

# FOIA for Law Enforcement Agencies – Video Recordings

Public Access Bureau  
Illinois Attorney General's Office  
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## Public Access Counselor

Added to the Attorney General Act in 2010, the Office of the Public Access Counselor within the Attorney General's office is authorized to:

- Provide advice and education with respect to FOIA and OMA
  - Resolve complaints concerning compliance with FOIA and OMA without litigation (Requests for Review)
- 15 ILCS 205(7)**



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## Public Access Counselor

- In 2023, the Public Access Counselor (PAC) received more than 3,800 complaints concerning FOIA and OMA
- Many are resolved informally or with just one letter to a public body
- 194 Binding Opinions Issued
- Thousands of determination letters issued
- Required online training plus presentations
- Hotline (877-299-3642)

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## Section 7.5(cc) of FOIA – Body Camera Recordings

Requests for recordings of officer-worn body camera footage are governed by the Law Enforcement Officer-Worn Body Camera Act. 50 ILCS 706/10-20(b).

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## Section 7.5(cc) of FOIA – 3 Separate Categories

- A body-worn camera recording is **exempt** unless it falls into either section 10-20(b)(1), 10-20(b)(2), or 10-20(b)(3) of the Law Enforcement Officer-Worn Body Camera Act.
- However, a recording that falls into **any one of those categories** is subject to disclosure, although, an agency may redact or withhold a recording if it is exempt from disclosure under another section of FOIA (section 7(1)(c) personal privacy, section 7(1)(d)(iv), JCA, etc.)
  - In **Binding Opinion 19-001**, the Attorney General concluded that 10-20(b)(1), (b)(2), and (b)(3) are to be read as independent bases for disclosure (despite the statute's use of the word "and").

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## Section 7.5(cc) of FOIA – 3 Separate Categories

### **Section 10-20(b)(1) and 10-20(b)(2)** relate to "flagged recordings"

- Generally, there is more disclosure of flagged recordings, especially where subject does not have an expectation of privacy (for example, if arrested).
- However, statute does not flatly prohibit disclosure of unflagged recordings, because of **section 10-20(b)(3)**.

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## Section 7.5(cc) of FOIA – 3 Separate Categories

(b)(1) – Flagged recordings where subject has reasonable expectation of privacy and is victim or witness and consents to disclosure

(b)(2) – Flagged recordings where subject has no reasonable expectation of privacy (so, consent is not needed)

(b)(3) – Flagged or unflagged recordings where subject/subject’s attorney/officer/officer’s legal representative is the requester

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## Section 7.5(cc) of FOIA – Definition of Flagged

Footage is “flagged” for purposes of disclosure if:

- **Complaint** is filed,
- Firearm discharged during encounter,
- Use of force occurred during encounter,
- Encounter led to **arrest or detention**, or
- **Resulting death or bodily harm** occurred to any person in the recording.

**Sections 10-20(b)(1) and 10-20(b)(2)**

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## Section 7.5(cc) of FOIA – Definition of Flagged

- **Complaint** may be formal or informal.
- **Arrest or detention:** Not defined here, but in the “retention” part of the statute (section 10-20(a)(7)(B)(iv)), recordings involving “**traffic stops**” which resulted in only a minor traffic offense or business offense” are not flagged for long-term retention.
  - “Minor traffic offense” is petty offense, business offense, or Class C misdemeanor under the Vehicle Code or a similar muni ordinance.
  - “Business offense” means a petty offense for which the fine is in excess of \$1,000. 50 ILCS 706/10-10
- **Resulting death or bodily harm** means an injury or death that resulted from an interaction with law enforcement.

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## Section 7.5(cc) of FOIA – “Flagged”/(b)(1)

(b)(1) – Flagged recordings where subject has reasonable expectation of privacy, and is victim or witness, and consents to disclosure

(b)(2) – Flagged recordings where subject has no reasonable expectation of privacy (so, consent is not needed)

(b)(3) – Flagged or unflagged recordings where subject/subject’s attorney/officer/officer’s legal representative is the requester

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## Section 7.5(cc) of FOIA – “Flagged”/(b)(1)

**Section 10-20(b)(1):** “If subject of the encounter has a reasonable expectation of privacy, at the time of the recording, any recording which is flagged . . . shall be disclosed if” (A) subject is victim or witness, and (B) subject gives written consent.

- ➔ “Subject does not have a reasonable expectation of privacy **if the subject was arrested** as a result of the encounter.”
- ➔ “‘Witness’ does not include a person who is a victim or who was arrested as a result of the encounter.”
- ➔ Person has a reasonable expectation of privacy during encounter that occurs in their home.

