



March 25, 2014

*Transmitted via E-Mail*

Daniel L. Abbott  
Samuel I. Zeskind  
Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.  
200 East Broward Boulevard, Suite 1900  
Fort Lauderdale, FL 33301  
Email: IMunoz@wsh-law.com

**Re: City of Sunrise Public Records Request # 140122**

Dear Messrs. Abbott and Zeskind,

I write in response to your letter of March 20, 2014 (attached as Exhibit A), in which you refuse to confirm or deny the existence of records responsive to the ACLU's February 28, 2014 public records request (the "Request") to the City of Sunrise ("City") Police Department ("Department"). The ACLU's Request seeks records regarding the Department's acquisition and use of cell site simulators, including policies and guidelines governing their use. Your response is patently inadequate, as it lacks a basis in law and fact and violates the Florida Public Records Act, § 119.07, Florida Statutes. Accordingly, the ACLU requests that the City immediately process the Request and produce responsive records. *See* § 119.07(1), Fla. Stat.

The importance of faithfully responding to a duly submitted public records request cannot be overstated: it is necessary "in order to preserve our basic freedom." *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779 (Fla. 4th DCA 1985). As courts have repeatedly explained, "the purpose of the Public Records Act 'is to open public records to allow Florida's citizens to discover the actions of their government.'" *Bent v. State*, 46 So. 3d 1047, 1049 (Fla. 4th DCA 2010). For that reason, "[t]he Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be construed narrowly and limited to their stated purpose." *Marino v. Univ. of Fla.*, 107 So. 3d 1231, 1233 (Fla. 1st DCA 2013).<sup>1</sup> The City's response frustrates the purpose of the Act and leaves the public with no information

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<sup>1</sup> *Accord Times Publ'g Co. v. State*, 827 So. 2d 1040, 1042 (Fla. 2d DCA 2002); *Christy v. Palm Beach Cnty. Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997).

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about an area of government conduct that raises serious questions of constitutional law.

The City's refusal to confirm or deny the existence of responsive records is not permitted under Florida law. I am aware of only one Florida case where a government agency "refus[ed] to confirm or deny the existence of the records sought by" the requester. *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985) (per curiam). Although the court resolved the case on other grounds, it explicitly disapproved of the agency's response, cautioning that "we do not condone public agency silence when confronted with a chapter 119 request." *Id.* at 1332 n.1. Indeed, the Public Records Act requires public records custodians to "respond to [records] requests in good faith." § 119.07(1)(c). "A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed." *Id.* Although a statutory exemption may be asserted to withhold specific records or portions of records, *id.* § 119.07(d)–(e), there is no basis for wholly refusing to process a request on the basis of broad claims of exemption.

Even if a refusal to confirm or deny the existence of responsive records were theoretically permissible, the City has waived its ability to assert such a response here by officially confirming its ownership of a cell site simulator and related devices. The City has posted to its public website a March 13, 2013 Quotation from Harris Corporation providing price and shipping information to the Department for upgrades to its existing stable of cell site simulator-type devices.<sup>2</sup> (Attached as Exhibit B). The document details Harris's offer to provide a Stingray II to Hailstorm Upgrade, a Harpoon PA Kit Dual Band 700/800, one-year extended maintenance for the Harpoon 2100 and Harpoon CONUS, and other equipment and training packages.<sup>3</sup> This document officially confirms the City's possession of at least one cell site simulator, its recent interest in upgrading that device, and the existence of records regarding its cell site simulator and associated technologies. The City cannot now attempt to shirk its responsibilities under the Public Records Act by refusing to confirm or deny the existence of the same. *See Wolf v. C.I.A.*, 473 F.3d 370, 378 (D.C. Cir. 2007) ("[W]hen information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's

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<sup>2</sup> Available at

<http://dms.sunrisefl.gov/public/AttachmentViewer.ashx?AttachmentID=10781&ItemID=3408>.

<sup>3</sup> Explanations of the product codes appearing in the Item Number field of the March, 2013 document are publicly available on the U.S. General Services Administration website. Harris, Federal Supply Service, Information Technology Schedule Pricelist, General Purpose Commercial Information Technology Equipment, Software and Services 28–29, 60–62 (Mar. 11, 2014), [https://www.gsaadvantage.gov/ref\\_text/GS35F0283J/0ML8KB.2S6VTT\\_GS-35F-0283J\\_HARRISMOD162.PDF](https://www.gsaadvantage.gov/ref_text/GS35F0283J/0ML8KB.2S6VTT_GS-35F-0283J_HARRISMOD162.PDF).



otherwise valid exemption claim.” (internal quotation marks omitted)); *cf. Tribune Co. v. Pub. Records, P.C.S.O. No. 79-35504 Miller/Jent*, 493 So. 2d 480, 484 (Fla. 2d DCA 1986) (“Once public records are open for inspection they cannot be withdrawn by subsequent court challenge.”).

