



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

August 1, 2019

Mr. Anthony L. Russo, Jr.
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Via electronic mail
Ms. Dana O'Malley
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RE: FOIA Request for Review – 2019 PAC 57517

Dear Mr. Russo and Ms. O'Malley:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2016)). For the reasons explained below, the Public Access Bureau concludes that the Chicago Police Department (CPD) did not improperly withhold officer-worn body camera recordings responsive to Mr. Anthony L. Russo's FOIA request.

On March 6, 2019, Mr. Russo, on behalf of Russo & Russo, Ltd., and its client Amanda Schut, submitted a FOIA request to CPD seeking copies of body camera recordings referred to in traffic report 2018 JB420531. On March 20, 2019, CPD denied the request pursuant to section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2017 Supp.), as amended by Public Act 100-732, effective August 3, 2018), which exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules or regulations implementing federal or State law." In support of its denial of the disclosure of the requested recordings under section 7(1)(a), CPD cited section 10-20(b) of the Law Enforcement Officer-Worn Body Camera Act (Body Camera Act) (50 ILCS 706/10-20(b) (West 2016)). On April 10, 2019, the Public Access Bureau received a completed Request for Review from Mr. Russo

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contesting CPD's denial of the recordings. In particular, Mr. Russo's Request for Review stated that his client "sustained personal injuries in a motor vehicle accident in the City of Chicago on September 3, 2018."¹

On April 10, 2019, the Public Access Bureau sent a copy of the Request for Review to CPD and asked it to provide copies of the officer-worn body camera recordings it had withheld together with a detailed explanation of the factual and legal bases for its assertion that the recordings are exempt from disclosure under section 7(1)(a) of FOIA. This office also asked CPD to clarify whether Ms. Schut was the subject of the encounter captured on the recordings. On April 30, 2019, CPD provided this office with a written answer. On May 2, 2019, the Public Access Bureau received the responsive body camera recordings from CPD. On May 2, 2019, this office forwarded to Mr. Russo a copy of CPD's written answer; he did not reply. On July 16, 2019, CPD provided this office with a supplemental response.

ANALYSIS

"All 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 2016); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2016).

Section 7.5(cc) of FOIA and Section 10-20(b) of the Body Camera Act

In its response to the FOIA request, CPD cited section 7(1)(a), the provision of FOIA that generally applies to records that are specifically prohibited from disclosure by State law. However, section 7.5(cc) of FOIA (5 ILCS 140/7.5(cc) (West 2017 Supp.), as amended by Public Acts 100-646, effective July 27, 2018; 100-863, effective August 14, 2018; 100-887, effective August 14, 2018; 100-690, effective January 1, 2019) expressly exempts from inspection and copying "[r]ecordings made under the Law Enforcement Officer-Worn Body Camera Act, **except to the extent authorized under that Act.**" (Emphasis added.) Section 10-20(b) of the Body Camera Act provides:

(b) Recordings made with the use of an officer-worn body camera are not subject to disclosure under the Freedom of Information Act, except that:

¹Letter from Anthony L. Russo, Jr., Russo & Russo, Ltd., to Public Access Counselor, Office of the Attorney General (March 25, 2019), at 1.

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(1) if the subject of the encounter has a reasonable expectation of privacy, at the time of the recording, any recording which is flagged, due to the filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or body harm, shall be disclosed in accordance with the Freedom of Information Act if:

(A) the subject of the encounter captured on the recording is a victim or witness; and

(B) the law enforcement agency obtains written permission of the subject or the subject's legal representative;

(2) except as provided in paragraph (1) of this subsection (b), **any recording which is flagged due to the filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm shall be disclosed in accordance with the Freedom of Information Act; and**

(3) upon request, the law enforcement agency **shall disclose, in accordance with the Freedom of Information Act, the recording to the subject of the encounter captured on the recording or to the subject's attorney, or the officer or his or her legal representative.** (Emphasis added.)

Section 10-20(a)(7) of the Body Camera Act (50 ILCS 706/10-20(a)(7) (West 2016)) provides the grounds for retaining body camera recordings beyond 90 days:

(7) Recordings made on officer-worn cameras must be retained by the law enforcement agency or by the camera vendor used by the agency, on a recording medium for a period of 90 days.

