

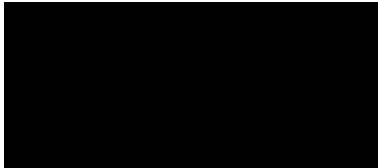


OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

KWAME RAOUL  
ATTORNEY GENERAL

June 20, 2023

*Via electronic mail*



*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 74063

Dear Mr. Van Buer 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. Derek Van Buer's September 29, 2022, FOIA request.

On that date, Mr. Van Buer submitted a FOIA request to the City seeking copies of license plate recognition (LPR) camera materials, particularly "photos or videos of the first five vehicles captured from the LPR camera pointing South on Sycamore Road near the Kishwaukee County Club from 10:00 a.m. on September 28, 2022."<sup>1</sup> On October 13, 2022, the City denied the request in its entirety pursuant to sections 7(1)(a), 7(1)(d)(v), and 7(1)(v) of FOIA.<sup>2</sup> On November 2, 2022, Mr. Van Buer submitted a Request for Review contesting that

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<sup>1</sup>E-mail from Derek Van Buer to Scott [Zak] (September 29, 2022).

<sup>2</sup>5 ILCS 140/7(1)(a), (1)(d)(v), (1)(v) (West 2021 Supp.), as amended by Public Acts 102-791, effective May 13, 2022; 102-1055, effective June 10, 2022.

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denial. He argued that the City's previous disclosure of the technical specifications and operational procedures for the LPR cameras reflects that disclosure of the responsive records would not have the negative consequences contemplated by the asserted exemptions.

On November 21, 2022, the Public Access Bureau sent a copy of the Request for Review to the City along with a letter requesting unredacted copies of the withheld records for this office's confidential review, and a detailed written explanation of the legal and factual bases for denying the request. On December 2, 2022, counsel for the City provided a written answer and a copy of the City's policy on the use of ALPR cameras, but claimed that he could not provide this office with copies of the responsive records. On December 14, 2022, Mr. Van Buer 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).

As background and as explanation for refusing to provide this office with copies of the records at issue for this office's confidential review, the City's attorney stated:

[T]he LPR cameras constantly capture photographs of vehicles that are sent to a third-party vendor's system. If there is an active police investigation or any other legitimate law enforcement purpose, then the City's Police Department runs a "query" to obtain the relevant photograph(s). The person running that "query" must be permitted to authorize the Law Enforcement Agencies Data System ("LEADS") because the LPR system runs all of the LPR photographs through LEADS. If there is no active investigation or legitimate law enforcement purpose for the "query", the City's policy prohibits running the "query" to obtain a photograph.<sup>[3]</sup>

### **Public Records**

Section 2(c) of FOIA (5 ILCS 140/2(c) (West 2020)) defines "public records" as "all records \* \* \* pertaining to the transaction of public business, regardless of physical form or

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<sup>3</sup>E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Jones (December 2, 2022).

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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." A record pertains to the transaction of public business when it "pertain[s] to 'business or community interests as opposed to private affairs.' Indeed, FOIA is not concerned with an individual's private affairs." *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶31, 992 N.E.2d 629, 637 (2013). Additionally, section 7(2) of FOIA<sup>4</sup> provides:

A public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act.

The City argued that the responsive photographs are not public records because:

LPR photographs that are not obtained pursuant to a police "query" do not pertain to the transaction of public business, nor are they being used by, received by, or in the possession of the City's Police Department (unless the City's Police Department violated its policy to respond to this FOIA request). Indeed, the City's Police Department would have to run a "query" solely for the purpose of this FOIA request in order to obtain or possess the requested photographs because none of the requested photographs were the subject of a "query". Accordingly, the FOIA request was properly denied because the requested records were not "public records" subject to the FOIA.<sup>[5]</sup>

Mr. Van Buer disputed those assertions in his reply, arguing: "The photographs clearly pertain to the transaction of public business. The cameras are owned by the city, takes photographs of licenses plates under the direction of the city, processes the uploaded photographs against other databases such as LEADS under the direction of the city, etc."<sup>6</sup>

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<sup>4</sup>5 ILCS 140/7(2) (West 2021 Supp.), as amended by Public Acts 102-791, effective May 13, 2022; 102-1055, effective June 10, 2022.