The City’s refusal to confirm or deny the existence of responsive records is also not justified by the statutory exemptions it cites, which apply to “information revealing surveillance techniques or procedures,” § 119.071(2)(d), Fla. Stat, and “active criminal investigative information,” *id.* § 119.071(2)(c)(1). Far from narrowly construing these exemptions, *see Marino*, 107 So. 3d at 1233, the City attempts to inflate their scope to eclipse the entire function of the Act.

The City’s assertion of § 119.017(2)(d) is wholly conclusory, and provides no explanation of why even confirming or denying the *existence* of responsive records would reveal surveillance techniques or procedures. Its response therefore fails to “state . . . with particularity the reasons for the conclusion that the record is exempt.” § 119.07(1)(f), Fla. Stat. It may be that, upon processing the request, the City identifies specific material that is properly covered by this exemption. But it is not logical or plausible that the very existence of records is exempt. The request seeks records crucial to understanding whether the Police Department is conducting searches in compliance with the United States and Florida Constitutions, and whether it is collecting private information about the locations and communications of innocent people without cause. These are matters that fall within the scope of the Department’s production obligations under the Act. Police and sheriffs’ departments throughout Florida have determined that they can respond to public records requests and answer press queries about their possession and use of cell site simulators without compromising their law enforcement functions.<sup>4</sup> There is no conceivable reason why the Sunrise Police Department cannot do the same.

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<sup>4</sup> *See, e.g.,* Jennifer Portman, *Is Cellphone Stingray Invasive or Essential?*, Tallahassee Democrat, Mar. 16, 2014, <http://www.tallahassee.com/apps/pbcs.dll/article?AID=2014303170020> (quoting Tallahassee Chief of Police Michael DeLeo and Leon County Sheriff’s Office officials discussing those departments’ use of cell site simulators); John Kelly & Britt Kennerly, *Special Report: Police Agencies Can Grab Data from Your Cellphone*, Florida Today, Dec. 9, 2013, <http://www.floridatoday.com/article/20131208/NEWS01/312080020/Special-Report-Police-agencies-can-grab-data-from-your-cellphone> (citing Miami-Dade Police Department purchasing records showing acquisition of Stingray device and quoting Assistant State Attorney Wayne Holmes of Brevard and Seminole Counties explaining that he has “weighed frequent police requests for . . . Stingray surveillance”); *Cell Tower Dumps Not Used Locally*, Fort Myers News-Press, Dec. 8, 2013, at A6 (reporting that records released by the Florida Department of Law Enforcement show that it has “spent more than \$3 million buying a fleet of Stingrays” that it makes available to local police departments in the state).

The City's invocation of § 119.071(2)(c)(1) is likewise unavailing. According to the City's logic, no investigative record in its possession can ever be acknowledged or released, even if it does not relate to an active investigation, because there may someday be future investigations of other suspects in other cases to which it could hypothetically relate. This circular reasoning would permit no release of investigative records by any police department at any time, and courts have rejected such an expansive reading of the exemption. *See, e.g., Tribune Co. v. Pub. Records, P.C.S.O. No. 79-35504 Miller/Jent*, 493 So. 2d 480, 484 (Fla. 2d DCA 1986) ("The criminal investigative information exemption of the Public Records Act . . . ha[s] 'always had a limited purpose—to prevent premature disclosure of information when such disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection.'" (quoting *Tribune Co. v. Cannella*, 438 So. 2d 516, 523 (Fla. 2d DCA 1983), *rev'd on other grounds*, 458 So. 2d 1075 (Fla. 1984))).