* * *

(B) Following the 90-day storage period, any and all recordings made with an officer-worn body camera must

be destroyed, unless any encounter captured on the recording has been flagged. An encounter is deemed to be flagged when:

(i) a formal or informal complaint has been filed;

(ii) the officer discharged his or her firearm or used force during the encounter;

(iii) death or great bodily harm occurred to any person in the recording;

(iv) the encounter resulted in a detention or an arrest, excluding traffic stops which resulted in only a minor traffic offense or business offense;

(v) the officer is the subject of an internal investigation or otherwise being investigated for possible misconduct;

(vi) the supervisor of the officer, prosecutor, defendant, or court determines that the encounter has evidentiary value in a criminal prosecution; or

(vii) the recording officer requests that the video be flagged for official purposes related to his or her official duties. (Emphasis added.)

The Attorney General has held that under section 10-20(b)(3) of the Body Camera Act "a subject of the [encounter captured on the] recording and the officer, and their legal representatives may obtain the recording in accordance with FOIA, regardless of whether or why it has been flagged." Ill. Att'y Gen. Pub. Acc. Op. No 19-001, issued January 9, 2019, at 10. The Public Access Bureau has defined the "subject of the encounter" as the person who appeared in the recording and "interacted with a law enforcement officer in the course of a law enforcement activity." Ill. Att'y Gen. PAC Req. Rev. Ltr. 48793, at 4 (concluding that a police officer who was not captured on the body camera recordings at issue, but whose conduct was discussed on the recordings, was not authorized to receive copies of the recordings under section 10-20(b)(3) of the Body Camera Act because the officer "d[id] not appear on the recordings.").

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In its supplemental response to this office, CPD stated that Ms. Schut was not captured on the recordings because she had been transported to the hospital before the recordings began. The narrative of the traffic report indicated that Ms. Shut was not on the scene when officers arrived: "Driver of Unit #2 [Amanda Shut] was transported to Community First Hospital by CFD and was subsequently treated and released by Dr. Akbarnia prior to R/O's arrival. * * * Driver information exchange card was mailed to Unit #2 as parties left hospital/scene prior to R/O's arrival."² Further, this office's review of the withheld recordings confirmed that Ms. Shut did not interact with any law enforcement officers at the scene because she had already been transported to the hospital before the recordings commenced. Because the plain language of section 10-20(b)(3) of the Body Camera Act permits a person who is the subject of the encounter captured on the recording or that person's attorney to request a copy of the recording under FOIA and because Ms. Schut was not captured on the recording, Mr. Russo is not entitled to the recording under section 10-20(b)(3). Accordingly, this office must consider whether the recording is subject to disclosure under section 10-20(b)(2) of the Body Camera Act.

Section 10-20(b)(2) states that flagged recordings which have been flagged because a complaint was filed, a firearm was discharged, force was used, an arrest or detention occurred, "or resulting death or bodily harm" are subject to disclosure under FOIA. The general conditions that cause a recording to be flagged in section 10-20(a)(7)(B) of the Body Camera Act are similar but not identical to the specific conditions that cause a flagged recording to be subject to disclosure under FOIA in section 10-20(b)(2). Where there is a general statutory provision and a specific statutory provision in the same act relating to the same subject, the specific provision controls and should be applied. *McFatridge v. Madigan*, 2013 IL 113676, ¶22, 989 N.E. 2d 165, 171 (2013). Thus, section 10-20(b)(2) limits rather than expands the types of flagged recordings that are subject to disclosure under FOIA when the person seeking the recording is not the subject of the encounter captured on the recording, the subject's attorney, the officer, or the officer's attorney.

As noted above, the conditions for a recording being flagged are outlined in section 10-20(a)(7)(B). Among the conditions is "death or great bodily harm occurred to any person in the recording" in section 10-20(a)(7)(B)(iii) of the Body Camera Act. Although the Body Camera Act does not define the term "great bodily harm," Ms. Schut does not appear in the recordings. Thus, the recordings cannot be considered to be "flagged" based on section 10-20(a)(7)(B)(iii) regardless of whether she sustained great bodily harm. Further, the available information and this office's review of the recordings indicate that none of the other conditions for recordings to be flagged occurred when the officers responded to the scene of the accident. Because the recordings were not flagged due to death or great bodily harm occurring to a person

²Narrative, Illinois Traffic Crash Report, Chicago Police Department, R.D. Number 2018 JB420531.

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who appeared in the recordings and because Mr. Russo is not among the persons who are authorized to obtain copies of non-flagged recordings under section 10-20(b)(3) of the Body Camera Act, this office concludes that CPD did not improperly withhold copies of the body camera recordings from Mr. Russo pursuant to section 7.5(cc) of FOIA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This correspondence serves to close this matter. If you have questions, you may contact me at (217) 782-9054 or the Springfield address listed at the bottom of the first page.

Very truly yours,



MATT HARTMAN
Assistant Attorney General
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