

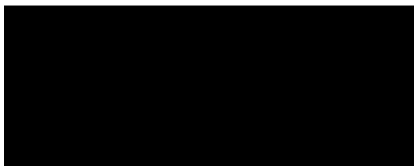


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 2, 2016

Via electronic mail



Via electronic mail
Ms. Martha-Victoria Diaz
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RE: FOIA Request for Review – 2016 PAC 42578

Dear [REDACTED] and Ms. Diaz:

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 2014)). For the reasons discussed below, the Public Access Bureau concludes that the response by the City of Chicago's Office of Emergency Management and Communication (OEMC) to [REDACTED] FOIA request violated the requirements of FOIA.

On June 6, 2016, OEMC received a FOIA request from [REDACTED] seeking video footage of a car crash that occurred on May 9, 2016, between 8:14 a.m. and 8:16 a.m. at the intersection of Congress Parkway and Michigan Avenue. On June 21, 2016, OEMC denied [REDACTED] request pursuant to section 7(1)(v) of FOIA (5 ILCS 140/7(1)(v) (West 2015 Supp.)). OEMC asserted that the disclosure of footage from the Operation Virtual Shield (OVS) camera system would allow the public to "become aware of what areas and images are capable of being captured by the OVS cameras and make the cameras ineffective."¹ In his Request for Review,

¹Letter from A. Martin, Freedom of Information Officer, Office of Emergency Management and Communications, City of Chicago, to [REDACTED] (June 21, 2016).

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disputed the denial of the footage stating that he was seeking it to contest liability in a car accident.

On June 29, 2016, this office sent OEMC a copy of the Request for Review and asked it to provide a copy of the footage that was withheld together with a detailed explanation of the factual and legal bases for the applicability of section 7(1)(v). On August 12, 2016, OEMC furnished this office with a disc of video footage and a written response. The disc was labeled "Congress Pkwy/Michigan Date: May 9, 2016 08:0[0]-9:00 hours[.]" This office reviewed the footage on the disc. The footage on the disc was date stamped June 9, 2016. On August 15, 2016, this office contacted OEMC to clarify whether the footage on the disc was from May 9, 2016, or June 9, 2016. On August 18, 2016, OEMC informed this office that the footage from the wrong date had been saved and that it was searching for saved footage from the correct date. On August 30, 2016, OEMC provided a supplemental response stating that it had inadvertently saved footage from June 9, 2016, instead of May 9, 2016. OEMC stated that the requested footage from May 9, 2016, was no longer available because footage from OVS cameras is only retained for 30 days.

ANALYSIS

FOIA provides that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2014). State and Federal courts have recognized that a public body has a duty to preserve records for which it has received a FOIA request. For example, in *Walloon Lake Water System, Inc. v. Melrose Tp.*, 163 Mich. App. 726, 732, 415 N.W.2d 292, 295 (1987), the Michigan Court of Appeals, interpreting Michigan's Freedom of Information Act, stated:

[W]hile there is no obligation under * * * FOIA to create public records, the statute does impose a "duty to provide access" to those public records that have been created and are the subject of a proper FOIA request, and this obligation "inherently includes the duty to preserve and maintain such records until access has been provided or a court executes an order finding the record to be exempt from disclosure." (Emphasis added.)

See also Laughlin v. Commissioner of Internal Revenue Service., 103 F. Supp. 2d 1219, 1223-24 (S.D.Cal.1999) (government agencies are obligated not to destroy records for which they have received FOIA requests).

Here, OEMC has confirmed to this office that it maintains footage from OVS cameras for 30 days. Therefore, at the time of June 6, 2016, FOIA request, OEMC possessed footage from May 9, 2016. However, by the time this office informed OEMC that it

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had provided footage from the wrong date for our confidential review, OEMC no longer possessed footage from May 9, 2016, because the footage had not been preserved. Although OEMC's failure to preserve the footage after receiving [REDACTED] FOIA request appears to have been inadvertent, that failure rendered its handling of [REDACTED] request improper. We decline to address the applicability of section 7(1)(v) because the failure to preserve the footage moots the question of whether it is subject to disclosure under FOIA.

While there is no action that OEMC can take to remedy its failure to preserve the video footage, this office urges OEMC to ensure that video footage and other records responsive to future FOIA requests are properly preserved. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (217) 782-9054. This letter closes this file.

Very truly yours,

[REDACTED]
MATT HARTMAN
Assistant Attorney General
Public Access Bureau

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