Indeed, even the cases cited in the City's March 20 letter speak to the narrow compass of this exemption, and do not support the City's position. *Barfield v. City of Fort Lauderdale Police Department*, 639 So. 2d 1012 (Fla. 4th DCA 1994), stands only for the proposition—self-evident under § 119.071—that *active* criminal investigative information is exempt from disclosure. The case involved an assessment of whether the investigation to which the requested records pertained was still "active." The court concluded that it was "virtually undisputed that the matter is still under active consideration by the state attorney and the grand jury," and therefore the records were still exempt. *Id.* at 1017. However, "[a] different situation would be presented if an affirmative decision is made to drop the investigation or put it on indefinite hold." *Id.* at 1017. Thus, it was "not a situation where the information sought will remain permanently confidential. Rather, once the investigations are concluded, if no charges are filed, the records would cease to be 'active' and thus subject to disclosure." *Id.* at 1018. Similarly, *State v. Johnson*, 284 So. 2d 198 (Fla. 1973), which concerns the discoverability of police reports in a criminal proceeding, does not stand for the broad proposition that any records in possession of a police department, or even any "police reports," must remain secret *in toto* or *ad infinitum*. In the criminal discovery context, the supreme court specified that such reports should be produced after narrow redactions of any properly withholdable matter. *Id.* at 201. The same rule applies here.<sup>5</sup>

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<sup>5</sup> *United States v. Rigmaiden*, 844 F. Supp. 2d 982 (D. Ariz. 2012), also does not support the City's blanket refusal to conduct a search for responsive records. *Rigmaiden* is not a public records case, and at most it suggests that the "precise techniques used by agents to locate [a wireless device], including their path of movement" in a *specific* investigation could be redacted from records produced. But it does not support the City's refusal to confirm or deny the existence of any responsive records; indeed, in *Rigmaiden*, the government acknowledged that that it had used a cell site simulator and described details of its use in the underlying



The City is not above the requirements of the Public Records Act. The ACLU respectfully requests that the City process the Request without delay, release nonexempt records, and explain with particularity any redactions or withholdings of records.<sup>6</sup> See *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1079 (Fla. 1984) (“The only delay permitted by the Act is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt.”). We look forward to your updated response within one week of the date of this letter.

Sincerely,



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investigation. *United States v. Rigmaiden*, No. CR 08-814-PHX-DGC, 2013 WL 1932800, at \*15 (D. Ariz. May 8, 2013).

<sup>6</sup> The ACLU reminds the City of its ongoing responsibility to preserve responsive records, including any which it may claim are exempt from disclosure. § 119.07(1)(h-i), Fla. Stat.

# **EXHIBIT A**

WEISS SEROTA HELFMAN  
PASTORIZA COLE & BONISKE, P.L.

MITCHELL BIERMAN, P.A.  
NINA L. BONISKE, P.A.  
MITCHELL J. BURNSTEIN, P.A.  
JAMIE ALAN COLE, P.A.  
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DAVID M. WOLPIN, P.A.

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JEFFREY D. DECARLO  
ALAN K. FERTEL  
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JOSEPH HERNANDEZ  
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JOHANNA M. LUNDGREN  
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March 20, 2014

VIA EMAIL ([nwessler@aclu.org](mailto:nwessler@aclu.org))

Mr. Nathan Freed Wessler, Esq.  
American Civil Liberties Union Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004-2400

Re: Public Records Request Submitted to City of Sunrise  
Request #140122

Dear Mr. Wessler:

As you know, this firm represents the City of Sunrise (“City”) with respect to the public records request (the “Request”) submitted by the ACLU in your February 28, 2014 letter to Chief Brooks. The Request seeks records regarding cell site simulators, in ten (10) separately listed sub-categories. Please consider this firm as the designee of the custodian of the City’s records pursuant to §119.07, Florida Statutes for this and any future requests you may have.

The City cannot and will not acknowledge whether any records responsive to the Request exist and, if any responsive records do exist, cannot and will not publicly disclose those records. Not only would the mere production of a single record responsive to these requests, even if entirely redacted, reveal the existence of confidential surveillance techniques,<sup>1</sup> but it would also compromise both active and future criminal investigations. Accordingly, the requested records,

<sup>1</sup> As the articles you cited in your letter demonstrate, “cell site simulators,” in varying forms, are used for surveillance. See, e.g., Ryan Gallagher, *Meet the Machines that Steal Your Phone’s Data*, ArsTechnica (Sept. 25, 2013), <http://arstechnica.com/tech-policy/2013/09/meet-themachines-that-steal-your-phones-data/> (describing various surveillance devices and the purposes therefor).



