

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
5th DIVISION**

Sebastian Westerhold

C [REDACTED] 2023

Plaintiff,

v.

Case: 60CV-14-3271

**Little Rock Police Department
700 W Markham St.
Little Rock, AR 72201**

**City of Little Rock
500 W Markham St.
Little Rock, AR 72201**

Defendants.

**AMENDED COMPLAINT FOR VIOLATION OF THE ARKANSAS FREEDOM OF
INFORMATION ACT OF 1967 AND PETITION FOR DECLARATORY RELIEF**

Comes now Plaintiff, Sebastian Westerhold, and for his Amended Complaint for Violation of the Arkansas Freedom of Information Act of 1967 and Petition for Declaratory Relief, states as follows:

I. PARTIES AND JURISDICTION

1. This is an action under the Arkansas Freedom of Information Act of 1967 as amended ("FOIA"), codified in Ark. Code Ann. §§ 25-19-101 to 25-19-109, for declaratory and other appropriate relief brought pursuant to Rule 57 of the Arkansas Rules of Civil Procedure, and Ark. Code sections 16-111-101 et seq.,

- and 25-19-101 et seq. to determine the rights and status of the parties with respect to the rights of the Plaintiff, Sebastian Westerhold, in regard of access to audio recordings of encrypted radio traffic by the Little Rock Police Department ("LRPD").
2. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to Ark. Code Ann. § 25-19-107(a). This Court also has subject matter jurisdiction pursuant to Ark. Code Ann. § 16-111-102 and Ark. Code Ann. § 16-111-103.
 3. Venue lies in Pulaski county because the cause of action arose in Pulaski county pursuant to Ark. Code Ann. §16-60-101 et seq. Venue is also proper pursuant to Ark. Code Ann. § 25-19-107. See: *ACORN v. Jackson*, 263 Ark. 67, 562 S.W.2d 589 (1978)
 4. Plaintiff is an individual residing in Lonoke county, Arkansas and a Citizen of the State of Arkansas in the sense the Arkansas Freedom of Information Act of 1967 as amended requires, seeking information for personal research and not for commercial purpose.
 5. The City of Little Rock is a city in Pulaski county, Arkansas.
 6. Little Rock Police Department ("LRPD") is the police department of the city of Little Rock.

II. FACTS

7. On August 19, 2014, Plaintiff transmitted, via electronic mail, a written FOIA request to the LRPD for department records (**Exhibit "C"**). Plaintiff requested the following department records:
 - a. All document[s] containing talk-groups and encryption keys used by

LRPD on the Arkansas Wireless Information Network (AWIN);

- b. All audio recordings of encrypted communications recorded by LRPD between 08/11/2014 and 08/17[2014].

8. Plaintiff also requested a waiver of fees.

LRPD Denied Plaintiff's Request In Part and Withheld Requested Information

9. LRPD transmitted an email to Plaintiff dated August 22, 2014 ("LRPD Response") (**Exhibit "D"**).

10. The LRPD Response acknowledged the receipt of Plaintiff's FOIA Request, but failed to make any determination regarding the substance of Plaintiff's request.

11. LRPD produced a document showing names of talkgroups used by LRPD (**Exhibit "E"**).

12. LRPD further denied Plaintiff's request for encryption keys and audio recordings.

13. After this initial LRPD Response, LRPD did not make any additional determinations regarding Plaintiff's request or produce any additional records in response to that request.

LRPD Failed to Perform an Adequate Search for, or Produce, Documents Responsive to Plaintiff's Request

14. LRPD argues that the requested documents contain information that is exempted from disclosure under the Freedom of Information Act of 1967 as amended.

15. Defendants have not demonstrated that they have in fact researched the requested records and identified whether or not such exempted information is in fact present.

16. It's the Defendants who have the evidence burden to prove that certain information is exempt from disclosure. See: *GANNETT RIVER STATES PUBLISHING Co. V.*

ARKANSAS INDUS. DEV. COMM'N, 303 Ark. 684 (1990), Accord, Ark. Op Att'y Gen. Nos. 97-071, 96-363, 96-229, 95-108, 95-106, 94-015, 93-254, 92-220, 92-156, 91-390, 90-324, 85-134, 75-130.