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## Section 7.5(cc) of FOIA – “Flagged”/(b)(2)

(b)(1) – Flagged recordings where subject has reasonable expectation of privacy and is victim or witness and consents to disclosure

(b)(2) – Flagged recordings where subject has no reasonable expectation of privacy (so, consent is not needed)

(b)(3) – Flagged or unflagged recordings where subject/subject’s attorney/officer/officer’s legal representative is the requester

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## Section 7.5(cc) of FOIA – “Flagged”/(b)(2)

**Section 10-20(b)(2):** “Except as provided in section 10-20(b)(1)”  
*[meaning, the subject did **not** have reasonable expectation of privacy at the time of the recording], “any recording which is flagged . . . shall be disclosed in accordance with FOIA.”*

- ➔ If the subject was arrested, the arrestee’s consent to disclosure if **not required** before the recording can be disclosed to a third party.
- ➔ If the subject did not have a reasonable expectation of privacy at the time of the recording, subject’s consent to disclosure if not required.

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## Section 7.5(cc) of FOIA – “Flagged”/(b)(2)

For **section 10-20(b)(2)**:

- ➔ No adult arrestee has a reasonable expectation of privacy, even if arrested in home
- ➔ It is not necessary to obtain the consent of the subject, and
- ➔ The recording can be disclosed even to someone who is not the subject.

Most of what falls into **section 10-20(b)(2)** will be:

- ➔ encounters involving arrests
- ➔ flagged recordings (use of force, complaint) that occurred in public

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## Section 7.5(cc) of FOIA – Mandatory Redactions

If a recording is going to be released, the agency **must** redact “to remove identification of any person that appears on the recording and is not:

- the officer,
- the subject of the encounter,
- or **directly involved** in the encounter.”

50 ILCS 706/10-20(b)

➔ Do we know who would not be “the subject” but would be “directly involved?” There is no additional guidance in the statute about this question.

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## Section 7.5(cc) of FOIA – Subject/(b)(3)

(b)(1) – Flagged recordings where subject has reasonable expectation of privacy and is victim or witness and consents to disclosure

(b)(2) – Flagged recordings where subject has no reasonable expectation of privacy (so, consent is not needed)

(b)(3) – Flagged or unflagged recordings where subject/subject’s attorney/officer/officer’s legal representative is the requester

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## Section 7.5(cc) of FOIA – Request from subject/(b)(3)

**Section 10-20(b)(3) of the Body Camera Act:** Upon request, the law enforcement agency shall disclose, in accordance with FOIA, the recording to the **subject of an encounter** or the subject’s attorney, or officer or officer’s legal representative.

- Because this section contains no reference to the footage being “flagged,” subject of an encounter/attorney can obtain footage regardless of whether it is flagged or not. Ill. Att’y Gen. Pub. Acc. Op. 19-001, issued Jan. 9, 2019.
- Therefore, the language of the Body Camera Act **does not** flatly prohibit the disclosure of all body camera recordings that have not been flagged.

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## Section 7.5(cc) of FOIA – Request from subject/(b)(3)

- “Subject of encounter” is “the person who appears in the recording and interacts with a law enforcement officer in the course of a law enforcement activity”
- Person who may be subject of the incident but is not captured on the recording is not “subject of encounter.” Ill. Att’y Gen. PAC Req. Rev. Ltr. 48793, issued August 31, 2017.
- Person already transported by ambulance from scene not “subject.” Ill. Att’y Gen. PAC Req. Rev. Ltr. 65010, issued October 6, 2020.

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## Section 7.5(cc) of FOIA – Common Request # 1

An uninvolved third party has requested recordings that relate to an arrest of an adult.

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### Example 1: Arrest, request is not subject

(b)(1) – Flagged recordings where subject has reasonable expectation of privacy and is victim or witness and consent is required

(b)(2) – Flagged recordings where subject has no reasonable expectation of privacy (so, consent is not needed)

(b)(3) – Flagged recordings where subject/subject's attorney/officer/officer's legal representative is present

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## Section 7.5(cc) of FOIA – Common Request # 1

- Requester is uninvolved, so (b)(3) does not apply.
  - A recording documenting an arrest is “flagged” so (b)(1) or (b)(2) may apply.
  - “Subject does not have a reasonable expectation of privacy if the subject was arrested as a result of the encounter.”
    - Therefore, section (b)(1) does not apply to the video.
    - Consent of arrestee is irrelevant.
- ➔ Recording likely falls into section (b)(2) and **should be disclosed** unless another FOIA exemption applies. Redactions may be appropriate.

