

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

ACLU OF TENNESSEE, INC.,)	
)	
Intervening Plaintiff,)	Case No. 2:17-cv-2120-JPM-jay
)	
v.)	
)	
CITY OF MEMPHIS, TENNESSEE,)	
)	
Defendant.)	

ORDER ON THE CITY’S OBJECTIONS

This cause is before the Court on the City of Memphis’s Objections to the Monitor’s Response to Request for Authority to Use Cameras at COVID Testing Site, filed on March 30, 2020.¹ (ECF No. 300.) A Public Telephonic Hearing was held on April 2, 2020. (ECF No. 303.) Counsel for the Parties, the Independent Monitor/Special Master, and members of the public were present. The City called three witnesses: (1) Jennifer Sink, the Chief Legal Officer for the City of Memphis; (2) Deputy Chief Don Crowe of the Memphis Police Department (“MPD”); and (3) Colonel Keith Watson of the MPD’s Traffic Operations unit. The Hearing concluded with testimony by the Independent Monitor and closing statements by counsel for the Parties.

The Hearing established that the Objections raised by the city are largely hypothetical and that the Independent Monitor acted promptly to immediately address the City’s concerns and grant the City’s request for use of a drone in providing security, training and site documentation for the Liberty Bowl/Tiger Lane COVID-19 testing site. The record also shows that the City, while

¹ The City’s initial request and the Independent Monitor’s response are attached as Exhibit A to this order. (See ECF No. 305-1.)

obtaining an affirmative response from the Independent Monitor within approximately 24 hours of their request, did not convey that information to the MPD personnel making the request. MPD personnel only learned that the use of the drone had been confirmed as authorized and allowed under the Kendrick Consent Decree as a result of testimony at the April 2, 2020 Hearing. The failure of the City to convey that information to MPD field personnel indicates that the requested clarification as to the Kendrick Decree was not a matter of actual importance for the City. Nevertheless, the clearance process worked efficiently and effectively, allowing the MPD to quickly obtain guidance consistent with the Kendrick Consent Decree without impeding important police and public safety work.

On Friday, March 20, 2020, at 3:57 p.m., Jennifer Sink emailed the Independent Monitor seeking guidance regarding the City's use of drones and searches of social media terms for threat assessments in connection with a COVID-19 testing site to be set up and made operational at the Liberty Bowl/Tiger Lane site by Monday, March 23, 2020. (See Exh. A (Correspondence Between Jennifer Sink and the Independent Monitor Ed Stanton, March 20-21, 2020), ECF No. 305-1.) The City, according to their email, intended to use the drones to "pick up traffic patterns so that we can safely and effectively control traffic" and "to monitor safety concerns." (*Id.*) The City further asserted that drone footage would not "be so specific as to allow identification of individuals or specific car owners, unless something alerts MPD and a closer look is warranted." (*Id.* (emphasis added).) The City also requested that the MPD be allowed to use mobile cameras in the event that weather conditions did not permit the use of a drone. (*Id.*)

The City's email also raised the issue of the retention of footage recorded by the use of a drone. (*Id.*) The City requested that the Monitor and the City discuss the "appropriate retention time after the first testing process, so we can address the need more directly." (*Id.*) The City

further requested that the Independent Monitor make his decision on retention “after the fact, when we all have more information to base it upon.” (Id.) Sink then sent a follow up email to the Monitor on Saturday, March 21, 2020, requesting further guidance. (Id.)

