



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

June 27, 2022

Via electronic mail
Mr. Mark Charvat

Via electronic mail
Mr. Matthew D. Rose
Donahue & Rose, P.C.
9501 West Devon Avenue, Suite 702
Rosemont, Illinois 60018
mrose@drlawpc.com

RE: FOIA Request for Review – 2022 PAC 71393

Dear Mr. Charvat and Mr. Rose:

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 2020)). For the reasons explained below, the Public Access Bureau concludes that City of DeKalb (City) improperly denied Mr. Mark Charvat's April 19, 2022, FOIA request.

On that date, Mr. Charvat submitted a FOIA request to the City seeking the locations of license plate recognition (LPR) cameras in the City. On April 20, 2022, the City denied the request in its entirety pursuant to section 7(1)(v) of FOIA.¹ On April 21, 2022, Mr. Charvat submitted a Request for Review contesting the denial. He argued that the City of DeKalb should follow the example of the City of Decatur, which initially denied a similar request pursuant to section 7(1)(v) but then determined the exemption was inapplicable.

On April 29, 2022, the Public Access Bureau sent a copy of the Request for Review to the City along with a letter requesting an unredacted copy of the withheld records for this office's confidential review, and a detailed written explanation of the legal and factual bases

¹ 5 ILCS 140/7(1)(v) (West 2020), as amended by Public Acts 102-038, effective June 25, 2021; 102-558, effective August 20, 2021; 102-694, effective January 1, 2022.

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for denying the request under section 7(1)(v). On May 4, 2022, the City provided a written answer and an affidavit from the City's Chief of Police, David Byrd. The following day, the City provided an unredacted copy of a responsive record. On May 16, 2022, Mr. Charvat submitted a reply.

DETERMINATION

Under FOIA, "[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 (West 2020).

Section 7(1)(v) of FOIA exempts from disclosure:

Vulnerability assessments, security measures, and response policies or plans that are **designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community**, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public. Information exempt under this item may include such things as details pertaining to the mobilization or deployment of personnel or equipment, to the operation of communication systems or protocols, or to tactical operations. (Emphasis added.)

In its answer to the Request for Review, the City analogized this matter to an Illinois Appellate Court decision concerning the applicability of section 7(1)(v) to rail platform cameras maintained by the Chicago Transit Authority (CTA): *Chicago Sun-Times v. Chicago Transit Authority*, 2021 IL App (1st) 192028, __ N.E.3d __ (2021). In particular, the City argued that it met the burden of proof articulated in *Chicago Sun-Times* of demonstrating that it "could reasonably be expected that the release of the record could jeopardize the effectiveness of the agency's security measures."² The City argued:

²E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Joshua Jones (May 4, 2022) (quoting *Chicago Sun-Times*, 2021 IL App (1st) 192028, ¶44, __ N.E.3d __).

Here, the * * * affidavit of City Police Chief David Byrd clearly and convincingly shows that: (1) the LPR is a security measure that is designed to identify, prevent, or respond to potential criminal attacks because they (a) identify known or potential criminal suspects and (b) provide live feed to the City's Police Department which can be used to give real-time intelligence to law enforcement officers and direct rescue personnel [citation]; and (2) disclosure of the LPR's location could reasonably be expected to jeopardize the effectiveness of the security measures by allowing individuals to evade these security devices when targeting City residents, planning attacks, or evading capture by law enforcement. [Citation.] Since there are a limited number of LPR cameras, they must be installed at targeted, high-crime locations to most effectively identify, prevent, or respond to potential criminal attacks. [Citation.] However, public disclosure of the LPR's location could further jeopardize their effectiveness by making them vulnerable to vandalism and requiring the City to move them to locations which will not be as effective in identifying criminal activity. [Citation.]^[3]

Mr. Charvat replied by disputing various aspects of Chief Byrd's affidavit. Addressing Chief Byrd's assertion that the public would not be able to identify the locations of the LPR cameras on sight, Mr. Charvat attached copies of photographs that, he said, depict some of those cameras. Mr. Charvat stated that he did not find it difficult to find the cameras despite having no specialized training. Disputing Chief Byrd's statement that all the LPR locations were currently undisclosed, Mr. Charvat attached a copy of an invoice for the purchase of the LPR cameras and stated that it discloses the location of six of the twelve cameras. Additionally, Mr. Charvat argued that the claim that all the LPR cameras have been placed in high-crime areas is false, as most have not been placed in high-crime areas according to the website spotcrime.com. Mr. Charvat quoted past meeting minutes in which Chief Byrd discussed the crime-solving purpose of the City's purchase of the LPR cameras, such as Chief Byrd's statement that the LPR cameras "will only be used for official law enforcement investigations, including outstanding warrants, missing persons, and people and vehicles wanted in connection to a specific investigation."⁴ In contrast to run-of-the-mill criminal investigations, Mr. Charvat argued, section 7(1)(v) "is meant to protect critical infrastructure and high-value targets from terrorist