Mr. Nathan Freed Wessler, Esq.  
March 20, 2014  
Page 2 of 2

to the extent they even exist, would be exempt from production as they relate to: (1) surveillance techniques, procedures and personnel;<sup>2</sup> and (2) active criminal investigations.<sup>3</sup>

While your letter states that the ACLU does not seek records relating to “open investigations,” your implicit assumption that records related to other investigations, to the extent they even exist, have lost their exempt status is mistaken. Simply because a single arrest may have been made or the investigation of a particular individual terminated does not mean that records are no longer exempt from disclosure where the records include leads to other cases and other suspects. On this point, the Florida Supreme Court has stated:

We must also bear in mind that police reports and documents often include leads to other cases and other suspects. This information must be protected in order to afford fair pursuit of such involvement by others and the solution of other offenses. These important objectives can be destroyed or defeated if police reports are made so readily available; the police would understandably be hesitant to enter freely in reports what might be of help later on if they were not generally protected.

*State v. Johnson*, 284 So. 2d 198, 200 (Fla. 1973). *See also Barfield v. City of Ft. Lauderdale Police Dept.*, 639 So. 2d 1012, 1014 (Fla. 4th DCA 1994) (“the sanctity of police records compiled during a criminal investigation also has a long heritage in Florida”). Moreover, the production of the requested records, to the extent they even exist, would hamper future law enforcement efforts by enabling adversaries of law enforcement to evade detection. *See U.S. v. Rigmaiden*, 844 F. Supp. 2d 982, 1002 (U.S.D.C. Ariz. 2012).

As such, because the requested records, to the extent they even exist, would reveal information vital to other cases and suspects, the requested records remain exempt from production in order to avoid the destruction and defeat of the City’s essential police objectives.

If you have any questions or comments, please do not hesitate to contact us.

Very truly yours,

  
Daniel L. Abbott  
Samuel I. Zeskind

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<sup>2</sup> “Any information revealing surveillance techniques or procedures or personnel is exempt from (public records law disclosure.)” §119.071.2(d), Fla. Stat.

<sup>3</sup> “Active criminal intelligence information and active criminal investigative information are exempt from (public records law disclosure.)” §119.071(2)(c)1, Fla. Stat.



# **EXHIBIT B**



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Quote	QTE6779-04207
Date	3/13/2013
Page:	1

HARRIS CORP - WIRELESS PRODUCTS GROUP  
 P.O. BOX 9800, M/S R5-11A  
 MELBOURNE, FL 32902-9800  
 PH: 800-358-5297, FAX: 321-309-7437, wpg@harris.com

# Quotation

<b>Bill To:</b>
Sunrise Police Department Detective Andre Bruna abruna@sunrisefl.gov 777 Sawgrass Corp. Parkway Sunrise FL 33325

<b>Ship To:</b>
Sunrise Police Department Detective Andre Bruna abruna@sunrisefl.gov 777 Sawgrass Corp. Parkway Sunrise FL 33325

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Purchase Order No.	Customer ID	Salesperson ID	Shipping Method	Payment Terms	Req Ship Date	Master No.
	SUNRISE	WPG7	BEST WAY	Net 30	0/0/0000	4,994
Quantity	Item Number	Description	UOM	Discount	Unit Price	Ext. Price
		NOTE Delivery 90 days after release of product or software, receipt of PO, receipt of unit for upgrade. Prices subject to change. Quotes valid 180 days from issue. Attached Ts&Cs applicable to	*			\$0.00
			*			\$0.00
		NOTE The GSA Contract Number for purchasing the below items is GS-35F-0283J. Please ensure that the GSA Number is referenced on the PO.	*			\$0.00
1	SRAY-II-HLS-UP		EA		\$65,652.00	\$65,652.00
1	DB-700-800-UP		EA		\$14,134.00	\$14,134.00
1	MT-HARP21		EA		\$1,914.00	\$1,914.00
1	MT-HARPC		EA		\$1,914.00	\$1,914.00
		NOTE Yearly Maint Agreements provide extended hardware warranty and software upgrades. Each Maint	*			\$0.00



Harris Proprietary

Quote	QTE6779-04207
Date	3/13/2013
Page:	2

HARRIS CORP - WIRELESS PRODUCTS GROUP  
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 MELBOURNE, FL 32902-9800  
 PH: 800-358-5297, FAX: 321-309-7437, wpg@harris.com