On Saturday, March 21, 2020, at 8:10 p.m., the Independent Monitor responded to the City’s request. (Id.) The Monitor approved the “City’s flying of drones or mobile cameras over the drive-through COVID-19 testing site on Tiger Lane.” (Id.) The City’s use of the drones was “subject to the following two conditions.” (Id.) First, the Monitor required that the “drones/cameras may not be used to identify individuals, specific car owners, license plates, or other individualized information for the purpose of a criminal investigation or other law enforcement matter unless such use is authorized and documented as required by § G of the Consent Decree.” (Id.) Second, the Monitor ordered that all footage recorded by the drones/cameras “that is *not* used to identify individuals, specific car owners, license plates, or other individualized information may not be maintained for more than 14 days.” (Id.) After this 14-day period, per § H of the Kendrick Consent Decree the footage “shall be destroyed” unless the City “determines the footage to be relevant to (1) a ‘lawful investigation of criminal conduct’ to which (2) the identification of individualized information gave rise.” (Id.) The Monitor further required that any footage recorded by the drones “may *not* be kept more than 14 days to further pre-existing criminal or non-criminal investigations or to support future criminal or non-criminal investigations because § H only allows personal information to be ‘collected in the course of a lawful investigation of criminal conduct’ to which that personal information is relevant.” (Id. (emphasis in original).)

Despite having received approval for the City’s proposed use of drones as requested, the City chose not to do so. Deputy Chief for Technology Information Don Crow testified that there

are already two Blue Crush units on Tiger Lane. The use of standard Blue Crush/Sky Cop cameras is not an issue. Those cameras are on a thirty-day record-over cycle, thus eliminating any retention and cataloguing of that video data.

As Exhibit A demonstrates, the Monitor responded to the City's request promptly. (See ECF No. 305-1.) The City's request used broad language, which required the cautious approach taken by the Independent Monitor. See supra at p. 2. The Monitor provided reasoned, detailed and effective guidance to the City on the MPD's use of the drone and mobile cameras. Additionally, the fact that the City waited 10 days after receiving the Monitor's response before filing its Objections with the Court demonstrates that the requested clarification as to the Kendrick Decree was not a matter of urgent importance for the City. (See ECF No. 300.)

The testimony established that the drone camera records to an onboard chip that can be readily removed when the drone is not in use. The drone camera fourteen-day retention period is the only retention period at issue. Since it does not appear either burdensome or difficult to comply with the Independent Monitor's guidance, the objection to the Monitor's response is **OVERRULED**. The Court further finds, however, based on the testimony of Chief Deputy Crow, that the current COVID-19 Pandemic is taxing MPD manpower and resources and that strict adherence to the fourteen-day retention period for drone camera footage retention may be impractical and should, for the period of the current health emergency, be waived.

Nothing in the Kendrick Decree or this Court's orders precluded the use of still shots without personal identifiers for MPD training, planning or site preparation in dealing with the COVID-19 Pandemic.

SO ORDERED, this 3rd day of April, 2020.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

EXHIBIT A

From: "Edward L. Stanton III" <Edward.Stanton@butlersnow.com>
Date: March 21, 2020 at 8:10:34 PM CDT
To: "Sink, Jennifer" <Jennifer.Sink@memphistn.gov>, Will Perry <Will.Perry@butlersnow.com>, Jim Letten <Jim.Letten@butlersnow.com>
Cc: Terri Wiseman <Terri.Wiseman@butlersnow.com>, "McMullen, Bruce" <bcmullen@bakerdonelson.com>, "Saleem, Zayid-mem" <Zayid.Saleem@memphistn.gov>, "Glover, R. Mark" <mglover@bakerdonelson.com>
Subject: RE: Request re: On-Site COVID testing

Good evening, Jennifer –

Based on your emails below, I approve the City's flying of drones or mobile cameras over the drive-through COVID-19 testing site on Tiger Lane, subject to the following two conditions:

- The drones / cameras may not be used to identify individuals, specific car owners, license plates, or other individualized information for the purpose of a criminal investigation or other law enforcement matter unless such use is authorized and documented as required by § G of the Consent Decree; and
- All footage collected by the drones / cameras that is *not* used to identify individuals, specific car owners, license plates, or other individualized information may not be maintained for more than 14 days. After that time, the footage "shall be destroyed," consistent with § H of the Consent Decree, unless, during the maintenance period (which, again, shall not exceed 14 days), the City

determines the footage to be relevant to (1) a “lawful investigation of criminal conduct” to which (2) the identification of individualized information gave rise. Such footage may *not* be kept more than 14 days to further pre-existing criminal or non-criminal investigations or to support future criminal or non-criminal investigations because § H only allows personal information to be “collected in the course of a lawful investigation of criminal conduct” to which that personal information is relevant.

