



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

January 10, 2020

Via electronic mail

Ms. Samah Assad
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Via electronic mail

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RE: FOIA Requests for Review – 2019 PAC 60575; CPD No. P516747
2019 PAC 60599; CPD No. P514119

Dear Ms. Assad and Ms. O'Malley:

This determination is issued pursuant to section 9.5(c) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(c) (West 2018)) as to 2019 PAC 60599 and section 9.5(f) of FOIA (5 ILCS 140/9.5(f) (West 2018)) as to 2019 PAC 60575. For the reasons set forth below, the Public Access Bureau concludes that the Chicago Police Department (CPD) did not violate FOIA by denying Ms. Samah Assad's FOIA requests for body camera footage from private residences.

On August 12, 2019, Ms. Assad submitted a FOIA request to CPD seeking copies of "any and all dash camera video and/or body camera video captured during the execution of a search warrant at [a specific residence] on Aug. 5, 2019."¹ On November 13, 2019, CPD denied

¹E-mail from Samah Assad, WBBM-TV CHICAGO, Investigative Producer, to [CPD FOIA] (August 12, 2019).

Ms. Samah Assad
Ms. Dana O'Malley
January 10, 2020
Page 2

the request in its entirety pursuant to sections 7(1)(a), 7(1)(c), and 7(1)(d) of FOIA (5 ILCS 140/7(1)(a), (1)(c), (1)(d) (West 2018), as amended by Public Act 101-455, effective August 23, 2019). In connection with 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 2018)). The following day, Ms. Samah submitted a Request for Review (2019 PAC 60599) contesting CPD's denial. She explained that her news station had been reporting on raids of the wrong homes and stated:

In this FOIA, I requested body camera footage from a wrong raid on an innocent family's home where children were present. The family alleges the officers pointed guns at them, including in the direction of a 3-month-old baby. While there may have been no arrests, it can be argued that police did in fact use force by pointing guns.^[2]

In addition, on August 21, 2019, Ms. Assad submitted another FOIA request to CPD seeking body camera footage for a different residence. On November 11, 2019, CPD denied the request, again citing section 7(1)(a) of FOIA in connection with the Body Camera Act. On November 18, 2019, Ms. Assad submitted a Request for Review (2019 PAC 60575) contesting that denial too. She stated:

In this FOIA, I requested body camera footage from a wrong raid on an innocent woman's home who was naked and handcuffed. She said officers pointed guns at her. While she may not have been arrested, it can be argued that police did in fact use force by pointing guns at her and handcuffing her—all events the police department has not denied to have occurred. In addition, we are aware the subject of the video has filed a FOIA request as well.^[3]

On November 21, 2019, this office forwarded a copy of Ms. Assad's latter Request for Review to CPD and asked it to provide copies of the responsive records for this office's confidential review, together with a detailed explanation for its denial. On November 22, 2019, CPD provided those materials. On that same date, an Assistant Attorney General in the Public Access Bureau e-mailed CPD asking whether it would be willing to provide Ms. Assad

²E-mail from Samah Assad, WBBM-TV Chicago, Investigative Producer, to Public Access [Bureau] (November 14, 2019).

³E-mail from Samah Assad, WBBM-TV Chicago, Investigative Producer, to Public Access [Bureau] (November 12, 2019).

Ms. Samah Assad
Ms. Dana O'Malley
January 10, 2020
Page 3

with a copy of the body camera recording if the subject were to provide written consent. CPD responded that it would still deny the request pursuant to sections 7(1)(d)(i) and 7(1)(d)(ii) of FOIA (5 ILCS 140/7(1)(d)(i), (1)(d)(ii) (West 2018), as amended by Public Act 101-455, effective August 23, 2019). CPD explained:

[A]fter conferring with the Civilian Office of Police Accountability ("COPA"), COPA confirmed that premature disclosure of the recording to the requestor or any other party would interfere with their open and active administrative enforcement proceeding. Regarding the factual basis underlying their denial under the aforementioned FOIA exemptions, COPA asserted that disclosing the recording would interfere with their apprehension of pertinent witnesses and COPA's attempts to interview said witnesses regarding the recording.^[4]

Likewise, although Ms. Assad provided CPD with a release from the subject of the recording in her other Request for Review after CPD issued its response to this office's inquiry letter, CPD stated that it would still deny a FOIA request containing such a release because of COPA's active investigation.

On November 25, 2019, this office sent Ms. Assad a copy of CPD's response in 2019 PAC 60575. She did not submit a reply, but did furnish a copy of written consent from the subject of the recording on January 6, 2020.

DISCUSSION

"All 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 2018).

Section 7.5(cc) of FOIA (5 ILCS 140/7.5(cc) (West 2018), as amended by Public Acts 101-013, effective June 12, 2019; 101-027, effective June 25, 2019; 101-081, effective July 12, 2019; 101-375, effective August 16, 2019; 101-377, effective August 16, 2019) exempts from disclosure "[r]ecordings made under the Law Enforcement Officer-Worn Body Camera Act, except to the extent authorized under that Act." Section 10-20(b)(2) of the Body Camera Act provides, in relevant part:

⁴E-mail from Yevgeniy ("Eugene") Bolotnikov, Associate Staff Attorney, Chicago Police Department, Office of Legal Affairs, to Steve Silverman (November 22, 2019).

Ms. Samah Assad
Ms. Dana O'Malley
January 10, 2020
Page 4

(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:

(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 bodily 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;

* * *

* * * 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.

Under the plain language of this provision, if the subject is a victim who has a reasonable expectation of privacy (i.e. because the body camera footage is of the inside of the subject's home), and the footage has been flagged for reasons such as detention, the footage is subject to disclosure pursuant to FOIA only if the law enforcement agency has received the subject's written permission. Even with the subject's permission, however, the law enforcement agency may still assert any applicable FOIA exemptions to withhold the footage.

In these matters, Ms. Assad sought body camera recordings in which the subjects had a reasonable expectation of privacy because they were inside their own homes. CPD acknowledged that the body camera recording at issue in 2019 PAC 60575 was flagged because the subject was detained, and that the body camera recording at issue in the other Request for Review would be flagged for the same reason. Ms. Assad did not submit written releases from the subjects when she submitted her FOIA requests to CPD. Therefore, section 10-20(b)(2) of the Body Camera Act prohibited CPD from disclosing the body camera recordings in response to Ms. Assad's requests. Ms. Assad's subsequent sending of signed releases from the subjects to CPD would allow CPD to grant her requests if it wishes, but CPD has elected to assert that the

Ms. Samah Assad
Ms. Dana O'Malley
January 10, 2020
Page 5

recordings are exempt from disclosure under sections 7(1)(d)(i) and 7(1)(d)(ii) of FOIA. If Ms. Assad resubmits her FOIA requests to CPD with signed releases from the subjects and CPD denies her requests pursuant to those exemptions, the question in any subsequent Request for Review or FOIA lawsuit will be whether CPD proves by clear and convincing evidence that the disclosure of the recordings would interfere with pending or actually and reasonably contemplated law enforcement proceedings or active administrative enforcement proceedings.

The Public Access Counselor has determined that resolution of these matters does not require the issuance of a binding opinion. This letter closes the files. If you have any questions, please contact me at (312) 814-6756.

Very truly yours,



STEVE SILVERMAN
Bureau Chief
Public Access Bureau

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60599 f unf pd