17. Defendants have not cited the exact exemption rule(s) under which LRPD assumes exemption.
18. Neither have Defendants provided reasons or evidence substantiating the application of exemption rules.
19. The information requested by Plaintiff does not fall under any of the exemptions of Ark. Code Ann. § 25-19-105.
20. Names, addresses, telephone numbers and dates of birth are not considered exempted information in the sense of the Arkansas Freedom of Information Act of 1967. See Ark. Op. Att'y Gen. Nos. 97-286, 96-134, 95-220 (addresses and telephone numbers); Ark. Op. Att'y Gen. No 95-080 (date of birth).
21. The Driver's Privacy Protection Act of 1994 ("DPPA"), codified in 18 U.S. Code § 2721 et seq., provides no protection for information "[f]or use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals."
22. Plaintiff declares under penalty of perjury that Plaintiff has no intent to publish, redisclose or otherwise use information to contact individuals based on information contained in the requested records (**Exhibit "F"**).
23. LRPD argues that in order to redact exempted information from recordings, LRPD would need an employee to physically listen to recordings and note information that should be redacted, identify where it is on the recording, and then create a new record

that does not contain such information.

24. LRPD further argues that the aforementioned redaction process would create a new record and that LRPD is not required to create new records in response to a FOIA request.

25. Plaintiff acknowledges that Defendant does not have to create new records in response to a FOIA request.

26. Plaintiff denies that the described process is required or necessary to redact affected records.

27. Defendants fail to demonstrate why this aforementioned redaction process is the only possible way to provide records.

28. Even if the requested recordings would contain information exempted from disclosure, LRPD would have to release partial records that are not affected by exemption rules.

29. It is unlikely that all of LRPD's recordings contain only information exempted from disclosure.

30. LRPD is required to research all records applicable to the FOIA request and determine exemption status for every single record individually.

31. LRPD has not demonstrated that such a document search has been completed.

32. LRPD has not demonstrated that exemption status has been evaluated for each record individually.

33. The abstract chance that records may potentially contain information exempted from disclosure is not sufficient to deny a record request in full.

34. LRPD could release only parts of audio recordings that do not contain information

exempted from disclosure.

35. LRPD is required by law to comply with FOIA requests.

36. LRPD is required to dedicate a sufficient amount of time, personnel and money to fulfill this legally mandated function.

37. If LRPD argues it does not have the right resources, then this is a pitiful admission on LRPD's inability to perform legally mandated functions. A government department's inability to perform is, however, no valid reason to deny a request under the Arkansas Freedom of Information Act.

38. LRPD's arguments are irrelevant for the subject matter as the given reasons are not valid reasons for exemption under Ark. Code Ann. § 25-19-105.

Encryption Keys

39. LRPD argues that it is unable to comply with the request to provide encryption keys as this would allow Plaintiff to access encrypted transmission.

40. LRPD argues no additional reason for exemption.

41. Plaintiff sees this as admission that records containing encryption keys do exist and are available to LRPD.

42. LRPD has not substantiated why it fears that Plaintiff would use the information contained in such documents for illicit purposes, namely listening to LRPD's encrypted communications.

43. The abstract possibility of illicit use without substantiating arguments is not an acceptable reason for exemption under the Arkansas Freedom of Information Act.

44. Even if Defendants could substantiate their allegations, this would still not be a valid

exemption under Ark. Code Ann. § 25-19-105.

45. Encryption keys do not fall under any of the exemptions of Ark. Code Ann. § 25-19-105.

46. The Supreme Court of Arkansas argued in *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986): “Whenever the legislature fails to specify that any records in public domain are to be excluded from inspection, or is less than clear in its intendments, then privacy must yield to openness and secrecy to the public's right to know the status of its own affairs. We hold, therefore, that the burden of confidentiality rests on the legislation itself, and if the intention is doubtful, openness is the result.” This opinion was affirmed in *ARKANSAS HIGHWAY AND TRANSP. DEP'T v. HOPE BRICK WORKS, INC.*, 294 Ark. 490 (1988).

47. If the Court finds that Plaintiff's request for access to encryption keys through the FOIA is a request that is not likely to succeed, then Plaintiff asks this Honorable Court to only stricken the claims of this action pertaining to the encryption keys from this action.

III. VIOLATION OF THE FREEDOM OF INFORMATION ACT OF 1967

48. LRPD unlawfully withheld (partial) records.

49. Ark. Code Ann. § 25-19-105 (f) (1) states: “No request to inspect, copy, or obtain copies of public records shall be denied on the ground that information exempt from disclosure is commingled with nonexempt information.”

50. LRPD denied Plaintiff's request to obtain copies of the requested records on the ground that information exempt from disclosure is commingled with nonexempt information.

51. Defendants violated Ark. Code Ann. § 25-19-105 (f) (1) by denying Plaintiff's request

because information exempt from disclosure is allegedly commingled with nonexempt information.

52. Ark. Code Ann. § 25-19-105 (f) (2) states: “Any reasonably segregable portion of a record shall be provided after deletion of the exempt information.”

53. Defendants did not provide Plaintiff with any reasonably segregable portion of the records requested.

54. Defendants violated Ark. Code Ann. § 25-19-105 (f) (2) by not providing any reasonable portion of the requested records after deletion of the alleged exempt information.