<sup>5</sup>E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Jones (December 2, 2022).

<sup>6</sup>Letter from Derek Van Buer to Deputy Bureau Chief Joshua Jones, PAC (December 14, 2022), at 4.

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The responsive photographs are clearly public records within the meaning of FOIA. The City acknowledged that the LPR system constantly photographs license plates. Thus, LPR photographs exist independently of whether they have been queried. The LPR photographs also are possessed by the City, regardless of whether the City physically possesses them or possesses them via a third-party vendor pursuant to section 7(2) of FOIA. If a public body could avoid the requirements of FOIA by implementing a policy that prohibited it from compiling records it maintains in order to respond to a FOIA request, the purpose of the Act would be defeated. *See* 5 ILCS 140/1 (West 2020) ("It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act."). Further, the City plainly uses the LPR cameras in the transaction of public business, such as monitoring the roads, rather than to conduct private affairs. Therefore, the City's assertion that the photos are not within the scope of FOIA is unavailing.

### **Section 7(1)(a) of FOIA**

Section 7(1)(a) of FOIA exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The City stated that it withheld information obtained through the Law Enforcement Agencies Data System (LEADS). Section 1240.80(d) of title 20 of the Administrative Code (20 Ill. Adm. Code §1240.80(d) (2020), last amended at 23 Ill. Reg. 7521, effective June 18, 1999) provides that "LEADS data shall not be disseminated to any individual or organization that is not legally authorized to have access to the information."<sup>7</sup> *See Better Government Ass'n v. Zaruba*, 2014 IL App (2d) 140071, ¶27, N.E.3d 516, 525 (2014) (sheriff's office did not improperly deny FOIA request seeking confidential data from LEADS because administrative rules "make clear that the public is not entitled to view or possess data that is transmitted through, received through, or stored in LEADS.").

In its answer to this office, the City's attorney asserted that the City was required to deny the request pursuant to section 7(1)(a) because:

[I]f the LPR photograph contains a license plate that is in the LEADS database, then the City's Police Department will receive an "alert" or a "hit" that is associated with that photograph. If there is such a "hit", the photograph specifically identifies the "hit" and the reason for the "hit" (e.g., stolen vehicle, missing person,

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<sup>7</sup>That provision implements section 7 of the Illinois Criminal Identification Act (20 ILCS 2630/7 (West 2021 Supp.)).

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etcetera). If there is no such "hit", then the photograph will necessarily reveal that LEADS information too.<sup>[8]</sup>

Mr. Van Buer disputed that argument, contending: "I did not request the data record provided by the request to LEADS; rather, I requested the photo generated by the LPR camera, which is a public record. [The City's attorney] is trying to confuse the matter by discussing a different public record – the public record from LEADS."<sup>9</sup>

Mr. Van Buer requested copies of LPR photographs rather than data in the LEADS database associated with the LPR photographs. The plain language of the request has nothing to do with "alerts" or "hits"; it simply asks for the first five photographs taken at a certain date and time. The City did not demonstrate that the responsive photographs qualify as confidential LEADS data and therefore did not prove by clear and convincing evidence that the photographs are exempt from disclosure under section 7(1)(a).

### **Section 7(1)(d)(v) of FOIA**

Section 7(1)(d)(v) 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:

\* \* \*

(v) disclose unique or specialized investigative techniques other than those generally used and known or disclose internal documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct, and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request[.]

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<sup>8</sup>E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Jones (December 2, 2022).

<sup>9</sup>Letter from Derek Van Buer to Deputy Bureau Chief Joshua Jones, PAC (December 14, 2022), at 2.

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In its response in this matter, the City incorporated its response in a different Request for Review concerning LPR cameras, 2022 PAC 73050. In that matter, the City's attorney asserted that LPR camera locations were exempt from disclosure because: "The LPR cameras are unique or specialized investigative techniques related to the detection, observation or investigation of crime, the disclosure of which would harm the ability of the City's Police Department to identify, prevent, or respond to crime in the City."<sup>10</sup>

The City did not demonstrate that the disclosure of the five requested LPR photographs would disclose unique or specialized investigative techniques other than those generally used and known. LPR camera systems are not unique, and they are generally used and known. Use of LPR cameras was widespread and commonplace at the time of the request. Accordingly, the City did not prove by clear and convincing evidence that the photographs are exempt from disclosure under section 7(1)(d)(v).