Please advise if you have additional questions or concerns. I’ll keep an eye out for the inquiries about social media search terms that you mentioned will be forthcoming.

Regards,

ELS

Edward L. Stanton III
Butler Snow LLP

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P.O. Box 171443, Memphis, TN 38187-1443
Edward.Stanton@butlersnow.com | [vCard](#) | [Bio](#)

[Twitter](#) | [LinkedIn](#) | [Facebook](#) | [YouTube](#)

From: Sink, Jennifer <Jennifer.Sink@memphistn.gov>
Sent: Saturday, March 21, 2020 5:48 PM
To: Edward L. Stanton III <Edward.Stanton@butlersnow.com>; Will Perry <Will.Perry@butlersnow.com>; Jim Letten <Jim.Letten@butlersnow.com>
Cc: Terri Wiseman <Terri.Wiseman@butlersnow.com>; McMullen, Bruce <bmcmullen@bakerdonelson.com>; Saleem, Zayid-mem <Zayid.Saleem@memphistn.gov>; Glover, R. Mark (mglover@bakerdonelson.com) <mglover@bakerdonelson.com>
Subject: Re: Request re: On-Site COVID testing

Hello,

We anticipate starting the testing sites on Monday. Can you please advise as to your position on the use of cameras during this event?

As some additional information, once set up, the testing site will be in place for a while. At Tiger Lane, the area is already in the line of site of RTCC cameras that were already in place. The tent and other pieces of equipment, all of which is expensive but not feasible to take down and set back up in between test days, will remain even when there is not an active testing event. We need cameras in place at all hours for security

purposes.

If you have any questions, please let me know.

Jennifer

From: Sink, Jennifer

Sent: Friday, March 20, 2020 3:57:21 PM

To: Edward L. Stanton III <Edward.Stanton@butlersnow.com>;
will.perry@butlersnow.com <will.perry@butlersnow.com>; Jim Letten
<Jim.Letten@butlersnow.com>

Cc: Terri Wiseman <Terri.Wiseman@butlersnow.com>; McMullen, Bruce
<bmcullen@bakerdonelson.com>; Saleem, Zayid-mem
<Zayid.Saleem@memphistn.gov>; Glover, R. Mark (mglover@bakerdonelson.com)
<mglover@bakerdonelson.com>

Subject: Request re: On-Site COVID testing

Ed, Will, and Jim,

The City is setting up a drive-through COVID-19 testing site on Tiger Lane, which is City property. The purpose is to provide a location for the public to obtain the COVID-19 test. The testing process is being handled by UTHSC, but the city is providing support, including law enforcement. UTHSC has requested police presence. We expect testing to start Monday. We also expect that additional on-site testing events will be held in the future.

For security concerns and for real-time traffic and crowd control decisions, we would like to fly drones over the testing area. The information will be used in the aggregate (meaning no one car or person specified) to pick up traffic patterns so that we can safely and effectively control traffic. Additionally, the drone cameras will be used to monitor security concerns. We don't believe the visual will be so specific as to allow identification of individuals or specific car owners, unless something alerts MPD and a closer look is warranted. If weather does not permit the use of drones, we will use mobile cameras.

I understand that you will have questions about how long the video will be retained. I would like to request that we discuss the appropriate retention time after the first testing process, so we can address the need more directly. Frankly, this event is unprecedented. We are planning extensively but do not know what to expect. I would prefer that decision be made after the fact, when we all have more information to base it upon.

Can we have your permission to execute in this manner?

Finally, we are going to do a threat assessment related to drive-through testing, which will involve searching social media. We will be submitting some terms to you for approval in the next 24 hours

Jennifer A. Sink, Esq.

Chief Legal Officer

City of Memphis

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W: 901-636-6614

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