55. Ark. Code Ann. § 25-19-105 (g) states: “Any computer hardware or software acquired by an entity subject to § 25-19-103(5)(A) after July 1, 2001, shall be in full compliance with the requirements of this section and shall not impede public access to records in electronic form.”

56. Defendants argue that they do not have the appropriate software to redact requested records.

57. Defendants use software which has been acquired after 2001 to record and play back radio communications of LRPD.

58. The software used by Defendants to record and play back radio communications of LRPD does lack functionality to redact recorded communications or to otherwise remove exempted information.

59. Therefore, the software used by Defendants violates the provisions of Ark. Code Ann. § 25-19-105 (g).

60. Defendants violated Ark. Code Ann. § 25-19-105 (g) by using software not compliant

with the requirements of Ark. Code Ann. § 25-19-101 et seq.

61. Defendants would – if equipped with Ark. Code Ann. § 25-19-105 (g) compliant software – be able to redact the existing recordings. This would not constitute creating a new record. See: Long v. IRS, 596 F.2d 362 (9th Cir 1979) (deletion of taxpayers' names, addresses, and social security numbers from computer tapes does not constitute the creation of a new record).

Also: In Ark. Op. Att'y Gen. No. 97-199, the Attorney General argues that “a good argument probably exists in favor of requiring that the non-exempt electronic information be provided in its electronics form [...] .”

62. Ark. Code Ann. § 25-19-104 states: “Any person who negligently violates any of the provisions of this chapter shall be guilty of a Class C misdemeanor.”

63. Defendants' violations of the aforementioned provisions were negligent because Defendants have not demonstrated any effort to satisfy Plaintiff's request.

IV. CONCLUSION

64. Pursuant to Ark. Code Ann. § 25-19-107 (a), Plaintiff is entitled to relief compelling the release and disclosure of the requested records.

65. The existence of another adequate remedy does not preclude declaratory relief. See: Rule 57, Ark. R. Civ. P.

66. Additionally, the Supreme Court has observed that the declaratory judgment is “a remedy peculiarly appropriate to controversies between private citizens and public officials about the meaning of statutes.” See: *Jones v. Clark*, 278 Ark. 119, 644 S.W.2d 257 (1983)

Requested Relief

WHEREFORE, Plaintiff prays that this Court:

- A. orders Defendants to conduct an adequate search for records responsive to Plaintiff's FOIA Request within ten (10) working days of the date of the Court's order in this matter;
- B. orders Defendants to produce all responsive records within thirty (30) business days of the Court's Order in this matter;
- C. declares that Defendants violated the provisions of Ark. Code Ann. § 25-19-105 (f) (1);
- D. declares that Defendants violated the provisions of Ark. Code Ann. § 25-19-105 (f) (2);
- E. declares that Defendants violated the provisions of Ark. Code Ann. § 25-19-105 (g);
- F. declares that Defendants negligently violated the provisions of Ark. Code Ann. § 25-19-105 (f) (1);
- G. declares that Defendants negligently violated the provisions of Ark. Code Ann. § 25-19-105 (f) (2);
- H. declares that Defendants negligently violated the provisions of Ark. Code Ann. § 25-19-105 (g);
- I. awards Plaintiff its costs and reasonable attorneys' fees incurred in this action pursuant to Ark. Code § 25-19-107 (d) (1); and
- J. grants such other relief as the Court may deem just and proper.

Respectfully submitted,

By: /s/ Sebastian Westerhold
Sebastian Westerhold, pro se
[REDACTED]
Cabot, AR 72023
Tel: (501) 554-[REDACTED]
Email: kf5obs@gmail.com

CERTIFICATE OF SERVICE

I, Sebastian Westerhold, do hereby certify that a copy of the foregoing pleading was served upon all interested parties by means of certified U.S. mail, postage prepaid, and/or electronic mail on this 5th day of September, 2014, addressed to:

Little Rock Police Department
700 W Markham St.
Little Rock, AR 72201

City of Little Rock
500 W Markham St.
Little Rock, AR 72201

Little Rock City Attorney
Thomas M. Carpenter
TCarpenter@littlerock.org

Little Rock Chief Deputy City Attorney
William C. Mann III
BMann@littlerock.org

/s/ Sebastian Westerhold



Sebastian Westerhold <kf5obs@gmail.com>

FOIA Request

Sebastian Westerhold <kf5obs@gmail.com>

Tue, Aug 19, 2014 at 10:33 AM

To: KBuckner@littlerock.org

Cc: "Allen, Sidney" <SAllen@littlerock.org>

Bcc: kreynolds@katv.com

Lt. Sidney Allen

Little Rock Police Department

700 W Markham St.

Little Rock, AR 72201

Re: Freedom of Information Act Request

Dear Lt. Allen:

This is a request under the Freedom of Information Act.