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## Section 7.5(cc) of FOIA – Common Request # 2

An individual requests a recording of a traffic crash, and says he was one of the involved drivers.

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## Example 2: No arrest, requester is subject

(b)(1) – Flagged recordings where the subject has reasonable expectations of privacy and is victim or witness and consent to disclosure

(b)(2) – Flagged recordings where the subject has no reasonable expectations of privacy (so, consent is not needed)

(b)(3) – Flagged or unflagged recordings where subject/s subject's attorney/officer/officer's legal representative is the requester

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## Section 7.5(cc) of FOIA – Common Request # 2

- Generally, BWC of a response to a traffic crash is not flagged unless someone was arrested or officer was one of the drivers. Therefore, most of these type of recordings will not fall into (b)(1) or (b)(2).
- Section (b)(3) authorizes disclosure to “the ***subject of an encounter*** or the ***subject’s attorney***.”
  - Driver is the “subject of an encounter” for the period of time they are on camera interacting with officer.
  - Driver is not the “subject of an encounter” during period of time another driver is interacting with officer.
- Recording likely falls into section (b)(3) and ***should be disclosed to subject or his attorney***. Redaction of other subject is likely.

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## Section 7.5(cc) of FOIA – Common Request #3

An insurance company requests a recording of a traffic crash and does not indicate how it is involved with the drivers.

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### Example 3: No arrest, requester uninjured

(b)(1) – Flagged recordings where subject has reasonable expectation of privacy and is victim or witness and consent is not needed

(b)(2) – Flagged recordings where subject has no reasonable expectation of privacy (so, consent is not needed)

(b)(3) – Flagged or unflagged recordings where subject/subject's attorney/officer/officer's legal representative is the requester

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## Section 7.5(cc) of FOIA – Common Request #3

- Section (b)(3) permits disclosure to “the **subject of an encounter** or the **subject’s attorney**, or officer or officer’s legal representative.”
- Where requester is not one of the drivers or their attorneys, disclosure of an unflagged BWC recording is not permitted.
- If insurance company or investigator claims they represent one of the drivers, you may wish to inform them that the driver should submit the FOIA.
- Generally, BWC of a response to a traffic crash is not flagged unless someone was arrested or officer was one of the drivers. Therefore, most of these type of recordings will not fall into (b)(1) or (b)(2).

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## Section 7.5(cc) of FOIA – Body Camera Recordings

If a recording is going to be released, the agency **must** redact “to remove identification of any person that appears on the recording and is not:

- the officer,
- the subject of the encounter,
- or **directly involved** in the encounter.”

50 ILCS 706/10-20(b)

→ Do we know who would not be “the subject” but would be “directly involved?” There is no additional guidance in the statute about this question.

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## Section 7.5(cc) of FOIA – Body Camera Recordings

“Nothing in this subsection (b) shall require the disclosure of any recording or portion of any recording which would be exempt from disclosure under the Freedom of Information Act.” 50 ILCS 706/10-20(b)

FOIA exemptions that may apply to reports can also apply to BWC recordings just as they may apply to reports:

- JCA/7.5(cc) – recordings of juvenile arrestees
- 7(1)(d)(iv) – information that would identify witnesses
- 7(1)(c) – clearly unwarranted infringement on personal privacy
- 7(1)(d)(vii) – obstruct ongoing investigation

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## Is the Request for “Any and All” BWC Unduly Burdensome?

Section 3(g) permits a public body to deny a request if the burden of compliance on public body outweighs public interest in the information.

- Are you dealing with duplicative footage because there were multiple officers on scene?
- Before invoking this section, public bodies must extend to requester an opportunity to ***confer with it to reduce the request to manageable proportions.***

**5 ILCS 140/3(g)**

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## Dash/In-Squad Camera Recordings

Dashcam or surveillance video recordings are **not** regulated by Law Enforcement Officer-Worn Body Camera Act

- Recordings are presumed subject to FOIA unless FOIA exemptions permit withholding.
- Ex: Section 7(1)(d)(vii) if disclosure would interfere with ongoing investigation

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## Interrogation Video of Accused

- Section 103-2.1(g) of the Code of Criminal Procedure (an Illinois law) prohibits disclosure of “any electronic recording of any statement made by an accused during a custodial interrogation that is complied by any law enforcement agency”
- Exempt from disclosure under section 7(1)(a) of FOIA
- *Hosey v. City of Joliet*, 2019 IL App (3d) 180118

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- Provide electronic training to all FOIA Officers, all elected and appointed officials, and persons designated by public bodies to receive OMA training.
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## PAC Contact Information

PAC Hotline: **877-299-3642**

(Voicemail, 9 a.m. – 5 p.m. on business days)

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