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Purchase Order No.	Customer ID	Salesperson ID	Shipping Method	Payment Terms	Req Ship Date	Master No.
	SUNRISE	WPG7	BEST WAY	Net 30	0/0/0000	4,994
Quantity	Item Number	Description	UOM	Discount	Unit Price	Ext. Price
		Agreement extends maint for an additional year. See Maint Terms for additional information.				
		NOTE	*			\$0.00
		The items quoted below are Catalog Priced Items and are not available on the GSA Contract.				
1	2009523-101		EA			\$0.00
1	HLS-L-SW		EA		\$20,000.00	\$20,000.00
1	HLS-U-SW		EA		\$22,000.00	\$22,000.00
1	KW-THORACIC		EA		\$10,125.00	\$10,125.00
1	TRAIN-MLB		EA		\$4,000.00	\$4,000.00
1	TRAIN-MLB		EA		\$4,000.00	\$4,000.00





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Quote	QTE6779-04207
Date	3/13/2013
Page:	3

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Purchase Order No.	Customer ID	Salesperson ID	Shipping Method	Payment Terms	Req Ship Date	Master No.
	SUNRISE	WPG7	BEST WAY	Net 30	0/0/0000	4,994
Quantity	Item Number	Description	UOM	Discount	Unit Price	Ext. Price
		NOTE Training classes are 12 hours (2 days) per product per protocol (unless stated otherwise). 4 students maximum. Please allow 120 days for scheduling training after receipt of PO.	*			\$0.00
		NOTE After PO is issued, please call 1-800-358-5297 or 1-321-309-7535 to schedule training. Please have your P.O # ready when you call for scheduling.	*			\$0.00

<b>Remit Payment To:</b>		
<b>Electronic Funds Transfer (EFT):</b>	<b>GCSD Mail Deposits:</b>	<b>GCSD Overnight Deliveries:</b>
Harris Corporation, GCSD Citibank Delaware Philadelphia, PA Account No: 30523187 ABA Rtg No: 021000089	Harris GCSD P.O. Box 7247 - LB 6759 Philadelphia, PA 19170-6759	Harris GCSD - LB 6759 C/O Citibank Delaware Lockbox Operations 1615 Brett Road New Castle, DE 19720 Phone number: 302-323-3600
Please reference the invoice number with your payment.		Harris Tax ID# 34-0276860

<b>Subtotal</b>	\$143,739.00
<b>Misc</b>	\$0.00
<b>Tax</b>	
<b>Freight</b>	\$0.00
<b>Trade Discount</b>	\$0.00
<b>Purchase Price</b>	\$143,739.00



# Quote

Quote #	2013-0017
Date	3/28/2013
Valid Thru	6/30/2013

<b>Name / Address</b>
City of Sunrise Police Department 10440 W. Oakland Park Blvd Sunrise, FL 33351

Item	Description	Qty	Rate	Total
Cardinal-3	Cardinal Vehicular Wi-Fi Survey / Geolocation Sys 2.4 GHz 802.11 b/g/n	1	21,500.00	21,500.00
Training Discount	Training Discount		-2,000.00	-2,000.00
Gatekeeper	Leave Behnd Wi-Fi Alert System - N900	1	1,495.00	1,495.00
802.11 Training ...	802.11 Training Kits comprised of:  *1-Shadow: a small, consumer product (NOKIA N810) modified to provide 802.11 surveys and direction finding (DF) capability for investigative deployment scenarios.  *1-Controller- used to operate open source 802.11 signal analysis tools  *1-Antenna - used in conjunction with the controller for signal detection and analysis	2	3,000.00	6,000.00
Shipping	FOB: Davie, FL • Ship Date: 120 Days ARO • Domestic Shipping Included		0.00	0.00
POC:Richard Lund II • Tele:954.663.3567 • EMail:rlundjr@srtgrp.com			<b>Total</b>	\$26,995.00



# Quote

Quote #	2013-0018
Date	3/28/2013
Valid Thru	6/30/2013

Name / Address
City of Sunrise Police Department 10440 W. Oakland Park Blvd Sunrise, FL 33351

Item	Description	Qty	Rate	Total
Tripwire	Passive Wi-Fi Survey Device	2	1,000.00	2,000.00
Shipping	FOB: Davie, FL • Ship Date: 120 Days ARO • Domestic Shipping Included		0.00	0.00
POC: Richard Lund II • Tele: 954.663.3567 • EMail: rlundjr@srtgrp.com			<b>Total</b>	\$2,000.00