentiality concerning "reports of elder abuse, neglect, or financial exploitation and all records generated as a result of such reports". As stated above, the records in question are not reports of elder abuse, neglect, or financial exploitation, nor generated as part of an investigation into such a report. Therefore, IDA has not demonstrated that section 270.275 of Title 89 of the Illinois Administrative Code specifically prohibits disclosure of these records.

Section 7(1)(b)

IDA also appeared to assert that records documenting financial assistance provided to Ms. St. Vincent are exempt from disclosure in their entirety under section 7(1)(b) of FOIA, which allows public bodies to withhold private information. "Private information" is defined in section 2(c-5) of FOIA (5 ILCS 140.2(c-5) (West 2011 Supp.)) as:

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[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.

Records documenting the amount of financial assistance to an individual are not unique identifiers within the scope of that definition. We therefore conclude that IDA has not sustained its burden of demonstrating that this information is exempt from disclosure under section 7(1)(b) of FOIA.

In accordance with the conclusions expressed in this letter, IDA should release the requested records to [REDACTED] but may redact the name of any older person who receives services under the Older Americans Act. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This correspondence shall serve to close this matter. If you have any questions, you may contact me at (312) 814-6756.

Very truly yours,

[REDACTED]
STEVE SILVERMAN
Assistant Attorney General
Public Access Bureau

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