I request that a copy of the following documents be provided to me:

1. All document containing talk-groups and encryption keys used by LR PD on the Arkansas Wireless Information Network (AWIN).
2. All audio recordings of encrypted communications recorded by LR PD between 08/11/2014 and 08/17.

In order to help to determine my status to assess fees, you should know that I am an individual seeking information for personal use and not for a commercial use.

I request a waiver of all fees for this request. Disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest.

Thank you for your consideration of this request.

Sincerely,

/s/ Sebastian Westerhold



Cabot, AR 72023

501-554-

Blog: <http://jaunty-electronics.com>

Twitter: #KF5OBS



Sebastian Westerhold <kf5obs@gmail.com>

FOI #390

Sloan, James <JSloan@littlerock.org>

Thu, Aug 21, 2014 at 3:52 PM

To: "kf5obs@gmail.com" <kf5obs@gmail.com>

Cc: "Martin, Laura" <LMartin@littlerock.org>, "Allen, Sidney" <SAllen@littlerock.org>

Mr. Westerhold,

In response to your most recent FOI request, I have attached a document that includes the requested "talk groups" for our agency. The LRPD is unable to comply with your request for encryption keys as this would enable you to have unrestricted access to encrypted transmissions. As you may be aware, Arkansas law provides that "it is unlawful for any person other than a law enforcement officer or law enforcement agency, a fire department, the Department of Health, or an employee of a law enforcement agency, a fire department, or the Department of Health to own or operate or possess any radio equipment described as a voice privacy adapter or any other device capable of receiving and decoding police department, fire department, or Department of Health communications that have been transmitted through a voice privacy adapter."

In response to your second request, the LRPD is unable to provide a response to this request. The encrypted audio recordings that you requested contain information that is exempt from disclosure under the Arkansas Freedom of Information Act ("FOIA") and the department does not have software with the capability of removing the information that is not subject to disclosure. Therefore, the only way respond to your request would be to have an employee physically listen to recordings and note information that should be redacted, identify where it is on the recording, and then create a new record that does not contain such information. The FOIA does not require the creation of a record in order to respond to a request.

As always, please feel free to contact me if you have additional questions.

Sgt. James Sloan

LRPD FOI Unit

918- [REDACTED]



doc01108420140821151908.pdf

254K

EXHIBIT "E"

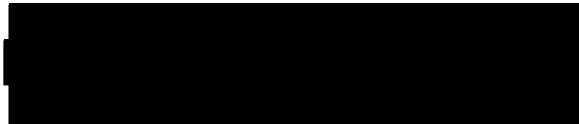
<u>Talkgroup</u>	<u>City</u>
LR CITY COMMON	Little Rock
LR SPEC EVENT	Little Rock
LR COMMON 1	Little Rock
LR COMMON 2	Little Rock
LR COMMON 3	Little Rock
LR PD HOSTAGE	Little Rock
LR PD ADMIN	Little Rock
LR PD AIRPORT	Little Rock
LR PD COM ADMN	Little Rock
LR PD CRIM SCN	Little Rock
LR PD DETECT 1	Little Rock
LR PD DETECT 2	Little Rock
LR PD DISPATCH	Little Rock
LR PD EVENT 1	Little Rock
LR PD INTEL	Little Rock
LR PD MOTORCYC	Little Rock
LR PD-ASP 2	Little Rock
LR PD COMM DT	Little Rock
LR PD COMM NW	Little Rock
LR PD COMM SW	Little Rock
LR PD TRAINING	Little Rock
LR PD SCNDRY1	Little Rock
LR PD SCNDRY2	Little Rock
LR PD SID COMM	Little Rock
LR PD COMMON NW2	Little Rock
LR PD COMMON SW2	Little Rock
LR PD VTAC	Little Rock
LR PD EVENT 2	Little Rock
LR PD SWAT 1	Little Rock
LR PD SWAT 2	Little Rock
LR PD TRF SRV	Little Rock
LR PD VICE	Little Rock
LR PD EVENT 3	Little Rock
LR PD NARC	Little Rock

EXHIBIT "F"

Case: 60CV-14-3271
Date: 09/03/2014

DECLARATION UNDER PENALTY OF PERJURY

I, Sebastian Westerhold, declare under penalty of perjury that I have no intent to publish or redisclose personal information, as defined in 18 U.S.C. 2725 (3), or contact individuals based on such personal information contained in the requested records from LRPD subject to this civil action (60CV-14-3271).

A large black rectangular redaction box covering the signature area of the document.

Sebastian Westerhold