#### **Section 7(1)(v) of FOIA**

At the time of the City's response to Mr. Van Buer's FOIA request,<sup>11</sup> section 7(1)(v) of FOIA exempted 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

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<sup>10</sup>E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Jones (August 23, 2022).

<sup>11</sup>Public Act 102-753, effective January 1, 2023, amended section 7(1)(v) to exempt:

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, but only to the extent that disclosure could reasonably be expected to expose the vulnerability or jeopardize the effectiveness of the measures, policies, or plans, 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, to cybersecurity vulnerabilities, or to tactical operations.

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.

In its answer to the Request for Review, the City argued that "the LPR photographs reveal the locations of the LPR cameras, the quality of the images, the areas that can be captured by the cameras, and the blind spot areas that are unmonitored and cannot be captured by the cameras." Therefore, "disclosure would jeopardize the effectiveness of the City's security measures."<sup>12</sup> 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, 198 N.E.3d 1084 (2021). In particular, the City argued that it met the burden of proof articulated in *Chicago Sun-Times* by demonstrating that it "could reasonably be expected that the release of the record could jeopardize the effectiveness of the agency's security measures."<sup>13</sup> Incorporating its response in 2022 PAC 73050, the City additionally argued that section 7(1)(v) concerns any kind of attack—not just those related to homeland security. Even if the exemption did just concern homeland security, the City further argued, the records would be exempt because the LPR cameras have an anti-terrorism purpose.

Mr. Van Buer replied by arguing that the product specifications of the LPR cameras are already known to the public.

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, 198 N.E.3d 1084, 1095-96. 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

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<sup>12</sup>E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Jones (August 23, 2022).

<sup>13</sup>E-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, 198 N.E.3d at 1095).

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evading capture by law enforcement." *Chicago Sun-Times*, 2021 IL App (1st) 192028, ¶49, 198 N.E.3d at 1096.

Unlike the evidence the CTA set forth in *Chicago Sun-Times* concerning how the views from the platform cameras would expose certain potential vulnerabilities in CTA's security systems, the City has not demonstrated that disclosure of the photographs at issue would expose potential vulnerabilities in its LPR camera system or any other City security measures. The City did not describe the images it declined to provide for this office's confidential review, despite the unambiguous requirement to provide this office with copies of those records,<sup>14</sup> nor did it set forth facts illustrating that the photographs depict anything other than license plates themselves. In *Glynn v. Department of Corrections*, 2023 IL App (1st) 211657, \_\_ N.E.3d \_\_ (2023), the Illinois Appellate Court recently ruled that an affidavit by the Illinois Department of Corrections about security camera footage in a prison that sought to align with the CTA's assertions in the *Chicago Sun-Times* case was insufficient to demonstrate that disclosure would potentially jeopardize prison security<sup>15</sup> because it was "vague regarding the layout of the rooms in question, the scope of the area covered by each of the cameras, the location of the blind spots, the images' clarity, and whether any of the cameras are hidden." *Glynn*, 2023 IL App (1st) 211657, ¶47, \_\_ N.E.3d \_\_. Similarly, the City's generalized claims are insufficient to show that disclosing the five requested photographs from one LPR camera could reasonably be expected to jeopardize the effectiveness of the City's LPR camera system or anyone's safety.

Accordingly, this office concludes that the City has not sustained its burden of proving by clear and convincing evidence that the responsive LPR photographs are exempt from disclosure. This office asks the City to disclose copies of those records to Mr. Van Buer.

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<sup>14</sup>5 ILCS 140/9.5(c) (West 2020) ("Within 7 business days after receipt of the request for review, the public body shall provide copies of records requested and shall otherwise fully cooperate with the Public Access Counselor.").

<sup>15</sup>The exemption at issue there was section 7(1)(e) of FOIA (5 ILCS 140/7(1)(e) (West 2018)).



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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](mailto:joshua.jones@ilag.gov).

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Jones", written in a cursive style.

JOSHUA JONES  
Deputy Bureau Chief  
Public Access Bureau

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