³E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Joshua Jones (May 4, 2022)

⁴Letter from Mark Charvat to Deputy Bureau Chief Joshua Jones, PAC (May 16, 2022), at 5 (quoting DeKalb City Council, Meeting, February 1, 2022, Minutes 2).

attacks."⁵ Mr. Charvat cited the legislative history of the bill that, as Public Act 93-422, effective August 5, 2003, added to FOIA the language now found in section 7(1)(v),⁶ and made a corresponding change to section 2(c)(8) of the Open Meetings Act.⁷ In particular, he quoted Senator Donne Trotter's remarks as Senate sponsor of the bill during legislative debate:

[The bill] allows closed meetings to be held by public bodies, such as our utilities, regarding security procedures and the use of personnel and equipment to respond to an actual threat and potential danger to be closed. It also exempts specific items from inspection and copying such as the vulnerability and assets -- assessments, technical construction documents, for security reasons. Remarks of Sen. Trotter, May 15, 2003, Senate Debate on House Bill No. 954, at 108.

Distinguishing the facts of this matter from *Chicago-Sun Times*, Mr. Charvat argued that "[t]he city of DeKalb failed to provide any reasonable explanation for what infrastructure was being protected. Furthermore, there is no critical infrastructure or high-value targets in the areas in which the LPR cameras are located."⁸

In *Chicago Sun-Times*, the CTA argued that it properly withheld surveillance camera video recordings from its rail platforms pursuant to section 7(1)(v) because the surveillance cameras were installed after the September 11, 2001, terrorist attacks, with funds from a U.S. Department of Homeland Security program designed to protect the public and critical infrastructure. *Chicago Sun-Times*, 2021 IL App (1st) 192028, ¶48, __ N.E.3d __. In concluding that "[t]he CTA sufficiently demonstrated that disclosure of its surveillance camera footage from the rail platform could reasonably be expected to jeopardize the effectiveness of its security measures[.]" the court cited an affidavit in which a homeland security expert averred that the requested platform footage "revealed the quality, resolution, field of view, and blind spots of the CTA's surveillance cameras, and that information could enable individuals to evade these security devices when targeting passengers, planning attacks, or evading capture by law enforcement." *Chicago Sun-Times*, 2021 IL App (1st) 192028, ¶49, __ N.E.3d __.

⁵Letter from Mark Charvat to Deputy Bureau Chief Joshua Jones, PAC (May 16, 2022), at 6.

⁶At the time, the statutory provision for the exception was 5 ILCS 140/7(1)(II) (West 2004).

⁷5 ILCS 120/2(c)(8) (West 2004) (inserting the term "the public" into the following language of the exception: "Security procedures and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff, the public, or public property.").

⁸Letter from Mark Charvat to Deputy Bureau Chief Joshua Jones, PAC (May 16, 2022), at 8.

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Unlike the evidence the CTA set forth in *Chicago Sun-Times* concerning the enhanced security environment of the CTA's rail platforms in relation to counterterrorism efforts, the City has not demonstrated that the LPR cameras have the same sort of homeland security purpose or role. In addition to the legislative history from the Senate that Mr. Charvat cited, the legislative debate from the House likewise reflects that the purpose of the exemption is homeland security. Representative James H. Meyer, House sponsor of the bill, stated that it "amends the Open Meetings Act and FOIA to allow public bodies to hold closed meetings when considering homeland security issues, exempts documents prepared for emergency and security procedures from being disclosed from homeland security where that would be compromised." Remarks of Rep. Meyer, May 31, 2003, House Debate on House Bill No. 954, at 107. Although the City supplied an affidavit from its Police Chief averring that the LPR cameras track the language of the exemption as security measures designed to identify, prevent, or respond to potential attacks upon the City's population or systems, facilities, or installations, the facts the City set forth do not establish the element of the LPR camera locations being designed to address potential *attacks* upon the City's population or systems, facilities, or installations. Rather, the City demonstrated that the LPR camera placements are designed to identify vehicles that are involved in commonplace, smaller-scale criminal activity, such as theft. Thus, while the LPR cameras clearly have a security purpose related to routine law enforcement activities, the nature of that purpose falls outside the plain language of the section 7(1)(v) exemption.

Accordingly, this office concludes that the LPR camera locations are not exempt from disclosure pursuant to section 7(1)(v) of FOIA. This office asks the City to disclose that information.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have questions, you may contact me at joshua.jones@ilag.gov.

Very truly yours,



JOSHUA JONES
Deputy Bureau Chief
Public Access Bureau

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